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

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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*

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Prof. dr. N.J. Schrijver

To Barbara,
Emma and Jules

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**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

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**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 |

# 1 INTRODUCTION

## 1.1 Introduction

Following the establishment of the United Nations, states have increasingly conferred powers on international organisations,[1] thus raising the significance of such organisations in international affairs.[2] The UN alone conducts a vast array of activities, including peacekeeping, promoting and protecting human rights, exercising administrative authority over territories and imposing targeted anti-terrorism sanctions.

The proliferation of international organisations and the increase of their functions have led to calls to improve their 'accountability'.[3] Over the past two decades, studies on the accountability of international

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[1] In this study, the term 'international organisation' is understood as a form of cooperation, '(1) founded on an international agreement; (2) having at least one organ with a will of its own; and (3) established under international law'. Cf. H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within Diversity* (2018), para. 33. And, in accordance with Art. 2(a) of the 2011 Draft articles on the responsibility of international organizations, UN Doc. A/CN.4/L.778 (2011), ('ARIO'), an international organisation is understood as 'possessing its own international legal personality'. Cf. S.Ø. Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (2020), at 3; P. Sands, P. Klein and D.W. Bowett, *Bowett's Law of International Institutions* (2009), para. 1-028 ('it must have an autonomous will distinct from that of its members and be vested with legal personality').

[2] See, e.g., Johansen (2020), at 3 ('Since the end of the Second World War, states have conferred more and more powers upon IOs in order to solve transnational problems and to provide global public goods.'); D. Sarooshi, 'International Organizations: Personality, Immunities and Responsibility', in D. Sarooshi (ed.), *Mesures de Réparation et Responsabilité à Raison des Actes des Organisations Internationales: Remedies and Responsibility for the Actions of International Organizations* (2014), 3 at 3 ('The law of international organizations is undergoing profound changes. This has been caused in large part by the increasingly important role that international organizations have played in exercising powers conferred on them by national Governments.'); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), at 6 ('Public international organizations have grown exceedingly numerous . . . especially since the Second World War.'); 2011 (Draft) Articles on the Responsibility of International Organizations, with Commentaries, UN Doc. A/66/10 (2011), Ch. V.E.2, ('ARIO Commentaries'), General Commentary, at 67, para. 1 (referring to 'the number of existing international organizations and their ever increasing functions'); B. Fassbender, 'A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations', (2006) 3 *International Organizations Law Review* 437, para. 6.3 ('Increasingly, the UN is entrusted with tasks of global governance that go beyond its traditional purposes and functions.'); A. El-Erian, First report on relations between states and inter-governmental organizations, UN Doc. A/CN.4/161 (1963) and Add.1, at 184, para. 172 ('The continuous increase of the scope of activities of international organizations is likely to give new dimensions to the problem of responsibility of international organizations.').

[3] See, e.g., Johansen (2020), at 3 ('the ever-expanding powers of International organisations and their subsequent capacity to affect individuals has captured the imagination of legal scholars. They began studying, often under the heading of *accountability*, whether and to what extent IOs are internationally responsible for human rights violations.' [emphasis in original]); C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2017), at 2 ('While some international organizations have paid lip-service to human rights and international humanitarian law protections by officially declaring their commitment to these principles, the internal structures of accountability that they have developed have not reflected the external and significantly wider human rights and international humanitarian law standards applicable to other actors such as States.'); Council of Europe Parliamentary Assembly, 'Accountability of international organisations for human rights violations' (Resolution 1979, 2014), para. 1 ('The Parliamentary Assembly recognises that international organisations are subject to human rights obligations under international law and highlights the importance of

organisations have broadly mapped the field.[4] Whilst it has been commented more recently that '[t]he full and multifaceted accountability of international organizations seems as necessary as it remains elusive',[5] the question has arisen: 'How might one advance the conversation when it comes to IO accountability?'[6]

The notion of 'accountability' is broad and elusive indeed.[7] The International Law Association described it as

> '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. A combination of the four forms provides the best chances of achieving the necessary degree of accountability . . . The constituency entitled to raise the accountability of IO-s consist of all component entities of the international community at large provided their interests or rights have been or may be affected by acts, actions or activities of IO-s. Accordingly the list of addressees of the rules comprises: intergovernmental Organisations, including their staff, member States of intergovernmental Organisations, non-members of intergovernmental Organisations, supervisory organs within intergovernmental Organisations, domestic and international courts and tribunals, supervisory and monitoring organs within domestic systems (e.g. parliaments) and non-governmental Organisations working on both the national and international level, and private parties (both legal and natural persons).'[8]

As explained by Irmscher:

> 'Accountability as a topic has become a recurring item in the recent discussion of international lawyers. Inspired by political and social science, legal writing has increasingly paid attention to the *topos* of accountability in the context of international law. But it has not become a legal term in itself — as opposed to, for example, responsibility and liability, all of which clearly belong to the legal sphere notwithstanding continuing disputes concerning their exact limits and mechanisms'.[9]

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ensuring that they refrain from violating the human rights of individuals and of the need to hold them accountable for any such violations.').

[4] See, e.g., Johansen (2020); P. Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (2017); Ferstman (2017); J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010); K. Wellens, *Remedies against International Organisations* (2002).

[5] K.E. Boon and F. Mégret, 'New Approaches to the Accountability of International Organizations', (2019) 16 *International Organizations Law Review* 1, at 10, having noted, for example, that 'a new chapter in the conversation about accountability' was recently opened following allegations of widespread sexual abuse by UN peacekeepers. Ibid., at 3.

[6] Boon and Mégret (2019), at 7.

[7] Johansen (2020), at 18 ('There is no universally agreed definition of accountability. To the contrary, it is said to have become a "complex and chameleon-like term."')

[8] International Law Association, 'Berlin Conference (2004). Accountability of International Organisations. Final Report', (2004) 1 *International Organizations Law Review* 221, at 225-226 (fns. omitted). The report defines the term 'remedy' as 'a form of shorthand for an acceptable outcome arrived at through a procedure instigated by an aggrieved party'. Ibid., at 263.

[9] T. Irmscher, 'Immunities and the Right of Access to Court: Conflict and Convergence', in D. Sarooshi (ed.), *Mesures de Réparation et Responsabilité à Raison des Actes des Organisations Internationales: Remedies and Responsibility for the Actions of International Organizations* (2014), 443 at 485 (fns. omitted, emphasis in original).

The notion of 'accountability' may be said to encompass the legal notions of 'responsibility' and 'liability'.[10] Notwithstanding the 'continuing disputes' alluded to by Irmscher,[11] in this study, the term 'responsibility' is understood to denote responsibility of an international organisation under international law. An international organisation may be said to incur international responsibility where it commits an internationally wrongful act, which in turn involves the breaching of an international obligation through conduct that is attributable to the organisation.[12]

As to the term 'liability', in this study, it is understood to arise for an international organisation where a legal claim by a third-party is sustained against it. The term 'third-party', also referred to as 'private party', is understood as a natural person *external* to the international organisation, or a legal person established under domestic law.[13] The more complete term used in this study is therefore the 'third-party liability' of international organisations. As explained below, in this study, disputes arising out of third-party claims are understood to have a 'private law character'.

Private parties are increasingly impacted by the actions of international organisations, as is often observed in the literature.[14] As explained by Wellens:

> 'Individuals and groups of individuals are increasingly becoming used to some form of redress towards the state under whose jurisdiction they find or have placed themselves, and they cannot really

---

[10] Johansen (2020), at 20 ('The key feature that distinguishes accountability from responsibility is that accountability implies going one step further than a responsibility analysis.') and 29 ('Responsibility is a precursor to accountability. If there is no potential for responsibility, there is no need for accountability.'); Boon and Mégret (2019), at 5 ('Accountability is not the same thing as a narrow international legal notion of IO responsibility and designates a wide range of processes by which international organizations may be led to account for their actions'); Irmscher (2014), at 491 ('Accountability is a broad concept which goes far beyond the availability of legal remedies').

[11] Irmscher (2014), at 485.

[12] Cf. Arts. 3 and 4 of the ARIO. See subsubsection 2.2.2.1 and paragraph 3.4.1.2.2.

[13] For purposes of this study, officials and staff of international organisations are excluded from the definition of 'third-party' for present purposes. Such individuals are typically subject to a distinct legal regime, referred to as international administrative law, as applied by international administrative tribunals, such as the UNDT and the UNAT, and the ILOAT.

[14] Johansen (2020), at 3 ('As a consequence of their increasing powers, IOs are affecting the lives of individuals across the globe – directly and indirectly.'); K. Daugirdas and S. Schuricht, 'Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies', in P. Quayle (ed.), *The Role of International Administrative Law at International Organizations* (2021), 54 at 81 ('international organizations affect individuals in ever-expanding ways'); Boon and Mégret (2019), at 7 ('accountability demands have become increasingly hard to shut out. The main reason is the striking emergence of third-party claims. As IOs' mandates have expanded, it is not surprising that third parties, including individuals and other non-state entities, have on occasion stood to be harmed by them.'); Ferstman (2017), at 1 ('Increasingly, international organizations take on State- or quasi- State- like functions in which they exercise control over individuals and societies, particularly in contexts of conflict and transition.'); B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15, at 23–25; A. Reinisch, 'Securing the Accountability of International Organizations', (2001) 7 *Global Governance* 131, at 132 ('wide range of potential individual rights abuses by international organizations'); M. Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995), at 5 ('The on-going expansion of the activities of international organizations inevitably generates risks to third parties.').

> be expected not to look for similar remedial mechanisms when their interests have or may have been affected by acts, actions or omissions on the part of an international organization'[15]

It is here that the aforementioned 'conversation when it comes to IO accountability' might be advanced.[16] That is, the legal regime governing legal claims by private parties against international organisations, particularly the enforcement of such claims, requires further enquiry.[17]

The matter is not altogether unexplored. For example, in 1995, the Institut de droit international adopted a resolution entitled the 'Legal Consequences for Member States of the Non-fulfilment by International Organizations of their obligations toward third parties'.[18] The resolution aimed to identify the international law on such legal consequences in connection with third-party liability of international organisations under international and domestic law.[19] However, the resolution did not as such address the third-party liability of international organisations.

The scope of the ARIO includes the international responsibility of international organisations towards private parties.[20] However, the ARIO only provide that where an international organisation breaches an international obligation towards a private party, this amounts to an internationally wrongful act for which the organisation incurs international responsibility. The ARIO concern neither the content nor the implementation of such responsibility of international organisations towards private parties.[21]

The ILC's long-term programme of work includes the topic 'The settlement of international disputes to which international organizations are parties'.[22] However, according to a paper prepared by ILC member Sir Michael Wood:[23] 'It would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered.'[24]

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[15] Wellens (2002), at 16.
[16] Boon and Mégret (2019), at 7.
[17] Building on, e.g., Hirsch (1995).
[18] Institut de droit international, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' (Session of Lisbon, 1995). The definition of 'third parties' in Art. 2(a) of the resolution includes, but is not limited to, 'private parties'.
[19] Ibid., preambular Para. 6 and Art. 4. A related approach is to focus on the international obligations and responsibility of the member States of an international organisation. See, e.g., A.S. Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (2019).
[20] Private parties feature regularly in the ARIO Commentaries. See, e.g., ARIO Commentaries, Art. 36, at 126-127, paras. 1-3.
[21] D. Shelton, *Remedies in International Human Rights Law* (2015), at 48 ('The omission of individuals and groups is clearly intentional'); Ferstman (2017), at 91 ('an unfortunate omission of the ILC').
[22] <legal.un.org/ilc/programme.shtml> accessed 21 December 2021. See generally A. Reinisch, 'International Organizations and Dispute Settlement', (2018) 15 *International Organizations Law Review* 1.
[23] UN Doc. A/71/10 (2016), Annex A, at 387-399.
[24] Ibid., para. 3.

This notwithstanding, Wood's paper does explain with respect to such disputes:

> 'Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Council of Europe's Committee of Legal Advisers on Public international law (CAHDI) has on its agenda an item on "Settlement of disputes of a private character to which an international organisation is a party"'.[25]

As to the CAHDI, during its 60th meeting (March 2021), the topic 'Settlement of disputes of a private character to which an International Organisation is a party' was included on the agenda as part of its ongoing activities, under the heading 'Immunities of states and international organisations'.[26]

The jurisdictional immunity of international organisations before domestic courts is a significant, procedural, factor with respect to the liability of such organisations towards private parties. The purpose of the immunity from jurisdiction of international organisations is to protect them against interference in their independent and efficient functioning.[27] As Jenks stated in 1961:

> 'In the present stage of development of world organisation [international immunities] are an essential device for the purpose of bridling unilateral and sometimes irresponsible control by particular governments of the activities of international organisations. These organisations have been created by agreement among governments to discharge important and in some cases vital responsibilities on behalf of the world community as a whole with freedom, with independence, and with impartiality.'[28]

This policy rationale underlying jurisdictional immunity is no less valid today.[29] The issue is how to resolve the conflict between immunity and 'access to court', a right guaranteed under provisions such as Article 6(1) of the 1950 (European) Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR')[30] and Article 14(1) of the 1966 International Covenant on Civil and Political Rights ('ICCPR').[31] To avoid 'accountability gaps',[32] the main trend in the literature seems to be in favour of developing alternative remedies.[33]

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[25] Ibid., fn. 7 (emphasis added).
[26] <coe.int/en/web/cahdi/-/60th-meeting-strasbourg-24-25-march-2021?inheritRedirect=true> accessed 21 December 2021.
[27] In the case of the UN, Art. II, Section 2 of the General Convention provides: 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'
[28] C.W. Jenks, *International Immunities* (1961), at xiii.
[29] See chapter 4 of this study.
[30] 213 UNTS 222.
[31] 999 UNTS 171.
[32] A. Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 313; N.M. Blokker and N. Schrijver, 'Afterwords', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 342.
[33] See, e.g., Johansen (2020), at 300 ('the disadvantages of restricting IO immunities appear quite clear and

A *policy* reason for developing such remedies, as explained by Daugirdas and Schuricht, is to avoid that national courts reject the jurisdictional immunity of such organisations.[34] Moreover, jurisdictional immunity without alternative remedies contrasts with the 'rule of law' (discussed below), undermining the legitimacy, and thereby the effectiveness, of international organisations.

There may be *legal* requirements for an international organisation to establish alternative remedies. According to Daugirdas and Schuricht, such a requirement possibly arises under customary international law,[35] in connection with the obligation to provide 'effective remedies'.[36] That purported obligation arises under, what this study refers to as, the international organisations law framework concerning third-party remedies.

Moreover, of particular relevance for present purposes, and as referred to in Wood's ILC paper, there may be a treaty requirement for the development of alternative remedies.[37] That is the case with the UN, which is subject to Article VIII, Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations ('General Convention'):[38]

> 'The United Nations shall make provisions for appropriate modes of settlement of:
> (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
> (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'

Article VIII, Section 29 of the General Convention is central to the present study. Disputes under that provision arise from, what is referred to in UN practice as, 'third-party claims', which concern the UN's 'third-party liability'.[39] The link—as reflected in the CAHDI's approach—between the UN's obligation

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tangible. Restrictions upon the immunities of IOs appear to be negatively correlated with their independence . . . it is possible to both ensure that IOs are not exposed to further risks of improper meddling by states, while simultaneously protecting the rights of individuals. That is by conducting reform at the international level.'); Daugirdas and Schuricht (2021), at 81; N. Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 329 at 335; E. De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations', (2010) 7 *International Organizations Law Review* 79, at 119 ('The answer to the question of how to improve the rights of individuals who cannot bring a claim against an international organization needs . . . to be found, not in an inconsistent exception to international organization immunity, but rather in the creation of effective alternative dispute settlement mechanisms.').

[34] Daugirdas and Schuricht (2021), at 55-56. Chapter 4 of this study confirms that it is not to be taken for granted that, in the absence alternative remedies, the lower Dutch courts will uphold the jurisdictional immunity of international organisations.

[35] Daugirdas and Schuricht (2021), at 56. See chapter 2 of this study.

[36] Ibid., at 70.

[37] Ibid., at 72 ('Some international organizations have express treaty obligations to develop alternative dispute settlement mechanisms when legal process is blocked in national courts on account of the organizations' jurisdictional immunities.').

[38] UN Doc. A/RES/22(I)(A) (1946), 1 UNTS 15.

[39] These terms are used throughout three reports by the UNSG that are key to this study: UN Doc. A/C.5/49/65 (1995) ('1995 Report'); UN Doc. A/51/389 (1996) ('1996 Report'); and UN Doc. A/51/903 (1997) ('1997 Report').

under Article VIII, Section 29 and its jurisdictional immunity under Article II, Section 2 of the General Convention goes back to the convention's early travaux préparatoires:[40] the former was conceived as the 'counterpart' to the latter.

The proper implementation of Article VIII, Section 29 of the General Convention by the UN, like that of similar provisions by many other international organisations, is of significant relevance. As observed by Klein, with reference to the ARIO: 'Responsibility of international organizations emerges as one of the areas of international law that has experienced the most significant maturation over the last years.'[41] However, according to Klein:

> 'In view of the fact that private persons or groups are much more frequently affected than states or international organizations by situations where the international responsibility of organisations is at stake, the creation of mechanisms allowing for the invocation of such responsibility by private claimants definitely emerges as one of the most significant challenges in this area for the years to come.'[42]

Whether cast in terms of 'responsibility' or 'liability', the challenge is to bolster the enforcement of the rights of private parties against international organisations. Where disputes have a 'private law character', Article VIII, Section 29 of the General Convention is at issue. Apart from a legal imperative, the proper implementation of that provision corresponds to the aforementioned policy objectives of counterbalancing the jurisdictional immunity of international organisations and buttressing their legitimacy.

Procedural mechanisms have not been ignored in the literature mapping the research field of the accountability of international organisations, but the approach is typically broad in scope.[43] In contrast, the scope of the present study is narrower, its focus being on Article VIII, Section 29 of the General Convention, more specifically, Section 29(a) thereof. The study thus concerns those disputes to which the UN is a party that have a 'private law character'.

That focus is not unique: Schmalenbach, in particular, has written about Article VIII, Section 29 of the General Convention.[44] Notwithstanding significant weaknesses, Schmalenbach concluded that 'the

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[40] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 219. See further paragraph 3.4.2.1.2 of this study.
[41] P. Klein, 'Responsibility', in J. Katz Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (2016), 1026 at 1047.
[42] Ibid., at 1045 (emphasis added).
[43] See, e.g., Johansen (2020); Ferstman (2017); Schmitt (2017).
[44] K. Schmalenbach, 'Dispute Settlement (Article VIII Sections 29–30 General Convention)', in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 529; K. Schmalenbach, 'Third Party Liability of International Organizations', (2006) 10 *Journal of International Peacekeeping* 33.

existing dispute settlement mechanisms available to aggrieved parties demonstrate the readiness on the part of the UN to satisfy, in principle, the legitimate expectations of the international community.'[45]

The present study, for its part, posits that those legitimate expectations rather require a structural revision of the implementation of Article VIII, Section 29(a) of the General Convention. Current dispute mechanisms are problematic: in particular, they do not fully conform to core notions of the 'rule of law', including the UN's human rights obligations, and they fail to adequately protect the UN from interference. Building on existing research, this study accepts the challenge referred to by Klein insofar as it proposes the creation of a comprehensive and systematic mechanism for the implementation of Article VIII, Section 29(a) of the General Convention.

### 1.2 Research objective and research questions

This study examines the third-party liability of international organisations from the perspective of Article VIII, Section 29 chapeau and subsection (a) of the General Convention, that is: 'The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'.

This passage in its entirety is referred to in this study as 'Section 29(a) of the General Convention'. This study refers only incidentally to Section 29(b) of the General Convention, as it is of less direct relevance for present purposes.[46]

The examination of the third-party liability of international organisations in this study is conducted in the context of the international organisations law framework concerning third-party remedies, including the jurisdictional immunity of international organisations, and against the backdrop of the 'rule of law'.

The relevance of the study extends beyond the UN. In addition to the aforementioned broad context and backdrop, this is because many international organisations are subject to provisions akin to Section 29(a) of the General Convention, which complement equally similar immunity rules.[47] Notably, a materially identical provision is included in Section 31 of the 1947 Convention on the Privileges and Immunities

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[45] Schmalenbach (2016), para. 87.
[46] As explained by Schmalenbach: 'With lit a being the more specific provision due to its private law qualification and the fact that the UN in the majority of cases acts through its officials, there is a strong case to be made for the primacy of lit a.' Schmalenbach (2016), para. 61. More specifically, in the case of claims against UN officials: 'Due to the attribution of the official act to the UN . . . the proper addressee of the claim is the UN with the corresponding consequences for the applicable liability and dispute settlement regime. Consequently, the claim has to fulfil the lit a elements ('dispute of a private law character') in order to be receivable under Art. VIII Section 29 General Convention.' Ibid., fn. omitted.
[47] Such rules 'were codified in the 1940s for the UN and the specialized agencies, remained unchanged since then, and were more or less copied when new organizations were created.' Schermers and Blokker (2018), para. 1611.

of the Specialized Agencies ('Specialized Agencies Convention').[48] And, essentially the same formula applies with respect to several other international organisations under multilateral treaties and headquarters agreements.[49]

Moreover, the third-party liability practice of the UN, being the quintessential international organisation, offers guidance to other international organisations, not least the Specialized Agencies and related organisations. Indeed, third-party liability is a common theme amongst international organisations and there arguably is considerable 'unity within diversity'[50] in the legal approach to the settlement of third-party disputes.

Cases concerning third-party claims against the UN arising out of three well-known events—the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic—are referenced throughout this study as case studies. These particular case studies were chosen because the events in point give rise to key questions and issues concerning the UN's accountability in light of Section 29(a) of the General Convention and the UN's immunity from jurisdiction. They are discussed extensively in the literature, thus warranting their inclusion in this study.[51] To provide context, and as a lead-in to the research questions, these cases studies will be briefly introduced next.

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[48] 33 UNTS 261.

[49] See, e.g., Art. 43 of the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, done at New York, 23 February 2015 ('IRMCT Headquarters Agreement'); Art. 31 of the 2002 Agreement on the Privileges and Immunities of the International Criminal Court, 2271 UNTS 3 ('APIC') (Art. 31 of the APIC is identical to Art. 54 of the 2007 Headquarters Agreement between the International Criminal Court and the host State, 2517 UNTS 173); Art. 26 of the 1997 Agreement between the Kingdom of the Netherlands and the Organisation for the Prohibition of Chemical Weapons concerning the Headquarters of the OPCW (with arrangement), 2311 UNTS 91 ('OPCW Headquarters Agreement'); Art. 33 of the Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization, done at Calgary and Montreal, 4 and 9 October 1990 ('ICAO Headquarters Agreement'); Art. 24 of the 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, 200 UNTS 3 ('Ottawa Agreement'); Art. 12 of the 1949 Agreement on Privileges and Immunities of the Organization of American States, 1438 UNTS 79 ('OAS Agreement on Privileges and Immunities').

[50] Schermers and Blokker (2018), para. 23, notably sub (2), third-party liability arguably being amongst the 'similar day-to-day problems' that confront international organisations. This notwithstanding, the European Union, an international organisation with comparatively 'far-reaching objectives' (Schermers and Blokker (2018), para. 28), also has a comparatively advanced legal framework for the settlement of third-party disputes. That framework is outside the scope of this study, though it is referred to incidentally. For an early study, see, e.g., T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law* (1997).

[51] The debate concerning the accountability of international organisations was more recently broadened in light of litigation in the United States against the International Finance Corporation. As explained by Boon and Mégret: 'In a landmark holding, the [Supreme] Court found that IOs are no longer presumed to be absolutely immune under the International Organizations Immunity Act'. Boon and Mégret (2019), at 4. See C. Treichl and A. Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals', (2019) 16 *International Organizations Law Review* 105.

### 1.2.1 Case studies: introduction[52]

The first case study concerns the genocide committed by Bosnian Serb forces in the summer of 1995, involving the killing of thousands of Bosnian men who had gathered at the Eastern Bosnian enclave of Srebrenica.[53] Though the enclave had been designated a 'safe area' by the UNSC, acting under Chapter VII of the UN Charter, UNPROFOR's Dutch battalion ('DUTCHBAT') proved unable to protect it.

In 2007, in *Mothers of Srebrenica,* survivors of the genocide sued the UN and the State of the Netherlands before the Dutch courts, holding them partly responsible for the fall of the enclave and the ensuing genocide. The Dutch courts held that the UN enjoyed immunity from jurisdiction. Before the ECtHR, the claimants argued that the Netherlands had breached Article 6(1) of the ECHR on account of its courts having upheld the UN's immunity. In 2013, the ECtHR declared the application inadmissible. In its contemporary case law concerning the jurisdictional immunity of international organisations, the ECtHR has consistently found that Article 6(1) of the ECHR has not been breached. *Mothers of Srebrenica*, however, is the only case before the Court in which alternative remedies were not available to the claimants. The ECtHR left unresolved in that case whether it deemed the UN to have breached Section 29 of the General Convention. In the immunity proceedings in *Mothers of Srebrenica*, the Dutch Supreme Court had found that the lack of alternative remedies was at odds with Section 29(a) of the General Convention. By implication, therefore, according to the Supreme Court, the dispute had a 'private law character' in terms of that provision.

The second case study concerns allegations of lead poisoning due to soil contamination in camps for internally displaced persons in Kosovo. These camps, set up since 1999, were administered by UNMIK, the UN's mission in Kosovo, which was responsible for the interim administration of Kosovo under a UNSC mandate. Former residents of the camps alleged that UNMIK had violated their human rights, including their right to life. In 2006, in *N.M. and Others*, the complainants submitted claims under, what the UNMIK administrative framework referred to as, the 'UN Third Party Claims Process', which involved the settlement of third-party claims by a claims commission.

In 2011, apparently without such a commission having been established, the UN Legal Counsel declared the claims 'non-receivable' for lack of a private law character. The complainants then pursued their case before the Human Rights Advisory Panel ('HRAP'). In 2016, the HRAP concluded that UNMIK had

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[52] In the context of the UN's implementation of Section 29(a) of the General Convention, subsection 3.3.3 of this study provides more extensive introductions to these case studies, together with references, including the main commonalities and differences.

[53] On the qualification of the crimes as genocide, see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43; *The Prosecutor v. Ratko Mladić* (MICT-13-56), Appeals Chamber, Judgement, 8 June 2021.

violated a broad range of international human rights. It recommended various remedies, including the payment of compensation. The UN has established a voluntary fund in connection with the recommendations. However, the HRAP's final report (2016) noted that the HRAP's recommendations remained to be implemented.

The third, and last, case study concerns the cholera epidemic that erupted in Haiti in 2010, leaving thousands of persons dead and several hundred thousand persons sick. In 2011, over 5,000 victims of cholera held the UN liable, alleging that UN peacekeepers from Nepal, who were part of the UN mission in Haiti, MINUSTAH, had brought the disease to Haiti. The victims sought compensation from the UN and requested it to establish a standing claims commission as per the 2004 Agreement between the United Nations and the Government of Haiti concerning the Status of the United Nations Operation in Haiti ('MINUSTAH SOFA').[54] The UN Legal Counsel dismissed the claims as not receivable under Section 29 of the General Convention and declined to establish a standing claims commission. In 2013, in *Georges et al.*, the UN (as well as UN officials) faced a class action lawsuit in US federal court. The case failed, as did other cases based on similar claims, on account of the UN's immunity from jurisdiction.

On 1 December 2016, without conceding liability, the UNSG apologised to the Haitian people and proposed a $400 million response package. However, little funding has reportedly been received.

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Back in 1946, the drafters of the General Convention are unlikely to have foreseen that Section 29(a) of the General Convention would be at issue in cases like the foregoing and that it would give rise to the complexities arising therein.

The foregoing cases have in common that the UN did not make 'provisions for appropriate modes of settlement' pursuant to Section 29(a) of the General Convention. As a consequence, in the cases arising out of the Srebrenica genocide and the Haiti cholera epidemic, the UN's jurisdictional immunity was hotly, albeit unsuccessfully, contested before the domestic courts. The three case studies, in particular the one concerning the Haiti cholera epidemic, moreover illustrate that where immunity from jurisdiction is not counterbalanced by alternative remedies, the organisation's legitimacy comes under pressure. This is because absent such remedies, jurisdictional immunity contrasts with the 'rule of law'.

[54] 2271 UNTS 235. This type of agreement is commonly referred to as a 'status of forces agreement' ('SOFA').

### 1.2.2 The rule of law

The concept of the 'rule of law' has been embraced by the UN and it is relevant to the present study in various respects. This warrants some elaboration at the outset.

There is no generally agreed definition of the 'rule of law'. As stated by Tamanaha: 'The rule of law . . . stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means'.[55] This is perhaps not surprising as the origins of the concept of the rule of law can be traced back to Antiquity.[56]

In 2011, Bingham authoritatively proposed the following definition: 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'[57] In exploring the ingredients of the rule of law, Bingham advanced 'eight suggested principles'.[58] The Council of Europe's 'Venice Commission' summarised these principles as follows:

> '(1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law.'[59]

As to the UN, notwithstanding the ongoing conceptual debate, the UNSG has defined the rule of law consistently since at least 2004.[60] In that year, UNSG Annan produced a report entitled 'The rule of law and transitional justice in conflict and post-conflict societies'. The UNSG had been invited to prepare this report at the first of a series of thematic debates on the rule of law, organised by the UNSC.[61] The report included the following definition:

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[55] B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), at 4 (emphasis in original). As explained by Stein, the phrase 'rule of law' 'has become chameleon-like, taking on whatever shade of meaning best fits the author's purpose'. R. Stein, 'Rule of Law: What Does It Mean?', (2009) *18 Minnesota Journal of International Law* 293, at 296.

[56] Stein (2009), at 297. As commented by Stein: 'We have more than two thousand years of writing and thinking about the rule of law to inform us'. Ibid., at 302.

[57] T.H. Bingham, *The Rule of Law* (2011), at 8.

[58] Ibid., at 37.

[59] European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law' (Study No. 512/2009, 2011), para. 37. Drawing largely on Bingham's definition, the Venice Commission suggested 'that a consensus can now be found for the necessary elements of the rule of law' and it set forth six such elements. Ibid., para. 41.

[60] On the UN and the rule of law generally, see, e.g., N.M. Blokker, *Saving Succeeding Generations from the Scourge of War: The United Nations Security Council at 75* (2021), chapter 3; B. Fassbender, 'What's in a Name? The International Rule of Law and the United Nations Charter', (2018) 17 *Chinese Journal of International Law* 761.

[61] On the various 'thematic debates', see Blokker (2021), chapter 3.

> 'The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[62]

Of note, the requirement regarding 'accountability to laws' places the aforementioned notion of accountability in the broader context of the rule of law.[63]

Notwithstanding the specific context of the 2004 report, the definition of the rule of law set forth therein lent itself for broader application. Indeed, UNSG Ban Ki-moon defined the rule of law identically in a 2012 report ahead of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels.[64] According to the UNSG's 2012 report, furthermore,

> 'it is important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions. In this connection … The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations.'[65]

The UNSG's definition of the rule of law was included in the first draft high-level declaration which the co-facilitators for the high-level meeting circulated amongst the UN membership on 29 May 2012.[66] However, the definition was not retained in the final version of the UNGA High-Level Declaration. Nonetheless, the declaration did provide:

> 'We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law,

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[62] UN Doc. S/2004/616 (2004), para. 6.

[63] Cf. A. Nollkaemper, J. Wouters and N. Hachez, 'Accountability and the Rule of Law at International Level' <mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf> accessed 21 December 2021, at 5 ('The view that the notion of accountability is a definitional part of the broader concept of rule of law is sometimes challenged. However, modern definitions of the rule of law such as that given by the Secretary-General in his 2004 report . . . state that the rule of law implies that all persons must be *accountable* to the law, that is, face the social and legal consequences of their violating the law. It indeed seems that for law – and therefore for the rule of law – to have any real social function, the social actors must have the obligation to abide by it and society must be able to hold them into account.' Emphasis in original). The term 'accountability' is understood here in its 'legal' form. See 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'. [emphasis added]).

[64] 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels', UN Doc. A/66/749 (2012), para. 2.

[65] Ibid., para. 11 (emphasis added). Pursuant to Art. 7 of the UN Charter, the Secretariat is one of the UN's principal organs.

[66] <un.org/en/ga/president/66/pdf/letters/20120529-ruleoflaw.pdf> accessed 21 December 2021, para. 6-7.

> as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built . . .
>
> 1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.
>
> 2. 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'.[67]

The UNGA High-Level Declaration therefore explicitly confirmed the application of the rule of law to the UN. Whilst the declaration ultimately did not define the rule of law, the UN website evidences that the UNSG's definition of the concept remains unchanged.[68]

The rule of law is central to this study in several respects. Notably, jurisdictional immunity without alternative remedies results in 'accountability gaps', which is contrary to the rule of law. Moreover, the UN's unilateral determination of the legal character of third-party disputes, as in the cases arising out of the Kosovo lead poisoning and Haiti cholera epidemic, is difficult to reconcile with the core rule of law elements of 'independent adjudication'" and 'separation of powers, . . . avoidance of arbitrariness, and procedural and legal transparency'.[69]

The UNSG's definition of the rule of law furthermore includes the requirement of consistency with international human rights norms and standards. It is here that the concept of the rule of law overlaps with the international organisations law framework concerning third-party remedies. The UN's human rights obligations, specifically Article 14(1) of the ICCPR, arguably inform the interpretation of Section 29(a) of the General Convention.

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In the 1995 Report, the UNSG expressed the belief that the UN implemented Section 29 of the General Convention.[70] In 1998, the UN Legal Counsel contended before the ICJ that the UN did so by providing

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[67] UN Doc. A/RES/67/1 (2012), preamble and para. 1-2 (emphasis added). Cf. A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010), at 273 ('Organizations are no longer regarded as merely convenient vehicles of inter-state cooperation. Rather, they are perceived as powerful actors whose actions/acts need to be restrained by the rule of law'.)

[68] <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021. The UN's ambitions regarding the rule of law and justice are also reflected in the UN Sustainable Development Goals <un.org/ruleoflaw/sdg-16/> accessed 21 December 2021.

[69] UN Doc. S/2004/616 (2004), para. 6; UN Doc. A/66/749 (2012), para. 2.

[70] UN Doc. A/C.5/49/65 (1995), para. 33 ('The above procedures and mechanisms, in the view of the Secretary-General, implement the obligation to provide an appropriate means of dispute resolution in respect of disputes arising out of contracts or other disputes of a private law character').

'a complete remedy system to private parties'.[71] In light of the aforementioned framework, and against the broader backdrop of the rule of law, the question arises whether that holds true today.

The foregoing gives rise to the following research questions:

(i) How to interpret Section 29(a) of the General Convention and assess its implementation by the UN in light of the international organisations law framework concerning third-party remedies and against the broader backdrop of the 'rule of law'?

(ii) Building on the response to research question (i), how to design, in the words of the UN Legal Counsel, 'a complete remedy system for private parties', counterbalancing jurisdictional immunity, in third-party disputes against the UN and other international organisations?

### 1.3 Structure and outline of the study

The starting point for a proper understanding of Section 29 of the General Convention is the UN's jurisdictional immunity under Article II, Section 2 of the General Convention. As discussed in chapter 2, the legal basis for that immunity ultimately is Article 105(1) of the UN Charter, the General Convention being based on Article 105(3) of the UN Charter. The privileges and immunities referred to in the former provision accompany the UN's domestic legal personality pursuant to Article 104 of the UN Charter. The implication of domestic legal personality, in principle, is that the UN partakes in the domestic legal order, which includes the exercise of jurisdiction by the domestic courts. However, the UN's privileges and immunities preclude this to the extent necessary to protect the UN against domestic interference in its independent and efficient functioning.

As it is international law, through privileges and immunities, that puts up barriers to scrutinise the legality of the activities of international organisations under domestic law before domestic courts, the question arises as to what remedies exist under international law for third-parties against international organisations. That involves an enquiry into the international organisations law framework governing third-party remedies. As part of that framework, human rights obligations are binding on international organisations as general principles of law. Chapter 2 argues, amongst others, that Article 2(3) of the ICCPR requires the UN to provide procedural remedies for human rights violations. Moreover, when it comes to the settlement of disputes under civil law, the UN is bound by the higher procedural standard under Article 14(1) of the ICCPR.

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[71] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17, <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 6.

Against the backdrop of the international organisations law framework governing third-party remedies, chapter 3 turns to the first research question, interpreting Section 29(a) of the General Convention and appraising the UN's implementation thereof. It does so in light of the aforementioned framework, including notably Article 14(1) of the ICCPR, and against the broader backdrop of the rule of law. Given the central importance of Section 29(a) of the General Convention to the present study, and to set the scene properly for the later chapters, chapter 3 is inevitably lengthy and detailed. Following an overview of the UN's current practice in implementing Section 29(a) of the General Convention—on the basis of available information—chapter 3 considers the terms 'private law character' and 'appropriate modes of settlement' under Section 29(a) of the General Convention. Upon identifying distinct problems with the UN's implementation of that provision, chapter 3 argues that that implementation is due to be revised structurally. Such a structural revision is needed for Section 29 of the General Convention to counterbalance jurisdictional immunity.

But such counterbalancing is warranted only insofar as the jurisdictional immunity of international organisations effectively shields international organisations before domestic courts. Chapter 4 pauses to consider the continuing need for, and effectiveness of, jurisdictional immunity. It does so by way of a case study of the jurisdictional immunity of international organisations in the Netherlands and in the jurisprudence of the ECtHR. The Netherlands, which hosts a significant number of international organisations, is a suitable jurisdiction for this purpose. This is because the broad scope of issues that arise regarding the jurisdictional immunity of international organisations are representative of the issues that arise across jurisdictions.

As reflected in the case law of the Dutch courts and the ECtHR, the case for immunity from jurisdiction remains strong. In terms of the effectiveness of the immunity, the challenge is how to reconcile the immunity with the right of access to court under Article 6(1) of the ECHR (which corresponds to Article 14(1) of the ICCPR). According to consistent ECtHR case law, such reconciling can be done through 'reasonable alternative means'.

Absent alternative remedies, the forum state's obligation to respect jurisdictional immunity conflicts with its obligation to grant access to court. In the case of the UN, Article 103 of the UN Charter may operate so as to prioritise the immunity (although the opinions in *Mothers of Srebrenica* are ambiguous on this point). Whilst other international organisations do not benefit from such a priority rule, there may nonetheless be good arguments to prioritise their jurisdictional immunity. This notwithstanding, the case law of the lower Dutch courts not infrequently suggests the opposite: absent alternative remedies, the jurisdictional immunity of international organisations is at risk of being rejected. Even if the immunity is upheld, without alternative remedies the legitimacy of international organisations is impaired. In sum, immunity without adequate alternative remedies, to the extent required under international law, is unsustainable.

Against that backdrop, chapter 5 returns to Section 29(a) of the General Convention to address the second research question. Its starting point is the problems identified in chapter 3 with the UN's current implementation of Section 29(a) of the General Convention. Building on the UN's experience to date, the chapter proposes combined and integrated solutions to these problems. In designing the basic features of a 'complete remedy system to private parties', the aim is to facilitate the fair, efficient and transparent resolution of third-party disputes under Section 29(a) of the General Convention.

Building on proposals by Jenks and others, chapter 5 outlines a comprehensive third-party dispute settlement mechanism, entitled the 'Mechanism for the Settlement of Disputes of a Private Law Character (Mechanism)'. Operating under the auspices of the Permanent Court of Arbitration, the Mechanism would be established by resolution of the UNGA, and complemented by a new UN convention: the 'United Nations Convention on the Settlement of Disputes of a Private Law Character'. The Mechanism would facilitate alternative dispute resolution and, where amicable settlement fails, two-tiered arbitration. It would be available to the UN as well as other international organisations.

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The ultimate purpose of this study is to contribute to enhancing the effectiveness of international organisations. When it comes to the third-party liability of such organisations, this requires bolstering their jurisdictional immunity, as well as improving their legitimacy and predictability in the settlement of disputes through a systematic approach in conformity with the rule of law. The analysis and proposals in this study aim to contribute to the further maturing of international law in that direction.

# 2 THE INTERNATIONAL ORGANISATIONS LAW FRAMEWORK GOVERNING THIRD-PARTY REMEDIES

## 2.1 Introduction

For present purposes, the international organisations law framework governing third-party remedies has three core aspects: the legal personality of international organisations; how international organisations are bound by international law; and the primary and secondary human rights law obligations of international organisations. This chapter discusses each of these aspects succinctly, with brief references to literature and practice. The law with respect to each of these aspects is in development and the main purpose of this chapter is to describe the law as it stands at present.

In sum, as to the first aspect of the framework, under treaty provisions like Article 104 of the UN Charter, states are required to confer legal personality on international organisations under *domestic law*. This is to enable these organisations to conduct their day-to-day operations, including to contract, acquire goods and institute legal proceedings.[72] Simultaneously, treaty provisions like Article 105(1) of the UN Charter, complemented by the General Convention in the case of the UN, confer privileges and immunities on international organisations. These aim to protect the independent functioning of international organisations, by excluding the application of domestic laws (privileges) and exempting international organisations from legal process (immunity from jurisdiction) and enforcement (immunity from execution).[73]

As it is international law—through privileges and immunities—that puts up barriers to international organisations being held accountable at the domestic level, the question arises as to the international law remedies of private parties against international organisations. The starting point is the international legal personality of international organisations—international organisations typically have such personality, as per the will of their member states. A corollary of international legal personality is that where an international organisation breaches an international obligation, according to the ARIO, it commits an internationally wrongful act for which it incurs international responsibility. However, whilst international organisations may incur such responsibility towards private parties, the ARIO do not elaborate on the legal consequences of such personality.

Moreover, the international personality of international organisations is normatively empty: it merely means that such organisations are *capable* of possessing international rights and duties. This leads to the framework's second aspect, that is, the question as to how international organisations are bound by

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[72] Cf. Art. 1, Section 1 of the General Convention.
[73] The term 'privilege', in contradistinction to 'immunity', may be understood to refer to 'all cases in which local legislation is not, or is differently, applicable'. Schermers and Blokker (2018), para. 323.

international law. As will be seen, international human rights obligations may be said to be binding on international organisations as general principles of law. For the UN, in addition, human rights obligations, as specified in the Universal Declaration of Human Rights and the 1966 Covenants, may be said to flow from the UN Charter as the UN's constitution.

As to the third aspect of the framework, in light of the void under the ARIO as to the consequences of international responsibility towards private parties, it is frequently asserted that there exists under international human rights law a 'right to a remedy', with a procedural and a substantive component. It will be concluded in this chapter that the former right arises under Article 2(3) of the ICCPR, which is binding on the UN under its constitution. Conversely, the latter right has yet to mature.

In discussing the international organisations law framework governing third-party remedies, this chapter is structured as follows. It begins by discussing the legal status of international organisations in domestic legal orders and the international legal order (Section 2.2). It next considers how international organisations, and the UN in particular, are bound by international law (Section 2.3). This is followed by a discussion of the primary and secondary obligations of international organisations, and the UN in particular, towards private parties under international human rights law (Section 2.4).

## 2.2 The Legal Status of International Organizations in Domestic Legal Orders and the International Legal Order

The legal status of international organisations largely revolves around their legal personality. The concept of legal personality developed at the domestic level. Humans are the original legal persons, from which the personality of legal persons, like companies, is derived.[74] International organisations often enjoy domestic legal personality, which may be conferred on them in a variety of ways. The status of international organisations at the domestic level is moreover determined by their privileges and immunities, which shield them from the application of laws and from legal process insofar as necessary to protect against interference.

At the international plane, states may be considered to be the original legal persons, from which the personality of international organisations is derived.[75] Whilst there is no centralized international authority that prescribes the conditions and process for acquiring international personality, international organisations often enjoy such personality. However, as discussed in this section, pursuant to the ARIO, the consequences of that personality as regards private parties are limited.

[74] Ibid., para. 1565.
[75] Ibid.

This section begins by discussing the domestic legal personality of international organisations and their privileges and immunities (subsection 2.2.1). It then turns to the international legal personality of international organisations and its legal consequences according to the ARIO (subsection 2.2.2).

### 2.2.1 Domestic legal personality, and privileges and immunities

International organizations need to operate at the domestic level, for example, to lease buildings, buy vehicles and office equipment, contract cleaning and catering services, and bring suit in national courts. They could not do so without domestic legal personality. Such personality is typically foreseen in one or more treaties, including notably the constituent instrument of an international organization. For example, according to Article 104 of the UN Charter: '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'.

Domestic legal personality may also be foreseen in a separate multilateral treaty. For example, Article 1 ('Juridical personality'), Section 1, of the General Convention provides: 'The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings.'

Domestic personality may moreover be foreseen in a bilateral treaty, such as a headquarters agreement. For example, according to Article 2 of the 1999 Agreement concerning the Headquarters of the Permanent Court of Arbitration ('PCA Headquarters Agreement'):[76] 'The PCA shall possess full legal personality. In particular, it shall have the capacity to contract, to acquire and dispose of immovable and movable property; and to institute legal proceedings.'

States parties to treaties like the foregoing are under an international law obligation to endow the relevant international organisation with legal personality under domestic law.[77] The actual conferral of such personality is governed by domestic law.[78]

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[76] 2304 UNTS 101. Headquarters agreement concluded between the Netherlands and international organisations typically provide for domestic legal personality. See, e.g., Art. 2 of the 1997 OPCW Headquarters Agreement; Art. 3(1) of the IRMCT Headquarters Agreement.

[77] R. Higgins et al. *Oppenheim's International Law: United Nations* (2017), para. 11-22. According to Reinisch, it does not seem generally accepted that customary international law requires states to recognise the domestic personality of international organizations. A. Reinisch, *International Organizations before National Courts* (2000), at 45-46. Nor does it seem generally accepted that international organizations have legal personality within domestic legal systems as a consequence of their international legal personality. Ibid., at 50, fn. 75. But see A.S. Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (1995), at 116 ('The national legal personality of international organizations is perhaps best described as an extension to the national level of the international organization's capacity to act on the international plan. It is implied in the possession of international legal personality').

[78] Higgins et al. (2017), paras. 11-21.

In the Netherlands, for example, such conferral may occur automatically on the basis of the treaty. Article 93 of the Dutch Constitution provides that self-executing provisions of treaties, once published, are directly applicable.[79] Whether a treaty rule is self-executing depends on its nature, notably whether it imposes obligations or confers rights, and whether it is unconditional and sufficiently precise to be applied by the courts.[80] The aforementioned treaty provisions concerning the domestic legal personality of the UN and the PCA would have such a direct effect.[81]

Other jurisdictions confer domestic legal personality on international organizations pursuant to national legislation. Well-known examples are the UK International Organisations Act 1986 and the US International Organizations Immunities Act 1945.[82]

Where an international organisation has domestic legal personality, it is capable of availing itself of domestic law.[83] And, *vice versa*, as explained by Schermers and Blokker: 'Most rules of national law are applicable to international organizations in the same way as to other subjects within the national jurisdiction.'[84] However, the application of domestic law is excluded where it would affect the proper functioning of the international organisation.[85] Exclusions apply by virtue of privileges and immunities, which are conferred on an organisation by treaty. For example, under Article 14(1) of the IRMCT Headquarters Agreement, concluded between the UN and the Netherlands, the Mechanism is exempt from taxes, including 'all direct taxes . . . import and export taxes'.[86]

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[79] An earlier version of this provision was first included in the constitution in 1953. <denederlandsegrondwet.nl/9353000/1/j9vvkl1oucfq6v2/vgrnd9dqjxze> accessed 21 December 2021.

[80] M. Chébti, 'Rechterlijke Toetsing aan een Ieder Verbindende Internationale Verdragsbepalingen. De Bijdrage van de Nederlandse Rechter aan het Bevorderen van de Internationale Rechtsorde en de Noodzaak dit te Kunnen Blijven Doen', in T. Gerverdinck et al. (eds.), *Wetenschappelijk Bijdragen: Bundel ter Gelegenheid van het 35-Jarig Bestaan van het Wetenschappelijk Bureau van de Hoge Raad der Nederlanden* (2014), 83 at 102, fn. 55, referring to Kamerstukken II 2007/08, 29861, nr. 19, at 3 ff.

[81] In an early Dutch case, UNRRA sued an individual before the District Court of Utrecht, the Netherlands, to recover sums allegedly paid in error under his contract of employment. In the absence of an explicit provision conferring domestic personality on UNRRA, the defendant argued that the organisation lacked such personality. The courts rejected this argument. See *UNRRA v. Daan*, Cantonal Court, Amersfoort, 16 June 1948. For references to the judgment, and the subsequent judgments on appeal, see UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 207, para. 2, and at 216, para. 41, fn. 24; and Reinisch (2010), at 85.

[82] 22 U.S.C 288. See generally Schermers and Blokker (2018), para. 1592 ff.

[83] Another question is whether the international organisation is competent to do so. That question is governed by the organisation's internal law. See Schermers and Blokker (2018), para. 1599 ('*capacity* does not entail *competence*'. Emphasis in original).

[84] Schermers and Blokker (2018), para. 1610.

[85] Ibid., para. 1608, referring to 'a general rule of international institutional law to the effect that national laws should not be applied to international organizations if they could affect the proper functioning of the organization'. See also ibid., para. 1610, fn. 260 ('As a general rule laws will apply when not excluded.').

[86] See also, e.g., Art. 7(2) of the IRMCT Headquarters Agreement: 'Except as otherwise provided in this Agreement or the General Convention, the laws and regulations of the host State shall apply on the premises.'

Insofar as the application of tort law is not excluded, the obligations thereunder apply to international organisations, including the obligation to pay compensation.[87] Importantly, however, the implementation of liability through legal proceedings is precluded by virtue of immunities. In particular, as discussed in greater detail in chapter 4 of this study, international organisation typically enjoy immunity from jurisdiction. That immunity aims to preclude international organisations from being held to account at the domestic level. Like the non-application of certain domestic rules as a matter of privilege, the rationale of immunity from jurisdiction (and, separately, immunity from execution) is to protect international organisations from interference.

Articles 104 and 105 of the UN Charter, taken together, sum up the position with respect to the UN: insofar as necessary for the fulfilment of its purposes, the organisation simultaneously enjoys domestic personality *and* privileges and immunities.[88]

### 2.2.2 International legal personality

There is no equivalent provision to Article 104 of the UN Charter when it comes to the UN's international legal personality.[89] The drafters 'considered it superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter as a whole'.[90] That was indeed what the ICJ did in its landmark advisory opinion in the *Reparation for Injuries* case.

The case arose in connection with the killing of a UN mediator in the Middle East, following unrest in connection with the establishment of the State of Israel.[91] The UNGA requested the ICJ for an advisory opinion on whether the UN could bring an international claim against the responsible state for the injury caused to its agent.[92] The ICJ held that this turns on whether the UN has international personality.[93] Its

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[87] Art. 6:162(1) of the Dutch Civil Code.

[88] The symmetry in formulation between Arts. 104 and 105(1) of the UN Charter underscores their close conceptual linkage. The beginning and ending of these provisions are identical: 'The Organization shall enjoy in the territory of each of its Members such . . . as . . . necessary for the . . . fulfilment of its purposes'. Art. 104 complements the text with 'legal capacity' ('as may be necessary for the exercise of its functions and the fulfilment of its purposes'). Art. 105(1) complements the text with 'such privileges and immunities' ('as are necessary for the fulfilment of its purposes').

[89] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 178 ('not settled by the actual terms of the Charter').

[90] United Nations Conference on International Organization Documents (1945), Vol. XIII, at 710, quoted in Schermers and Blokker (2018), para. 1565.

[91] For a factual background, see K. Marton, *A Death in Jerusalem* (1994).

[92] According to the ICJ in *Reparation for Injuries*: 'The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State"'. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 177.

[93] Ibid., at 178 ('in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire . . . does the Organization possess international personality?').

conclusion that the UN has such personality is based on four main grounds which are largely derived from the UN Charter. That is, as explained by Schermers and Blokker:

> '(1) to achieve the ends of the UN, the attribution of international personality is indispensable. (2) The organization is equipped with organs and has special tasks. (3) The Charter has defined the position of the member states in relation to the organization, by requiring them to give it every assistance in any action undertaken by it, and to accept and carry out the decisions of the Security Council, by authorizing the General Assembly to make recommendations to the member states, by giving the organization legal capacity, privileges and immunities in the territory of each of its members, and by providing for the conclusion of agreements between the organization and its members. (4) Practice has confirmed this character of the organization, which occupies a position in certain respects in detachment from its member states.'[94]

International legal personality, where it is not granted explicitly to an international organisation, may be implied in the powers conferred on it by its member states, as in the case of the UN.[95] With respect to the UN, the following passage in the *Reparation for Injuries* advisory opinion is key:

> 'In the opinion of the Court, the Organization was intended to exercise and 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 on the international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that <u>its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged</u>.'[96]

According to the ICJ in *Reparation for Injuries*, whilst international legal personality 'is no doubt a doctrinal expression, which has sometimes given rise to controversy',[97] for the UN to be an international person means 'that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'[98]

In its Advisory Opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the ICJ opined with reference to international organisations generally:

> 'The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are <u>invested by the States which create them with</u>

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[94] Schermers and Blokker (2018), para. 1566.
[95] Ibid., para. 1565. The intention of the member states, as evidenced by the conferral of powers, is central to the prevailing theory on the acquisition of international personality. Schermers and Blokker (2018), para. 1565. According to the ARIO Commentaries: 'The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the United Nations Charter'. ARIO Commentaries, Art. 2, at 73, para. 7.
[96] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 179 (emphasis added).
[97] Ibid., at 178.
[98] Ibid., at 179.

> powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'[99]

According to the ILC in connection with the ARIO, the ICJ has taken a 'liberal view'[100] on the acquisition of international legal personality by international organisations. That is, the ICJ's opinions 'do not appear to set stringent requirements for this purpose.'[101] That being so, according to the ILC: 'The legal personality of an organization . . . needs to be "distinct from that of its member States".'[102] That is reflected in the definition of 'international organization' adopted in Article 2(a) of the ARIO: 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.'[103]

In the end, the matter of the international legal personality of international organisations may be to an extent academic insofar as it is more common nowadays for the constituent instrument of an international organisations to confer explicitly such personality on the organisation.[104] Moreover, as explained by Schermers and Blokker: 'It is generally recognized that organizations have such capacity, unless there is clear evidence to the contrary'.[105]

Lastly, the international legal personality of the UN may be said to be 'objective' insofar as it applies also vis-à-vis non-member states. This results from the ICJ's opinion in *Reparation for Injuries*. According to the Court,

> 'the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.'[106]

However, the question of whether other international organisations can be said to have 'objective' international legal personality remains controversial.[107]

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[99] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, para. 25 (emphasis provided).
[100] ARIO Commentaries, Art. 2, at 74, para. 8.
[101] Ibid.
[102] Ibid., para. 10.
[103] Art. 2(a) of the ARIO (emphasis added); ARIO Commentaries, Art. 2, at 74, para. 10.
[104] Schermers and Blokker (2018), para. 1564; Sands, Klein and Bowett (2009), para. 15-004.
[105] Ibid., para. 1569, an example of an exception being the case of the OSCE. The definition of 'international organisation' in this study (see section 1.1 of this study) includes the possession of international legal personality.
[106] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 185 (emphasis added).
[107] Amerasinghe (2005), at 86-91; Sands, Klein and Bowett (2009), paras. 15-014 and 15-015 (commenting with

In sum, whether an international organisation has international legal personality depends on the will of its member states. Nowadays, they more commonly express that will explicitly in the constituent instrument of an international organisation. But the conferral of international legal personality may also be implied, as in the case of the UN. In reality, international organisations typically have international legal personality. In the case of the UN at least, such personality arguably is 'objective' in the sense that it can be invoked also against non-member states.

#### 2.2.2.1 Legal consequences of international legal personality: the ARIO

The question arises as to the legal consequences, if any, of the international legal personality of an international organisation. As explained by Schermers and Blokker: 'The link between international legal personality and responsibility issues was confirmed in the *Reparation for Injuries* Advisory Opinion of the International Court of Justice.'[108] In that case, as seen, the ICJ concluded that the UN, being endowed with international personality, was empowered to bring an international claim. The reverse also applies, that is, as explained by Schermers and Blokker: 'Being an international legal person also implies that claims may be brought against international organizations.'[109]

In its commentary to the 2001 'Draft articles on responsibility of states for internationally wrongful acts (ASR)',[110] the ILC stated: 'It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality.'[111] The ILC continued that approach, a decade later, in the ARIO. However, as will be seen in this subsubsection, the scope of the ARIO, like that of the ASR, does not extend to the contents and implementation of international responsibility owed towards *private parties*.

By way of preliminary observations regarding the ARIO, first, the ILC started its work on the topic of the responsibility of international organisation in 2003,[112] having appointed Giorgio Gaja as its Special Rapporteur.[113] Upon the ILC's adoption of the ARIO in 2011, the UNGA:

> '3. *Takes note* of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends

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reference to the quoted passage from the ICJ's opinion in *Reparation for Injuries*: 'It is far from clear . . . that this reasoning extends to all other international organisations, as it has generally been viewed as a statement of the political and factual importance of the UN, rather than as the formulation of a more general rule or principle of law.').

[108] Schermers and Blokker (2018), para. 1583.

[109] Ibid.

[110] (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10 (2001), at 31 ff., para. 1 ff. ('ASR Commentaries').

[111] Ibid., Art. 1, at 34, para. 7.

[112] The ILC conducted the work at the request of the UNGA. UN Doc. A/RES/56/82 (2001), para. 8.

[113] G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), para. 1.

> them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action'.
>
> 4. *Decides* to include in the provisional agenda of its sixty-ninth session an item entitled "Responsibility of international organizations", with a view to examining, inter alia, the question of the form that might be given to the articles.'[114]

Second, the ARIO 'follow the same approach adopted with regard to State responsibility'[115] and they 'are in many respects similar to the articles on State responsibility'. The ILC was in fact criticized for 'basically replacing the term "State" with "international organization"' in the ASR'.[116] However, according to Special Rapporteur Gaja,

> 'neither the Special Rapporteur nor the Commission has started from a presumption that the solutions adopted with regard to States should also apply to international organizations: I said as much already in my first report. Any question was going to be, and has been, examined on its merits. Only when a question relating to the responsibility of international organizations appeared to be parallel to one that had already been examined with regard to States and there was no reason for stating a different rule was an identical solution adopted.'[117]

Notably, like the ASR,[118] the ARIO

> 'rely on the basic distinction between primary rules of international law, which establish obligations for international organizations, and secondary rules, which consider the existence of a breach of an international obligation and its consequences for the responsible international organization. Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft

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[114] UN Doc. A/RES/66/100 (2011). As Wood notes, the UNGA took a similar action in relation to the ASR and this 'has become a common initial reaction of the Assembly to the Commission's work product'. See M. Wood, '"Weighing" the Articles on Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 55 at 64, fn. 38.

[115] ARIO Commentaries, General Commentary, at 67, para. 3. Regarding the process of law-making with respect to (the responsibility of) international organizations. See generally K. Keith, 'The Processes of Law-Making: the Law Relating to International Organizations as an Example', in M. Ragazzi (ed,), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 15.

[116] G. Gaja, Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (2008), para. 5. See likewise G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), para 5. Klein refers to 'significant criticism' against the method used by the ILC in producing the ARIO, as well as the substance of certain provisions. See Klein (2016), at 1027; and the literature cited in fns. 6 and 7.

[117] G. Gaja, Sixth Report on Responsibility of International Organizations, UN Doc. A/CN.4/597 (2008), para. 5 (fn. omitted). A. Pellet, 'International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 41 at 44 ('The Special Rapporteur was reproached for aiming at producing a carbon copy of the [ASR]. However, then a Commission's member, I underlined that there was just one unequivocal notion of responsibility in international law and in law in general, and I took the position that it was not unreasonable to use those Articles as a starting point: the general system of responsibility was similar in both cases'. Fns. omitted). Schermers and Blokker highlight two essential differences between the ASR and the ARIO. First, certain provisions in the ASR relate exclusively to states and were not included in the ARIO. Second, *vice versa*, certain new issues in the ARIO relate specifically to the responsibility of international organisations; these notably concern the relationship between international organisations and their members. Schermers and Blokker (2018), para. 1590B.

[118] ASR Commentaries, at 31, para. 1.

articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.' [119]

Third, and final, according to the ARIO Commentaries: 'The fact that several of the present draft articles are based on limited practice moves the order between codification and progressive development in the direction of the latter.'[120] And, 'their authority will depend upon their reception by those to whom they are addressed.'[121]

Turning to the substance of the ARIO, the fundamental proposition is set forth in Part Two, which is entitled 'the internationally wrongful act of an international organization' (which corresponds to Part One of the ASR). Under Article 3 of the ARIO: 'Every internationally wrongful act of an international organization entails the international responsibility of that organization.'

According to Article 4 of the ARIO: 'There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.'

The scope of application of Part Two of the ARIO corresponds to the scope of Part One of the ASR. As the ILC commented in the ARIO Commentaries regarding the ASR, it 'concerns any breach of an obligation under international law that may be attributed to a State, irrespectively of the nature of the entity or person to whom the obligation is owed.'[122]

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[119] ARIO Commentaries, General Commentary, at 67, para. 3. The distinction between primary and secondary law was introduced to the ILC by Special Rapporteur Robero Ago, who took over from F.V. Garcia Amador. See A. Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument* (2007), at 44.

[120] ARIO Commentaries, General Commentary, at 68, para. 5. G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), at 5-6, para. 6 ('some draft articles are based on limited practice. This could hardly be attributed to the lack of efforts deployed by the Commission to acquire knowledge of the relevant practice and take it into account. Unfortunately, only a few instances of unpublished practice have been contributed by States and international organizations in order to facilitate the Commission's study.') Upon adoption of the ARIO on first reading by the ILC, the UN Secretariat commented as follows: 'Another aspect in which the law of responsibility of international organizations differs from that of States is in the extent of practice that is available from which the International Law Commission can discern the law. In this respect, we note that the Commission has acknowledged in the commentary on a number of draft articles that practice to support the proposed provision is limited or non-existent.' See UN Doc. A/CN.4/637/Add.1 (2011), General Comments, at 5, para. 3.

[121] ARIO Commentaries, General Commentary, at 68, para. 5. Cf. Pellet (2013), at 54; Wood (2013), at 63 ('The most important element for "weighing" any product of the Commission is its reception by States (and in the present case also by international organizations)'). On the authority of ILC studies in general, see D.D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', (2002) 96 *American Journal of International Law* 857. On the 'key role of the commentaries', see D. Bodansky and J.R. Crook, 'Introduction and Overview', (2002) 96 *American Journal of International Law* 773, at 789. See also Wood (2013), at 60 ('The general commentary should be seen as an integral part of the articles.').

[122] ARIO Commentaries, Art. 33, at 124, para. 1 (emphasis added). See also the commentary to Art. 10 (Existence of a breach of an international obligation): 'An international obligation may be owed by an international

This scope includes private parties, as confirmed by the following statement in the ARIO Commentaries:

> 'With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals'.[123]

Both areas concern obligations owed by international organisations to individuals. Of note, the UN Secretariat likewise seemed to be of the view that the UN may incur *international responsibility* towards private parties. This is clear from the comments which the Secretariat submitted to the ILC in connection with the issue of attribution (cf. Article 7 of the ARIO):

> 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.'[124]

In short, the breach of an obligation by an international organisation (insofar as attributable to it) towards a private party would amount to an internationally wrongful act, entailing its international responsibility towards that party. However, the legal consequences of such responsibility under international law remain unclear.

#### 2.2.2.1.1 The limited scope of the ARIO

Like the ASR, the ARIO do not govern the content and implementation of responsibility owed to private parties. The scope of Parts Three ('Content of the international responsibility of an international organization')[125] and Four ('The implementation of the international responsibility of an international organization')[126] of the ARIO is limited.[127] As to the former, according to Article 33:

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organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.' ARIO Commentaries, Art. 10, at 97, para. 3 (emphasis added).

[123] ARIO Commentaries, Art. 33, at 125, para. 5 (emphasis provided). Fn. 242 regarding peacekeeping forces refers to UN Doc. A/RES/52/247 (1998). As discussed below, pursuant to that resolution the UNGA promulgated the UN Liability Rules concerning the UN's third-party liability in connection with UN operations.

[124] UN Doc. A/CN.4/545 (2004), at 17 (emphasis added).

[125] This part notably concerns the obligation to make full reparation for injury, involving restitution, compensation and satisfaction.

[126] This includes the entitlement to invoke responsibility, that is, the making of a claim for compliance with the obligations under Part Three.

[127] The ASR contain similar savings clauses. That is, Art. 33(2) of the ASR in Part Two sets forth a savings clause concerning the content of responsibility. The part concerning implementation does not as such have a savings clause, however, Art. 33(2) of the ASR was apparently intended to concern implementation as well. This results from the ASR Commentaries to Art. 33(2): 'Part Three is concerned with the invocation of responsibility by other States . . . The articles do not deal with the possibility of the invocation of responsibility by persons or entities

> '1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization'.

As seen, the ARIO Commentaries explain with respect to this provision:

> '(4) While the scope of Part Three is limited according to the definition in paragraph 1, this does not mean that obligations entailed by an internationally wrongful act do not arise towards persons or entities other than States and international organizations. Like article 33, paragraph 2, on State responsibility, paragraph 2 provides that Part Three is without prejudice to any right that arises out of international responsibility and may accrue directly to those persons and entities.
>
> (5) With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals. The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.'[128]

As to the scope of Part Four of the ARIO, Article 50 of the ARIO provides: 'This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.'

As the ARIO Commentaries explain with respect to this provision:

> 'Articles 43 to 49 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 33, which defines the scope of the international obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole.'[129]

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other than States, and paragraph 2 [of Art. 33] makes this clear.' ASR Commentaries, Art. 33, para. 4, at 95. Similarly, in the introduction to Part Three of the ASR (concerning the implementation of responsibility), the ASR Commentaries state: 'Part three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.' ASR Commentaries, Art. 33, at 116 (emphasis added).

[128] ARIO Commentaries, Art. 33, at 125, paras. 4-5 (fns. omitted, emphasis added). Of note, the commentary to the ARIO adopted by the ILC at first reading stated that 'while the consequences of . . . breaches with regard to individuals . . . are not covered by the draft, certain issues of international responsibility arising in these contexts are arguably similar to those that are examined in the draft'. The UN Secretariat recommended the deletion of that passage because 'it may create a misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations'. See G. Gaja, Eighth Report on Responsibility of International Organizations, UN Doc. A/CN.4/640 (2011), at 27, para. 79.

[129] ARIO Commentaries, Art. 50, at 147, para. 1 (emphasis provided).

The limited scope of the ARIO (like that of the ASR) has been criticised. Proulx referred to

> 'the inexistent role and place of individuals in the Commission's text as the potential beneficiary and/or victim of the actions and conduct of international organizations. After all, if one subscribes to the notion that international law seeks primarily to improve and enhance the lives of individuals, its core mission being not to shelter sovereign States but to protect the populations committed to their charge, several difficult questions must be posed. The usual concerns regarding *locus standi* and matters of procedural substance inevitably crop up: what recourse(s) do individuals affected by the (unlawful) acts of international organizations possess? What judicial or arbitral fora exist to vindicate claims that the true victims of unlawful behavior by an organization may legitimately have?'[130]

According to Shelton, the 'main problems for victims of human rights violations seeking accountability of IOs are not solved by the draft articles.'[131]

Why, then, this limited scope of the ARIO? In developing the ARIO, Gaja explained with reference to the ASR:

> 'There are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of [this] Part . . . to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. This would not only be a way of following the general pattern provided by the articles on State responsibility, it would also avoid the complications that would no doubt arise if one widened the scope of obligations here considered in order to include those existing towards subjects of international law other than States or international organizations.'[132]

As to the first of these reasons for the limited scope of the ARIO, the preference to follow the 'general pattern of the ASR', the question of why the ASR's scope is limited arises. Article 33 of the ASR, which is identical in material respects to Article 33 of the ARIO, provides:

> 'Article 33. Scope of international obligations set out in this Part
>
> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.'

According to the ASR Commentaries in connection with that provision:

> '(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the

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[130] V-J. Proulx, 'An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 109 at 119 (fns. omitted).
[131] Shelton (2015), at 48. See likewise Ferstman (2017), at 91 ('an unfortunate omission of the ILC').
[132] G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583 (2007), at 12, para. 37 (emphasis added).

> holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights. The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand case*, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".
>
> (4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".'[133]

According to Weiss, the ASR were 'to some extent out-of-date at their inception'[134] and, at least for the 21st century, 'wanting'.[135] The ASR, according to Weiss, 'should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility.'[136] According to Weiss: 'Three areas illustrate the significant role of individuals and nonstate entities in invoking state responsibility before international disputes settlement bodies: human rights, environmental protection, and foreign investor protection.' [137] Specifically:

> 'An article could have confirmed that individuals and nonstate entities are entitled to invoke the responsibility of a state if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides.'[138]

In response, Crawford, the ILC's Special Rapporteur on State Responsibility (1997-2001), stated that

> 'Article 33(1) could not stand on its own, because it would have implied that all secondary obligations were owed to states or collectives of states, and that nonstate entities could not be directly injured by breaches of international law. Avoiding this implication is the function of Article 33(2). In form a saving clause, it nonetheless clearly envisages that some "person or entity other than a State" may be directly entitled to claim reparation arising from an internationally wrongful act of a state . . . Taken

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[133] ASR Commentaries, Art. 33, at 95, para. 3-4 (fns. omitted, underlining added). Para. 3 in the original text, following the sentence 'Individual rights under international law may also arise outside the framework of human rights', contains a fn. referring to *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, Rep. PCIJ Series B No. 15, at 17-21.
[134] E.B. Weiss, 'Invoking State Responsibility in the Twenty-first Century', (2002) 96 *American Journal of International Law* 798, at 816.
[135] Ibid.
[136] Ibid., at 809.
[137] Ibid.
[138] Ibid., at 816

> together, the two paragraphs of Article 33 emphasize the variety of situations that may be involved, and the subtlety of possible interactions between states as legislators and actors and nonstate entities as beneficiaries and claimants.'[139]

As explained by Crawford with reference to investment treaties, on the one hand, the ICJ in *LaGrand* held that an interstate treaty may create 'individual rights',[140] reaffirming the Permanent Court's opinion in *Jurisdiction of the Courts of Danzig*.[141] But, as Crawford continued:

> 'On the other hand, one might argue that investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis* formula, the rights concerned are those of the state, not the investor.'[142]

According to Crawford,

> 'what Article 33 clearly shows is that the secondary obligations arising from a breach may be owed directly to the beneficiary of the obligation, in this case the investor, who effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty.'[143]

That being so, the ASR do not address those secondary obligations. As explained by Crawford:

> 'The ILC had a compelling interest in completing the project on time, given that it had dragged on for so many years. In addition, the project certainly did not extend to the responsibility of entities other than states. This is a disparate topic: the ILC has just begun its study of the responsibility of international organizations, but that will leave various other issues untouched. The responsibility of nonstate entities for breaches of international law raises novel and difficult questions, and could have given rise to significant controversy. Diplomatic protection had already been carved off from the articles (likewise not having been treated on first reading). Conceptually, it seems that diplomatic protection should be regarded as a form of invocation of state responsibility; but it is at least a distinct form of invocation, which was being separately treated.
>
> Above all, there was a need not to raise so many new issues that the acceptability of the text as a whole might have been put in question.'[144]

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[139] Crawford (2002), at 887.
[140] Ibid., at 887, referring to *LaGrand Case (Germany v. United States of America)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466.
[141] J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 *American Journal of International Law* 874, at 887, referring to *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, Rep. PCIJ Series B No. 15, at 17-19.
[142] Crawford (2002), at 887-888 (fn. omitted), referring to *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, Judgment of 30 August 1924, Rep. PCIJ Series A No. 2, at 12.
[143] Crawford (2002), at 888. Then again, according to Tomuschat, 'general international law has not yet evolved an undisputed right of financial compensation for victims of gross human rights violations'. Tomuschat (2014), at 401-402. See also M. Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', (2006) 24 *Netherlands Quarterly of Human Rights* 641, at 655 ('State practice . . . does not support the proposition that there is an individual right under international customary law to claim a remedy for violations of human rights.'). See also section 2.4.2.2.
[144] Crawford (2002), at 888 (fns. omitted). Of note, as explained by Crawford, the first Special Rapporteur, F.V. Garcia Amador, 'focussed on the substantive rules of injury to aliens and their property. It is generally regarded now as a false start'. Crawford (1999), at 436.

The reason given by Crawford for limiting the scope of the ASR to the responsibility of states seems to resonate in the ARIO Commentaries, in referring to the ASR:

> 'This seems to be because of the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One.'[145]

In other words, the consequences of international responsibility towards private parties were not considered because the responsibility of such parties themselves was not addressed in the articles. Now, it may be that in assessing the responsibility of a state or international organisation towards a private party, the breaching by such a party of its own legal obligations is legally relevant. However, it is not readily apparent that this warrants the wholesale exclusion of the legal consequences of the international responsibility towards such parties.

As to Crawford's reference to diplomatic protection as a reason for limiting the scope of the ASR, one can speculate as to whether it corresponds to the second, unexplained, reason given by Special Rapporteur Gaja for the limited scope of Part Three of the ARIO, that is, 'the complications that would no doubt arise if one widened the scope of obligations'.[146] Shelton contended regarding the ARIO that 'the omission of individuals and groups is clearly intentional, especially in the light of Article 45 of the draft articles, which contains basic norms of diplomatic protection on nationality of claims and exhaustion of local remedies.'[147]

According to Article 45 of the ARIO, on the 'admissibility of claims', included in part Four of the ARIO (on the implementation of international responsibility):

> '1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.
>
> 2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.'

This provision deals with two aspects related to diplomatic protection: nationality of claims (paragraph 1) and exhaustion of local remedies (paragraph 2).[148]

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[145] ARIO Commentaries, Art. 33, at 124, para. 1.
[146] G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583 (2007), at 12, para. 37.
[147] Shelton (2015), at 48.
[148] Regarding the former, according to the ARIO Commentaries: 'Nationality of claims is a requirement applying to States exercising diplomatic protection . . . diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.' ARIO Commentaries, Art. 45, at 137-138, para. 2.

Shelton suggests that the 'intentional' omission of individuals and groups in the ARIO was because of the underlying perception that their rights would be vindicated through diplomatic protection. There is some support for that suggestion in that the ARIO Commentaries emphasise the relevance of diplomatic protection in practice. In this respect, according to the Commentaries, in connection with the obligation of compensation (Article 36 of the ARIO): 'The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo' in the 1960s ('ONUC settlements').[149] As the ARIO Commentaries explain:

> 'Compensation to nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States in keeping with the United Nations declaration contained in these letters according to which the United Nations: "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties". With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France, and also with the International Committee of the Red Cross'.[150]

For reasons discussed elsewhere in this study (paragraph 3.4.3.1.3), diplomatic protection in the case of ONUC was considered to be advantageous to the UN. However, the ONUC settlements are the *only* known example of diplomatic protection in the UN's practice regarding the settlement of third-party claims. To refer to the ONUC settlements as the 'most well-known instance of practice' does not reflect the reality that, as will be seen, third party claims are typically settled directly between the UN and private claimants, without the intervention of states.

Nonetheless, the fact is that diplomatic protection is retained in the ARIO, like in the ASR, and it raises complex questions concerning legal relationships.[151] Such complexities are illustrated by the case of *Manderlier* before the Belgian courts. Mr Manderlier, a Belgian national, claimed compensation from the UN for the loss of property in the Congo due to the actions of ONUC troops. The Belgian government espoused Manderlier's claim and it was part of the ONUC settlement. However, Manderlier was

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[149] ARIO Commentaries, Art. 36, at 126, para. 1. These settlements were reached after protracted negotiations and without recourse to third dispute settlement procedures. See UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 219, para. 54.

[150] ARIO Commentaries, Art. 36, at 126-127, para. 1 (fn. omitted). The 1996 Report contains, in fn. 8, the following summary of the procedure for settling the Belgian claims. That procedure 'was described in the Secretary-General's letter of 6 August 1965 to the representative of the Union of Soviet Socialist Republics. Accordingly, the claims submitted were investigated by the competent services of ONUC and United Nations Headquarters. Claims for damage due to military operations or military necessity were excluded, as well as claims for damage caused by non-United Nations personnel. Of approximately 1,400 claims submitted by Belgian nationals, the United Nations accepted 581 as entitled to compensation. Following consultations with the Government of Belgium, a lump-sum payment in the amount of $1.5 million was agreed as a final settlement of the matter. At the same time, a number of financial questions that were outstanding between the United Nations and Belgium were settled. Payment was effected by offsetting the amount of $1.5 million against unpaid ONUC assessments amounting to approximately $3.2 million'.

[151] Cf. Vermeer (2007), at 54 ('The *Mavrommatis Palestine Concessions* case may be the most cited authority on diplomatic protection, but it presents us with a difficulty that is not easily overcome and that has been a source of confusion with respect to the question of whose rights are protected in the exercise of diplomatic protection'.)

dissatisfied with his share under the settlement and he initiated proceedings against both the UN and Belgium before the Belgian courts.[152] The courts declined to hear the case against the UN on account of its jurisdictional immunity.[153] But, if Manderlier had been able to invoke the responsibility of the UN and seek reparation from it, would his rights have been affected due to Belgium having espoused his claim and having entered into the lump-sum settlement with the UN?[154]

#### 2.2.3 Interim conclusions

Domestic law governs the conferral of domestic legal personality on international organisations. But for its privileges and immunities, an international organisation with such personality would be subject fully to domestic law and the jurisdiction of the local courts.

Whether an international organisation has international legal personality depends on the will of the member states. Such personality is often conferred. As to the UN, as opined by the ICJ in *Reparation for Injuries*, it has been endowed with such personality. As a consequence of international legal personality, an international organisation incurs international responsibility for the wrongful act of breaching a primary obligation towards a private party. However, the ARIO clarify neither the content nor implementation of such responsibility. The rights of private parties to remedies against international organisations under international law require closer examination.

### 2.3 How Are International Organisations, and the UN in Particular, Bound by International Law?

In its 1980 Advisory Opinion concerning the *Interpretation of the WHO-Egypt Agreement*, the ICJ stated that 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[155]

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[152] According to the correspondence from the UNSG to the Belgian Minister for Foreign Affairs, the Belgian Government was responsible for distributing the settlement sum. UN Doc. A/CN.4/SER.A/1967/Add.1 (1967), at 219, para. 54.
[153] *Manderlier v. United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, United Nations Juridical Yearbook 1966, 283 at 283; *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 237.
[154] That would likely have been the position of the UN. According to the 1996 Report, 'the lump-sum compensation . . . would be in full and final settlement of all claims (whether by the Government or its nationals)'. 1996 Report, para. 35 (emphasis added). This touches on some of the complexities concerning diplomatic protection.
[155] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, at 89-90.

This statement is often cited in support of the proposition that international organisations are subject to international law,[156] notably general international law.[157] However, as explained by Daugirdas, the ICJ did not substantiate its statement as regards general international law.[158] In any event, the Court's statement is ambiguous as it does not clarify what obligations are 'incumbent upon' international organisations.[159]

As stated by Daugirdas in the context of the accountability of international organisations:

> 'The sources of states' international law obligations are well known: they include treaties, customary international law, and general principles. But whether and when these sources bind IOs is mired in uncertainty. If we do not know what IOs' international obligations are, we do not know when IOs have violated them.'[160]

Upon an extensive enquiry, Daugirdas concluded:

> 'IOs are not categorically more or less bound by international law than states are. *Jus cogens* norms bind IOs. Customary international law and general principles do, too-but only as a default matter. Treaties do not bind IOs without their consent.'[161]

Against the backdrop of that conclusion, which will be explained further below, the present section enquires—to the extent necessary for purposes of this study—how international organisations, and the UN specifically, are bound by international law. The section first considers treaty law, followed by general international law and *jus cogens* (subsection 2.3.1).[162] It then considers the sources of international law that are specifically applicable to the UN (subsection 2.3.2).

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[156] See, e.g., Schermers and Blokker (2018), para. 1574; Sands, Klein and Bowett (2009), para. 14-034 ('As an international person an international organization is subject to the rules of international law, including in particular conventional and customary rules').

[157] Daugirdas (2016), at 332 ('A single sentence in the ICJ's 1980 WHO-Egypt advisory opinion supplies the foundation for many analyses of I0 obligations under general international law.'). See, e.g., the sources cited in Daugirdas (2016), fn. 34. See also Johansen (2020), at 51 ('It is clear that, as subjects of international law, IOs are bound by "any obligations incumbent upon them under general rules of international law.'). See also, without reference to ICJ case law: Hirsch (1995), at 31 ('International customary law is applicable *mutatis mutandis* to intergovernmental organizations.'); ibid. at 37 ('International organizations are bound to respect [general principles of law] and they may be held responsible for their violation').

[158] Daugirdas (2016), at 333 ('The ICJ's opinion offers nothing to bolster its statement that IOs, as subjects of international law, are bound by general rules of international law.').

[159] Ibid., adding 'WHO-Egypt thus fails to resolve which international law rules bind IOs, and the question remains unsettled'. Ibid., at 334. Cf. F. Naert, *International law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (2010), at 362, fn. 1611.

[160] Ibid., at 330 (fn. omitted).

[161] Ibid., at 380.

[162] Understood as comprising customary international law (that is, 'international custom, as evidence of a general practice accepted as law', under Art. 38(1)(b) of the ICJ Statute), and general principles of law (that is, 'general principles of law recognized by civilized nations' pursuant to Art. 38(1)(c) of the ICJ Statute). Cf. Daugirdas (2016), at 326 and 331.

### 2.3.1 Treaty law, general international law and *jus cogens*

#### 2.3.1.1 Treaty law

In considering whether the UN possesses international personality,[163] the ICJ in its *Reparation for Injuries* advisory opinion considered, amongst others, that the UN Charter 'has defined the position of the Members in relation to the Organization . . . by providing for the conclusion of agreements between the Organization and its members.'[164] The Court also referred to '[p]ractice – in particular the conclusion of conventions to which the Organization is a party'.[165] Indeed, the UN regularly concludes treaties with states—for example, status of forces agreements or headquarters agreements—[166] as well as other international organizations.[167]

The Court specifically referred to the General Convention, stating that it 'creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35).'[168] As discussed in chapter 3 of this study, the UN's consent to be bound by the General Convention, in combination with the terms of the treaty, may be deemed to be enshrined in the UNGA approving the convention and proposing it for accession by UN member states. This notwithstanding, there remains discussion as to whether the UN may be deemed to have become a party to the General Convention.

As regards international organisations generally, in discussing the international obligations by which they are bound, Blokker explained:

> 'First, of course, there are treaties, such as the organization's own constitution and treaties to which it is a party, including its host state agreement. In addition, many international organizations have concluded more specific agreements within their fields of competence that may contain obligations for them.'[169]

As explained by Schermers and Blokker: 'There can be no doubt that international organizations generally have the capacity to enter into agreements.'[170] However, that capacity is not unlimited. According to the preamble to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ('1986 VCLT'),[171] 'international

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[163] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 178.
[164] Ibid., at 178-179.
[165] Ibid., at 179.
[166] See, e.g., the MINUSTAH SOFA and the IRMCT Headquarters Agreement, respectively.
[167] See, e.g., the 2001 Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons, UN Doc. A/55/988 (2001), Annex.
[168] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 179.
[169] N.M. Blokker, 'International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?', (2017) 14 *International Organizations Law Review* 1, at 11.
[170] Schermers and Blokker (2018), para. 1748. See also Naert (2010), at 383.
[171] Vienna, 21 March 1986 (not yet in force).

organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'.[172] According to Article 6 of the 1986 VCLT, 'the capacity of an international organization to conclude treaties is governed by the rules of that organization'. Thus, as explained by Schermers and Blokker: 'The treaty-making capacity of international organizations is not the same for each organization, but is related to their competences: an organization may only conclude agreements in those areas in which it is competent to act.'[173]

The issue, therefore, is not so much *whether* an international organization has the capacity to conclude treaties, but rather *what treaties* it can conclude. That is determined with reference to their functions and powers. In contradistinction from states, 'an organization may only conclude agreements in those areas in which it is competent to act'.[174]

Whether an international organization can become a party to a treaty moreover depends on whether the treaty so allows. Certain multilateral treaties are exclusively open to states. This is typically the case, for example, with human rights treaties, such as the ICCPR.[175] Fassbender explained the limited scope of such treaties on the basis that 'traditionally States (i.e. governmental, administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights'.[176]

An unsettled issue is 'whether treaties can bind IOs without their consent'.[177] More specifically, the question is whether international organizations are bound by treaties to which their members are parties. Mégret and Hoffmann assert 'that the United Nations is bound "transitively" by international human rights standards as a result and to the extent that its members are bound.'[178] Insofar as this implies that an international organisation would be bound by the treaty obligations of its members, that is arguably incorrect.[179] International organisations enjoy international legal personality separate from their members.[180] And, under the *pacta tertiis* rule, to incur obligations or rights under a treaty requires

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[172] UN Doc. A/CONF.129/15 (1986), Preamble, para. 11.
[173] Schermers and Blokker (2018), para. 1748.
[174] Ibid.
[175] Under Art. 48 ICCPR. Of note, Art. 6(2) of the 2007 Lisbon Treaty envisages the accession of the EU to the ECHR. As explained by Blokker, 'international organizations are not parties to major law-making treaties such as human rights conventions and the Geneva Conventions. Moreover, the ongoing saga of the accession of the EU to the ECHR has demonstrated how complex this is.' Blokker (2017), at 11. On the ECHR and the European Communities, see generally R.A. Lawson, *Het EVRM en de Europese Gemeenschappen: Bouwstenen voor een Aansprakelijkheidsregime voor het Optreden van Internationale Organisaties* (1999).
[176] Fassbender (2006), para. 3.3.
[177] Daugirdas (2016), at 335.
[178] F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314, at 318.
[179] See generally Naert (2010), at 422 ff.
[180] Cf. Fassbender (2006), para. 3 ('the United Nations being an autonomous subject of international law').

consent.[181] Daugirdas concluded that 'the argument that states should not be able to evade their international obligations by joining with other states to establish an IO . . . fails to establish that member states' treaty obligations automatically bind IOs.'[182]

According to Daugirdas:

> 'Accepting the argument that the common treaty obligations of an IO's member states automatically bind the IO at the moment of its establishment would diminish the very wide discretion that states have under the VCLT to shape and revise their treaty obligations. When the same group of states first enters into a treaty and subsequently creates an IO that is unbound by the obligations in the earlier treaty, those states are not evading anything. They are modifying their obligations, in the same way that states might modify otherwise applicable customary international law by creating *lex specialis*. Because such modifications are wholly compatible with international law, there is nothing impermissible or even especially troubling about states choosing to establish an IO that is unbound by treaty obligations to which those same states previously agreed.'[183]

This notwithstanding, treaties may reflect general principles of law which, as will be seen next, arguably bind international organizations as such:[184]

> 'Whether a particular treaty contains such a general principle may be indicated by its mode of establishment. The number of states that participated in its drafting is important, and also whether the text has been unanimously – or almost unanimously – adopted. It will also be relevant to determine how long the treaty has been open to ratification and how many ratifications have been deposited. References in other treaties or public statements may also reinforce the view that a particular treaty contains general principles of law, binding not only on states but also on international organizations.'[185]

#### 2.3.1.2 General international law

As explained by Blokker, it is

> 'increasingly accepted that international organizations are bound by obligations under customary international law. Such obligations concern, for example, international human rights law and international humanitarian law. The practical relevance of this is clear if we ask whether . . . UN . . . peacekeeping forces are fully bound by customary human rights and humanitarian law, knowing that it is unlikely that many international organizations will become parties to human rights and

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[181] Cf. Art. 34 of the VCLT ('A treaty does not create either obligations or rights for a third State without its consent.'). The same rule is laid down in the 1986 VCLT (not yet in force); however, that treaty has not entered into force and 'a number of scholars disagree with [it]'. Daugirdas (2016), at 335.
[182] Daugirdas (2016), at 357.
[183] Ibid., at 352. Otherwise put, 'there is no rule of treaty law that prohibits states from entering into treaties and becoming members of 1Os that work at cross-purposes. Except for treaties that violate *jus cogens*, the VCLT *never* prescribes invalidity of a treaty as the consequence of a treaty conflict. Under the VCLT, then, states are perfectly free to create IOs that do not share their member states' pre-existing treaty obligations-although states that do so could face responsibility for violating those obligations.' Ibid., at 354 (emphasis in original).
[184] Daugirdas formulates a further, though 'rare', exception to the conclusion that treaties do not bind international organisations without their consent, namely, 'when IOs succeed or displace states in the performance of governmental functions.' Ibid., at 372.
[185] Schermers and Blokker (2018), para. 1577.

> humanitarian law conventions in the near future. Therefore: customary international law is relevant for international organizations, at times even essential.'[186]

More specifically, according to Blokker,

> 'it is increasingly recognized that international organizations are bound by customary international law. Not just "in certain cases", but in general. Of course, many rules of customary international law simply do not apply to international organizations, as they normally have no territory, no territorial waters, no nationals, etc. But in the areas in which powers have been given to international organizations, it is increasingly recognized that these organizations are bound by the relevant rules of customary international law that are applicable in these areas.'[187]

According to Schermers and Blokker: 'In principle, international custom will apply as much to international organizations as it does to states. However, while this is generally recognized, much is also uncertain.'[188] That uncertainty is due to a variety of unsettled issues. These include the legal basis for applying customary law to international organisations, and the extent to which international organisations may contribute to developing customary international law further.[189]

Regarding the former—the legal basis for the application of customary international to international organisations—according to Daugirdas:[190]

> 'As members of the international community, then, when IOs emerge they are bound by *jus cogens* and by general international law as a default matter, just as new states are. The states establishing the

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[186] Blokker (2017), at 2, see extensive literature references in fn. 2 (omitted), following the first sentence in the quoted passage. See also A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 *American Journal of International Law* 851, at 855 (referring to the 'apparently widespread acceptance of the proposition that international organizations are largely bound by general international law.') See also Naert (2010), at 449 (referring to the 'appearance of general agreement in doctrine and jurisprudence that international organizations are bound by (general) international law, at least in their external relations and inasmuch as the rules are relevant to their competences and are compatible with their proper nature'.)

[187] Blokker (2017), at 10. With reference to the examples of international human rights law and international humanitarian law in the first-quoted passage, Blokker explained: 'The examples given demonstrate that rights and duties derived from customary international law may be important for the successful performance of their functions.' Ibid., at 12. These examples, which were provided in the opening lines of the article, concern international human rights law and international humanitarian law. Ibid., at 2.

[188] Schermers and Blokker (2018), para. 1579. See also ibid., para. 1574 ('there seems to be general agreement on the basic assumption that international organizations "are bound by any obligations incumbent upon them under general rules of international law", this does not resolve numerous uncertainties emerging in the practice of individual organizations.'). Cf. Naert (2010), at 393 ('the basis for this apparently obvious binding nature is rarely mentioned or examined in detail and the scholars who have studied this matter more extensively come to different conclusions.'). Daugirdas (2016), at 331 ('Scholars have taken a range of positions about whether and how general international law binds IOs. Some hesitate to stake out a position at all, considering it a hard question. Others argue that only a subset of general international law binds 1Os. Still others suggest not only that the entire corpus of general international law binds 1Os, but also that these rules constitute mandatory rather than default rules for 1Os.')

[189] Schermers and Blokker (2018), para. 1579, referring also to the suitability of such rules for international organisations, given that these rules have developed on the basis of practice and *opinio juris* of states; and the reticence of international organizations to accept obligations under customary international law.

[190] Naert submitted that 'the better basis for holding that international organizations are bound by (relevant) customary international law (subject to any necessary modifications) is the argument that this simply derives from their international legal personality'. Naert (2010), at 394.

> IO might, by means of the IO's charter, alter the general international law rules that would otherwise apply between themselves and the IO. But the states establishing the IO cannot alter the general international law rules that govern their own and the IO's relationship to nonmember states. In other words, the states creating the IO cannot create a new "white spot" on the map when they establish an IO. Over time, IOs, like states, will be bound by new general international law rules as they coalesce, except to the extent that individual lOs have and exercise the authorities to contract around those default norms.'[191]

That is, with respect to general international law more broadly:

> 'When it comes to an IO's interactions with its member states, general international law binds the organization except to the extent that the member states have made clear their desire to diverge from it. This conclusion accords with the ordinary rule in treaty interpretation that treaties are presumed not to contract around general international law unless they do so expressly.'[192]

Thus, member states, *inter se*, may diverge from general international law where they make clear a 'desire' to this effect.

As a corollary of the application of general international law to international organisations 'as a default matter',[193] that application is not contingent on the consent of such organisations. Absent a clearly expressed desire to deviate from such rules, international organisations are bound by such rules insofar as relevant to their operations.[194] Put plainly, the default mechanism explained by Daugirdas is 'opt-out' (not 'opt-in').

In a similar vein, Schraga states in regard to the application of the ARIO to the UN, that

> 'the absence of an organization specific practice, as such, is not conclusive to the determination of the customary international law nature of the secondary norm or its applicability to the international organization. Where States' practice has already been crystallized into a customary secondary norm, it may be applicable to the Organization as a subject of international law, by analogy and *mutatis mutandis*, unless the political nature and organizational structure of the Organization are not conducive to the emergence of a similar practice, or to the applicability of the rule. The principle that international organizations are bound by the customary international law norm-creating process to which they did not contribute, and "irrespective of [their] will", was the legal basis for the applicability of international humanitarian law and human rights law to United Nations peacekeeping operations, and, long before they were articulated in international conventions and the Commission's

[191] Daugirdas (2016), at 367-368 (fns. omitted).
[192] Ibid., at 348 (emphasis added).
[193] Ibid., at 380.
[194] According to Daugirdas, the extent to which international organisations are bound by general international law is not limited to their functions: 'some rules of international law might seem completely irrelevant to some 1Os. Is there really reason to consider WIPO bound by, say, the law of the sea? I argue that there is, in part because there is always a possibility that 1Os will engage in ultra vires conduct . . . The principle of speciality does mean that particular IOs might be especially unlikely to contravene some general international law rules. But the principle of speciality does not render violations impossible. For that reason, it does not justify limiting 1Os' international obligations to match their limited authorities.' Ibid., at 367.

> articles, for the applicability *mutatis mutandis* of the laws of treaties, diplomatic protection and international responsibility.'[195]

The opt-out mechanism seems to contrast with the contention by Fassbender, in the context of targeted anti-terrorism sanctions, that

> 'due process rights may today be a part of customary international law, as far as States are the addressees of those obligations. But because of a lack of relevant practice and *opinio juris*, the same can presently not be said for international organizations in general, or the United Nations in particular.'[196]

To require practice and *opinio juris* on the part of international organisations would rather amount to an opt-in mechanism. States may be the addressees of the obligations referred to by Fassbender because they traditionally exercised the powers that require legal controls. Where states have been exercising such powers and the UN takes over, as it did in the case of targeted sanctions, practice and *opinio juris* on its part are necessarily lacking at that point in time.[197] Under the *opt-out* approach, the UN would be bound by due process rights unless its member states expressed a 'desire' otherwise.

Where there *is* practice and *opinio juris* on the part of an international organisation, this may be relevant when it comes to the other issue mentioned above: the extent to which international organisations may contribute to the further development of customary international law. In critically appraising the ILC's work on the topic 'Identification of customary international law', Blokker contended that

> 'if international organizations are not to carry out their increasing number of activities in limbo, in a vacuum, unbound by law, then customary law is an important source of law to fill this void. But if we agree these activities of international organizations should be governed by the rule of law, then we must also accept that they can contribute in a serious way to the development of customary international law. If they are not taken seriously in the identification of customary international law, why should they take customary international law seriously?'[198]

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[195] D. Shraga, 'ILC Articles on Responsibility of International Organizations: The Interplay between the Practice and the Rule (A View from the United Nations)', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 201 at 210 (fns. omitted). Shraga referred to, *inter alia*, Zwanenburg, who stated as to whether IHL is binding on international organizations: 'Strictly speaking, the theory under which the organization is bound by international humanitarian law as an international person acting in a particular field does not require the international organization in question to contribute to the rules of customary international law concerned. The organization is directly bound.' M. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (2004), at 170 (fn. omitted).

[196] Fassbender (2006), para. 5.3 (fn. omitted, emphasis provided).

[197] As explained by Fassbender, 'the founders of the United Nations did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected.' Fassbender (2006), para. 6.2.

[198] Blokker (2017), at 11.

#### 2.3.1.3 Jus cogens[199]

As to the limited class of peremptory norms of general international law, or *jus cogens*, as explained by Crawford: 'Their key distinguishing feature is their relative indelibility.'[200] A frequent point of reference is Article 53 of the 1969 Vienna Convention on the Law of Treaties ('VCLT'),[201] which provides in relevant part:

> 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[202]

In 2015, the ILC included the topic '*Jus cogens*' in its programme of work and appointed Dire Tladi as Special Rapporteur for the topic.[203] In 2019, having received four reports from the Special Rapporteur,[204] the ILC adopted, on first reading, 'Draft conclusions on peremptory norms of general international law (*jus cogens*)*'*, together with commentaries.[205]

The ILC debates illustrate that the concept of *jus cogens* gives rise to complex questions.[206] This is further underscored by the title of a book edited by Tladi,[207] in which he commented with reference to said draft conclusions:

> 'While many of the provisions were not contested, several issues in the proposals attracted fierce debate and disagreement within the Commission (and also beyond the Commission). The so-called characteristics of peremptory norms – i.e. the notion that peremptory norms reflect and protect the fundamental values of the international community, are universally applicable and hierarchically superior – attracted particularly strong reactions from a few members of the Commission (but equally strong support from the vast majority of the member [*sic*] of the Commission). But there were other issues that caused disagreement: to refer or not to Security Council decisions as an example of obligations invalidated by *jus cogens*; to qualify or not the *erga omnes* consequences of *jus cogens* by the word serious; to provide or not an illustrative or non-exhaustive list of *jus cogens* norms; and

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[199] The inclusion of *jus cogens* under a separate heading here is not intended to reflect its classification in relation to other sources of international law. The matter is outside the scope of present study, as none of the rights central to it (notably, immunity from jurisdiction and the right of access to court) have attained the status of *jus cogens*.
[200] Crawford (2012), at 594.
[201] 1155 UNTS 331.
[202] At the time of writing, the topic 'Peremptory norms of general international law (*Jus cogens*)' was under consideration by the ILC. See <legal.un.org/ilc/guide/1_14.shtml> accessed 21 December 2021.
[203] UN Doc. A/70/10 (2015), para. 286. The topic was subsequently renamed 'Peremptory norms of general international law (*jus cogens*)'. UN Doc. A/72/10 (2017), para. 146.
[204] UN Doc. A/CN.4/693 (2016); UN Doc. A/CN.4/706 (2017); UN Doc. A/CN.4/714 (2018); and UN Doc. A/CN.4/727 (2019).
[205] UN Doc. A/74/10 (2019), para. 52 ff.
[206] See, e.g., UN Doc. A/CN.4/727 (2019), para. 5 ('During the seventieth session, the third report elicited an intense debate spanning seven days with a total of 27 members of the Commission taking the floor. Nearly all members expressed agreement with the Special Rapporteur that the subject of the third report was particularly complicated and sensitive.').
[207] D. Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (2021).

> the question of a decision-making procedure in the event of a dispute. These were some of the other issues on which agreement was not easy.'[208]

Important questions regarding *jus cogens* moreover arise with respect to international organisations. Article 53 of the VCLT—which according to the Special Rapporteur's first rapport 'provides a framework for the nature of *jus cogens* as presently understood'[209]—refers to a 'norm accepted and recognized by the international community of States as a whole' (emphasis added). Considering the reference to 'states' in that provision, can international organisations be deemed to be part of such international community for purposes of *jus cogens*? And, what role, if any, do international organisations play in the formation of *jus cogens*?

Such questions warrant an enquiry into the assertion by Daugirdas that international organisations are bound by *jus cogens* and that, contrary to general international law, member states may not 'opt out' of such norms.[210] Such an enquiry, however, would fall outside the scope of the present study.[211]

### 2.3.2 Sources of obligations specific to the UN

#### 2.3.2.1 'Constitutional' obligations

The UN Charter contains several references to human rights. For example,[212] Article 1(3) of the UN Charter states as one of the purposes of the UN: 'To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Under Article 55(3) of the UN Charter, the UN is charged to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

The UN Charter does not explicitly oblige the UN *itself* to respect human rights. As Fassbender explained in the context of targeted sanctions,

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[208] Ibid, at 1.
[209] UN Doc. A/CN.4/693 (2016), para. 28.
[210] Daugirdas (2016), at 380 ('Jus cogens norms bind IOs. Customary international law and general principles do, too-but only as a default matter.'). See also ibid., at 346 ('Jus cogens norms bind IOs because states cannot, by treaty, establish IOs that are authorized to violate jus cogens norms. . . . When it comes to customary international law and general principles, the analysis is more complicated. States are not categorically prohibited from entering into treaties that derogate from general international law. To the contrary, it is well established that states can enter into treaties to either elaborate or modify the general international law rules that would otherwise govern.').
[211] Of note, according to De Wet and Nollkaemper, 'it may be argued that at least in the context of criminal prosecution the core elements of a right to a fair hearing have . . . acquired *jus cogens* status.' E. de Wet and P.A. Nollkaemper, 'Review of Security Council Decisions by National Courts', (2002) 45 *German Yearbook of International Law* 166, at 183.
[212] See also the preamble and Arts. 13, 62, 68 and 76 of the UN Charter.

> 'the founders of the United Nations did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected. Accordingly they did not find it necessary to make human rights directly binding on the Organization.'[213]

This notwithstanding, there seems to be broad support in the literature that, in connection with the UN Charter, the UN is bound to observe human rights.[214]

There is a particular focus in the literature on the UNSC. This is understandable since, as explained by Higgins et al., the UNSC 'in particular has the potential to come into conflict with international law obligations, including human rights, in performing its role.'[215] In exploring whether the UNSC is bound by human rights in the context of economic sanctions,[216] Reinisch contended: 'Put into perspective, it appears plausible to regard the United Nations as having violated its duty to promote respect for and observance of human rights if it disregards these rights itself'.[217]

According to Fassbender,

> 'the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.'[218]

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[213] Fassbender (2006), para. 6.2. Likewise, Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 857.

[214] See, e.g., Higgins et al. (2017), paras. 12.16-12.29; Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 856; Naert (2010), at 390.

[215] Higgins et al. (2017), para. 12.17.

[216] According to De Wet and Nollkaemper, 'the Security Council is bound by fundamental human rights for two separate, albeit closely related, reasons. First, it concerns norms which constitute elements of the purposes of the United Nations. In addition, the United Nations has committed itself to these norms in a fashion that has created a legal expectation that it will honor them when authorizing (quasi-)judicial measures as a mechanism for restoring international peace and security. Any behavior to the contrary would violate the principle of good faith to which the organization is bound in terms of Article 2 para. 2 of the Charter.' De Wet and Nollkaemper (2002), at 175 (fns. omitted).

[217] Reinisch (2001, 'Developing Human Rights and Humanitarian Law Accountability'), at 857, drawing additional support from the ICJ's *Effect of Awards* advisory opinion, in which the Court affirmed the competence of the UN to establish an administrative tribunal for staff disputes. Suggesting that the UN had a duty to do so, the Court opined that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.' *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47 (July 13) (*Effect of Awards*), at 57.

[218] Fassbender (2006), chapter c, summary of findings, para. 8. The final words in the quoted passage ('to the greatest possible extent') may be taken to qualify the UN's obligation to comply with human rights. This wording is repeated, for example, in para. 8.6 of Fassbender's study, fn. 78: 'For discussion, with special emphasis on the Security Council, see Reinisch [(2001, 'Developing Human Rights and Humanitarian Law Accountability')], at 853 et seq.' In that publication, Reinisch explored the legal constraints, if any, of the Security Council, particularly in imposing economic sanctions. Fassbender's study, for its part, concerned: 'The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter' (Fassbender (2006), sub-title). In that light, it may be that any

As a 'living instrument',[219] the UN Charter must be interpreted and applied in light of changing circumstances. In this respect, Fassbender described a

> 'dual process - the coming into existence of a firmly recognized body of human rights in international law, promoted by the United Nations, and the expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals.'[220]

As a consequence of that 'dual process',

> 'the mentioned references of the UN Charter to human rights have developed into rules embodying direct human rights obligations of the organs of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent. The United Nations cannot attain its purpose of achieving "international co-operation … in promoting and encouraging respect for human rights and fundamental freedoms for all" (Article 1, paragraph 3 of the UN Charter) if it disregards these rights when exercising jurisdiction over individuals. In the absence of a specification of such rights and freedoms in the Charter itself, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights serve, first and foremost, as a relevant standard.'[221]

Building on the UN Charter, the UDHR was originally drawn up as a 'political instrument',[222] which was concretised, in a legally binding manner, in the 1966 covenants.[223] Jointly, the UDHR and the 1966 covenants form the 'International Bill of Human Rights'.[224]

Higgins *et al*. referred to the view that 'the UN . . . is bound by those rights that are proclaimed in instruments adopted within the organization',[225] which 'are to be regarded as an elaboration of the rights

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nuance in the UN's human rights obligations suggested by Fassbender in the quoted passage relates to the UNSC, rather than the UN as a whole. This would be supported by the following passage from the summary of findings: 'When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent.' Ibid., chapter c, summary of findings, para. 11.

[219] Ibid., para. 8.3.

[220] Ibid., para. 8.6.

[221] Ibid., para. 8.6 (fns. omitted). According to Fassbender, a further argument why the UN is required to respect human rights is based on the maxim *venire contra factum proprium*. That is: 'The United Nations would contradict itself if, on the one hand, it constantly admonished its Member States to respect human rights and, on the other hand, it refused to respect the same rights when relevant to its own action.' Ibid., para. 6.6, arguing that that maxim ('no one is allowed to act contrary to, or inconsistent with, one's own behaviour') is a general principle of law in the sense of Art. 38(1)(c) of the ICJ Statute. Furthermore, according to Fassbender, the UN's main human rights instruments 'have become part of the constitutional foundation of the international community.' Ibid., para. 8.4. That argument is to be distinguished from what Fassbender considers 'a development which in the future may also be of importance to other international organizations, including the United Nations – namely the development of a legal technique through which constitutional traditions and international obligations of member states are integrated into the legal order of the organization itself.' Ibid., para. 4.2.

[222] C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), at 35.

[223] Ibid., at 35.

[224] Ibid., at 36. The ICCPR and the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[225] Higgins et al. (2017), para. 12.19.

provided for in the UN Charter.'[226] It is in that sense that the UN's human rights obligations may be said to emanate from the UN Charter as its 'constitution'.

#### 2.3.2.2 Kosovo under UNMIK administration

In addition to the foregoing legal bases for the UN's human rights obligations, there may be other such bases. A notable example concerns UNMIK in Kosovo.[227] In effectively acting *in lieu* of a state,[228] UNMIK was subject to international human rights obligations pursuant to a decision of the Special Representative of the Secretary-General ('SRSG'). According to Section 2 of UNMIK/REG/1999/1 of 25 July 1999:

> 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.'

This was further specified in UNMIK/REG/1999/24, 12 December 1999, Section 1.3 of which states:

> 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: (a) The Universal Declaration on Human Rights of 10 December 1948; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and (h) The International Convention on the Rights of the Child of 20 December 1989.'

This corresponds to the subject matter jurisdiction of the Human Rights Advisory Panel ('HRAP'),[229] which was created by UNMIK/REG/2006/12 of 23 March 2006 to examine claims of human rights violations by UNMIK.[230]

### 2.3.3 Interim conclusions

There are good arguments that international organisations, including the UN, are bound by treaties to which they have consented. Furthermore, they arguably are bound by general international law, that is,

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[226] Ibid., para. 12.19, fn. 65.
[227] Another example concerns the UN Transitional Authority in East Timor (UNTAET). See UNTAET/REG/1999/1, 27 September 1999, Section 2 of which is largely identical to UNMIK/REG/1999/24, 12 December 1999, Section 1.3.
[228] See further paragraph 2.4.2.1.1.
[229] Art. 1.2 of UNMIK/REG/2006/12, 23 March 2006. Furthermore, UNMIK was the first UN operation to have submitted to human rights oversight by the Human Rights Committee. See Higgins et al. (2017), para. 12.29.
[230] Also, Section 1.4 of UNMIK/REG/1999/24 *inter alia* prohibits discrimination by anyone 'undertaking public duties or holding public office in Kosovo', whereas Section 1.5 of said regulation abolished capital punishment.

customary international law and general principles of law. However, the Member States, *inter se*, may 'opt out' of such obligations by clearly expressing a 'desire' to that effect. Further enquiry is required when it comes to *jus cogens* norms, including in relation to international organisations.

Regarding the UN specifically, in addition to human rights obligations under general international law, in terms of treaty law, as discussed in detail in chapter 3*,* it incurs obligations under the General Convention. The UN may moreover be considered bound to respect human rights under the UN Charter, as its constitution, which rights are specified in the International Bill of Rights. As to the UN operation in Kosovo, UNMIK, it is moreover bound by a wide range of international human rights obligations, as per its own decision.

## 2.4 International Human Rights Law

Having concluded how international organisations, and the UN in particular, are bound by international law, the present section enquires into concrete obligations arising under international human rights law. The section begins by considering the primary rules of international human rights law (subsection 2.4.1). The subsequent discussion of secondary rights concerns the purported 'right to a remedy (subsection 2.4.2), which has a procedural and a substantive component.

### 2.4.1 Primary rules

As explained by Tomuschat,

> 'it may be safely said that in the circumstances of today the individual human being takes centre stage within the international system, and that human rights, which define the core legal status of the individual human being, have at the same time advanced to the highest level of the rules and principles making up the international legal order.'[231]

By way of background, the international protection of human rights has largely developed in response to the atrocities during World War II.[232] As Tomuschat explained: 'Never again could it be credibly maintained that human beings were placed, by law, under the exclusive jurisdiction of their home state . . . The fate of the individual had definitively become a matter of international concern.'[233]

This was exemplified by the adoption of the Universal Declaration on Human Rights (UDHR) on 10 December 1948. As Tomuschat explained:

> 'For the first time in the history of mankind, a document had come into being which defined the rights of all human beings, independently of their race, colour, sex, language, or other condition. A new chapter of human history began on that day, notwithstanding the fact that the UDHR was not

[231] Tomuschat (2014), at 2.
[232] On the history of human rights, see generally Tomuschat (2014), at 12 ff.
[233] Ibid., at 27-28.

> binding—and still has not reached that status. It characterizes itself as a 'common standard of achievement' (Preamble, last paragraph).'[234]

The adoption of the Universal Declaration was followed by the adoption of, amongst others, the 1966 Covenants, which are legally binding on their states parties. Typically, as seen, (human rights) treaties are open to states only; international organisations cannot become parties.

Certain human rights norms arguably have become part of general international law.[235] That being so, the extent to which human rights obligations are part of *customary international law* is a 'hotly debated question'.[236] For such obligations to qualify as customary international law, they must meet the requirements regarding 'general practice accepted as law' under Article 38(1)(b) of the ICJ Statute. As the ICJ opined in the *North Sea Continental Shelf* cases,[237] and as reflected in its case law since:[238]

> 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough'.[239]

Customary international law is complex, not to say problematic.[240] In 2012, the ILC decided to include in its programme of work the topic 'Formalities and evidence of customary international law', subsequently re-named 'Identification of customary international law'.[241] The ILC's Special

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[234] Ibid., at 29.
[235] Regarding customary international law, see, e.g., the literature cited in O. De Schutter, 'Human Rights and the Rise of International Organisations: the Logic of Sliding Scales in the Law of International Responsibility', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51 at 68, fn. 48. See also Johansen (2020), at 47 and 53, submitting that a 'core' set of human rights has become part of general international law.
[236] Johansen (2020), at 51, adding 'scholarly positions vary, from enthusiastic inclusion of virtually all human rights, to more or less complete rejection of human rights as customary international law.'
[237] With respect to international customary law developing on the basis of a specific rule of treaty law, the Court stated: 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are particularly affected should have been both extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, Merits, Judgment of 20 February 1969, [1969] ICJ Rep. 3, para. 74.
[238] See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99 (*Jurisdictional Immunities of the State*), para. 55.
[239] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands*), Merits, Judgment of 20 February 1969, 1969 ICJ Rep. 3, para. 77.
[240] De Schutter referred to a 'general identity crises of custom as a source of international law'. De Schutter (2010), at 70. Charlesworth contended: 'Custom is an increasingly controversial source of law in the late twentieth century'. H. Charlesworth, 'Customary International Law and the Nicaragua Case', (1991) 11 *Australian Yearbook of International Law* 1, at 1 (fn. omitted).
[241] UN Doc. A/68/10 (2013), chapter VII, para. 65.

Rapporteur, Sir Michael Wood, recognised the complexities surrounding the topic,[242] as did other ILC members.[243] In 2018, the ILC adopted, on second reading, 'Draft conclusions on identification of customary international law, with commentaries'.[244] The 'basic approach' under the ILC draft conclusions, according to the commentaries, is that 'determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*).'[245]

According to the ILC's General Commentary:

> '(2) The present draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.
>
> (3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law.'[246]

In 2018, the UNGA, amongst others: 'Welcome[d] the conclusion of the work of the International Law Commission on identification of customary international law and its adoption of the draft conclusions and commentaries thereto'.[247]

The draft conclusions and commentaries do not specifically concern human rights law, though the latter do include references to human rights.[248] It has moreover been commented that

> 'the work of the ILC is meant to be a generally available legal kit for the ascertainment of customary rules by judges, practitioners and scholars. It seems no less appropriate in relation to a heavily value-loaded field of international law, such as human rights.'[249]

Whilst the identification of customary international law is complicated as it is, the requirement of 'state practice' raises particular difficulties with respect to human rights obligations.[250] According to one

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[242] Ibid., e.g., para. 68.
[243] Ibid., e.g., para. 75.
[244] UN Doc. A/73/10 (2018), para. 65.
[245] Ibid., at 124.
[246] Ibid., General Commentary, at 122, para. 2-3.
[247] UN Doc. A/RES/73/203 (2018), para. 1.
[248] Ibid., at 150, para. 4.
[249] L. Chiussi, 'Remarks on the ILC Work on the Identification of Customary Law and Human Rights: Curbing "Droit de L'hommisme"?', (2018) 27 *Italian Yearbook of International Law* 163, at 174 (emphasis added).
[250] Johansen (2020), at 51 ('Many of the rights that enthusiastic scholars see as having customary status are negative rights. Apart from the general difficulty in proving negative facts, it is also well known that states violate even the most basic among these rights, sometimes systematically.' Fn. omitted).

commentator,

> 'the extent to which human rights law forms part of customary international law must be said to be unclear as the law presently stands . . . it is difficult to argue that more than a limited set of human rights . . . can be regarded as part of customary international law.'[251]

The complexities arising under customary international law have led commentators to contend that human rights may rather be understood to form part of general principles of law.[252] In support of that proposition, De Schutter refers to, amongst others, ICJ opinions.[253] De Schutter argued that the UDHR has in its entirety become part of the general principles of international law.[254] Arguably, then, international organisations are bound by international human rights obligations insofar as such obligations reflect general principles of law.

Human rights norms may be part of *jus cogens*. An example is the prohibition to commit genocide. Care is required, however, to ascertain the precise obligations that arise. This is illustrated by *Mothers of Srebrenica*, concerning the UN's alleged responsibility in connection with the 1995 genocide. As explained by Ventura and Akande, with reference to the proceedings concerning the UN's immunity from jurisdiction before the Dutch courts and the ECtHR:

> 'In the underlying proceedings in the Dutch Courts, the complainants did not seek to hold the UN responsible for the *commission* of genocide, but rather for the failure, in the applicant's view, of the UN's duty to *prevent* genocide . . . The decisions of the Dutch courts and the ECtHR are unsatisfactory in one respect. They all ignore an important issue: the exact status of the obligation to *prevent* genocide in international law. These courts simply assumed that just as the obligation *not to commit genocide* is a rule of *jus cogens*, the obligation to prevent genocide is also a norm of *jus cogens* . . . However to suggest that a *jus cogens* norm is involved simply because the prohibition of genocide is a *jus cogens* norm is a big legal leap that simply cannot be assumed . . . To come to that conclusion, careful analysis was required as it is a proposition that is not at all clear from international law as it presently stands . . . Because the UN is not a party to the Genocide Convention (and indeed cannot be as it is only open to states as per Article XI), it therefore cannot be bound to the duty to prevent genocide as per Article I as treaty law. This simple fact raises another question: if the prevention of genocide is not a *jus cogens* norm, then is the UN actually obliged at all to prevent genocide, and if so, on what basis?'[255]

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[251] Ibid., at 53.
[252] De Schutter (2010), at 71-73. See also B. Simma and P. Alston, 'The Sources of Human Rights Law : Customs, Jus Cogens, and General Principles', (1988) 12 *Australian Yearbook of International Law* 82, at 102-108.
[253] For example, *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, and *United States Diplomatic and Consular Staff in Tehran*, Merits, Judgment of 24 May 1980, [1980] ICJ Rep. 3. While De Schutter accepted that the meaning of the term 'principles' in ICJ opinions is not always clear, he contended that it is 'at least arguable that these statements qualify human rights among the "general principles of law recognized by civilized nations" mentioned by Article 38(1)(c) of the Statute of the International Court of Justice'. On this source of law, see J. Crawford and I. Brownlie, *Brownlie's Principles of Public International Law* (2012), at 34 ff.
[254] De Schutter (2010), at 72-73. One recent commentator concludes that 'it seems that a substantial range of human rights obligations – including perhaps most of the rights recognized in the UDHR– have acquired the status of general principles of international law.' Johansen (2020), at 58.
[255] M. Ventura and D. Akande, 'Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention' (*EJIL: Talk!* 2013) <ejiltalk.org/ignoring-the-elephant-in-the-room-

In the case of the UN, its human rights obligations under general principles of law and *jus cogens* (subject to the aforementioned need for further enquiry) coincide with its obligations under the UN Charter (as its constitution), as specified in the ICCPR.[256]

In the case of UNMIK, as seen, Section 1.3 of UNMIK/REG/1999/24 of 12 December 1999, is a further source of human rights obligations for the UN.[257] The opinions of the HRAP illustrate how, in concrete cases, the UN's (in)actions can be scrutinised in light of those obligations. In the case arising out of the Kosovo lead poisoning, following procedural developments discussed elsewhere in this study (subsubsection 3.3.3.2), the HRAP issued its opinion on 26 February 2016. As summarized by HRAP, the complaint was as follows:

> '99. The complainants complain that UNMIK violated their human rights by placing them in IDP camps on land known to be highly contaminated, by not providing them with timely information about the health risks or the required medical treatment, as well as by failing to relocate them to a safer location. In particular, they allege that UNMIK violated its positive obligations to protect the right to life, as envisaged by Article 2 of the ECHR, their right to be free from inhuman and degrading treatment (Article 3 ECHR), their right to respect for private and family life (Article 8 ECHR), their right to a fair hearing (Article 6 § I ECHR) and to an effective remedy (Article 13 ECHR). They also claim that UNMIK's decision to place the RAE IDPs in the contaminated camps and its failure to move them to a safer environment constituted discrimination against the complainants as members of the RAE community in violation of Article 14, ECHR, taken in conjunction with the provisions mentioned above.
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> 100. The complainants further claim that the unhealthy and unhygienic conditions in the camps constituted a violation of their right to adequate housing, health and sanitation (Article 25 of the Universal Declaration of Human Rights (UDHR)), Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that the rights of women and children under several provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have also been violated.
>
> 101. Complainants N.M. (no. 1) and S.M. (no. 2), parents of D.M., complainant S.M. (no. 8), husband of R.M., and complainant I.I. (no. 20), wife of V.S., also complain, insofar as their complaints have been declared admissible, that no investigation was launched regarding the deaths in the camp of their family members, in violation of the procedural obligation under Article 2, ECHR.'[258]

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in-mothers-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/> accessed 21 December 2021, italics in original, underlining added.

[256] The UN's human rights obligations under its Constitution may extend beyond those under general principles of law and *jus cogens*. For example, whilst it remains to be determined whether the obligation to prevent genocide is a *jus cogens* norm (see Ventura and Akande (2013)), the Genocide Convention arguably is binding on the UN under the UN Charter as its constitution. See Fassbender (2006), para. 8.4. The implication would be that the UN is bound by the obligation to prevent the commission of genocide pursuant to Art. I of said convention.

[257] Section 2 of UNTAET/REG/1999/1, 27 September 1999, in regard to the UN Transitional Authority in East Timor (UNTAET) is largely identical.

[258] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), paras. 99-101.

The HRAP concluded that there had been violations of various international instruments, including notably the ECHR, but also the ICCPR.[259] As to the right to life under Article 2 of the ECHR, for example, the HRAP recalled that

> 'the European Court has held that Article 2 not only imposes an obligation on authorities to refrain from taking life intentionally but also lays down a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.'[260]

Under ECtHR case law, according to the HRAP

> 'the positive obligation to take all appropriate steps to safeguard the right to life for the purposes of Article 2 entails a primary duty on authorities to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.'[261]

Applied to the facts, the HRAP concluded that 'UNMIK did not comply with its obligations under Article 2 of the ECHR as it did not take all measures that one could have reasonably expected from it to protect the life of the complainants.'[262]

In connection with these and other violations of human rights obligations, the HRAP recommended several remedies, including the payment of compensation for material and moral damages.[263] However, as discussed below, UNMIK's recommendations remain to be implemented. In fact, according to the HRAP's final report: 'By far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel's recommendations.'[264] That raises questions about HRAP's effectiveness as a procedural remedy in light of the purported 'right to a remedy'.

### 2.4.2 Secondary rules: the 'right to a remedy'

Petitioners in connection with the Haiti cholera epidemic case alleged extensive human rights violations by the UN through its operation in Haiti, MINUSTAH. That is:

> 'The UN and MINUSTAH acted in violation of petitioners' fundamental human rights. These rights include:
>
> a. The right to life, as articulated in Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 4(1) the American Convention on Human Rights ("ACHR"), Article 2(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), and Article 3

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[259] Ibid., para. 349.
[260] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, decision of 5 June 2009, para. 194.
[261] Ibid., para. 195.
[262] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 223.
[263] Ibid., para. 349.
[264] M. Nowicki, Ch. Chinkin and F. Tulkens, 'Final Report of the Human Rights Advisory Panel: Executive Summary', (2017) 28 *Criminal Law Forum* 77, para. 64. According to the HRAP, its 'main legacy lies in its contribution towards the progress of human rights jurisprudence'. Ibid., para. 22.

> of the Universal Declaration on Human Rights ("UDHR"). The right to life is non-derogable and must be protected in a time of public emergency, such as after the earthquake. Human Rights Committee, General Comment No. 6: The Right to Life, art. 1.
>
> b. The right to health, as articulated in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Article 25 of the UDHR, Article 24 of the Convention on the Rights of the Child ("CRC"), Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").
>
> c. The right to an adequate standard of living, as articulated in Article 11 of the ICESCR and Article 25 of the UDHR.
>
> d. The right to clean water and sanitation, recognized as a separate right by the General Assembly, U.N. Doc. A/RES/64/292, and UN Human Rights Council, U.N. Doc A/HRC/15/L.14, and derived from the right to an adequate standard of living. The right to clean water and sanitation are inextricably related to the right to the highest attainable standard of physical and mental health, as well as to the rights to life and human dignity.'[265]

The claimants contended that customary international law entitled them to a remedy.[266] They claimed that

> 'this right to a remedy must be substantiated through adjudication of their claims within a reasonable time by a body that is independent, impartial and competent to hear a human rights violation . . . The Petitioners therefore assert that the establishment of an independent commission is necessary to hear this claim in accordance with the victims' right to a remedy'.[267]

Furthermore, as contended by the claimants: 'The right of victims of human rights violations to adequate, effective and prompt reparation is an important corollary to the right to a judicial remedy'.[268]

The contention that the purported 'right to a remedy' has a procedural and substantive aspect corresponds to the explanation given by Shelton:

> 'The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant'[269]

Wellens contended that the right to a remedy is

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[265] Petition for relief to Chief, Claims Unit, MINUSTAH, 3 November 2011, para. 83.
[266] Ibid., para. 86.
[267] Ibid., para. 92.
[268] Ibid., para. 95, adding: 'Under international law, full and effective reparations for victims of grave human rights violations are expansive.' Ibid., para. 96.
[269] Shelton (2015), at 16. See likewise V. David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court', (2014) 3 *British Journal of American Legal Studies* 259, at 261.

> 'a norm of customary international law, and therefore also directs international organisations in their dealings with . . . non-state entities . . . ; the right would include both the "procedural right of effective access" and "the substantive right to a remedy".'[270]

According to Shelton:

> 'The right of access to judicial remedies is widely guaranteed in international human rights treaties and can be considered as part of the corpus of the customary international law of human rights . . . The nature and scope of remedies is generally consistent throughout the world. The notion of remedial justice, of wiping out the consequences of the wrong, is a general principle of law on which there is broad consensus.'[271]

As to human rights treaties referred to, these are numerous. For example, Article 8 of the UDHR provides: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

Article 2(3) of the ICCPR provides (emphasis added):

> 'Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.'[272]

Those provisions are supplemented by provisions on remedies in other international instruments, including the 1965 Convention on the Elimination of Racial Discrimination,[273] and the 1984 Convention

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[270] Wellens (2002), at 17. Cf. International Law Association (2004), at 266 ('the right to a remedy is widely considered to be a general principle of law'). Cf. Schmitt (2017), at 119 ('there are in my view sufficient arguments to assert that the core requirements of the right of access to justice are progressively developing into customary international law applying to international organizations. Hence, I submit that international organizations are under an obligation to establish dispute settlement mechanisms meeting the core institutional requirements of independence and impartiality').

[271] Shelton (2015), at 432. See ibid., at 81 ('there are many common aspects to the approach to reparations of UN treaty bodies. All of the monitoring groups strongly affirm the right of access to justice. They also adhere to the view that substantive reparations are a right of victims, but that the kind and scope of the reparations will vary according to the nature of the violation and needs of the victims.')

[272] Contrary to Art. 8 of the Universal Declaration of Human Rights, UN Doc. A/RES/217(III)A (1948), the remedial rights under the ICCPR are linked to rights and freedoms under the convention. In addition, according to Art. 9(5) the ICCPR: 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.' And, according to Art. 14(6) of the ICCPR: 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.' (emphasis added).

[273] 660 UNTS 195. See Art. 6: 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.' (emphasis added).

against Torture.[274] International political declarations, often called 'soft law', similarly refer to remedies.[275]

Regional human rights treaties also typically address remedies for human rights violations. For example, Article 13 of the ECHR ('Right to an effective remedy') provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'[276]

Similar provisions are included in the Charter on Fundamental Rights of the European Union,[277] the 1969 American Convention on Human Rights,[278] and the 1981 African (Banjul) Charter on Human and Peoples' Rights.[279]

The issue is whether these instruments, and related practice, support the contention by Wellens and Shelton that the right to a remedy, including both its procedural and substantive prongs, has become part of general international law. That contention is not generally accepted.[280] Johansen recently argued that

> 'neither the access nor outcome component of the right to remedy appears to have been elevated to the status of general international law. Outside of human rights courts and treaty bodies, little practice exists which could potentially shed light on how the right to remedy under general international law is to be understood. That being said, the right to remedy seems to have a significant common core

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[274] 1465 UNTS 85. See Art. 14: '1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.' (emphasis added).

[275] Thus, for example, according to the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993), para. 27: 'Every State should provide an effective framework of remedies to redress human rights grievances or violations.' (emphasis added). The 1999 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (1999), Art. 9, provides in relevant part: '1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights. 2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay'. (emphasis added).

[276] The provision is complemented by Art. 41 ('Just satisfaction'): 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

[277] [2012] OJ C326/391, Art. 47 ('Right to an effective remedy and to a fair trial').

[278] 1144 UNTS 123. See Art. 25 ('Right to Judicial Protection').

[279] 1520 UNTS 217. See Art. 7(1).

[280] According to Daugirdas and Schuricht: 'Numerous international human rights treaties expressly require States to afford effective remedies to victims of human rights violations. There is a plausible, albeit not uncontested, argument that over the past several decades this obligation has—in at least some contexts—ripened into a norm of customary international law.' Daugirdas and Schuricht (2021), at 63.

> across the different human rights systems. But this does not in itself provide sufficient support for the proposition that the access component of the right to remedy has attained the status of general international law.'[281]

Fassbender concluded upon a thorough enquiry, focussed on targeted UNSC sanctions:

> 'Generally recognized due process rights include . . . the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.'[282]

It appears that Fassbender's study concerned the procedural prong of the right to a remedy.[283] The term 'effective remedy' is used, amongst others, in Article 2(3) of the ICCPR, to which Fassbender attributed particular significance.[284] As discussed below, that provision seems to be limited to conferring procedural rights. Aside from arguably being reflected in general international law, the obligations under Article 2(3) of the ICCPR, and the ICCPR generally, bind the UN under its constitution.

The remainder of this section will enquire more closely into the procedural and substantive components of the right to a remedy, respectively, with particular reference to Article 2(3) of the ICCPR.

#### 2.4.2.1 Procedural obligations

In interpreting Article 2(3) of the ICCPR, guidance is provided by the Human Rights Committee's General Comment no. 31, which states the following:

> 'The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.'[285]

As explained by Taylor:

> 'A preference for judicial remedies under Article 2(3)(a) is indicated by the obligation in Article 2(3)(b) "to develop the possibilities of judicial remedy', even though the same provision refers more

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[281] Johansen (2020), at 94 (emphasis added).
[282] Fassbender (2006), para. C.1, at 6.
[283] Fassbender's study was commissioned by the UN Office of Legal Affairs to consider the following question: 'Is the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or 'fair and clear procedures', are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?'. Fassbender (2006), at 3.
[284] Fassbender (2006), para. 1.11.
[285] UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 15 (emphasis added).

> broadly to 'competent judicial, administrative or legislative authorities". That description generally rules out decisions made solely by political and subordinate administrative organs, or those which are otherwise not independent and free of political constraint.'[286]

Similarly, according to David:

> 'The wording of article 2(3) of the ICCPR as well as the *travaux préparatoires* of this provision indicate that the institutions entrusted with the power to declare whether a violation has taken place and to offer redress may be of a judicial, administrative or political nature. These procedures involving 'competent authorities' have been understood broadly as encompassing different kinds of mechanisms, including administrative courts, inquiries by parliamentary commissions, inspectors and ombudsmen, informal preventive measures and judicial proceedings.
>
> The variety of possibilities for ensuring an adequate remedy is a consequence of the requirement of effectiveness. The appropriate form of procedural remedy may depend upon what will be 'effective' in the particular circumstances of the case. An effective remedy will be one which in practice brings the violation to an end and/or provides redress for a particular violation . . .
>
> Notwithstanding the above, judicial remedies are considered the ideal, as is evident from the explicit agreement between the States to "develop the possibilities of judicial remedy."'[287]

Therefore, under Article 2(3) of the ICCPR, the 'effectiveness' of a remedy is key. Under that provision, *judicial* remedies are aspired to, but they are not required.[288]

Article 13 of the ECHR, on which Article 2(3) of the ICCPR is based,[289] is similarly broad. It confers the right to an 'effective remedy before a national authority' (emphasis added). As explained in the ECtHR's Guide on Article 13: 'According to the travaux préparatoires in respect of the European Convention on Human Rights, the national authority before which a remedy will be effective may be a **judicial or nonjudicial body**.'[290]

Of relevance for purposes of the present study, according to the ECtHR's Guide on Article 13:

> 'Article 6 § 1 of the Convention is *lex specialis* in relation to Article 13. In many cases where the Court has found a violation of Article 6 § 1 it has not deemed it necessary to rule separately on an Article 13 complaint. Thus, where the Convention right asserted by the individual is a "civil right"

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[286] P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (2020), at 78-79 (fn. omitted, emphasis added).
[287] David (2014, 'The Expanding Right'), at 264 (fns. omitted, emphasis added). Cf. Daugirdas and Schuricht (2021), at 68 ('the procedural component of the remedy . . . depends on the circumstances of a given case.' fn. omitted).
[288] Cf. Fassbender: 'It is not universally accepted that there exists a right to a *judicial* remedy against any administrative act of a State organ or agency. In many states, all or certain "acts of state (or government)" (*actes de gouvernement*, *Regierungsakte*) and legislative acts (acts of Parliament) are exempt from judicial review.' Fassbender (2006), para. 1.10 (emphasis in original, fns. omitted).
[289] David (2014, 'The Expanding Right'), at 264.
[290] 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. 24 (all emphasis in original). According to the Watson report, that 'appears to grant more room for non-judicial remedies', that is, 'an ombudsman, administrative or other nonjudicial procedures may also qualify as long as they constitute *effective* remedies.' Watson report (2006), at 15 (emphasis in original).

> recognised under domestic law – such as a property right – the protection afforded by Article 6 § 1 will also be available . . . In such circumstances the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13'.[291]

That 'full panoply' under Article 6(1) of the ECHR, applies '[i]n the determination of his civil rights'. It notably involves: 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 6(1) of the ECHR corresponds to Article 14(1) of the ICCPR:

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[292]

That is a higher standard than the one under Article 2(3) of the ICCPR, notwithstanding the aspiration expressed in the latter for a remedy that is judicial in nature. When it comes to the 'determination of . . . civil rights', under the UN Charter, as its constitution, the UN would be bound by the standard under Article 14(1) of the ICCPR, as *lex specialis* in relation to Article 2(3) of the ICCPR.[293]

Returning to the latter provision, as *lex generalis*, it results from the Human Rights Committee's General Comment no. 31 that the requirement of 'effectiveness' of a remedy encompasses independence and impartiality.[294] Furthermore, under ECtHR case law with respect to Article 13 of the ECHR, effectiveness depends, amongst others, on 'the powers' of the authority.[295] In particular, it seems relevant whether the authority has binding powers, that is, whether its decisions are to be complied with.

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[291] 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 (underlining added).

[292] The question arises as to the status of those rights under general international law. In this respect, according to the Dutch Supreme Court in *Mothers of Srebrenica*, the Netherlands no longer contested that the right of access to court is part of customary international law. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.1.

[293] See further the discussion in paragraph 3.4.3.1.2.

[294] See also Taylor (2020), at 78-79; Fassbender (2006), para. 12(d) (referring to an 'effective remedy against an individual measure before an impartial institution or body previously established'). See also, ibid., para. 12.11 ('For the criterion of impartiality of the reviewing body or mechanism, reference can be made to the "Basic Principles on the Independence of the Judiciary", adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 and endorsed by UN General Assembly resolutions 40/32 and 40/146 of 29 November 1985 and 13 December 1985, respectively.') As to the criterion of 'effectiveness', Fassbender listed a number of factors, including: 'due process concerns (does each party have a fair opportunity to put forward its case and permit full consideration of disputed issues of fact and law so that credible and persuasive decisions result?) . . . quality of decision-making (does the decision of the reviewing body clearly indicate the reasoning on which any finding is based, and indicate the appropriate remedy?) . . . compliance with the decision . . . follow-up (does the reviewing body have effective procedures to monitor whether its decision has been carried out?).' Fassbender (2006), para. 12.10 (fns. omitted, emphasis added).

[295] *Klass and Others v. Germany*, Judgment of 6 September 1978, ECHR (Ser. A no. 28), para. 67. The effectiveness test may be met by the aggregate of available remedies. *Leander v. Sweden*, Judgment of 26 March 1987, ECHR (Ser. A no. 116), para. 84.

Independence and compliance are central with respect to the effectiveness of remedial measures developed in UN practice, namely targeted UNSC anti-terrorism sanctions, and UNMIK's territorial administration of Kosovo.

#### 2.4.2.1.1 UN practice

*UNSC anti-terrorism sanctions: The Ombudsperson*

An informal working paper conveyed by the UNSG to the UNSC enumerated 'basic elements for fair and clear procedures' concerning the inclusion of individuals and entities on anti-terrorism sanction lists.[296] The paper stated that persons who are the subject of anti-terrorism measures have, amongst others, 'the right to review by an effective review mechanism (the effectiveness which [*sic*] depends on impartiality, degree of independence, and ability to provide effective remedy).'[297]

On 17 December 2009,[298] the UNSC established the Office of the Ombudsperson for Al-Qaida and ISIL Sanctions.[299] According to the information provided by the Office itself:

> 'The Office of the Ombudsperson was established by Security Council resolution 1904 (2009). Its mandate was extended by resolution 1989 (2011), resolution 2083 (2012), resolution 2161 (2014), resolution 2253 (2015) and resolution 2368 (2017). The current mandate expires on 17 December 2021.
>
> Individuals, groups, undertakings or entities seeking to be removed from the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions List can submit their request for delisting to an independent and impartial Ombudsperson who has been appointed by the Secretary-General.
>
> The Ombudsperson's mandate is contained in Security Council resolution 2368 (2017). The Ombudsperson is mandated to gather information and to interact with the petitioner, relevant States and organizations with regard to the request. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee. Based on an analysis of all available information and the Ombudsperson's observations, the report will set out for the Committee the principal arguments concerning the specific delisting request. The report will also contain a recommendation from the Ombudsperson to the Committee on the delisting request. The Committee may overturn the recommendation of the

[296] The informal working paper was based on the analysis in Fassbender (2006). See letter dated 15 June 2006 from the UNSG to the President of the UNSC, 'Targeted individual sanctions: fair and clear procedures for listing and delisting'. Cited in Watson report (2009), at 12.
[297] UN Doc. S/PV.5474 (2006). De Wet and Nollkaemper concluded 'that the freezing of assets of those appearing on the list of the Sanctions Committee in accordance with Resolution 1333, can trigger the rights protected by Article 14 ICCPR. As a result, the Security Council is obliged to provide or allow for an independent, impartial and even-handed review of the Sanctions Committee's decisions vis-a-vis the affected individuals.' De Wet and Nollkaemper (2002), at 181. This is based on a broad reading of the term 'suit at law' under Article 14(1) of the ICCPR. Ibid., at 177-178.
[298] UN Doc. S/RES/1904 (2009), para. 20ff.
[299] Prior to that, in UN Doc. S/RES/1730 (2006), the UNSC had established a 'focal point' to receive de-listing requests.

> Ombudsperson under certain circumstances (which has not happened to date). The decision of the Committee on the delisting request will be communicated to the Petitioner by the Ombudsperson.'[300]

In 2015, outgoing Ombudsperson Kimberly Prost expressed concerns over the institutional arrangements concerning the Office of the Ombudsperson, as these 'threaten the independence and sustainability of the mechanism.'[301] The same message is echoed in the Ombudsperson's twentieth report:

> 'Ultimately, the situation demonstrates what the Ombudsperson himself as well as both his predecessors have emphasized at length: that the way the Office is integrated into the Secretariat, the Ombudsperson's contractual arrangement and the resultant working conditions are not appropriate for the function of the Ombudsperson as an independent reviewer. The Ombudsperson invites the Council to address the inappropriate contractual arrangement and the lack of institutional independence afforded to the Office.'[302]

Another concern seems to be the lack of full-fledged remedial powers of the Ombudsperson. On 12 November 2015, a 'Group of Like-Minded States on targeted sanctions' submitted proposals to the UNSC concerning 'fair and clear procedures for a more effective UN sanctions system'.[303] They stated, amongst others:

> 'In Europe, both the European Court of Human Rights as well as the Court of Justice of the EU confirmed in judgments – regarding the Al-Qaida sanctions regime but also with regard to a country-related sanctions regime – that in the implementation of UN measures, actions of Member States remain subject to full judicial review as to their conformity with fundamental norms of due process. Those fundamental norms include, among others, respect for the right to be heard and other rights of the defense (right to have access to the file, subject to legitimate interests in maintaining confidentiality; right to ascertain the reasons of a decision) and the right to an effective remedy.'[304]

Concretely, amongst others, the proposal was to empower 'the Ombudsperson to decide, on the basis of her comprehensive report, whether to maintain a listing or to delist an individual or entity.' That is,

> 'the Ombudsperson should be given decision-making powers with regard to delisting requests through a new provision in the forthcoming update of Security Council resolution 2161 (2014). The comprehensive reports of the Ombudsperson should be accepted as final by the Committee, otherwise

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[300] <un.org/securitycouncil/ombudsperson> accessed 21 December 2021.
[301] Letter of outgoing ombudsperson to UNSG, 13 July 2015 <un.org/securitycouncil/ombudsperson> accessed 21 December 2021.
[302] UN Doc. S/2021/122 (2021), para. 45.
[303] Letter dated 12 November 2015 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/867 (2015).
[304] Ibid., at 5 (fn. omitted, emphasis added). Fn. 1 in the above-quoted passage (following 'country-related sanctions regime') reads as follows, in part: 'See European Court of Human Rights (Grand Chamber), *Nada v. Switzerland*, Application No. 10593/08, 12 September 2012; European Court of Human Rights (Chamber), *Al-Dulimi v. Switzerland*, Application No. 5809/08, 26 November 2013; Court of Justice of the European Union, *European Commission and UK v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013'.

> it would retain the possibility of acting as the judge in its own cause, which is not in conformity with the right to an effective remedy.'[305]

The Ombudsperson was not given such decision-making powers. This notwithstanding, according to the above-quoted information provided by the Ombudsperson, the Committee has not, to date, overturned the recommendations of the Ombudsperson. However, the potential for such overturning remains.

The January 2021 Report of the 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' to the Human Rights Committee raised concerns over the sanction regimes' fairness under international law:[306]

> 'Through multiple Security Council resolutions, a United Nations infrastructure has developed, namely, sanctions committees which administer the "blacklists" of individuals and entities listed. The absence of adequate and comprehensive legal oversight of sanctions regimes has been the subject of sustained concern for national courts, regional courts and human rights actors, including holders of this mandate. Responding in part to those concerns, the Security Council adopted resolution 1904 (2009) establishing the Office of the Ombudsperson to receive, consider and make recommendations on requests for names to be removed from the sanctions list. All holders of the office of the Ombudsperson have been recognized jurists of integrity, yet, despite their best efforts to work within the constraints of the procedures provided, disquiet remains about listing on rule of law grounds. Persons are targeted often on unclear or non-independent grounds. The basis of the information provided has been rightly critiqued by those who see it, specifically the Ombudsperson. The process is highly politicized, and the rights of the targeted individuals and their families play no meaningful role in the outcomes or deliberations concerning listing. Notwithstanding the fact that the Office of the Ombudsperson undertakes important and valuable work to delist, the process provides neither a fair process nor a fair remedy to those who are subject to it, as is required by international law.'[307]

The fundamental concerns raised by the Special Rapporteur regarding UNSC anti-terrorism sanctions seem to go beyond the issues of independence and mandatory powers of the Ombudsperson.

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[305] Ibid., at 6.

[306] The 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' stated in 2012 that 'the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed. To reflect this modification, the Special Rapporteur invites the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.' UN Doc. A/67/396 (2012), para. 35. The Special rapporteur endorsed the statement by the UN High Commissioner for Human Rights to the UNSC in 2010 that the Council must explore 'every avenue of possibility' for establishing 'an independent quasi-judicial procedure for review of listing and delisting decisions'. UN Doc. A/HRC/16/50 (2010), paras. 27 and 44.

[307] UN Doc. A/HRC/46/36 (2021), para. 15 (fns. omitted, emphasis added). The reference to international law regards: 'Concerns include breach of article 10 of the Universal Declaration of Human Rights and articles 2 and 14 of the International Covenant on Civil and Political Rights and incompatibility with the Basic Principles on the Independence of the Judiciary'. Ibid., fn. 66.

*UNMIK: The Human Rights Advisory Panel*

UNSC resolution 1244 (1999) signalled the end of the NATO bombing campaign in Serbia and Kosovo.[308] In addition to authorizing member states and relevant international organizations to establish an international security presence (KFOR), the UNSC authorized the UNSG,

> 'with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.[309]

Para. 11 of the resolution set out UNMIK's extensive responsibilities:

> '(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);(b) Performing basic civilian administrative functions where and as long as required; (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities; (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648); (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement; (g) Supporting the reconstruction of key infrastructure and other economic reconstruction; (h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; (j) Protecting and promoting human rights; (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo'.

In sum, as the HRAP would explain:

> 'All legislative and executive authority, including control over the judiciary, was vested in the Special Representative of the Secretary-General (SRSG). Thus UNMIK, as a surrogate state, had essentially the same powers as a state.'[310]

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[308] The United Nations Mission in Kosovo (UNMIK) is an example of the UN assuming responsibility for the temporary administration of a territory. Contemporaneously, in UN Doc. S/RES/1272 (1999), the UNSC established the United Nations Transitional Authority in East Timor (UNTAET). Endowed with full executive and legislative powers, UNTAET operated like a government for about almost three years, during which authority was gradually transferred to the East Timorese institutions. The new state achieved independence on 20 May 2002 under the name 'Timor-Leste' and it joined the UN on 27 September 2002. For a discussion of UNTAET, see E. De Brabandere, 'Human Rights Accountability of International Administrations: Theory and Practice in East Timor', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 331. On international territorial administrations generally, see, e.g., C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (2008); R. Wilde, 'The United Nations as Government: The Tensions of an Ambivalent Role', (2003) 97 *American Society of International Law Proceedings* 212.

[309] UN Doc. S/RES/1244 (1999), para. 10.

[310] Nowicki, Chinkin and Tulkens (2017), para. 4.

UNMIK's vast powers were temporary in nature. As the HRAP would recall in *S.C. v. UNMIK*:

> 'UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law . . . Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo'.[311]

In exercising its broad executive powers, UNMIK, like states, was capable of violating human rights.[312] UNMIK enjoys immunity from the jurisdiction of the Kosovar courts.[313] On the back of an Ombudsperson Institution, established in 2000,[314] the Council of Europe's 'Venice Commission' recommended the establishment of an independent Advisory Panel regarding human rights complaints against UNMIK.[315]

The Special Representative of the UNSG established the Human Rights Advisory Panel (HRAP) in UNMIK/REG/2006/12 (HRAP Regulation). As the HRAP stated a decade later in its final report, its

> 'establishment constitutes an unprecedented development in the context of United Nations missions. In this respect, the Panel is a pioneer and unique mechanism concerning the imputability and the responsibility, with regard to human rights, for actions by international organisations.'[316]

The HRAP's members were appointed in January 2007 and the Panel started to function in November 2007.[317] Pursuant to Section 1.2 of the HRAP Regulation, the HRAP's jurisdiction covered 'complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights'.[318] As seen, under the same provision, the appliable law covered a broad range of international

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[311] *S.C. v. UNMIK*, Opinion of 6 December 2012, HRAP, Case No. 02/09, para. 113.
[312] As seen, Section 2 UNMIK/REG/1999/1 of 25 July 1999 provides: 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.' See generally R. Istrefi, 'Should the United Nations Create an Independent Human Rights Body in a Transitional Administration? The Case of the United Nations Interim Administration Mission in Kosovo (UNMIK)', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 355, chapter II ('UNMIK's mandate as a cause of human rights violations').
[313] UNMIK/REG/2000/47, 18 August 2000, Section 3.
[314] UNMIK Regulation No. 2000/38 'On the Establishment of the Ombudsperson Institution in Kosovo', 30 June 2000.
[315] European Commission for Democracy through Law (Venice Commission), 'Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms' (No. 280/2004, 11 October 2004), para. 159ff. See generally Istrefi (2010), proposing the establishment of a specialised human rights commission for Kosovo.
[316] Nowicki, Chinkin and Tulkens (2017), para. 1.
[317] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo' (No. 545/2009, 21 December 2010), para. 2.
[318] The ECtHR does not have jurisdiction over UNMIK. The case *N.M. v. UNMIK*, concerning the Kosovo lead poisoning came before the HRAP after the claimants had moved before the ECtHR and the Court had denied its own jurisdiction. See <errc.org/article/european-court-of-human-rights-has-no-jurisdiction-in-kosovo-lead-poisoning-case/2568> accessed 21 December 2021 ('On 20 February 2006, the European Roma Rights Centre

human rights instruments, including notably the International Bill of Rights and the ECHR. Pursuant to Section 2 of the HRAP Regulation, the HRAP had temporal and territorial jurisdiction over

> 'the whole territory of Kosovo and over complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights.'

Under Section 5 of Administrative Direction 2009/1, the cut-off date for the submission of claims to the HRAP was 31 March 2010.[319]

To return to the aforementioned case arising in connection with the Kosovo lead poisoning, as seen, the HRAP concluded in its 2016 opinion that UNMIK had violated several of its international human rights obligations. The HRAP recommended extensive remedies, including compensation. The website of the UN High Commissioner for Human Rights summarises the developments regarding the case since then:

> 'In April 2016, the Human Rights Advisory Panel (HRAP) of the United Nations Interim Administration Mission in Kosovo (UNMIK) released an opinion on the case. The opinion concluded that numerous articles of the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child were violated by UNMIK. Among the human rights identified by the Advisory Panel as being violated were the rights to life, freedom from inhuman and degrading treatment, health, respect for private and family life, an adequate standard of living, and suffered discrimination. Numerous violations of the UN Convention on the Rights of the Child were identified, including exploitation.
>
> The HRAP found that for many years, UNMIK failed to make sufficient efforts to relocate the displaced families despite awareness of serious risk to the internally displaced community's health and wellbeing from the toxic contamination present in the camps.
>
> HRAP recommended that UNMIK make a public apology to the victims and their families, as well as take appropriate steps towards payment of adequate individual compensation for both material and moral damage to 138 members of the Roma, Ashkali and Egyptian (RAE) communities who resided in the camps from 1999, among other recommendations.
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> The Trust Fund
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> In 2017, the Secretary General of the UN established a Trust Fund charged with implementing community-based assistance projects, primarily in North Mitrovica, South Mitrovica and Leposavić,

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filed an application with the European Court of Human Rights in Strasbourg on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. On 21 February 2006, the Court faxed a letter to the ERRC declining to review the case stating that it did not have jurisdiction to do so. Specifically, the Court claimed it was not competent to review the case since the United Nations Mission in Kosovo (UNMIK) is not party to the Convention. Furthermore, in *Behrami and Saramati*, the ECHR held that 'the impugned acts and omission of KFOR and UNMIK cannot be attributed to the respondent States . . . As such, their actions were directly attributable to the UN'. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01) (*Behrami and Saramati*), para. 151. The Court declared the applications inadmissible for lack of jurisdiction *ratione personae*.

[319] According to HRAP: 'This provision must be read in the context of UNMIK's reconfiguration, due to the difficulties it is facing in exercising its mandate under Security Council Resolution 1244 (1999).' HRAP Annual report (2009) <media.unmikonline.org/hrap/Eng/Documents/annual_report2009.pdf> accessed 21 December 2021, para. 45.

> which would benefit the affected communities. Contributions to the Fund were to be made on voluntary basis and the Trust Fund is not intended to offer any individual compensation to the victims, contrary to HRAP recommendation.
>
> The Trust Fund has never been operational due to lack of resources. On 5 October 2018, in response to a letter addressed by the UN Special Rapporteur on Toxics, the Under-Secretary General for Peacekeeping Operations confirmed that despite targeted outreach and resource mobilization campaigns by a UN Task Force encouraging contributions to the Trust Fund, "no contribution has yet been received from the international community in response to these appeals." In response to a subsequent letter by the Rapporteur, no concrete details on plans to mobilize resources were provided.
>
> In November 2018, the European Parliament adopted a resolution calling on the UN "to swiftly deliver the necessary support to the victims." In January 2019, fifty five members of the European Parliament wrote to UN Secretary General Antonio Guterres urging him to "take long overdue steps to ensure that the victims of widespread lead poisoning at UN-run camps in Kosovo receive individual compensation, adequate health care and educational support.'[320]

At the time of writing, as far as known, the situation has not changed. This seems to be exemplary of the fate of HRAP's recommendations. According to the HRAP's final report of 2016:

> 'By far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel's recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from this activity, as UNMIK failed to ever take any meaningful action in relation to the Panel's recommendations.'[321]

When it comes to the effectiveness of the HRAP as a procedural remedy, that assessment speaks for itself.[322]

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This brief description of two procedural remedies in the practice of the UN relate to very different situations. Each raises distinct human rights concerns. In the case of UNSC sanctions, 'negative' human rights obligations are at play, that is, obligations to refrain from interfering in the enjoyment of human rights. Conversely, the case of Kosovo concerns primarily UNMIK's compliance with 'positive' human rights obligations, that is, obligations to take action to ensure the enjoyment of human rights.

If there is a common theme amongst the foregoing remedies in UN practice, it is that they seem to be in a state of development. Regarding targeted UNSC anti-terrorism sanctions, this is illustrated by the proposals made by like-minded states, critical reports by the Ombudsperson and by the Special Rapporteur on the 'promotion and protection of human rights and fundamental freedoms while

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320 <ohchr.org/EN/Issues/Environment/SRToxicsandhumanrights/Pages/LeadContaminationKosovo.aspx> accessed 21 December 2021 (fns. and hyperlinks omitted).
321 Nowicki, Chinkin and Tulkens (2017), para. 64 (emphasis added).
322 However, when it comes to the non-implementation of HRAP's recommendations to pay compensation, HRAP's effectiveness cannot be assessed in isolation from the underdeveloped state of the law on substantive remedies, as discussed below.

countering terrorism'. As regards the UN's territorial administration of Kosovo, the same is suggested by the HRAP's final report and, with respect to the Kosovo lead poisoning case, the developments as summarised by the UN High Commissioner for Human Rights.

The understanding that the Ombudsperson and the HRAP reflect a developing practice is underscored by Daugirdas and Schuricht:

> 'This practice by international organizations could contribute to the development of customary international law rules regarding effective remedies that apply to states and international organisations alike—but it may also, or alternatively, contribute to the development of rules that apply only to international organizations, or only to subsets of them. There is room for the emergence of such particularized rules with respect to international organizations' obligations to provide effective remedies.'[323]

#### 2.4.2.2 Substantive obligations

As seen, in the case concerning the Kosovo lead poisoning, the HRAP found extensive violations of the ECHR as well as other international human rights instruments. The HRAP recommended, amongst others, that 'UNMIK . . . takes appropriate steps towards payment of adequate compensation'.[324] Apart from stipulating that the compensation was for both material and moral damages,[325] the HRAP did not elaborate on its recommendation.

As the HRAP drew heavily on ECtHR case law, its recommendation on compensation may have been inspired by Article 41 of the ECHR ('Just satisfaction'). That provision reads as follows:

> 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

As explained by Tomuschat regarding the ECtHR's power under that provision:

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[323] Daugirdas and Schuricht (2021), at 71.
[324] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 349.
[325] Ibid. As to UNMIK's specific refusal to pay compensation for moral damages, UNMIK reportedly invoked the following argument: 'Current UN General Assembly resolutions do not allow the Organization or its Missions to pay compensation other than for material damage or physical harm. UNMIK therefore is not in a position to pay any compensation for human rights violations that may have occurred. UNMIK will, however, continue to address the issue with the United Nations Headquarters in New York with the aim of drawing the attention of the General Assembly to this problem, also taking into account of the human rights standards that prevail in the context in which UNMIK is operating.' See SRSG's (undated) comments on HRAP opinion in case no. 08/07. The reference to 'UN General Assembly resolutions' is not specified. However, the reference may be to UN Doc. A/RES/52/247 (1998), which excludes the payment of moral damages. However, that resolution implements Section 29 of the General Convention, regarding the settlement of disputes of a private law character. Such disputes are excluded from the jurisdiction of the HRAP (see para. 9(b)). Conversely, UN Doc. A/RES/52/247 (1998) has no bearing on cases that do not qualify for dispute settlement under Section 29 of the General Convention and are adjudicated before the HRAP, like the case concerning the Kosovo lead poisoning.

> 'This is a discretionary power . . . Examination of the case law of the Court shows many inconsistencies . . . More recently. . . the ECtHR has begun awarding financial damages on a more regular basis, even in cases where proceedings were unduly delayed by national courts, although maintaining that "the awarding of sums of money is not one of the Court's main duties but is incidental to its task of ensuring observance by States of their obligations" . . . the states parties . . . gave their implicit approval to the restrictions inherent in Article 41. We have to note, therefore, that the system which in the field of human rights can boast of being ahead of all other regional and universal systems does not acknowledge a right to financial compensation in all instances of violations of human rights, irrespective of the gravity of the relevant breach. Therefore, it would be erroneous to contend that any breach of the ECHR entails a right of financial reparation for the victim; in any event, such a right to financial compensation depends on a corresponding determination by the ECtHR.'[326]

As to 'general treaties for the protection of human rights treaties', according to Tomuschat, they 'are in the main extremely discrete regarding the 'secondary' rights which should accrue to victims of breaches of the rights they set forth'[327] As seen, two specific provisions of the ICCPR explicitly concern substantive remedial rights: Articles 9(5) and 14(6) of the ICCPR accord a right to compensation in the specific contexts of unlawful arrest ('enforceable right to compensation') and wrongful conviction ('compensated according to law'), respectively. Otherwise, according to Tomuschat, a former member of the Human Rights Committee,

> 'there is no general provision governing the issue of reparation. According to Article 2(3), everyone whose rights under the CCPR have been violated shall have an 'effective remedy'. Seen in context, this provision addresses remedies as a procedural means to obtain redress, but does not say anything about the substance of redress owed to the victim of a violation. This construction of Article 2(3) is confirmed by the other linguistic versions of the text. In French, the word '*recours*' is employed, and the Spanish text uses the word '*recurso*'. Both terms designate procedural devices but do not connote substantive remedial rights to which an aggrieved individual may be entitled.
>
> Notwithstanding this lack of clear indications as to the way in which human rights violations should be made good, the HRCee has had no doubt as to the obligation of a wrongdoing state to provide relief. Generally, it observes that compensation should be paid to the victim in case physical harm has been sustained by it . . .
>
> With regard to procedural irregularities, in particular, the HRCee may confine itself to finding that an appropriate remedy should be afforded to the victim. Likewise, the HRCee may refrain from recommending compensation when religious or political rights have been breached and where, primarily, symbolic rehabilitation is required. Generally, not much attention is devoted to the issue of compensation, no specification regarding the amounts considered appropriate as moral reparation is set out. It has become almost a routine proviso in the operative part of final views that compensation

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[326] Tomuschat (2014), at 405-405 (emphasis added). With reference to both the ECHR and the Inter-American Court of Human Rights, Tomuschat stated 'as explicitly laid down in the clauses governing the power of the two international tribunals to grant reparation, it is left entirely to their discretion to award financial compensation or to refer the winning party to the moral value of a judgment that finds a violation to have been perpetrated. Given this strong discretionary element, it is hard to speak of a true right to financial compensation of aggrieved individuals, a right which arises directly under the relevant treaty law. It is true, though, that the two regional courts have come a long way from their first steps to where they stand now. In their current practice, financial compensation appears to be almost the rule, whereas denial of such compensation constitutes rather an exception.' Tomuschat (2014), at 408-409 (emphasis added).

[327] Ibid., at 403.

> should be paid— with the unavoidable consequence that states parties do not pay much heed to such unspecific demands.'[328]

As to general international law, according to Tomuschat,

> 'it is clear that international law has not yet evolved to a point where it could be said that, just as with states under the regime of state responsibility, individuals enjoy a full (secondary) right to reparation, including financial compensation, where their (primary) rights have been infringed . . . no such right exists under the most highly elaborated treaties for the protection of human rights at the universal level as well as at the regional level. While the CCPR, with the exception of two provisions which refer to national law, remains silent with regard to reparation, confining itself to the ominous reference to an 'effective remedy' in Article 2(3), the two comprehensive human rights treaties at regional level, the ECHR and the ACHR, leave the granting of financial compensation to the discretion of the competent courts. If no unequivocal individual entitlement exists under these treaties, no such entitlement can exist under general international law. Customary law does not go further in scope than the most advanced treaties on that same subject matter.[329]

Lastly, the question arises as to the international law status of the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', adopted by the UNGA in A/RES/60/147 (2006). The HRAP referred to this resolution, for example, in *S.C. v. UNMIK*, a case concerning enforced disappearances and arbitrary killings:

> 'The Panel . . . considers it appropriate that UNMIK: . . . In line with . . . A/Res/60/147, 21 March 2006 . . . takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-

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[328] Ibid., at 403-404 (fns. omitted, underlining added), referring to the 'flawed literal construction of Article 2(3) CCPR'. Ibid., at 404. Cf. likewise Taylor (2020), at 82 ('The Committee does not have power to order reparation. It instead draws to the attention of States their binding obligation to provide victims with an effective remedy, with an indication of which ones it considers appropriate.'). Cf. David (2014, 'The expanding Right'), at 280-282 ('the ICCPR, unlike the ACHR and the ECHR, does not contain a provision concerning reparation for violations of the rights set forth in that covenant. There is no equivalent to article 63 of the ACHR or article 41 of the ECHR in the JCCPR or its First Optional Protocol . . . despite the silence of the ICCPR and its OP, the HRC has interpreted article 2(3), the right to an effective remedy, as the normative source for requesting States parties to repair the violations established in its views on individual communications. The HRC adopted this position very early in its practice, although it was not self-evident that the HRC's mandate could go beyond finding violations and extend to recommending reparations. However, the position taken by the HRC on this issue must be viewed in light of the type of violations that it examined during its first period of activity, that is, gross human rights violation committed in the context of dictatorships . . . The remedial practice of the HRC has been consolidated and is formally accepted by the majority of States parties. However, there are still some important challenges to be addressed by the HRC. Firstly, the HRC's practice on reparations has not been entirely coherent and systematic. Moreover, the ambiguity in the formulation of reparations and the underdevelopment of guarantees of non-repetition are problematic aspects that need to be rectified. Lastly, the HRC's development as described above has not been accompanied by the adoption of an adequate system to monitor the implementation of its requests for reparations.' [fns. omitted]).

[329] Tomuschat (2014), at 415-416 (emphasis added). See also Daugirdas and Schuricht (2021), at 69 ('Because the requirements of an effective remedy vary by context, and because States have significant discretion in shaping such remedies, it is difficult to discern consistent patterns in the type, amount, or frequency of reparations awarded.').

> repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict'.[330]

The unanimous adoption by the UNGA of said 'Basic Principles and Guidelines', also referred to as the 'Van Boven/Bassiouni Principles', was the culmination of a lengthy process that goes back as far as 1989. At that time, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted professor Theo van Boven, as Special Rapporteur, with the task of conducting a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing relevant basic principles and guidelines.[331] Van Boven produced a set of draft principles in 1997,[332] which the Sub-Commission transmitted to the Commission on Human Rights. The commission appointed professor Cherif Bassiouni as an expert to revise the draft principles. In 2000, Bassiouni produced a report including a set of draft principles.[333] Upon a broad consultative process, this eventually led to the adoption of the aforementioned UNGA resolution, on 16 December 2005.[334]

In terms of substance, Principle 18 of the Van Boven/Bassiouni Principles provides:

> 'In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation . . . which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.'

The wording of this provision neither imposes an obligation ('should') nor specifies the applicable law on point ('In accordance with domestic law and international law').[335] Indeed, according to Tomuschat, 'the document has in its central passages no more than a hortatory function'.[336] The stipulation, in Principle 18, that reparation includes 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition',[337] reflects secondary rules in the context of state responsibility, and the

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[330] *S.C. v. UNMIK*, Opinion of 6 December 2012, HRAP, Case No. 02/09, at 19.
[331] Resolution 1989/13 of 31 August 1989 (referenced in Sub-Commission on Human Rights resolution 1993/29, 25 August 1993).
[332] UN Doc. E/CN.4/Sub.2/1997/104 (1997).
[333] UN Doc. E/CN.4/2000/62 (2000).
[334] For the background of the process and assessment of the Van Boven/Bassiouni Principles, see Zwanenburg (2006); Shelton (2015), at 73-76.
[335] Zwanenburg (2006), at 652-653, discussing the use of the verbs 'shall' and 'should' in the Van Boven/Bassiouni Principles.
[336] Tomuschat (2014), at 416.
[337] Principle 20 stipulates as regards compensation that it 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services'.

responsibility of international organizations. Indeed, as explained by Van Boven: 'From the outset the Principles and Guidelines were based on the law of State Responsibility as elaborated over the years by the International Law Commission' in the ASR.[338] However, as seen in paragraph 2.2.2.1.1 of this study, the ASR, like the ARIO, do not concern the content of international legal personality in the relations of states and international organizations, respectively, with private parties. This may reflect a lack of relevant state and international organization practice.[339]

In any event, the scope of the Van Boven/Bassiouni Principles is limited to particularly serious violations, namely, 'gross violations of international human rights law and serious violations of international humanitarian law'.[340] As to violations that do not meet that gravity threshold, Van Boven contended that 'it is generally acknowledged that in principle all violations of human rights and international humanitarian law entail legal consequences'.[341] Nonetheless, Principle 26 of the Van Boven/Bassiouni Principles merely contains a savings clause (emphasis added): 'It is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law.'

Thus, in the case of violations that are not 'gross' or 'serious', respectively, the Van Boven/Bassiouni Principles at most deem it conceivable that a right to a substantive remedy exists. That does not go much further than the savings clause in Article 33(2) of the ARIO.[342] According to Shelton, as seen, the 'main problems for victims of human rights violations seeking accountability of IOs are not solved by the draft articles.'[343] Whilst Ferstman argued that '[i]nternational organizations are obligated to afford injured

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[338] T. van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2010) <un.org/law/avl> accessed 21 December 2021, at 1-2.
[339] Zwanenburg (2006), at 655 ('State practice . . . does not support the proposition that there is an individual right under international customary law to claim a remedy for violations of human rights'); Tomuschat (2014), at 401-402 ('general international law has not yet evolved an undisputed right of financial compensation for victims of gross human rights violations'). Tomuschat is critical of the Van Boven/Bassiouni Principles' analogy with the rules of state responsibility. Tomuschat (2014), at 416. See also Johansen (2020), at 97 ('it seems necessary to conclude that the *lex lata* is at best unclear. General international law, as it now stands, does not seem to provide for a right to an effective remedy in cases where IOs have caused human rights violations. Such a right may be in the process of crystallizing but further developments are needed for the right to fully emerge.' [fn. omitted]).
[340] There is debate as to the meaning of 'gross'. Zwanenburg (2006), at 649-650. As explained by Van Boven: 'The authors had in mind the violations constituting international crimes under the Rome Statute of the International Criminal Court'. Van Boven (2010), at 2. As to the HRAP referring to the Van Boven/Bassiouni Principles in its opinion in *S.C. v. UNMIK*, that case concerned enforced disappearances and arbitrary killings.
[341] Van Boven (2010), at 3.
[342] Concerning Part 3 of the ARIO ('Content of the international responsibility of an international organisation'), that provision states: 'This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.' See paragraph 2.2.2.1.1 of this study.
[343] Shelton (2015), at 48. See also Ferstman (2017), at 91 ('an unfortunate omission of the ILC').

individuals with full reparation which corresponds to the harm suffered,'[344] this may not in fact correspond to the current state of the law.[345]

### 2.4.3 Interim conclusions

International organisations may be said to owe human rights obligations to private parties under general international law, more specifically, general principles of law. This arguably includes the obligation to provide an effective remedy, which is procedural in nature. That obligation arises under Article 2(3) of the ICCPR, which, as part of the International Bill of Rights, is moreover binding on the UN pursuant to the UN Charter, as its constitution.

The right to an effective remedy entails the review of impugned measures by an authority, which may take various forms and need not be judicial. Whilst the precise contents of the right to a procedural remedy remain unsettled, what matters under Article 2(3) of the ICCPR is that the remedy is 'effective'. Various factors are relevant in determining this, including whether the authority in point is independent and whether its findings are complied with. When it comes to the UN, the Ombudsperson for Al-Qaida and ISIL Sanctions, and the HRAP above all illustrate the developing state of the law in this respect.

Article 14(1) of the ICCPR is *lex specialis* in relation to Article 2(3) of the ICCPR. As will be submitted in chapter 3 of this study, the former informs the interpretation of Section 29 of the General Convention. This means that the settlement of disputes of a 'private law character' involves 'a fair and public hearing by a competent, independent and impartial tribunal established by law'. Where disputes lack a 'private law character', a procedural remedy in accordance with Article 2(3) of the ICCPR, the *lex generalis*, would nonetheless be due. This applies, for example, to the disputes arising out of the Haiti cholera epidemic, that is, if the UN were right that the disputes fall outside the scope of Section 29 of the General Convention.

As to a substantive right to a remedy for violations of international human rights, the ECHR and its American counterpart, as interpreted and applied by the respective regional human rights courts, are at the forefront of the development of the law. The Van Boven/Bassiouni Principles may be of particular importance in 'structuring the material' that is emanating from a 'broad corpus of law on the subject of reparations'.[346] Nonetheless, human rights treaties, including the ICCPR, do not generally confer a right to reparation for human rights violations. Neither may it be possible to conclude that such a right has

[344] Ferstman (2017), at 91.
[345] Johansen (2020), at 95 ('It is particularly uncertain whether there is a right to substantive redress for all human rights violations, or only for violations that are gross or of a fundamental character.').
[346] Zwanenburg (2006), at 667.

crystallized under general international law, at least as far as non-gross human rights violations are concerned.

## 2.5 Conclusions

This chapter discussed, what are for present purposes, the three core aspects of the international organisations law framework governing third-party remedies.

First, the domestic legal personality of international organisations goes accompanied by the privileges and immunities of international organisations. These entitlements arise under international law and they are designed to preclude the scrutiny of the activities of international organisations by domestic courts under domestic law.

This raises the question as to what remedies international law bestows on third-parties *vis-à-vis* international organisations. The UN, and other international organisations, typically possess international legal personality. However, such personality is normatively empty.

Second, international obligations arise for international organisations under treaties to which they consent. And, whilst further enquiry is required with respect to *jus cogens*, such obligations arguably arise for international organisations under general international law except insofar as the member states determine otherwise. The UN may moreover be considered to be bound by the International Bill of Rights pursuant to the UN Charter, as its constitution.

Third, international organisations may be said to be bound by international human rights obligations under general principles of law. Where an international organisation breaches such an obligation, it commits an internationally wrongful act towards the individual in point, for which it incurs international responsibility.

Whereas the ARIO do not address the legal consequences of such responsibility towards private parties, the obligation to provide a procedural remedy arguably arises under general international law. As to the UN, it is in any event obliged to provide an 'effective remedy' under Article 2(3) of the ICCPR pursuant to its constitution. The meaning of 'effective remedy' is undergoing development, as illustrated notably by UN practice. When it comes to the 'determination of . . . civil rights', the higher procedural standard under Article 14(1) of the ICCPR arguably applies to the UN as a constitutional obligation.

Conversely, a substantive right to a remedy for human rights violations seems to have developed insufficiently as of yet, even as regards the UN.

The limited remedies for international human rights violations contrast starkly with both the procedural and substantive remedies of third-parties under Section 29 of the General Convention. As explained by Daugirdas and Schuricht with specific reference to that provision:

> 'One important way that international organizations' obligations may differ from those of States concerns the *scope* of international organizations' obligations to provide effective remedies. Specifically, international organizations' obligations may be broader than States' obligations in that they apply not only to violations of human rights, but also to other instances where international organizations cause harm to private individuals.'[347]

This underscores the importance of the proper interpretation and implementation of Section 29(a) of the General Convention.

[347] Daugirdas and Schuricht (2021), at 72 (fn. omitted, emphasis in original).

# 3 SECTION 29(A) OF THE GENERAL CONVENTION

## 3.1 Introduction

In addressing the first research question of this study, the aim of this chapter is to interpret Section 29(a) of the General Convention and, on the basis of available information, assess the UN's implementation thereof in light of the international organisations law framework governing third party remedies and against the broader backdrop of the rule of law. As this chapter concludes at the outset, Section 29 of the General Convention is binding on the UN; however, shortcomings in the implementation thereof have no bearing on the UN's entitlement to immunity from jurisdiction.

Upon providing an overview of the UN's implementation of Section 29(a), the chapter discusses the constituent elements of that provision, notably the terms 'private law character' and 'appropriate modes of settlement'. The travaux préparatoires of Section 29 of the General Convention, considered in the context of the former element, reveal that the provision was conceived as the counterpart to the UN's immunity under Article II, Section 2 of the General Convention.

This chapter concludes that the UN's implementation of Section 29(a) of the General Convention, is problematic. Not only is this implementation detrimental to third-party claimants, it also insufficiently protects the UN from national court interference.

This chapter is structured as follows. It begins by discussing the binding character of the General Convention, including Section 29, for the UN (section 3.2). Next follows a largely descriptive overview of the UN's practice under Section 29(a) (section 3.3). After introducing the key documents from which that practice can be gleaned, the overview is broken down per category of dispute. This is complemented by a more extensive introduction to the three case studies of the UN's alleged third-party liability, which were briefly introduced in chapter 1: the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic. Next follows a discussion of the UN's implementation of Section 29(a) (section 3.4). After general observations, the discussion turns to the interpretation of the terms 'private law character' and 'appropriate modes of settlement', respectively, and their implementation in practice. The analysis concerning the former includes a consideration of the travaux préparatoires and the aforementioned case studies. As to the latter, the critical appraisal of the various 'modes of settlement' currently used by the UN includes the nascent liability regime for third-party claims in connection with peacekeeping operations.

## 3.2 The UN is bound by the obligation under Section 29 of the General Convention

Two related issues require discussion at the outset. First, the General Convention is binding on the UN (subsection 3.2.1). Second, where the UN reneges on its obligation under Section 29 of the General

Convention, it incurs international responsibility towards the states parties to the General Convention. However, it does *not* in consequence forfeit its entitlement to immunity from jurisdiction under Section 2. That is, its jurisdictional immunity is not conditional on the UN's compliance with its obligations under Section 29 (subsection 3.2.2).

### 3.2.1 The General Convention is binding on the UN

Article 105 of the UN Charter reads as follows:[348]

> '(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.'

In furtherance of the latter part of Paragraph 3, during its first session, on 13 February 1946, the UNGA approved the General Convention in resolution 22A(I) and 'proposed it for accession by each member of the United Nations'.[349] The Convention was registered with the Secretary-General on 14 December 1946. Under Section 31, States can become parties to the treaty by way of accession only. As of 8 November 2021, the General Convention had 162 states parties.[350]

While only UN member states can accede to the General Convention,[351] the terms of the treaty suggest it was intended to be binding on the UN. Thus, for example, Section 35 provides (emphasis added):

> 'This convention shall continue in force as <u>between the United Nations and every Member</u> which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.'

Furthermore, of particular relevance for present purposes, as seen, Section 29 clearly imposes an obligation on the UN (emphasis added):

> 'The United Nations <u>shall make</u> 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

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[348] For an introduction to the General Convention, including its relationship to Art. 105 of the UN Charter and its binding nature for the UN, see generally A. Reinisch, 'Introduction to the General Convention' in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 3.
[349] Preamble, para. 3.
[350] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed 21 December 2021.
[351] Arts. 31-33 of the General Convention.

> Nations is a party;
> b. disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'[352]

Likewise, Section 30 refers to differences arising out of the interpretation or application of the convention 'between the United Nations on the one hand, and a Member on the other hand'.[353]

The drafting history of the General Convention (discussed more fully below) confirms the understanding that the UN is bound by the General Convention. At one stage, the convention was being negotiated within a sub-committee of the Sixth Committee of the UNGA. According to the subcommittee's first report:

> 'The general convention on immunities and privileges of the United Nations is in a sense a convention between the United Nations as an Organization on the one part and each of its Members individually on the other part. The adoption of a convention by the Assembly would therefore at one and the same time fix the text of the convention and also import the acceptance by the United Nations as a body on their side of that text.'[354]

Though unable to accede to the General Convention, the UN's consent to be bound by it, in combination with the terms of the treaty, may be deemed to be enshrined in the UNGA approving it and proposing it for accession by UN member states.[355]

There is an unresolved issue, as explained by Reinisch: 'While the UN itself and many legal scholars seem to lean towards the view that the UN is a party to the General Convention, some have regarded it as only a third party beneficiary.'[356] In the *Reparation for Injuries* advisory proceedings before the ICJ, counsel for the UN argued:

> 'The United Nations has authority to enter into other international agreements. Thus, by virtue of Article 105, it is a Party to the Convention on Privileges and Immunities of the United Nations, which

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[352] According to Schmalenbach 'there are reasonable and convincing grounds to enshrine the duty of the UN to make available an alternative dispute settlement within the UN Charter itself: Art. 105 para 3 UN Charter indicates that the entire General Convention is perceived as determining the details of the application of paras 1 and 2'. Schmalenbach (2016), para. 2 (fn. omitted).

[353] Another example is Section 20 of the General Convention which stipulates that the UNSG 'shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course justice and can be waived without prejudice to the interests' of the UN (emphasis added).

[354] UN Doc. A/C.6/17 (1946), para. 5 (emphasis added). Cf. Reinisch (2016, 'Introduction'), para. 36.

[355] According to Reinisch: 'The fact that the UN Secretary-General registered the General Convention *ex officio* was also taken as an indication that the UN is a party to the Convention.' Reinisch (2016, 'Introduction'), para. 39 (fns. omitted). Cf. Art. 11(2) of the 1986 VCLT (not yet in force) ('Means of expressing consent to be bound by a treaty'): 'The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.'

[356] Reinisch (2016, 'Introduction'), para. 34.

> binds the United Nations as an Organization, on the one part, and each of its Members individually, on the other part.'[357]

In its *Reparation for Injuries* Advisory Opinion, however, the ICJ did not clarify the UN's status under the General Convention. It merely stated regarding the international legal personality of the UN: 'The 'Convention on the Privileges and Immunities of the United Nations of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35)'.[358] Neither did the ICJ resolve the matter in its 1989 advisory opinion in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*.[359] This notwithstanding, as Reinisch stated, 'it seems clear that the UN is bound by the provisions of the General Convention.'[360]

### 3.2.2 Failure to implement Section 29 of the General Convention and jurisdictional immunity

According to the travaux préparatoires of the General Convention, as will be seen in this chapter, 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. In that light, the question explored in this sub-section is whether the UN's failure to implement Section 29 has a bearing on its entitlement to jurisdictional immunity.

#### 3.2.2.1 Whether the UN's entitlement to immunity is conditional on its compliance with Section 29 of the General Convention

If the UN would fail to implement its obligation to make 'provisions for appropriate modes of settlement' under Section 29, this would amount to an internationally wrongful act. The UN would incur international responsibility towards the states parties to the General Convention.[361] The question arises

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[357] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, Pleadings, Public Sittings held at the Peace Palace, The Hague, on March 7th, 8th and 9th and April 11th, 1949, the President, M. Basdevant, presiding, verbatim record <icj-cij.org/en/case/4/oral-proceedings> accessed 21 December 2021, at 71 (emphasis added).

[358] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 179.

[359] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177, para. 33 ('The United Nations is itself intimately, and for the most part directly, concerned with the operation of the General Convention. Section 30 was therefore so framed as to take in also the settlement of differences between the United Nations and a State party to the General Convention. If such a difference arises, "a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties." This provision pursues the same intent as expressed in the first sentence of Section 30; the particular nature of the proceeding contemplated is attributable to the status as an international organization of one of the parties to the difference.'). Cf. Reinisch (2016, 'Introduction'), at 13, paras. 40-41.

[360] Reinisch (2016, 'Introduction'), para. 42.

[361] The UN would not incur such responsibility towards private claimants. Cf. Schmalenbach (2016), para. 10 ('the aggrieved parties who benefit from an alternative dispute settlement mechanism have no direct legal claim under Art. VIII Section 29 General Convention against the UN').

whether as a consequence of such failure, the UN would forfeit its right to immunity from jurisdiction under Section 2 of the General Convention.

Sections 2 and 29 of the General Convention are closely linked. As explained by Schmalenbach: 'Section 29 General Convention is the flip side of and the necessary supplement to Art. II Section 2 (immunity of the UN)'.[362] That being so, the ordinary meaning of the terms of the General Convention, considered in their context and in the light of the treaty's object and purpose,[363] does not suggest that the UN's entitlement to immunity is conditional on its implementation of Section 29.

The main purpose of the General Convention, considering its title and preamble, is to specify the UN's privileges and immunities in furtherance of Article 105 of the UN Charter.[364] Article II, Section 2 provides for the 'immunity from every form of legal process' which the UN 'shall enjoy'. Section 2 sets forth a single, precisely worded exception to the UN's immunity: 'except in so far as in any particular case it has expressly waived its immunity'. There is no textual support for an exception to the immunity where the obligation 'to make provisions for appropriate modes of settlement' under Section 29 is not implemented.[365]

Neither do the travaux préparatoires of the General Convention support that the UN's entitlement to immunity is conditional on its implementation of Section 29 of the General Convention.[366] As further discussed below, the link between Section 2 and Section 29 of the General Convention goes back to the resolution proposed by the International Labour Office on the status, immunities, and other facilities to be accorded to the ILO, which laid the basis for the General Convention. The explanatory commentary to Article 18(2) of the 'suggested text of proposed resolution', which would evolve into Section 29 of the General Convention, states:[367]

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[362] Schmalenbach (2016), para. 1 (emphasis added).
[363] Cf. Art. 31(1) of the VCLT.
[364] Art. 105(1) of the UN Charter qualifies the UN's immunity in functional terms ('such privileges and immunities as are necessary for the fulfilment of its purposes'), whereas under Section 2 of the General Convention its immunity is cast in rather absolute terms ('immunity from every form of legal process'). On the relationship between both standards, see De Brabandere (2010), at 88 ('Despite allegations that the Convention should be considered as undermining the standard of functional necessity contained in Article 105 of the Charter by expanding the organization's immunity to absolute immunity, we suggest that the Convention should instead be regarded as a reliable interpretation of Article 105.')
[365] Indeed, Art. II, Section 2 contains a 'crystal clear provision . . . according to which, there is no room for domestic courts to examine the necessity for immunity in each case'. Y. Okada, 'Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN', (2018) 15 *International Organisations Law Review* 39, at 44. See also the reasoning in *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), at 18 ('we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity').
[366] Cf. Art. 32 of the VCLT.
[367] In a 'General Note' accompanying the draft text, the Office stated: 'It must never be forgotten that the special

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[368]

Other than confirming the close link between immunity and alternative remedies, according to Schmalenbach:

> 'Given the sparsity of historical material, the attempt to find support for the (un)conditionality claim in the travaux préparatoires is virtually tantamount to speculation. Yet it is noteworthy that the Preparatory Committee was emphatic about the fact that Art. 105 UN Charter already obliges member States to respect the organization's immunity irrespective of any implementing action by the General Assembly under Art. 105 para 3 UN Charter, which strongly argues against an early conditionality concept.'[369]

Indeed, the Executive Committee of the Preparatory Committee recommended

> 'that the Preparatory Commission instruct the Executive Secretary to remind the Members of the United Nations that, under Article 105 of the Charter, the obligation to accord to the United Nations, its officials and representatives of its Members all privileges and immunities necessary for the accomplishment of its purposes, operates from the coming into force of the Charter and is therefore applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the Article, or the conventions there mentioned have been concluded.'[370]

As to the ICJ, its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* disconnected immunity from alternative remedies altogether. The issue before the Court, in sum, was whether a Special Rapporteur of the UN Commission on Human Rights was entitled to jurisdictional immunity under Section 22 of the General Convention before the courts of Malaysia in connection with lawsuits for defamation. In concluding that the Special Rapporteur was entitled to immunity, the Court pointed out

> 'that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their officia1 capacity.
>
> The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance

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status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197.

[368] Ibid., at 219 (emphasis added).

[369] Schmalenbach (2016), para. 9 (fns. omitted).

[370] PC/EX/113/Rev.1 (1945), at 69, para. 2 (emphasis added).

> with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.'[371]

In *Mothers of Srebrenica*, contrary to *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, alternative remedies were absent. According to the ECtHR in *Mothers of Srebrenica*,[372] this was of no consequence for the UN's entitlement to immunity:

> 'There remains the fact that the United Nations has not, until now, made provision for "modes of settlement" appropriate to the dispute here in issue. Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case, this state of affairs is not imputable to the Netherlands. Nor does Article 6 of the Convention require the Netherlands to step in'.[373]

As for the Dutch Supreme Court in *Mothers of Srebrenica*, whilst noting that Section 29 of the General Convention had not been implemented,[374] it did not question the UN's entitlement to immunity.[375]

The District Court for the Southern District of New York in *Georges et al.*, one of the Haiti cholera cases, dismissed the claims holding that 'nothing in the text of the [General Convention] suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29.'[376] On appeal, the Court of Appeal for the Second Circuit

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[371] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 66 (emphasis added). According to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel before the ICJ: 'By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules'. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[372] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 155 refers to *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*).

[373] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165.

[374] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3 ('Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.')

[375] To the contrary, the Supreme Court stated: 'That immunity is absolute'. Ibid., para. 4.3.6.

[376] *Delama Georges, et al. v. United Nations*, *et al.*, No. 13-cv-7146 (JPO) (S.D.N.Y., 9 January 2015), at 5. The reference to 'CPIUN' is to the Convention on the Privileges and Immunities of the UN, i.e., the General Convention. For an early judicial decision rejecting the notion that immunity is conditional on the availability of

similarly ruled:

> 'The principal question presented by this appeal is whether the UN's fulfillment of its obligation under Section 29 of the [General Convention] to "make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the [UN] is a party," as well as "disputes involving any official of the [UN] who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary‐General," is a condition precedent to its immunity under Section 2 of the [General Convention], which provides that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."
> Because we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity— and because we find plaintiffs' other arguments unpersuasive—we **AFFIRM** the District Court's judgment.'[377]

Notwithstanding the foregoing, there is a 'growing recognition of a human rights-based challenge to international organization's immunity'.[378] The Special Rapporteur on extreme poverty and human rights, Philip Alston, stated in the context of the Haiti cholera crisis and the UN's jurisdictional immunity before the US courts:

> 'The irony of the position of the United Nations on cholera in Haiti is that far from strengthening its case for immunity, it has provoked a backlash which has led scholars and commentators to call for immunity to be lifted, for only functional immunities to be recognized, or for national courts to adapt their approach to immunity to respect the human rights principle of access to a remedy. Support for these suggestions will only grow if an appropriate remedy is not provided in the Haiti cholera case. There is much to be said in favour of the argument, supported by many scholars and invoked in the litigation, that the absolute immunity conferred by article II of the 1946 Convention is contingent upon respect for the requirement of article VIII, section 29, that 'appropriate modes of settlement' be provided by the United Nations. The rejection of this argument by courts in the United States provides no assurance that courts elsewhere will follow suit.'[379]

Indeed, as explained by Reinisch,[380] domestic courts of several states have at times denied immunity from jurisdiction to international organisations on the basis that the claimant lacked alternative recourse,[381] 'sometimes even to the extent of making the latter a precondition for the former.'[382]

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alternative remedies, see *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 236.

[377] *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), underlining added, other emphasis in original.

[378] R. Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge', (2014) 25 *European Journal of International Law* 239, at 242, see also ibid., at 254. See also Okada (2018); A. Reinisch, 'Immunity of Property, Funds, and Assets (Article II Section 2 General Convention)', in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 63, paras. 29-49 ('The Impact of Access to Justice on the Immunity of International Organizations'); A. Tzanakopoulos, 'Theorizing or Negotiating the Law? A Response to Devika Hovell', (2016) 110 *AJIL unbound* 3, at 6; C. Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends', (2010) 7 *International Organizations Law Review* 121, at 147.

[379] UN Doc. A/71/367 (2016), para. 54 (fns. omitted; underlining added).

[380] Reinisch (2016, 'Immunity'), paras. 29-49. Schmalenbach refers to 'rare cases in which courts lifted the immunity of an organization due to a lack of alternative'. Schmalenbach (2016), para. 9, fn. 29 (emphasis added).

[381] Reinisch (2016, 'Immunity'), para. 35. This includes the courts of France, Germany, Italy, Switzerland, Italy and Belgium, including the oft-cited case *Siedler v Western European Union*, as reported in ibid., para. 39, fn. 87.

[382] Reinisch (2016, 'Immunity'), para. 35.

However, Schmalenbach concludes with respect to the UN, 'present international practice, assessed in its entirety, does not yet support the notion of a conditional relationship between Art. II Section 2 and Art. VIII Section 29 General Convention at the expense of the UN's immunity before domestic courts.[383]

#### 3.2.2.2 Denying the UN's immunity in response to 'material breach' or as a 'countermeasure'

While there is no relationship of conditionality between the immunity and the availability of alternative recourse, the forum state might seek to argue, along the lines of Article 60(2) of the VCLT,[384] that the UN's failure to comply with Section 29 amounts to a 'material breach' of the treaty.[385] The state might invoke this as a ground for suspending the General Convention's operation 'in part', that is, insofar as the provision on the UN's immunity from jurisdiction is concerned.

However, this argument is problematic. To start with, the forum state would need to argue that under Article 60(3)(b) of the VCLT, Section 29 is 'essential to the accomplishment of the object or purpose of the treaty'.[386] However, notwithstanding the close link between that provision and Section 2 of the General Convention,[387] the only 'essential' provisions under the Convention, as suggested by its full name ('Convention on the Privileges and Immunities of the United Nations'), arguably are those conferring privileges and immunities on the UN.

Furthermore, the General Convention being a multilateral treaty,[388] the forum state would need to argue that, under Article 60(2)(b) of the VCLT, it qualifies as 'a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State'. In this respect, the state could argue that it is 'specifically

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[383] Schmalenbach (2016), para. 9 (fn. omitted). Similarly, Okada rejects a 'conditional link between fulfilment of the obligation by the UN and entitlement of its immunity because interpreting the [General Convention] in such a way would be contrary to the object and purpose of the *Convention*. Thus, domestic courts are not allowed to exercise unilateral control over the implementation of section 29'. Okada (2018), at 75 (emphasis in original). See likewise, De Brabandere (2010), at 92 ('there is no conditional relation between the two, in the sense that the application of immunity would be conditional upon the existence of alternative mechanisms.').

[384] In the case of a bilateral treaty, such as a headquarters agreement, the relevant provision is Art. 60(1) of the VCLT.

[385] An argument along these lines was put forward by the plaintiffs in *Delama Georges et al. v. United Nations et al*. The Court of Appeal held: 'According to plaintiffs, the UN's material breach of its Section 29 obligation means that it 'is no longer entitled to the performance of duties owed to it under' the CPIUN, including its Section 2 immunity. We need not reach the merits of this argument, however, because plaintiffs lack standing to raise it.' *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), at 19.

[386] The claimants in *Delama Georges et al. v. United Nations et al.* argued that 'Section 29, by its nature, is such a provision because dispute settlement provisions are generally considered essential under international law.' *Delama Georges et al. v. United Nations et al.*, on Appeal from the United States District Court for the Southern District of New York, Brief for Appellants, 27 May 2015, at 36.

[387] As evidenced by the travaux préparatoires (see below).

[388] On the UN being bound by the General Convention, see subsection 3.2.1 of this study.

affected' since by respecting the immunity absent alternative remedies, it would incur international responsibility for denying access to court.

However, the problem lies with the argument's underlying premise, that is, that the UN's failure to comply with Section 29 amounts to a 'material breach' of the treaty. The interpretation and application of that provision—including whether, to begin with, the dispute in point has a 'private law character'—are matters that concern the international organisation as a whole and its entire membership. In this respect, the General Convention is not merely a multilateral treaty: it is part of the UN's constitutional framework, being grounded in Article 105 of the UN Charter and having been adopted by the UNGA. Arguably, therefore, it is not for a member state on its own, but rather for the Organisation as a whole, to consider the UN's compliance with Section 29.

In any event, even if the treaty law provision granting immunity from jurisdiction were to be suspended, under the Dutch Supreme Court's ruling in a case against the Iran-United States Claims Tribunal ('IUSCT'), *Spaans v. IUSCT*, international organisations are entitled to immunity under 'general international law'.[389] The implication would be that if the Dutch courts were to deny immunity, even absent a treaty law basis, the Netherlands would still commit an internationally wrongful act towards the UN.

Another potential argument against upholding the UN's immunity is advanced by Irmscher: the forum state could deny the UN's immunity as a *countermeasure* against the UN for its failure to implement Section 29 of the General Convention.[390] One problem with this argument is that, under Article 52(1)(b) of the ARIO, a member state of an international organisation is not allowed to take countermeasures, 'unless . . . the countermeasures are not inconsistent with the rules of the organisation' (emphasis added). Under Article 2(b) of the ARIO, '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.

Arguably, the General Convention forms part of the rules of the organisation, as it has been adopted by an UNGA resolution pursuant to Article 105(3) of the UN Charter. It would be inconsistent with Section 2 of the General Convention to deny immunity (immunity not being conditional on compliance with Section 29), such that the contemplated countermeasure is not allowed.

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[389] However, that is not generally accepted. See M. Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 29.
[390] Irmscher (2014), at 476-478.

In any event, more fundamentally, a condition for taking countermeasures is that the UN has committed an internationally wrongful act,[391] that is, that it breached the obligation under Section 29 of the General Convention. This is problematic for the very same reason that the abovementioned material breach argument is problematic: whether the UN implemented that provision correctly is a question for its membership as a whole.

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In conclusion, it is submitted that failure on the part of the UN to implement Section 29 of the General Convention has no bearing on its entitlement to immunity from jurisdiction.

### 3.3 Overview of practice of the UN under Section 29(a) of the General Convention

The purpose of this section is to provide an overview of the UN's practice under Section 29(a) on the basis of available information. The section is therefore largely descriptive in nature. Upon introducing the various documents that describe the UN's practice and regulations (subsection 3.3.1), it provides a breakdown of the UN's practice per category of claim (subsection 3.3.2). It then introduces the three case studies in more detail: the Srebrenica genocide, the Haiti cholera epidemic, and the Kosovo lead poisoning (subsection 3.3.3).

#### 3.3.1 Key documents setting out the practice and regulations of the UN

The first available document dates from 1967 and is entitled 'The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities; study prepared by the Secretariat'.[392] It contains four studies which the UN Secretariat prepared to assist the ILC in its work on relations between states and 'inter-governmental organisations'. The study that is of relevance for present purposes concerns the practice of the UN ('1967 Study').[393]

The first chapter of the 1967 Study is entitled 'juridical personality of the United Nations'. It contains sections concerning the contractual capacity of the UN, the capacity of the UN to acquire movable and immovable property, and legal proceedings brought by and against the UN. The last-mentioned section, Section 4, is most relevant for present purposes. Its third subsection is entitled 'claims of a private law nature made against the United Nations and the steps taken to avoid or mitigate such claims'.[394] That subsection includes a brief overview of dispute settlement mechanisms regarding: commercial contracts

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[391] Art. 51(1) of the ARIO provides: 'An injured State . . . may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.' (emphasis added).
[392] UN Doc. A/CN.4/L.118 and Add. 1 and 2 (1967), Volume II, at 154 ff.
[393] Ibid., at 207 ff.
[394] Ibid., at 217, sub I (emphasis provided).

(negotiation and arbitration); disputes concerning employment contracts (internal appellate procedures); 'other claims of a private law nature' (insurance or negotiation); and disputes in connection with operational UN programmes, such as UNICEF or UNDP.

Section 5 of the 1967 Study concerns 'international claims'. The subsection entitled 'Claims made against the United Nations by states or by other international organizations' is of particular relevance for present purposes. In it, the UN Secretariat stated that 'the only claims of any significance brought by States (whether on their own behalf or on behalf of their nationals') arose out of the United Nations activities in the Democratic Republic of Congo.'[395] The 1967 Study then goes on to discuss the ONUC settlements in detail.

Moving on from the 1967 Study, the next document concerning the UN's practice in regard to the settlement of claims by third non-state parties dates from 1985. This is an update of the 1967 Study, produced by the UN Secretariat at the request of the ILC ('1985 Supplement to the 1967 Study').[396] The update in particular concerns the practice of the UN in relation to contracts.

The principal UN document setting out the UN's practice and regulation in regard to claims by private non-state parties is the 1995 Report, which the UNSG prepared at the request of the UNGA. It is entitled 'Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946'. On 17 September 1996, on the recommendation of the Fifth Committee, the General Assembly 'took note of' the 1995 Report.[397] To date, the 1995 Report remains the most comprehensive overview of the UN's practice in relation to Section 29 of the General Convention. The 1995 Report mainly deals with procedural mechanisms for the settlement of disputes, but it also addresses certain substantive matters pertaining to Section 29 of the General Convention.

The 1995 Report distinguishes between various categories of claims (discussed separately hereafter). One of these categories concerns claims in connection with UN peacekeeping operations. Around the same time, though with little reference to Section 29 of the General Convention or the 1995 Report,[398] the UNSG and the UNGA further addressed that category in a separate process. That process involved

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[395] Ibid., para. 54.
[396] UN Doc. A/CN.4/L.383 and Add.1-3 (1985), Yearbook of the International Law Commission 1985, Volume II, Part One, at 145 ff.
[397] Decision 50/503 of 17 September 1996 ('Review of the efficiency of the administrative and financial functioning of the United Nations'). See also UN Doc. A/INF/50/4/Add.2 (1996), at 32. The UNGA decided to 'defer consideration of [the 1995 Report] until its fifty-first session'. However, the present author was unable to identify any records pertaining to such consideration during the 51th session.
[398] See 1997 Report, paras. 10 and 43; 1996 Report, para. 7; the ACABQ referred to Section 29 of the General Convention in connection with the 1996 Report, see UN Doc. A/51/491 (1996), para. 6. UN Doc. A/RES/52/247 (1998) does not contain any reference to the 1995 Report.

the production of two reports by the UNSG, followed by the adoption of UNGA resolution 52/247 (1998), in which the UNGA promulgated what will hereafter be referred to as the 'UN Liability Rules'.

More precisely, said process regarding claims in connection with UN peacekeeping operations started in 1996. The Advisory Committee on Administrative and Budgetary Questions ('ACABQ') expressed 'its concern about the magnitude and number (about 800) of outstanding third-party claims submitted to [UN peace forces headquarters]',[399] and

> 'recommends that the current procedures on settling third-party claims associated with United Nations peacekeeping efforts be the subject of a thorough study by the Legal Counsel, the results of which should be reported by the Secretary-General to the General Assembly through the Advisory Committee not later than November 1996. Furthermore, the Advisory Committee recommends that on the basis of the study the Secretary-General develop and propose during the fifty-first session of the General Assembly appropriate measures and procedures which would provide for a simple, efficient and prompt settlement of third-party claims, secure United Nations interests, limit its liabilities and allow for a coordinated approach to this issue on the part of the United Nations organizations, agencies and programmes.'[400]

The UNGA thereupon requested

> 'the Secretary-General to develop revised cost estimates for third-party claims and adjustments, following completion of the thorough study to be completed by the Legal Counsel and taking into account the issues raised in the report of the Advisory Committee on Administrative and Budgetary Questions, and to submit them, through the Advisory Committee, to the General Assembly'[401]

This led to a report of the Secretary-General dated 20 September 1996 ('1996 Report').[402] The report concerns: the scope of UN liability for activities of UN peacekeeping forces (including regarding an exemption from liability for operational necessity and military necessity); procedures for handling third-party claims; and limitation of liability.

The ACABQ commended the 1996 Report and, subject to certain observations,[403] recommended the UNGA to endorse the proposals and recommendations regarding *limitations on the liability* of the UN set out therein.[404] The UNGA endorsed the observations and recommendations of the ACABQ and requested 'the Secretary-General to develop specific measures, including criteria and guidelines for

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[399] UN Doc. A/50/903/Add.1 (1996), para. 19.
[400] Ibid., para. 20.
[401] UN Doc. A/RES/50/235 (1996), par. 16.
[402] UN Doc. A/51/389 (1996).
[403] For example, the ACABQ requested the UNSG to review the provisions of Art. 51 of the of the model SOFA concerning standing claims commissions, which 'have proved to be unrealistic or ineffective'. See UN Doc. A/51/491 (1996), para. 9, discussed further below.
[404] Ibid., paras. 3 and 15 (emphasis added).

implementing the principles outlined in his report and to report thereon to the General Assembly through the Advisory Committee.'[405]

The Secretary-General recommended such measures in the 1997 Report, which is supplemental to the 1996 Report. In addition to setting forth limitations of liability, that report also briefly addresses procedural mechanisms for the settlement of third-party claims in connection with peacekeeping operations. Lastly, at the proposal of the UNSG, the UNGA adopted resolution 52/247 on 17 July 1998, without a vote,[406] promulgating the UN Liability Rules.

The final UN document setting forth, in general terms, the UN's position on the settlement of claims by third non-state parties is a memorandum by the Office of Legal Affairs (OLA) addressed to the UN Controller in 2001.[407] The memorandum concerns 'the regulatory basis for the payment of claims settlements that have been recommended by [the Office of Legal Affairs] and the payment of such settlements'. [408] It recalled the observation by the Controller 'that the United Nations Financial Regulations and Rules do not expressly provide for payments of such settlements', and the Controller's reference 'to financial rule 110.1, which requires that "the expenditures of the Organization remain within the appropriations as voted and are incurred only for the purposes approved by the General Assembly".'[409]

Notwithstanding the lack of clarity regarding the Controller's query and its context, the OLA memorandum clearly concerns the relationship between the UN and private non-state parties in the context of Section 29 of the General Convention.[410] The memorandum makes certain assertions regarding the UN's liability and the consequences thereof.

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[405] UN Doc. A/RES/51/13 (1996), para. 2 (emphasis added).
[406] UN Doc. A/52/PV.88 (1998), at 16.
[407] Office of Legal Affairs, Memorandum to the Controller, United Nations Juridical Yearbook 2001, at 381 ff ('2001 OLA Memorandum to the Controller').
[408] Ibid., para. 2.
[409] Ibid., para. 2.
[410] Amongst others, this results from its reference to the 1996 Report and other documents concerning third party claims. And, according to the background section of the memorandum: 'The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused by the Organization to property or persons, is reflected in article 29 of the Convention on Privileges and Immunities and the long-standing practice of the Organization in addressing such claims.' See 2001 OLA Memorandum to the Controller, para. 4. The memo's background section also refers to the limitations of liability decided upon by the UNGA. Regarding the procedures for the settlement of private law claims, it moreover refers to the following documents: UN Doc. A/RES/52/247 (1998); the 1995 Report, 1996 Report and 1997 Report; and the 1967 Study.

### 3.3.2 The UN's practice per category of dispute

On the basis of the foregoing UN documents, following the categorisation in the 1995 Report, the picture that emerges of the UN's practice concerning the settlement of third-party disputes is as follows.

At the outset, it is noted that most contractual and tort disputes are settled amicably. As the UN Legal Counsel stated in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* proceedings before the ICJ:

> 'If the United Nations has a private law dispute arising out of a non-contractual situation and such dispute has not been settled by negotiation, it does make provision for suitable means to settle the dispute, usually by arbitration in accordance with the UNCITRAL Arbitration Rules. The United Nations has also agreed to formal conciliation through the UNCITRAL Conciliation Rules. I should emphasize, however, that the overwhelming majority of claims are settled through negotiation.'[411]

Rashkow, a Former Director of the General Legal Division of the Office of Legal Affairs (writing in his personal capacity), explained that

> 'the Organization consistently and, for the most part, successfully seeks to amicably resolve all third party claims—both contractual and tort. In this respect, the Organization has developed a number of measures or processes for dealing with third party claims, depending on the nature of the claims or the situations in which they arise.'[412]

In this respect, Article 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services) (rev. April 2012) provides:

> 'AMICABLE SETTLEMENT: The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law ("UNCITRAL"), or according to such other procedure as may be agreed between the Parties in writing.'[413]

Furthermore, as reported by the UNSG in 2008: 'Non-staff personnel, including consultants, individual contractors and individuals under service contracts, may . . . seek the services of the Office of the

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[411] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 9.

[412] Rashkow (2015), at 79. See also, e.g., 1995 Report, para 7: 'The overwhelming majority of commercial agreements that have been entered into by the United Nations have been performed without the occurrence of any serious difficulty and, when problems have arisen, they have been resolved through direct negotiations in most instances. The United Nations has, therefore, had recourse to arbitral proceedings in only a limited number of cases to date.'

[413] <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021.

Ombudsman, which, in a number of instances, has assisted the parties in reaching mutually acceptable solutions.'[414]

#### 3.3.2.1 Disputes 'arising out of commercial agreements (contracts and lease agreements)'

With reference to the first limb of Section 29(a) of the General Convention ('disputes arising out of contracts'), the practice of the UN and its subsidiary bodies has been to include arbitration clauses in commercial agreements, that is, contracts and lease agreements.[415] Where an arbitration clause has not been included 'because of error or oversight',[416] and where negotiation fails,[417] the UN agrees to negotiate an arbitral *compromis*. This applies to all types of contractual disputes, as Rashkow explained:

> 'Individual consultants, contractors both large and small, and others who interact with the United Nations but are not staff members, e.g. volunteers, generally must seek to resolve their claims in some manner consistent with Section 29 of the General Convention, calling for a modality for resolving disputes of a private law character.'[418]

According to the 1995 Report, this specifically also includes disputes concerning contracts concluded in the context of peacekeeping operations,[419] insofar as they cannot be resolved through negotiation.[420]

The UN's standard arbitration clause, which may be amended if the circumstances so warrant, provides for arbitration proceedings under the UNCITRAL Arbitration Rules.[421] At the time of the 1995 Report, there had been only a limited number of arbitration cases since few disputes had arisen and most could be settled through negotiation.[422]

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[414] UN Doc. A/62/748 (2008), para. 18.
[415] 1995 Report, paras. 3-8. According to Schmalenbach: 'The UN concludes various contracts of a private law character for various reasons, ranging from, for example, contracts for maintenance work, the purchase of goods, leasing of premises and supply of short-term services such as research, editing, and translation through services such as consultants or experts on mission as well as arrangements for hosting UN conferences. Short-term employment contracts also fall under this category provided that they do not accord the status of staff members to the contracting partner.' Schmalenbach (2016), para. 37 (fns. omitted). See also Report by the Secretary-General, Procurement-related arbitration, A/54/458, 14 October 1999.
[416] 1995 Report, para. 8.
[417] Rashkow (2015), at 79.
[418] Ibid., at 79.
[419] As well as commercial agreements entered into by UNDP and UNICEF. See 1995 Report, para. 22.
[420] 1995 Report, para. 21.
[421] Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services (Rev. April 2012). <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021. Under the standard arbitration clause at the time of the 1995 Report, arbitration was conducted under the auspices of either the American Arbitration Association ('AAA') (for contracts to be performed in the USA) or the International Chamber of Commerce ('ICC') (for contracts to be performed outside the USA).
[422] 1995 Report, para. 7. Cf. 1985 Supplement to the 1967 Study, at 152, para. 3. In 1999, the UNSG reported to the UNGA on the roles and mandates within the Secretariat concerning the settlement negotiations. According to OLA, the same procedure applies to the settlement of other types of private law claims. See 2001 OLA

The 1985 Supplement to the 1967 Study explained the practice of including arbitration agreements in contracts, whilst waiver of jurisdictional immunity normally only occurred in situations involving third party liability insurance.[423] In fact, according to the 1995 Report, a standard clause normally incorporated in commercial agreements concluded by the UN typically stipulated that 'nothing in or relating to the contract shall be deemed a waiver' of its privileges and immunities.[424] The 1995 Report emphasized in this connection that the immunity 'does not adversely affect the commitment to arbitration since the Organization has agreed to be bound by the arbitration award as the final adjudication of the dispute, controversy or claim'.[425]

As to the *applicable law* in commercial contracts, according to the 1967 Study, 'express reference has rarely been made to a given system of municipal law. The standard practice was for the contract to contain no choice of law clause as such.'[426] According to the 1985 Supplement to the 1967 Study, 'the Organization relies on general principles of law in the interpretation of contracts concluded by it with private parties'.[427] More specifically,

> 'it has been the practice of the United Nations to interpret the contracts concluded by it on the basis of general principles of law, including international law, and upon the standards and practice established by its internal law, including its Financial Regulations, principles of delegation of authority under the United Nations Charter and the internal rules and procedures promulgated thereunder'.[428]

Otherwise put, at the time of the 1985 supplement to the 1967 Study:

> 'The most recent trend in United Nations contractual practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.'[429]

In 2008, the UNSG stated in the context of grievances by consultants and individual contractors:

> 'With respect to the law applicable to arbitral claims, the Organization reviews such claims in the light of the applicable contractual terms as well as general principles of international law. As an intergovernmental Organization with 192 Member States, the United Nations takes the view that its contracts and agreements should not be subject to the laws of any one jurisdiction, but should respect general principles of international law. Therefore, the General Conditions do not include a choice of

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Memorandum to the Controller, para. 9. The procedure for the settlement of contractual claims is set out in UN Doc. A/54/458 (1999).

[423] 1985 Supplement to the 1967 Study, at 156 and 159.

[424] 1995 Report, para. 6.

[425] 1995 Report. Para. 6.

[426] 1967 Study, para. 6. As to employment contracts, they form part 'of a growing system of international administrative law, independent of given systems of municipal law', at 208, para. 5.

[427] 1985 Supplement to the 1967 Study, at 153.

[428] Ibid., at 154-155 (emphasis added, fn. omitted).

[429] Ibid., at 155. As far as the 'terms of the contract' are concerned, these include any General Terms and Conditions of Contract annexed thereto, which form an integral part of the contract. See <un.org/Depts/ptd/about-us/conditions-contract> accessed 21 December 2021.

law provision but stipulate that the "decisions of the arbitral tribunal shall be based on general principles of international commercial law".'[430]

#### 3.3.2.2 Other disputes of a private law character

##### 3.3.2.2.1 Third-party claims arising outside peacekeeping[431]

*Tort claims arising from acts within the UN Headquarters district in New York*[432]

At the time of the 1967 Study, claims in respect of personal injuries incurred on premises of the UN (as well as those caused by UN-operated vehicles) were largely dealt with through insurance, and otherwise through negotiation between the UN and the injured party.[433]

The 1995 Report recalls that, in conjunction with the UN's decision to become self-insured, on 11 December 1986, the UNGA adopted resolution 41/210, entitled 'Limitation of damages in respect of acts occurring within the Headquarters district',[434] known as 'Headquarters regulation No. 4'. It was adopted pursuant to Section 8 of the Headquarters Agreement between the US and the UN,[435] according to which said regulation 'displaces any inconsistent federal, state or local law or regulation of the United States, to the extent of such inconsistency, which would otherwise have been applicable within the Headquarters district.'

Headquarters regulation No. 4 concerns

> 'any tort action or in respect of any tort claim by any person against the United Nations or against any person, including a corporation, acting on behalf of the United Nations, to the extent that the United Nations may be required to indemnify such person, whether such person is a member of its staff, an expert or a contractor, arising out of any act or omission, whether accidental or otherwise in the Headquarters District'.[436]

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[430] Administration of justice: further information requested by the General Assembly, Note by the Secretary-General, A/62/748, 14 March 2008, para. 22. See Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services (Rev. April 2012). <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021. According to the 1985 Supplement to the 1967 Study, at the time: 'More generally, the determination of the applicable law has been left to the arbitrators'. See 1985 Supplement to the 1967 Study, at 152.

[431] The heading in the 1995 Report is: 'Third-party claims for personal injury (arising outside the peace-keeping context)'. In fact, however, what follows is not limited to personal injury, but also concerns property-related claims.

[432] 1995 Report, paras. 10-13.

[433] 1967 Study, para. 44.

[434] UN Doc. A/41/210 (1986). See generally P. Szasz, 'The United Nations Legislates to Limit its Liability' (1987) 81 *American Journal of International Law* 739, at 739.

[435] Agreement between the United Nations and the United States of America regarding the headquarters of the United Nations, 26 June 1947, approved by the General Assembly of the United Nations, on 31 October 1947, with an exchange of Notes, dated 21 November 1947, 11 UNTS 11, ('US-UN headquarters agreement').

[436] UN Doc. A/41/210 (1986), para. 1 (chapeau). As to the term 'Headquarters district', the resolution incorporates by reference the definition in Section 1 of the Agreement between the Unites Nations and the United States of America Regarding the Headquarters of the United Nations, 26 June 1947. Ibid., para. 2(b).

Headquarters regulation No. 4 limits damages as follows. As to 'economic loss', compensation or damages relating to *death, injury or illness* is capped according to the

> 'limits prescribed for death, injury or illness in the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations applied *mutatis mutandis*'.[437]

The term 'economic loss' is defined as

> 'the reasonable cost of repairing or replacing property, and, in respect of death, injury or illness, any reasonable past, present and estimated future: (i) Health care expenses; (ii) Rehabilitation expenses; (iii) Loss of earnings; (iv) Loss of financial support; (v) Cost of homemaker services; (vi) Transportation expenses; (vii) Burial expenses; (viii) Legal expenses.'[438]

As to damaged, lost or destroyed *property*, the resolution provides that compensation is limited to 'reasonable amounts'. As to 'non-economic loss', compensation or damages is capped at $100,000.[439] Punitive and moral damages are excluded.[440]

As to the mechanisms for settling such disputes arising at UN headquarters, the UNSG's Bulletin 'resolution of tort claims' (ST/SGB/230 of 8 March 1998) sets forth dispute settlement arrangements.[441] Accordingly, in the case of claims that upon a preliminary review by the Office of Legal Affairs (OLA) can be settled by payment of a sum up to $5,000, OLA negotiates a settlement subject to approval from the Controller. Claims that are not so settled must be referred to a Tort Claims Board, composed of five members, four of which are from various UN offices and one of which is appointed by the SG. If the Board considers that the UN is liable, it recommends a maximum settlement amount to the Controller. If the Controller agrees, the Office of Legal Affairs then conducts negotiations with the claimant under the guidance of the Board.[442]

If such negotiations do not lead to settlement of the claim, the UN agrees to resort to arbitration in accordance with the UNCITRAL rules and conducted under the auspices of the American Arbitration Association, with New York as the place of arbitration.[443] In terms of applicable law, the arbitral tribunal is to take 'into account, as appropriate, Headquarters Regulation no. 4'.[444]

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[437] Ibid., para. 1(a)(i). The rules referred to are included in UN Doc. ST/SGB/103/Rev.1 (1980).
[438] UN Doc. A/41/210 (1986), para. 2(a).
[439] Ibid., para. 1(b).
[440] Ibid., para. 1I. The term 'non-economic losses' is not defined and neither is the term 'moral damages'.
[441] However, UN Doc. ST/SGB/230 (1989) was abolished pursuant to Section 1(a) of UN Doc. ST/SGB/2017/3 (2017). It is not known to the present author whether the regime contained in UN Doc. ST/SGB/230 (1989) was incorporated into another administrative instrument.
[442] UN Doc ST/SGB/230 (1989), para. 5.
[443] Ibid., para. 6.
[444] Ibid., para. 6.

As to tort claims arising from acts at other duty stations than New York, these are settled through negotiation and, where this fails, arbitration.[445]

*Claims 'arising from accidents involving vehicles operated by United Nations personnel for official purposes'*

The UN has taken out commercial liability insurance with worldwide coverage against third party claims arising in connection with accidents involving UN vehicles.[446] According to Rashkow: 'This system has worked effectively to insulate the Organization from such claims throughout the years.'[447] The insurance coverage for car accidents includes claims arising from such accidents during UN peacekeeping operations.[448]

Cases involving third party liability insurance represent the only instance 'in which the Organization might normally waive its immunity'.[449] This is because insurers would otherwise not be able to defend claims against the UN.[450] In practice, however, it may well be that insurers settle claims rather than

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[445] 1995 Report, para. 13.
[446] Ibid., para. 14.
[447] Rashkow (2015), at 80.
[448] 1995 Report, para. 17. The 1996 Report clarifies that if the insurance company does not have a representative on the ground, the claim is first reviewed by the local claims review board before it is forwarded to the insurance company. 1996 Report, para. 3, fn. 1. Rashkow explained that insurance coverage has also been put in place in connection with aircraft charter arrangements. Rashkow (2015), at 80.
[449] 1985 Supplement to the 1967 Study, at 159.
[450] According to the 1967 Study, para. 84: 'In 1949 a suit was commenced by a private individual against the United Nations for damages arising out of a motor car accident in New York in which a United Nations vehicle was involved. Under the terms of the insurance policy held by the United Nations, the insurers were ready to defend the action in court. Before they could do so, however, it was necessary for the United Nations to waive its immunity. In an internal memorandum the Office of Legal Affairs recommended that this should be done "for the purpose of allowing this particular suit to go to trial and that as a matter of policy it also be prepared to waive its immunity in any other case of a similar nature, subject to each such case being first reviewed by the Office of Legal Affairs to make sure that it has no complication such as might merit special treatment." The memorandum continued: "The question arises as to how this immunity may be waived. Resolution 23 (I), paragraph E, instructs the Secretary-Gener"l "to insure that the drivers of all official motor cars of the United Nations and all members of the staff who own or drive motor cars shall be properly insured against third party r"sk". Under this resolution the Secretary-General has clear authority to take whatever steps he may deem necessary to implement its terms. As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive the immunity of the United Nations for the purpose of permitting such suits to be brought. This memorandum is only intended to deal with the waiver of the Organizat'on's immunity in insurance cases. The question as to under what circumstances the United Nations might be prepared to waive its immunity in other cases is complex, but as this question has no bearing on the insurance cases which are in a class by themselves, the necessity for discussing the waiver of immunity as a whole does not arise at this time. In accordance with the conclusions reached in this memorandum, it is proposed that the Office of Legal Affairs should authorize the insurance carrier to defend this particular suit on behalf of the United Nations, thereby, of course, resulting in the United Nations waiving its immunity for this particular case and that the Office of Legal Affairs take similar action in all other insurance cases where it considers it would be within the spirit of the relevant General Assembly Resolution so to do. The same policy has been followed in subsequent cases.' Ibid. (emphasis added). The 1985 Supplement to the 1967 Study also refers to the 1949 OLA memorandum and state': 'The only situation in which the Organization might normally waive its immunity would be one involving third party liability insuran'e.' See 1985 Supplement to the 1967 Study, at 159.

going to Court so that there is no need for the UN to waive its immunity. In terms of applicable law, according to the 1995 Report, 'the claims are dealt with by the insurers . . . in accordance with the local law of the particular State concerned.'[451]

*Claims related to 'operational activities for development'*

As to the operational activities for development carried out by UNDP and UNICEF, commercial agreements with contractors (or lessors) include an arbitration clause as described above. Furthermore, according to the 1995 Report,

> 'in consideration of the fact that UNDP and UNICEF assistance to national programmes and projects (including entering into agreements with contractors for the provision of goods and services) are provided at the request of and for the benefit of the respective recipient State, it has been the practice of both UNDP and UNICEF to include in their agreements with recipient Governments a provision to shift liability to the latter in respect of third-party claims. In effect, the provision ensures that the Government concerned will be responsible for dealing with, and satisfying, third-party claims and will hold harmless the United Nations in respect of any such claims that may arise, except in cases of gross negligence or wilful misconduct on the part of the United Nations organ or its representatives.'[452]

3.3.2.2.2 Third party-claims arising in connection with UN peacekeeping operations

*Claim settlement mechanisms*

As to the settlement of claims of private parties that arise in the context of peacekeeping operations, other than the aforementioned claims in relation to contracts and car accidents, the 1996 Report set forth two procedures:[453] claim settlement by a standing claims commission, and by a local claims review board. In reality, however, the former does not exist, though its establishment is envisaged in status-of-forces agreements. Article 51 of the then model status-of-forces agreement provides as follows:[454]

> 'Except as provided in paragraph 53, any dispute or claim of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached within thirty days of appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either the Secretary-General or the Government, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the thirty-day period there described shall start as soon as there is a vacancy in the chairmanship. The commission

[451] 1995 Report, para. 14 (emphasis added). Likewise, 1996 Report, para. 3, fn. 1.
[452] 1995 Report, para. 22. The 1995 Report discusses this category under the heading 'claims related to United Nations peacekeeping operations', but such claims do not necessarily relate to peacekeeping. Indeed, it appears that the topic was erroneously placed under said heading, given also that the introductory paragraph (para. 9) of 'other disputes of a private law character' refers to claims related to development activities as a separate category.
[453] 1996 Report, paras. 20-37. See 1995 Report, paras. 16-20.
[454] UN Doc. A/45/594 (1990).

> shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of thirty days after the creation of a vacancy) and all decisions shall require approval of any two members. The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government permit an appeal to a tribunal established in accordance with paragraph 53.'[455]

As to standing claims commissions not being established, the 1997 Report speculated that this may be 'due to the lack of political interest on the part of host States, or because the claimants themselves may have found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory.'[456] Yet, as the 1997 Report put it,

> 'the standing claims commission envisaged in article 51 of the model agreement should be maintained, mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[457]

This notwithstanding, the reality is that to date local claims review boards are the only dispute settlement mechanisms,[458] in addition to negotiations, for third-party claims in the case of peacekeeping operations, other than contractual disputes.[459]

With respect to claims review boards,[460] the UN Secretary-General explained in the 1996 Report that

> 'it has been the practice, with respect to most past and present United Nations operations, for a local claims review board established in the mission on the basis of authority delegated by the Controller to examine, approve or recommend settlement of third-party claims for personal injury or death and for property loss or damage that are attributable to acts performed in connection with official duties by civilian or military members of the mission . . . When a claims review board approves a settlement amount within its delegated financial authority, the relevant administrative office of the peacekeeping mission - normally the claims unit - proceeds to offer such a settlement amount to the claimant. In

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[455] Art. 53 provides for an appeal against the commission's award to a tribunal to be established jointly by the Government and the Secretary-General in accordance with the same procedure for establishing the claims commission.

[456] 1997 Report, para. 8.

[457] Ibid., para. 10. The UNSG did, however, propose to remove the option of a further appeal to a tribunal as foreseen in Art. 53 of the model SOFA to avoid what may in fact be seen as a 'duplication of the proceedings in the standing claims commission.' Ibid., fn. 2. This was done in modern SOFAs, which are discussed below.

[458] According to the Schmalenbach: 'The settlement of disputes by the local claims review board has developed into a form of adjudication', which is 'by no means unusual'. See Schmalenbach (2006), at 42, referring to practice in connection with NATO operations.

[459] The UNSG's financial report for 2016-2017 refers to the settlement of third-party claims through arbitration, though without specifying the type of disputes in point: 'During the reporting period, the Office of Legal Affairs defended the Organization from claims totalling $91.3 million arising out of peacekeeping operations. As a result of the efforts of the Office, such claims were resolved, whether by arbitral award or by approved settlement, in the amount of $4.9 million, representing some 5.4 per cent of the amount originally claimed, and a reduction of 94.6 per cent in the actual liability borne by the Organization from that originally claimed.' UN Doc A/72/701 (2018), para. 27 (emphasis added).

[460] On the liability of the UN towards members of peacekeeping contingents, see Schmalenbach (2016), para. 58.

> the vast majority of cases, the offer is accepted by the claimant and payment is made against the execution of a release form.'[461]

The 1995 Report explained that the 'release form' entails the claimant's agreement 'to indemnify and hold harmless the United Nations, its officials and agents, from any and all claims and causes of action by third parties arising from or relating to the injuries or loss at issue.'[462]

Importantly, where the claimant does not accept the settlement proposed following proceedings before the local claims review board, in the absence of a standing claims commission, there is no further recourse.[463]

While the 'existing mechanisms and procedures for dealing with third-party claims are not inadequate per se', [464] according to the UNSG in the 1996 Report, problems were being encountered in the practice of claims review boards.[465] According to the 1996 Report: 'the increasing number and complexity of claims that have arisen from recent major United Nations operation have taxed the ability of the Organization to deal with claims efficiently and promptly'.[466] Indeed, there were 'exceptionally large numbers of claims from several major current or recent United Nations operations'.[467] The 1995 Report was more specific in stating that it

> 'is important to note that there has been a marked increase in the number of third-party claims that have been submitted to the United Nations Operation in Somalia (UNOSOM II) - the first Chapter VII peacekeeping operation in recent years established under United Nations command - and, in addition, that the nature of those claims has varied, to a certain extent, from those that have arisen within the context of traditional Chapter VI operations. The question of how to assess and handle the category of claims for personal injury or death and/or property loss or damage arising from "enforcement actions" of UNOSOM II (involving the use of force) is currently under study by the relevant Secretariat offices as this matter raises complex issues of public international law that must eventually be reviewed by the General Assembly.'[468]

As the 1997 Report summarized, with reference to the 1996 Report,

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[461] 1996 Report, paras. 22-23. The 1996 Report continues: 'When, however, the settlement amount recommended by a claims review board exceeds its authorized financial limit, the third-party claim is referred by the mission to Headquarters for review and approval. In those cases, the recommendations of the local claims review board are submitted to the Field Administration and Logistics Division of the Department of Peacekeeping Operations, which, in turn, forwards them to the Director of the Peacekeeping Financing Division of the Office of Programme Planning, Budget and Accounts for review and approval.' Ibid., para. 24.
[462] 1995 Report, para. 19.
[463] According to Schmalenbach, this is in contrast to NATO operations in Bosnia-Herzegovina and Kosovo. See Schmalenbach (2006), at 42.
[464] 1996 Report, para. 30.
[465] Ibid., paras. 31-33. See likewise 1997 Report, para. 9.
[466] 1996 Report, para. 26.
[467] Ibid., para. 27.
[468] 1995 Report, para. 20. The present author is not aware that such a study has been produced.

> 'in order to cope with the large numbers and amounts of claims a series of measures, such as provision of additional personnel, increasing the financial authority of local claims review boards or increasing their numbers in the field, were suggested.'[469]

In this respect, as the *first set* of 'modified procedures for the settlement of third-party claims' (the second such set is discussed below), the 1996 Report suggested changing the financial authority of the local claims review boards on the basis of the work by the 'Interdepartmental Working Group on Third-party Claims', which was ongoing at the time.[470]

In terms of the law applied by claims reviews boards, there has been a lack of clarity as the proceedings before those boards are not public.[471] Arguably, according to the 1996 Report, they apply international law.[472] However, the UN Legal Counsel wrote in 1966 concerning the UNEF claims review board:

> 'I believe that it would be correct to say that the local law was taken as a guideline in reaching an equitable settlement and it has not been necessary to reach definitive conclusions whether the lex loci or general principles of law are to be applied.'[473]

According to the 1997 Report, specifically with respect to personal injury:

> 'In the practice of peacekeeping operations, compensation payable to third-party claimants for personal injury is based on the types of injury and loss compensable under local law and the prevailing practice in the mission area, in particular, as well as on the past practice of the Organization.'[474]

According to Zwanenburg:

> 'One could argue that the applicable primary norms that apply to a peace operation in the host state are the national law of the host state, in particular its law of torts. Status of Forces Agreements concluded by the UN provide that UN peace operations shall respect all local laws and regulations.'[475]

However, Zwanenburg continued to state that

> 'it could also be argued that the obligation in SOFAs to respect the law of the host state must be understood as entailing a lesser obligation than "to apply" or "to comply with" and essentially obliges the staff to take duly into account local law.'[476]

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[469] 1997 Report, para. 9.
[470] 1996 Report, para. 31. The present author was unable to determine the outcome of the work by said working group.
[471] According to Zwanenburg: 'The legal framework in which local claims review boards operate is relatively unclear.' M. Zwanenburg, 'UN Peace Operations Between Independence and Accountability', (2008) 5 *International Organizations Law Review* 23, at 29.
[472] Ibid., at 29.
[473] Cited in ibid., at 29 (emphasis added).
[474] 1997 Report, para. 24 (emphasis added).
[475] Zwanenburg (2008), at 29. See, e.g., Para. 5 of the MINUSTAH SOFA.
[476] Zwanenburg (2008), at 30.

Ultimately, according to Schmalenbach:

> 'the claims review boards of the early missions leaned towards general principles of laws of tort in order to identify substantive rules governing the UN's liability. Beyond that, it is impossible to fathom the exact set of rules applied by the boards, and it remains unclear whether such a set of established rules exists at all. In this regard, however, it should be noted that the claims review boards' recommendations and their correspondence with the UN headquarters rarely, if at all, discussed the applicable rules and principles, nor even mentioned a survey into different domestic tort laws.'[477]

That said, as explained by Schmalenbach:

> 'With regard to the amount of damages to be paid by the UN, the claims review boards apply local laws and standards as it is common practice of member States in the course of their own military missions as well. That does not alter the fact that this practice is open to human rights concerns given that some local laws of operational areas of UN missions measure the amount of damage on the basis of sex, age, profession, and social status of the injured or killed person.'[478]

Against this backdrop, it was perhaps no surprise that the 1996 Report stated as one of the problems encountered in relation to claims review boards:

> 'The procedural problems encountered by local claims review boards have been exacerbated by the lack of clarity as to the scope of United Nations liability for property loss or damage, in general, and its liability for damage resulting from "operational necessity", in particular.'[479]

This lack of clarity was addressed through the UN Liability Rules. As discussed hereafter, following the 1996 Report and the 1997 Report, these were promulgated by the UNGA in resolution 52/247 (1998).

As a *second set* of 'modified procedures for the settlement of third-party claims', the 1996 Report referred to 'lump-sum agreements', whereby the UN negotiates a settlement with the government of nationality of the claimants.[480] There is only one known example in UN practice of such an arrangement: the ONUC settlements in the 1960s.[481] Such an arrangement has been understood to qualify as a mode

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[477] Schmalenbach (2016), para. 75 (emphasis added).
[478] Ibid., para. 76 (fns. omitted, emphasis added).
[479] 1996 Report, para. 29. When it comes to the UN's liability for combat-related activities, the 1996 Report stated: 'The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces. The scope of third-party liability of the Organization, however, will have to be determined in each case according to whether the act in question was in violation of any particular rule of international humanitarian law or the laws of wars. Thus, for example, the fact that damage was caused in itself may not necessarily engage the liability of the United Nations. Such liability would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".' Ibid., para. 16. See Observance by United Nations forces of international humanitarian law, United Nations, Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13 (1999), reprinted in: International Review of the Red Cross, vol. 81, No. 836, 1999, 812; ILM, vol. 38, 1999, 1656. See generally D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', (2000) 94 *American Journal of International Law* 406.
[480] 1996 Report, para. 34.
[481] Schmalenbach (2016), para. 26 and fn. 77.

of settlement under Section 29 of the General Convention. That results from the background of those arrangements. That is, in response to USSR opposition to one such arrangement (alleging aggression on the part of Belgium),[482] the UNSG stated that

> 'it has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.'[483]

The reference to the General Convention in the UNSG's statement may be taken to point to Section 29 thereof, taking into account that the lump sum agreement was to 'compensate individuals who have suffered damages for which the Organization was legally liable'. Thus, at the time, the lump sum agreement was arguably understood to qualify as a 'mode of settlement' under that provision.

Similarly, the 1996 Report proposed lump sum agreements as part of the 'modified procedures for the settlement of third-party claims' under Section 29.[484] The 1996 Report listed a number of advantages of such agreements: no lengthy and costly proceedings to handle individual claims; lump-sum agreements would be in full and final settlement of all claims by both the government and its nationals; any determination of the ownership of property can be left to the government; any claims from the UN against the Government can be deducted.[485] On the downside, according to the 1996 Report, lump sum agreements depends on the availability of a government and, where a government is available, its willingness to espouse the claim.[486] The 1996 Report did not contain any proposals on how to revive lump sum agreements. Neither the 1997 Report nor the UNGA in resolution 247 (1998) referred to such agreements.

*The UN Liability Rules*

As seen, the UNGA in resolution 52/247 (1998) promulgated the UN Liability Rules. More precisely, in that resolution, the UNGA:

- decided that the financial and temporal limitations set out in the 1997 Report shall apply;[487]

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[482] UN Doc. S/6597 (1965), reproduced in the 1967 Study, para. 55.
[483] Ibid., para. 56 (emphasis added).
[484] 1996 Report, para. 34.
[485] Ibid., para. 35.
[486] Ibid., para. 37.
[487] UN Doc. A/RES/52/247 (1998), para. 5.

- endorsed the view of the UNSG in the 1997 Report that no limitations on liability apply in the case of gross negligence or wilful misconduct;[488] and
- endorsed the view of the UNSG in the 1996 Report that the liability of the UN is not engaged in the case of operational necessity.[489]

Two general observations are called for at this point. First, the 1996 Report, the 1997 Report and A/RES/247 (1998) concern the non-contractual[490] liability of the UN towards 'third parties'. That term is not defined in these documents, but it clearly denotes private non-state parties. This results from the focus in the reports and resolution on the types of loss or injury most commonly encountered in the practice of UN operations, namely: non-consensual use and occupancy of premises; personal injury and property loss or damage arising from the ordinary operation of the force; and such injury and damage resulting from combat operations.[491] In this respect, an annex to the 1997 Report contains a 'consolidated claim form for third-party personal injury or death and/or property damage or loss', which clearly envisages the claimant to be a natural person.

Second, the 1996 Report, the 1997 Report and UNGA resolution 247 (1998) relate to 'peacekeeping operations'. That term is used broadly so as to cover different types of UN operations. According to the 1996 Report:

> 'In view of the fact that such damage has occurred both in traditional peacekeeping operations (the so-called "Chapter VI" operations) and in enforcement actions conducted under Chapter VII of the Charter, the approach of the present study to the question of United Nations third-party liability cuts across the peacekeeping/peace-enforcement divide. It distinguishes instead between the tortious liability of the Organization for damage caused in the ordinary operation of the force regardless of the type of operation and its liability for combat-related damage whether in the course of a Chapter VII operation or in a peacekeeping operation where force has been used in self-defence'.[492]

The following describes the UN Liability Rules and specifically the UN's liability for the ordinary operation of the force and for combat-related activities, and limitation of liability.

- The scope of liability for the ordinary operation of the force

Insofar as peacekeeping operations are carried out with the consent of the host state, it is for the host state to provide premises to the UN force, if necessary, by taking possession of privately-owned land

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[488] Ibid., para. 7.
[489] UN Doc. A/RES/52/247 (1998), para. 6.
[490] Schmalenbach (2016), para. 80 ('the liability resolution is geared towards tort claims so that contractual claims against the UN are excluded from its scope'.).
[491] 1996 Report, para. 3; 1997 Report, para. 2. See also ILC commentary to Art. 33 ARIO, para. (5) ('breaches committed by peacekeeping forces and affecting individuals'), fn. 242, which refers to UN Doc. A/RES/247 (1998).
[492] Ibid., para. 4.

and premises. This was reflected in Article 16 of the 1989 model status-of-forces agreement. In practice, however, host states rarely do so. This may be because there is no government, or none that exercises effective control over the area of operation. This leaves the UN to arrange for its own premises. According to the 1996 Report:

> 'It is only when the Government fails to provide the necessary premises and they could not be otherwise secured that the United Nations force may take temporary possession of land and premises - whether State or privately owned - as may be operationally necessary for the deployment of the force and the pursuance of its mandate.'[493]

The Secretary-General considers such occupancy to be lawful—i.e., one that is not tortious—though it does not 'exempt the Organization from liability to pay adequate compensation or fair rental for privately owned property'.[494] UNGA resolution 52/247 (1998) does not address the practice concerning the occupancy of privately-owned land and premises.

By contrast, in that resolution the UNGA did endorse the view of the UNSG in the 1996 Report that 'liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from "operational necessity" as described in paragraph 14 of the [1996 Report]'.[495] Paragraph 13 of the 1996 Report sets out the basic notion regarding operational necessity (fn. omitted):

> 'The liability of the Organization for property loss and damage caused by United Nations forces in the ordinary operation of the force is subject to the exception of "operational necessity", that is, where damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates.'

Paragraph 14 of the 1996 Report explained this further:

> 'It is, of course, difficult, if not impossible to determine in advance what would constitute "operational necessity" in any given situation. That decision must remain within the discretionary power of the force commander, who must attempt to strike a balance between the operational necessity of the force and the respect for private property. In deciding upon the operational necessity of any given measure the following must be taken into account:
>
> (a) There must be a good-faith conviction on the part of the force commander that an "operational necessity" exists;
>
> (b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;
>
> (c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action;

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[493] Ibid., para. 11.
[494] Ibid., para. 12. The UN retains the right to seek reimbursement from the Government of the host state.
[495] UN Doc. A/RES/52/247 (1998), para. 6.

> (d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.'

The ACABQ recalled with reference to the 1996 Report that 'the concept of "operational necessity" . . . has been formally presented in a document for the first time, although it has already been applied in the practice of Claim Review Boards as an exception from liability.'[496]

According to Schmalenbach, 'operational necessity' is historically rooted in the obligation of host states of UN operations to provide the UN for free with the necessary premises, if necessary by taking possession thereof.[497] Indeed, as seen above, the 1996 Report also uses the term 'operational' in connection with the non-consensual use of premises. However, as seen, in that case the UN is liable to pay compensation, while this is not the case under the rules of operational necessity endorsed by the UNGA.

- The scope of liability for combat-related activities

The 1996 Report is rather brief on the scope of the liability of the UN for combat-related activities. First, it states that the principles and rules of international humanitarian law determine its liability. Concretely, this means that 'liability would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".'[498]

Second, the 1996 Report asserts the following:

> 'The principle that in coordinated operations liability for combat-related damage in violation of international humanitarian law is vested in the entity in effective command and control of the operation or the specific action reflects a well-established principle of international responsibility.'[499]

Therefore, the liability of the UN for combat-related damage is engaged insofar as it exercises effective command and control, and where such damage is caused in breach of international humanitarian law and could not be justified on the basis of 'military necessity'. Notwithstanding this practice, however, UNGA resolution 52/247 (1998) addresses neither the UN's liability for violation of international humanitarian law, nor the exemption from liability regarding 'military necessity'.

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[496] UN Doc. A/51/491 (1996), para. 8. Cf. Schmalenbach (2016), para. 79 ('A pattern was begun with the UNEF mission where the claims review board refused to settle claims related to damages that were caused by actions considered necessary from an operational point of view.'). According to Schmalenbach, the OAS and NATO have similarly dismissed claims on grounds of 'operational necessity'. See Schmalenbach (2006), at 44.
[497] Schmalenbach (2006), at 44-45.
[498] 1996 Report, para. 16.
[499] Ibid., para. 19.

- Limitation of liability

As to third-party claims for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises*)* in connection with peacekeeping operations, the UNGA decided in UNGA resolution 52/247 (1998), paragraph 5, that the temporal and financial limitations set out in the 1997 Report, as reproduced in paragraphs 8-11 of the resolution, 'shall apply'. These limitations, which are to be included in SOFAs with host states of peacekeeping operations and in the terms of reference of local claims review boards,[500] are as follows:

- As to *temporal limitations* 'in relation to third-party claims . . . resulting from peacekeeping operations', they are laid down in paragraph 8 of UNGA resolution 247 (1998). Though that paragraph only refers to 'damage, injury, or loss', read in conjunction with paragraph 5 of the resolution and paragraph 13 of the 1997 Report, it seems that the temporal limitations apply to the full scope of third-party claims for personal injury, illness or death, and for property loss or damage (including the non-consensual use of premises). Claims must be submitted within six months of sustaining the damage, loss or injury, or six months after the claimant discovered it, and in any event within a year of the termination of the mandate of the operation. The UNSG has a discretionary power to accept, in exceptional circumstances, the consideration of claims submitted at a later date.[501]
- As to *financial limitations* in regard to 'third-party claims against the Organization for personal injury, illness or death resulting from peacekeeping operations', according to paragraph 9 of UNGA resolution 52/247 (1998):

> '(a) Compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses;
>
> (b) No compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;
>
> (c) No compensation shall be payable by the United Nations for homemaker services and other such damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the injury or loss itself;
>
> (d) The amount of compensation payable for injury, illness or death of any individual, including for the types of loss and expenses described in subparagraph (a) above, shall not exceed a maximum of 50,000 United States dollars, provided, however, that within such limitation the actual amount is to be determined by reference to local compensation standards;

[500] UN Doc. A/RES/52/247 (1998), paras. 12 and 13.
[501] 1997 Report, para. 20; UN Doc. A/RES/52/247 (2008), para. 8. Such exceptional circumstances would arise where damage occurs during the wind-up period of an operation. 1997 Report, para. 20.

(e) In exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50,000 dollars provided for in subparagraph (d) above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation.'

As discussed further below, it follows from the 1997 Report that the maximum ceiling amount is drawn from the maximum amounts that apply for military or police observers and members of UN commissions.[502] As to the term 'economic loss', it is taken from Headquarters regulation No. 4, criteria developed by the UN Compensation Commission, and practice of peacekeeping operations.[503]

- As to *financial limitations in regard to* 'third-party claims against the Organization for property loss or damage resulting from peacekeeping operations', according to paragraph 10 of A/RES/247 (1998):

'(a) Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team; or (ii) not exceed a maximum ceiling amount payable per square metre or per hectare as established by the United Nations pre-mission technical survey team on the basis of available relevant information; the Secretary-General will decide on the appropriate method for calculating compensation payable for non-consensual use of premises at the conclusion of the pre-mission technical survey;

(b) Compensation for loss or damage to premises shall either: (i) be calculated on the basis of the equivalent of a number of months of the rental value, or a fixed percentage of the rental amount payable for the period of United Nations occupancy; or (ii) be set at a fixed percentage of the cost of repair; the Secretary-General will decide on the appropriate method for calculating compensation payable for loss or damage to premises at the conclusion of the pre-mission technical survey;

(c) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the premises'.

- As to *loss or damage to personal property of third parties,* according to paragraph 11 of UNGA resolution 52/247 (1998):

'(a) Compensation for loss or damage to personal property of third parties arising from the activities of the operation or in connection with the performance of official duties by its members shall cover the reasonable costs of repair or replacement;

(b) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the personal property.'

[502] 1997 Report, paras. 27-29.
[503] Ibid., para. 25.

- Lastly, according to paragraph 7 of UNGA resolution 52/247 (1998), as to 'third-party claims resulting from gross negligence or wilful misconduct of the personnel provided by troop-contributing States for peacekeeping operations', the UNGA endorsed the view of the UNSG in the 1997 Report that no limitations on liability apply.

By contrast, the UNGA did not endorse a further proposal in the 1996 Report to limit the liability of the UN through 'counter-claims' and 'off-sets'.[504] These are claims by the UN against the claimant that relate to the same or a different situation, respectively. Such claims by the UN against an individual are rare, whereas they frequently arise against the host state of a UN operation regarding payments made by the UN that were not legally required. Thus, counter-claims and off-sets will come into play in the case of diplomatic protection, of which the ONUC settlements are the only known example in the case of the UN. Indeed, in that case, the UN off-sets amounts in settlement of several financial matters outstanding between the UN and Belgium.[505]

#### 3.3.2.3 'Other claims'

In addition to the categories of 'Disputes arising out of commercial agreements' and 'Other disputes of a private law character', the 1995 Report contains a chapter entitled 'Other claims'. Such claims do *not* qualify for dispute settlement under Section 29 of the General Convention. According to the 1995 Report:

> 'The Organization does not agree to engage in litigation or arbitration with the numerous third parties that submit claims (often seeking substantial monetary compensation) based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters. Such claims, in many instances, consist of rambling statements denouncing the policies of the Organization and alleging that specific actions of the General Assembly or the Security Council have caused the claimant to sustain financial losses. The Secretary-General considers that it would be inappropriate to utilize public funds to submit to any form of litigation with the claimants to address such issues.'[506]

Furthermore, according to the 1995 Report:

> 'The other major category of claims of a private law nature that have been received to date by the Organization have been from disappointed job applicants, i.e. individuals who are aggrieved that they were not selected for a United Nations position. Such claims typically allege the occurrence of prejudice or some other impropriety in the selection process. The Organization's policy is not to enter into any litigation or arbitration with such individuals but to reply in a reasoned manner to such individuals with a copy provided to their Permanent Mission if it has become involved in the matter. Furthermore, appointments, other than short-term appointments, are examined by joint staff management appointment machinery (the Appointment and Promotion Board and its subsidiary bodies) and the Secretary-General considers that this procedure ensures fairness in selection. Again, the Secretary-General considers that it would be inappropriate to use public funds to submit to any

[504] 1996 Report, para. 41.
[505] 1967 Study, para. 56.
[506] 1995 Report, para. 23 (emphasis added).

> form of litigation with the many disappointed job applicants world wide who wish to contest their non-selection.'[507]

There are therefore two types of claims under the heading of 'other claims', neither of which qualifies for dispute settlement under Section 29: claims based on 'political or policy-related grievances', and claims from disappointed job applicants. As will be seen in the next section, the exclusion of these types of claims from dispute settlement raises questions in light of the key criterion under Section 29, that is, the 'private law character' of disputes. Do disputes concerning claims based on 'political or policy-related grievances' necessarily lack such a character? And, if claims by disappointed job applicants are of a private law *nature*, as per the above-quoted passage from the 1995 Report, would the disputes to which they give rise lack a private law *character* under Section 29?

The chapter's title 'Other claims' may be taken to suggest that the chapter covers *all* claims other than the ones specifically mentioned in the 1995 Report, and that none of these other claims qualify for dispute settlement under Section 29 of the General Convention. That is, *any* other claim (i) is either from a disappointed job applicant, or one that is based on 'political or policy-related grievances', and (ii) is excluded from the scope of Section 29. However, that does not necessarily seem to be the intention behind the 1995 Report. That results from the report's discussion of the implementation of Section 29(b), concerning disputes involving UN officials.[508] According to the 1995 Report:

> '30. At the outset, it ought be noted that if a claim is against an official for acts performed in the course of his or her official functions, the Organization will inform the claimant that the action is against the Organization itself and then the normal procedures for dispute resolution set out in paragraphs 3 to 8 above should apply. It is only if an act relates to private activities of the official that the issue of waiver is examined.
>
> 31. Should there be a dispute not dealt with in accordance with the preceding paragraph involving any official of the Organization who by reason of his official position enjoys immunity, if immunity has not been waived, the United Nations, in accordance with Article VIII, section 29(b) of the General Convention, is expected to make provisions for appropriate modes of settlement of such a dispute. The General Convention itself, however, does not provide for a specific mechanism for the settlement of disputes of this character'.[509]

The reference in paragraph 30 of the 1995 Report to 'the normal procedures for dispute resolution set out in paragraphs 3 to 8 above' is ambiguous. Paragraphs 3 to 8 of the 1995 Report concern the

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[507] Ibid., para. 24 (emphasis added). Of note, the 'Appointment and Promotion Board' has now been replaced by 'central review bodies' (UN Doc. ST/SGB/2011/7 (2011)). These bodies encompass (field) Central Review Boards, (field) Central Review Committees and (field) Central Review Panels (UN Doc ST/SGB/2011/7, (2011), Section 1). The involvement of each respective body depends on the level of the staff to be selected. These bodies, which are composed of UN staff members (UN Doc. ST/SGB/2011/7 (2011), Section 3) are tasked to 'advise the Secretary-General on all proposed appointments of one year or longer' (UN Doc. ST/SGB/2011/7 (2011), Subsection 4.3).

[508] The UN 'shall make provisions for appropriate modes of settlement of: . . . (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'

[509] 1995 Report, paras. 30-31 (emphasis added).

settlement of contractual disputes through negotiation and, as necessary, arbitration. Is the reference in paragraph 30 of the 1995 Report to be understood to refer to contractual disputes only? The types of disputes under Section 29(b) may well concern non-contractual, that is, tortious, liability. It may be, therefore, that said reference is rather to be understood as negotiation and arbitration being the 'normal procedures' for dispute resolution under Section 29(b) irrespective of the type of dispute at issue. That is, except disputes concerning claims based on 'political or policy-related grievances', or claims from disappointed job applicants, which the 1995 Report explicitly excludes.

That reading of the 1995 Report would be supported by the UN's position in the advisory proceedings before the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The matter will be introduced here to complete the overview of UN practice in connection with Section 29 of the General Convention.

The advisory proceedings arose out of defamation claims against a Special Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers, Mr Cumaraswamy, before the Malaysian courts. In the November 1995 issue of International Commercial Litigation entitled 'Malaysian Justice on Trial', Mr Cumaraswamy was quoted as saying in regard to a specific case

> 'that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had not finished his investigation.
>
> Mr. Cumaraswamy is also quoted as having said:
>
> > "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice."
>
> He added: "But I do not want any of the people involved to think 1 have made up my mind." He also said:
>
> > "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."'[510]

This led two commercial firms to sue Mr Cumaraswamy for slander and libel (collectively referred to as 'defamation').[511] The Malaysian courts entertained the claims notwithstanding Mr Cumaraswamy's immunity as a UN special rapporteur under the General Convention. The UN Economic and Social Council then submitted a request for an advisory opinion to the ICJ as to whether Mr Cumaraswamy

[510] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), at 71, para. 13.
[511] Ibid., para. 14.

was entitled to immunity from jurisdiction before the Malaysian courts under Section 22 of the General Convention.[512] The ICJ held this to be the case, opining

> 'that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.'[513]

As to the defamation claims against the UN—which were not as such at issue in the case before the ICJ—in his written submissions on behalf of the UNSG, the UN Legal Counsel submitted to the Court:

> 'Article VIII, Section 29(a) deals with disputes of a private law character to which the United Nations is a party. It is clear that a claim of libel and/or slander constitutes a dispute of a private law character. Moreover, once the United Nations maintained that the words giving rise to the lawsuits were spoken by the [*sic*] Dato' Param Cumaraswamy in his official capacity and within the course of the performance of the mission entrusted to him by the United Nations Commission on Human Rights, the United Nations had an obligation to protect the Special Rapporteur and to ensure respect for his immunity from legal process. As this immunity was at the heart of the litigation and as the United Nations had formally ratified the words of its expert on mission, the plaintiffs could have pursued the matter with the United Nations as the party to the dispute. Article VIII, Section 29(a) of the Convention is therefore applicable to the dispute.'[514]

At the hearing before the Court, the UN Legal Counsel similarly stated: 'The United Nations settles most claims through negotiation, referring those claims that cannot be settled to arbitration under the UNCITRAL Arbitration Rules or, sometimes, through conciliation under the UNCITRAL Conciliation Rules.'[515]

More specifically, according to the UN Legal Counsel:

> 'By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this

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[512] To be precise, the request concerned 'the legal question of the applicability of Art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of D'to' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, contained in document E/1998/94, and on the legal obligations of Malaysia in this case.' *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), at 64.

[513] Ibid., at 86, para. 56 (emphasis in original).

[514] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Written Statement Submitted on behalf of the Secretary-General of the United Nations, 30 October 1998 <icj-cij.org/en/case/100/written-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[515] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12.

> is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules'[516]

This resonates to some extent in the ICJ's advisory opinion, according to which

> 'the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.
>
> The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.'[517]

Therefore, the UN accepted that these defamation claims would come within the purview of Section 29 of the General Convention.[518] This supports the reading of the 1995 Report that it does not categorically exclude *all* 'other claims', that is, claims other than those specifically mentioned in the 1995 Report.

The 1995 Report, coupled with the UN Legal Counsel's statement in the proceedings in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, suggest that for the UN, UNCITRAL conciliation and arbitration are the 'normal procedures' (or default procedures), for dispute resolution under Section 29 of the General Convention.

### 3.3.3 From Srebrenica to Haiti: introduction to case studies

The key criterion to determine the application of Section 29 of the General Convention is whether disputes have a 'private law character'. That criterion, as interpreted and applied by the UN, was key in connection with its alleged third-party liability in cases arising out of three distinct events: the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic. The case studies concerning these events and the resulting legal cases, having been briefly set out in chapter 1, will now be introduced more extensively to complete the overview of the UN's practice under Section 29(a) of the General Convention.

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[516] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[517] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 66.

[518] Irrespective of whether the claims underlying *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* were actually the subject of dispute settlement under Section 29 of the General Convention.

#### 3.3.3.1 The Srebrenica genocide

Following the initiation of the case *Mothers of Srebrenica et al. v. State of the Netherlands and the United Nations* before the Dutch courts in 2007, several years of litigation followed concerning the UN's entitlement to immunity from jurisdiction. The Dutch courts upheld the immunity in all instances. The claimants then sued the Netherlands before the ECtHR alleging that the UN's immunity violated the forum state's obligations under, *inter alia*, Article 6 of the ECHR. The ECtHR declared the application inadmissible on 11 June 2013.[519]

The claimants alleged that, as UNPROFOR's 'Dutchbat' had proved unable to protect the 'safe area' of Srebrenica, the respondents are partly liable for the fall of Srebrenica and the subsequent genocide. More specifically, the Dutch Supreme Court summarized the claim as follows:

> '[The claimants] held the State (and Dutchbat, the Dutch unit under UN command) and the UN partly responsible for the fall in 1995 of the Srebrenica enclave in Eastern Bosnia, where Dutchbat was based and which had been designated a 'Safe Area' under the protection of the UN peacekeeping force UNPROFOR by Security Council resolutions, and for the consequences of its fall, in particular the genocide committed subsequently which cost the lives of at least 8,000 people, including relatives of appellants 2-11 in the cassation proceedings. They sought, in brief, a declaratory judgment to the effect that the State and the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave and other obligations, including treaty obligations, to which they were subject, in addition to (advances on) payments in compensation, to be determined by the court in follow-up proceedings.'[520]

The ECtHR understood the claim before the Dutch courts to be

> 'that the State of the Netherlands (responsible for Dutchbat) and the United Nations (which bore overall responsibility for UNPROFOR), despite earlier promises and despite their awareness of the imminence of an attack by the VRS, had failed to act appropriately and effectively to defend the Srebrenica "safe area" and, after the enclave had fallen to the VRS, to protect the non-combatants present. They therefore bore responsibility for the maltreatment of members of the civilian population, the rape and (in some cases) murder of women, the mass murder of men, and genocide. The applicants based their position both on Netherlands civil law and on international law . . .
>
> The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (*onrechtmatige daad*) against them by sending insufficiently armed, poorly

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[519] The present author has discussed the judgments of the Dutch courts and the decision of the ECtHR in the following publications: T. Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 279; T. Henquet, 'The Supreme Court of the Netherlands: Mothers of Srebrenica Association et al. v. the Netherlands', (2012) 51 ILM 1322; T. Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts', (2010) 57 *Netherlands International Law Review* 267.

[520] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.2.1.

> trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.'[521]

The case against the UN was terminated as a result of its jurisdictional immunity, which was upheld by the Dutch courts in three instances. As discussed below, the case against the State of the Netherlands did proceed and resulted in the Supreme Court finding the State liable to a limited extent.

As to the implementation of Section 29 of the General Convention, the Supreme Court concluded that the UN 'has not made provision for any appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party'.[522] According to the court, this was '[c]ontrary to the provisions of article VIII, § 29, opening words and (a) of the Convention.'[523] This implies that, according to the Supreme Court, the dispute had a private law character. As to the ECtHR, in declaring the case against the Netherlands inadmissible (on grounds discussed below), it left unresolved whether Section 29 of the General Convention required the UN to arrange for dispute settlement.[524]

#### 3.3.3.2 The Kosovo lead poisoning

The claims by former residents of UNMIK-administered camps for internally displaced persons in Kosovo, set up since 1999, concerned alleged damages due to, amongst others, lead contamination at the camps.[525] On 10 February 2006,[526] the claims were submitted under, what Administrative Direction No. 2009/1 of the Special Representative of the UN Secretary-General referred to as, the 'UN Third Party Claims Process'.[527] According to Section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo of 18 August 2000:

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[521] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 54-55.
[522] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3. Under Para. 55 of the UNPROFOR SOFA, that agreement remained in force 'until the departure of the final element of UNPROFOR from Bosnia and Herzegovina' with the exception of the third-party dispute settlement clause (Art. 48), which 'shall remain in force until all claims have been settled that arose prior to the termination of the present Agreement and were submitted prior to or within three months of such termination.' It is not known to the present author whether, at the time, the claims were submitted under the third-party dispute settlement clause.
[523] Ibid., para. 3.3.3.
[524] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case').
[525] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 2; *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 37.
[526] *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 5.
[527] Section 2.2 of Administrative Direction No. 2009/1 of the Special Representative of the Secretary-General, dated 17 October 2009, cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 20.

> 'Third Party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from "operational necessity" of either presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.'[528]

On 4 July 2008, whilst the claims were pending under the Third Party Claims Process, the complainants submitted parallel claims to the Human Rights Advisory Panel ('HRAP').[529] They claimed

> 'to have suffered lead poisoning and other health problems on account of the soil contamination in the camp sites due to the proximity of the camps to the Trepca smelter and mining complex and/or on account of the generally poor hygiene and living conditions in the camps. The Trepca smelter extracted metals, including lead, from the products of nearby mines from the 1930s until 1999. It currently operates on a limited basis.'[530]

Asserting a broad scope of human rights violations,[531] the complainants contended that UNMIK

> 'has a particular duty of care to [the claimants] as a vulnerable displaced minority population subjected to historical discrimination and marginalization. This duty of care requires [UNMIK] to take positive measures to protect the complainants and to desist from any actions that would violate the complainants' human rights.'[532]

On 5 June 2009, the HRAP declared the complaint partially admissible.[533] However, pending the HRAP's consideration of the case on the merits, on 17 October 2009, the SRSG issued Administrative Direction No. 2009/1. According to Section 2.2 thereof:

> 'Any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure

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[528] Cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 24. According to the HRAP: 'The UN Third Party Claims Process referred to in Section 2.2 forms the object of General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations" (A/RES/52/247).' Ibid., para. 23.

[529] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 18.

[530] Ibid., para. 2.

[531] According to *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 16: 'The complainants contend that their human rights have been violated under certain provisions of the European Convention on Human Rights (ECHR), namely: Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), Article 6 § 1 (right to a fair hearing), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 14 (prohibition against discrimination). Breaches of the following human rights instruments are also alleged by the complainants: the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).'

[532] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 14.

[533] Ibid., Decision of 5 June 2009, HRAP, Case No. 26/08. Insofar as the complaint was declared inadmissible, this was, amongst others, on grounds of lack of personal jurisdiction (see Decision, chapter IV(A)(1)). Of further note, On 20 February 2006, the European Roma Rights Centre filed an application with the European Court of Human Rights on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. The Court declared the application inadmissible for lack of jurisdiction. See also paragraph 2.4.2.1.1.

> under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of (Regulation No. 2006/12).'[534]

As third-party proceedings were pending, the HRAP held:

> 'The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.'[535]

In this respect, the Panel considered:

> 'The substantive complaints declared admissible by the Panel in its 5 June 2009 decision on admissibility are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall *prima facie* within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.'[536]

This notwithstanding, over a year later, the UN Third Party Claims Process ended with the claims being rejected. According to HRAP:

> 'On 25 July 2011, the UN Under-Secretary-General for Legal Affairs informed the complainants of her decision to declare the claims non-receivable. She stated that under Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations . . . the UN Third Party Claims Process provided for compensation only with respect to "claims of a private law character", whereas the complainants' claims concerned "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo".'[537]

HRAP proceedings then resumed. In a decision dated 26 February 2016,[538] the panel granted the complaints. If found a significant number of human rights violations and made (non-binding) recommendations for remedial action.[539] However, according to the HRAPs final report,[540] the HRAP's recommendations remained to be implemented.

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[534] Cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 20.
[535] Ibid., para. 38.
[536] Ibid., para. 40. As to complaints regarding procedural human rights violations, though they were not part of the third-party process, they were deemed to be interlinked with the substantive complaints (which were part of that process) such that the complaint was ruled inadmissible in its entirety. Ibid, paras. 42-43.
[537] *N.M. and Others v. UNMIK*, Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19. The HRAP decision refers to similar claims by a large group of claimants, which received the same response from the UN. Ibid., para. 20-21.
[538] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016).
[539] See subsection 2.4.1 and paragraph 2.4.2.1.1 of this study.
[540] Nowicki, Chinkin and Tulkens (2017), para. 64.

#### 3.3.3.3 The Haiti cholera epidemic

In 2011, over 5,000 victims of the cholera epidemic, which left thousands dead and several hundred thousand persons sick, held the UN liable on the basis that UN peacekeepers from Nepal brought the disease to Haiti.

After initial approaches to the UN had failed, in what has been referred to as a 'watershed moment' regarding the accountability of the UN,[541] in 2013, the petitioners in *Georges et al.* filed a class action lawsuit against the UN (as well as UN officials) in the US District Court for the Southern District of New York. The case, like related ones, was dismissed for lack of jurisdiction on account of the UN's jurisdictional immunity.[542]

The introductory paragraphs of the Legal Complaint in *Georges et al.* speak for themselves:

> '1. This class action arises out of an epidemic of cholera that broke out in Haiti in October 2010. At the time of this filing, the epidemic has killed at least 8,300 people and sickened at least 679,000 others in Haiti, and has resulted in additional cholera cases in at least the United States, the Dominican Republic, and Cuba.
>
> 2. The outbreak resulted from the negligent, reckless, and tortious conduct of the Defendants: the United Nations ("UN"); its subsidiary, the United Nations Stabilization Mission in Haiti ("MINUSTAH"); and at least two of their officers.
>
> 3. Prior to Defendants' introduction of the cholera bacterium to Haiti in October 2010, Haiti had no reported cases of cholera.
>
> 4. Defendants have long known that Haiti's weak water and sanitation infrastructure created a heightened vulnerability to waterborne disease but failed to exercise due care to prevent the devastating outbreak of such disease.
>
> 5. In or around October 2010, Defendants knowingly disregarded the high risk of transmitting cholera to Haiti when, in the ordinary course of business, they deployed personnel from Nepal to Haiti, knowing that Nepal was a country in which cholera is endemic and where a surge in infections had just been reported. Defendants failed to exercise reasonable care to test or screen the personnel prior to deployment, allowing them to carry into Haiti a strain of cholera that a UN-appointed panel of experts and other independent scientific experts have since determined is the source of Haiti's present cholera epidemic.

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[541] Boon and Mégret (2019), at 1.

[542] *Delama Georges, et al. v. United Nations*, *et al.*, No. 13-cv-7146 (JPO) (S.D.N.Y., 9 January 2015). Documents pertaining to this litigation are available at <ijdh.org/our_works/case-1/> accessed 21 December 2021. Similar suits were filed before New York courts: *Laventure et al.* v. *UN* and *Petit Homme Jean-Robert et. al.* v. *UN* <opiniojuris.org/2014/03/13/developments-haiti-cholera-claims-un-us-support-uns-absolute-immunity-two-new-suits-filed> accessed 21 December 2021. The UN's immunity from jurisdiction was upheld in each case. For case law references, see International Human Rights Clinic, Harvard Law School *et al.,* 'Violations of the Right to Effective Remedy: The UN's Responsibility for Cholera in Haiti. Joint Submission to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (undated) <hrp.law.harvard.edu/wp-content/uploads/2020/02/HLS-IHRC-IJDH-BAI-Submission-to-Special-Procedures_Cholera.pdf> accessed 21 December 2021, at 15, fn. 83.

> 6. Defendants stationed their personnel on a base on the banks of the Meille Tributary, which flows into the Artibonite River, Haiti's longest river and primary watersource for tens of thousands. There, Defendants discharged raw sewage from poor pipe connections, haphazard piping, and releases of water contaminated with human waste. They also regularly disposed of untreated human waste in unprotected, open-air pits outside the base where it flowed into the Meille Tributary. Defendants' sanitation facilities and disposal pits overflowed in heavy rain, emitted noxious odors, and exposed the local community to raw sewage.
>
> 7. Defendants knew or should have known that their release of raw sewage into Haiti's primary water source created a high risk of contamination, but they did not take any steps prior to the outbreak to mitigate the dangers or to prevent highly foreseeable harm to the local population, environment and any visitors to the area.
>
> 8. In or around October 2010, human waste from the base seeped into and contaminated the Meille Tributary with cholera. From the Meille Tributary, the contaminated waters flowed into the Artibonite River, resulting in explosive and massive outbreaks of cholera along the river and eventually throughout the entire country.
>
> 9. Defendants recklessly failed to take remedial steps necessary to contain the outbreak of cholera, willfully delayed investigation into the outbreak, and obscured discovery of the outbreak's source. As a result of Defendants' tortious acts and omissions, cholera continues to present an ongoing grave threat to water quality, public health and safety in Haiti, resulting in additional injuries and deaths.
>
> 10. The Named Plaintiffs and the members of the proposed Class they seek to represent have been proximately harmed through Defendants' acts and omissions. These plaintiffs, who are residents in Haiti and the United States, have been or will be sickened, or have family members who have died or will die, as a direct result of the cholera introduced to Haiti by Defendants.'[543]

In terms of the facts, a 2013 report by Yale University stated:

> 'In the years following the outbreak, the U.N. has denied responsibility for the epidemic. The U.N. has repeatedly relied on a 2011 study by a U.N. Independent Panel of Experts, which concluded that at the time there was no clear scientific consensus regarding the cause of the epidemic. However, these experts have since revised their initial conclusions. In a recent statement, they unequivocally stated that new scientific evidence does point to MINUSTAH troops as the cause of the outbreak.'[544]

The Yale University report concluded: 'Scientific study of the origins of the cholera epidemic in Haiti overwhelmingly demonstrates that U.N. peacekeeping troops from Nepal introduced the disease into the country.'[545]

The claimants in *Georges et al.* had initially approached the UN, sending a 'petition for relief' dated 3 November 2011 to the Claims Unit of MINUSTAH (with a copy to the office of the UNSG). The petition requested the UN, amongst others, to establish a standing claims commission as per the MINUSTAH SOFA and to pay compensation to the petitioners.[546] In a letter dated 21 February 2013, the UN Legal

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[543] *Georges et al. v. United Nations et al.*, United States District Court, Southern District of New York, 9 October 2013, Complaint, paras. 1-10.
[544] Transnational Development Clinic, Yale Law School *et al*., 'Peacekeeping Without Accountability' (2013), at 3.
[545] Ibid., at 25.
[546] Petition for Relief, 3 November 2011, paras. 102-114.

Counsel acknowledged the 'terrible suffering caused by the Cholera outbreak' and provided an overview of the UN's efforts to fight the epidemic.[547] The letter went on, however, to assert that 'consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention]'.[548]

According to a report by the UN Special rapporteur on Extreme Poverty and Human rights:

> 'The claimants challenged the non-receivability finding and requested either mediation or a meeting to discuss the matter. In July 2013, the Under-Secretary-General wasted no words in dismissing such requests: "In relation to your request for the engagement of a mediator, there is no basis for such engagement in connection with claims that are not receivable. As these claims are not receivable, I do not consider it necessary to meet and further discuss this matter."'[549]

According to Higgins et al., with reference to the same July 2013 communication from the Under-Secretary-General: 'As a result of the view that the claims were not receivable, the UN also declined a request for a standing claims commission'.[550]

Eventually, on 1 December 2016:

> 'United Nations Secretary-General Ban Ki-moon today apologized to the people of Haiti, expressing deep regret for the loss of life and suffering caused by the country's cholera epidemic, and outlined the way forward including immediate steps to stem the outbreak and long-term support for those affected – while also highlighting the need for adequate funding of the proposal.'[551]

This involved a proposed $400 million response package.[552] However, the UN did not admit liability or accept dispute settlement under Section 29 of the General Convention.

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The cases arising out of the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic have in common that dispute settlement under Section 29 of the General Convention did not take place. At least in the last two cases, this is because the UN determined that the respective disputes

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[547] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, dated 21 February 2013 <opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> accessed 21 December 2021.
[548] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, dated 21 February 2013, at 2.
[549] UN Doc. A/71/367 (2016), para. 29 (fn. omitted).
[550] Higgins et al. (2017), at 709-710, fn. 39.
[551] <news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and> accessed 21 December 2021.
[552] Reportedly, little funding has been received. See UN inaction denies justice for Haiti cholera victims, say UN experts, 30 April 2020, <ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25851&LangID=E> accessed 21 December 2021.

lacked a 'private law character'. That determination is therefore significant, both in terms of substance and process. That will be addressed further as part of the discussion in the next section.

### 3.4 Discussion: 'a complete remedy system to private parties'?

As seen, the 1995 Report concluded that the procedures and mechanisms set forth in the report

> 'in the view of the Secretary-General, implement the obligation to provide an appropriate means of dispute resolution in respect of disputes arising out of contracts or other disputes of a private law character or involving any official of the United Nations who by reason of his official position enjoys immunity that has not been waived by the Secretary-General.'[553]

In a similar vein, the UN Legal Counsel stated in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory proceedings before the ICJ in 1998:

> 'Section 29 of the Convention requires the United Nations to make provision for appropriate modes of settlement of private law disputes in two situations which are intended to provide a complete remedy system to private parties who allege to have been harmed by actions of the United Nations or by its agents acting within the scope of their mandate.'[554]

In his statement before the ICJ, the UN Legal Counsel proceeded to elaborate on the UN's implementation of this purported system.

This section interprets Section 29 of the General Convention and assesses whether, in light of the international organisation law framework governing third-party remedies and against the broader backdrop of the rule of law, its implementation by the UN amounts to the purported 'complete remedy system to private parties'. It begins by making general observations regarding Section 29 of the General Convention (subsection 3.4.1). It then considers, respectively, the elements 'private law character' (subsection 3.4.2) and 'appropriate modes of settlement' (subsection 3.4.3). Each subsection is followed by interim conclusions.

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[553] 1995 Report, para. 33.

[554] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 6 (emphasis added) under the heading 'The remedy regime [*sic*] envisaged by the Convention and implemented by the United Nations'. In this respect, Rashkow notes that 'the Organization has consistently maintained over the years that its immunity is not a shield from responsibility to respond to credible claims of a private law character and that the Organization is obligated to make a dispute resolution modality available for such claims under Section 29 of the General Convention. See, e.g., United Nations Juridical Yearbook (1980) at 227–242.' Rashkow (2015), at 84, fn. 22.

The present section is particularly lengthy and detailed. This is due to the central importance of Section 29(a) of the General Convention to the present study, and the need to set the scene properly for the chapters that follow.

### 3.4.1 General observations regarding Section 29 of the General Convention

The general observations regarding Section 29 of the General Convention in this subsection concern: the reference in the chapeau to 'disputes . . . to which the UN is a party' (subsubsection 3.4.1.1); the UN's liability and international responsibility in connection with the provision (subsubsection 3.4.1.2); and who decides whether a dispute has a 'private law character' and whether modes of settlement qualify as 'appropriate' (subsubsection 3.4.1.3).

#### 3.4.1.1 'Disputes . . . to which the UN is a party'

Section 29 concerns 'disputes . . . to which the United Nations is a party'.[555] As to the meaning of 'dispute', Black's Law Dictionary defines the term as 'a conflict or controversy, esp. one that has given rise to a particular lawsuit'.[556] In terms of international law, the PCIJ in *Mavrommatis Palestine Concessions* stated: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[557] In an early advisory opinion, the ICJ held:

> 'There has . . . arisen a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.'[558]

As to the term 'United Nations' in Section 29,[559] it has the same meaning as under Article 105 of the UN Charter, on which the General Convention is based. Accordingly, 'United Nations' refers to both

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[555] According to Schmalenbach, 'the existence of a reasonably purposeful dispute between the UN and a claimant who has the exclusive right to dispose of the claim' corresponds to two of the four requirements which according to Harpignies must be met in order for Section 29 of the General Convention to apply. These two requirements are that the claimant acts in in good faith, and that settlement of the claim definitively extinguishes the claim. The other two requirements formulated by Harpignies are: '[t]he claimant has a *prima facie* case' and '[t]the damage complained about has actually occurred.' Schmalenbach (2016), para. 19, referring to R. Harpignies, 'Settlement of Disputes of a Private Law Character to Which the United Nations Is a Party—A Case in Point: The Arbitral Award of 24 September 1969 in Re Starways Ltd. v. the United Nations', (1971) 7 *Revue Belge de Droit International* 451. Schmalenbach adds: 'On closer scrutiny, the four requirements are specifications of the key elements of Art. VIII Section 29 General Convention.' Ibid.

[556] B.A. Garner (ed.) *Black's Law Dictionary* (2014), at 572. See generally C. Schreuer, 'What is a Legal Dispute?', in I. Buffard and others (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2009), 959.

[557] *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, Judgment of 30 August 1924, Rep. PCIJ Series A No. 2, at 11.

[558] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, [1950] ICJ Rep. 65, at 74.

[559] On the issue of 'attribution', see Schmalenbach (2016), paras. 31-36.

the Organization and its (subsidiary) organs.[560] UN funds and programs legally resort under the UN. This is because, contrary to specialized and related organisations, they do not have their own legal personality.[561] Therefore, even where funds and programs, such as UNDP or UNICEF, are named as a contractual party, it is the UN, as the entity with legal personality, whose obligation under Section 29 of the General Convention is engaged (as is its immunity under Article Section 2 of the General Convention).[562] The same applies in the case of tort claims against UN funds and programs.[563]

#### 3.4.1.2 Liability and responsibility

##### 3.4.1.2.1 Liability

Section 29 of the General Convention does not refer to the 'liability' of the UN in relation to disputes of a private law character. Nonetheless, the UN has consistently recognised that it incurs liability where third-party claims are sustained. Early on, in the context of the ONUC settlements, the UNSG stated that the UN's policy to compensate individuals for damage for which it is liable is

> 'in keeping with generally recognized legal principles and with the [General Convention]. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.'[564]

The 2001 OLA Memorandum to the Controller referred, amongst others to 'the inherent authority of the Organization to incur liabilities of a private law nature and the obligation to compensate for such liabilities,'[565] More specifically, according to the memorandum,

> 'as an attribute of the international legal and juridical personality of the United Nations, it is established that the Organization is capable of incurring obligations and liabilities of a private law nature. Such obligations and liabilities may arise, for example, from contracts entered into by the Organization. The capacity of the Organization to contract is specifically provided in the [General Convention], article I, section 1. The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused

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[560] Reinisch (2016, 'Immunity'), para. 50, referring to A. Ziegler, 'Article 105', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012), 2158, para. 17.
[561] Reinisch (2016, 'Immunity'), para. 50.
[562] Schmalenbach (2016), para. 29, writing with respect to subsidiary organs like UNICEF or UNWRA: 'As UN organs, they nevertheless fall within the scope of Arts. 104 and 105 UN Charter to the effect that, for the purpose of dispute settlement, the UN is the actual party to any contractual disputes even though in individual cases, the latter is represented by UNICEF or UNRWA' (fn. omitted).
[563] Furthermore, where the UN has taken out insurance, as in the case of traffic accidents, it is the UN that remains the defendant in litigation before national courts (in which case, if the claim cannot be settled, the UN waives its immunity from jurisdiction). Cf. Schmalenbach (2016), para. 30 ('it must be not entirely unreasonable that, on the basis of the claimant's assertion, the UN is the proper party to the dispute').
[564] See correspondence between UNSG and Permanent Representative of the USSR regarding the ONUC settlement (discussed hereafter), S/6597, reproduced in 1967 Study, para. 56.
[565] 2001 OLA Memorandum to the Controller, para. 3.

> by the Organization to property or persons, is reflected in article 29 of the [General Convention] and the long-standing practice of the Organization in addressing such claims.'[566]

The memorandum continues to state that the obligation to honour obligations incurred by the UN follows from 'general principles of law'.[567] It concludes:

> 'As a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities. It is equally clear that the Administration has the obligation and the authority to resolve claims of a private law nature, and that there is a long practice of the Administration in exercising that authority. It is also true that the practice has been presented to the General Assembly and that it is aware of that practice.'[568]

As to the nature of the UN's liability towards third parties under Section 29 of the General Convention, like the disputes referred therein, it is of a 'private law character'. As seen, the precise law applicable to disputes varies.[569] Thus, for example, as seen:

- contractual liability: general principles of law, including international law, as well as the terms of the contract itself;[570]
- liability in tort within UN headquarters district: Headquarters regulation No. 4, supplemented by relevant US law, to the extent it is not inconsistent with the former; and
- liability in connection with traffic accidents: domestic law.

The applicable law is relevant not least as it determines the remedies available.

#### 3.4.1.2.2 Responsibility

The 1967 Study juxtaposed 'claims of a private law nature'[571] with 'international claims',[572] which are 'claims . . . in respect of a breach of international law'.[573] Under the latter heading, the study referred, amongst others, to the ONUC settlements. Those settlements arose from claims by private parties against the UN for injury and damage in connection with the UN operation in the Congo in the early 1960s. The claims were espoused by the claimants' states of nationality, which in exercising diplomatic protection reached settlements with the UN. In connection with those settlements, the UN incurred international

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[566] Ibid., para. 4 (fns. omitted).
[567] Ibid., para. 10.
[568] Ibid., para. 17.
[569] On claims of military and civilian personnel of peacekeeping missions, see Schmalenbach (2016), paras. 52-53.
[570] However, according to Reinisch: 'In more recent practice, however, it seems that most sales, rental, and service contracts between international organizations and private parties are governed by national law.' Reinisch (2011), para. 9. Nonetheless, the arbitration clause in Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012) provides: 'The decisions of the arbitral tribunal shall be based on general principles of international commercial law.'
[571] 1967 Study, paras. 44-48.
[572] Ibid., paras. 54-55.
[573] Ibid., para. 54.

responsibility – that is, responsibility under international law – towards those states (and not towards the third non-state parties themselves).[574]

The nature of the UN's responsibility, that is, *international* responsibility, in connection with the ONUC settlements is confirmed by the ARIO Commentaries. As seen, an international organisation incurs international responsibility where it commits an internationally wrongful act by breaching an international obligation.[575] Regarding the content of international responsibility, in connection with Article 36 of the ARIO ('Compensation'), the ARIO Commentaries prominently referred to the ONUC Settlements:

> 'Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo . . . The fact that such compensation was given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union'.[576]

The original third-party claims triggered the UN's third-party liability towards the claimants under Section 29 of the General Convention. Upon the respective states of nationality espousing the claims, and settlements being reached, the UN incurred international responsibility towards those states.

The UN's international responsibility in connection with the ONUC settlements seems to be reflected in the following passage of the 1996 Report:

> 'The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organizations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) and its liability in compensation.'[577]

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[574] This is discussed further below in connection with 'lump sum agreements' and the 1996 Report.

[575] Thus, 'the primary applicable law is international law'. A. Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 147 at 155. The ARIO are explicitly not concerned with private law liabilities. G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), para. 29 ('The provision on the scope of the draft articles should first of all make it clear that the present study is only concerned with responsibility under international law. Thus, issues of civil liability, which have been at the centre of recent litigation before municipal courts, will be left aside. This is not intended to deny the interest of some judicial decisions on civil liability, because these decisions either incidentally address questions of international law or develop some arguments with regard to a municipal law that may be used by analogy'. [fn. omitted]). See also ARIO Commentaries, Art. 1, at 69, para. 3 ('The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law.').

[576] ARIO Commentaries, Art. 36, at 126-127, para. 1-2 (emphasis added).

[577] See 1996 Report, para. 6-7 (fn. omitted, emphasis added), partially cited in ARIO Commentaries, Art. 3, at 78, para. 1.

The 1996 Report likely included that statement in connection with its, unsuccessful, proposal to revive lump-sum agreements (see paragraph 3.4.3.1.3 of this study).

#### 3.4.1.3 Who decides?

As Schmalenbach explained:

> 'Under current conditions, the UN exercises a substantial degree of discretion when implementing Art. VIII Section 29 General Convention, not only with regard to the choice of appropriate modes of settlement, but also with regard to the types of claims and claimants falling under the provision's scope.'[578]

That discretion is particularly at play when it comes to determining whether a particular dispute has a 'private law character' and whether modes of settlement are 'appropriate'. In practice, it is the UN that makes that determination unilaterally. Regarding the character of the dispute, this is clear, for example, from the correspondence of the UN Legal Counsel to the claimants in the *Haiti cholera* dispute: 'With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[579]

As discussed further below, the 'review of political and policy matters' appears to mean that, in the view of the UN, the dispute lacks a private law character. It is the UN Legal Counsel who determined that the 'review of political and policy matters' was at issue.

It is true that there is the potential for advisory proceedings before the ICJ under Section 30 of the General Convention on the interpretation and application of Section 29 of the General Convention. Section 30 provides in relevant part (emphasis added):

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

Article 96 of the UN Charter provides:

> 'a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
> b. Other organs of the United Nations and specialized agencies, which may at any time be so

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[578] Schmalenbach (2016), para. 87.
[579] Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Brian Concannon, 20 February 2013, at 2.

> authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

Article 65 of the Statute of the Court provides:

> '1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.'

For any UN organ, duly authorised, to agree to request the Court for an advisory opinion involves a political process. There have been two advisory opinions regarding the General Convention; both were requested by ECOSOC and concerned legal questions concerning Section 22 of the General Convention.[580]

As to disputes concerning the implementation of Section 29 of the General Convention, as explained by Schmalenbach, 'Section 30 is not the proper procedural provision to handle the multitude of disputes on the legal nature of each individual third party claim against the UN.'[581] As a result, 'the obvious reluctance of UN member States to diplomatically or via the ICJ intervene in dispute settlement practices of the UN leaves it entirely to the organization to interpret Art. VIII Section 29 General Convention.'[582]

Schmalenbach contended that the decision on the legal character of a dispute instead ought to fall within the jurisdiction of the settlement mechanisms established pursuant to Section 29 of the General Convention. In its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, concerning the jurisdictional immunity of a Special Rapporteur of the UN Commission on Human Rights, the ICJ opined that the UNSG's finding concerning the immunity of a UN agent 'creates a presumption which can only be set aside for the most

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[580] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*). However, as the ICJ noted in the latter case (ibid., para. 24), that case was the 'first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention'.

[581] Schmalenbach (2016), para. 50. But see Daugirdas (2019), exploring 'raising the reputational stakes by seeking an advisory opinion from the International Court of Justice about the scope the United Nations' obligations under section 29 of the General Convention in connection with the cholera outbreak in Haiti.' Ibid., at 36-37.

[582] Schmalenbach (2016), para. 87. Cf. Rashkow (2015), at 87-88 ('If the United Nations were to continue to resist the responsibility to review the claims of the Haitian cholera victims, the claimants could urge the Haitian Government to seek an advisory opinion from the ICJ under Section 30 of the General Convention regarding the responsibility to review the claims in light of the mandate imposed on the Organization under Section 29 of the Convention. It does not appear that any member state has ever exercised or sought to exercise this right to go to the ICJ under Section 30. The process for making such a request could be very complicated, both legally and politically.' [emphasis added]).

compelling reasons and is thus to be given the greatest weight by national courts.'[583] According to Schmalenbach:

> 'This assessment is equally valid for alternative dispute settlement mechanisms that replace domestic courts in the light of the UN's immunity. Applied to a decision on the legal nature of a claim against the UN, from the foregoing it follows that any dispute settlement mechanism established under Art. VIII Section 29 General Convention would need jurisdiction to decide a dispute on the legal nature of the claim. If no compelling reasons are provided against the 'public international law' assessment of the UN Secretary-General, a negative decision on jurisdiction is required.'[584]

The problem is that the UN controls the *very existence* of dispute settlement mechanisms on the basis of its own assessment of that character. Thus, as seen in the correspondence regarding the *Haiti cholera* dispute, and as further discussed below (paragraph 3.4.2.2.2), the UN held the claims to be 'irreceivable', presumably on the basis that the dispute lacks a private law character. As a result, and as discussed below, the UN denied that there existed a legal basis to establish a standing claims commission under Section 29 of the General Convention. The commission therefore was unable to determine the nature of the dispute.

In this respect, according to Schmalenbach: 'The 2010 Haiti cholera claims exemplify the weaknesses of the system set up under Art. VIII Section 29 and 30 that tolerate the UN being both the judge and respondent.'[585] Similarly, as discussed below, the UN refused to activate the 'Third Party Claim Process' with respect to the dispute over claims concerning lead poisoning in Kosovo. This practice exposes the UN to criticism that it violates the maxim that no one may be judge in their own case (*nemo iudex in causa sua*). In effect, the UN exercises a significant measure of control over its own accountability.

This practice is at odds with the rule of law as understood by the UN Secretariat, as seen in chapter 1.[586] To recall, first articulated in a 2004 report by UNSG Annan,[587] the UNSG's understanding of the rule of law was reiterated in a 2012 report by UNSG Ban Ki-moon:

> 'The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[588]

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[583] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 61.
[584] Schmalenbach (2016), para. 50 (emphasis added).
[585] Ibid., para. 87 (fn. omitted).
[586] See section 1.2.2 of this study.
[587] UN Doc. S/2004/616 (2004), para. 6.
[588] UN Doc. A/66/749 (2012), para. 2.

Moreover, according to the UNSG's 2012 report:

> 'It is important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions. In this connection … The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations.'[589]

In its 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels', the UNGA took note of the UNSG's 2012 report.[590] Whilst it ultimately did not include a definition of the rule of law, the declaration did provide:

> 'We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built. . . .
>
> 1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.
>
> 2. 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.'[591]

Read in conjunction with the 2012 declaration, the UNSG's consistent understanding of the rule of law—particularly the elements of independent adjudication, separation of powers, avoidance of arbitrariness, and procedural and legal transparency—is difficult to reconcile with its unilateral determination of the legal character of third-party disputes.

Moreover, the UNSG's control over the application of Section 29 of the General Convention may violate Article 14(1) of the ICCPR which, as discussed below, governs the interpretation of Section 29.[592] An alternative approach, whereby such control is exercised by a body external to the UN, will be proposed in chapter 5.

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[589] Ibid., para. 11 (emphasis added).
[590] Un Doc. A/RES/67/1 (2012), para. 39.
[591] Ibid., preamble and paras. 1-2 (emphasis added).
[592] That is, the process to determine whether a dispute has a private law character must arguably meet the requirements of Art. 14 of the ICCPR. Art. 6 of the ECHR, which is similar to this provision, has been held to apply by the ECtHR where there is an 'arguable (civil) right for the purposes of Article 6'. See, e.g., *Markovic and Others v. Italy* [GC], Judgment of 14 December 2006, [2006] ECHR (XIV), para. 101.

#### 3.4.1.4 Interim conclusions

Section 29(a) of the General Convention concerns legal controversies concerning third party claims, having a 'private law character', to which the UN, as a legal person, is a party. Under Section 29, the UN is required to make 'provisions for appropriate modes of settlement' of such disputes. Where the UN fails to do so, in breach of Section 29(a) of the General Convention, it incurs international responsibility towards those states parties (not to third parties themselves).

There is a long-standing tradition of the UN recognising its liability where third party claims are substantiated. The nature of that liability varies depending on the law applied in settling the dispute. Where a state espouses claims of its nationals by way of diplomatic protection, and the claims are founded, the UN incurs *international responsibility*, that is, responsibility under international law, towards that state.

In reality, it is the UN that unilaterally determines whether a dispute has a 'private law character' and whether modes of settlement qualify as 'appropriate' (both heads of Section 29 are discussed separately below). Consequently, the UN effectively controls its own accountability. Whilst such determinations may be scrutinised by the ICJ in advisory proceedings under Section 30, that is not a realistic avenue given the multitude of claims and the political nature of the process regarding the making of a request for an advisory opinion. The current practice is at odds with core notions of justice and the rule of law (and arguably Article 14 of the ICCPR), which are central to the UN's very purposes and operations, and which it has embraced.

### 3.4.2 'Private law character'

This subsection begins by interpreting the term 'private law character' under Section 29(a) of the General Convention (3.4.2.1). In so doing, it will consider the ordinary meaning of the term (paragraph 3.4.2.1.1) and the travaux préparatoires (paragraph 3.4.2.1.2). It will then make a number of observations in light of the dichotomy of private v. public (paragraph 3.4.2.1.3). This is followed by a discussion of UN practice (subsubsection 3.4.2.2), including regarding the aforementioned disputes arising in connection with the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic.

#### 3.4.2.1 'Private law character': interpretation

##### 3.4.2.1.1 Ordinary meaning

Section 29(a) of the General Convention does not define the term 'private law character' in Section 29(a) of the General Convention phrase and neither does the 1995 Report. The ordinary meaning of

'private law' may be formulated as follows:[593] 'the area of law that deals with disagreements between people or companies, rather than disagreements that involve government'.[594]

Section 29(a) refers to claims of a 'private law character' (emphasis added), not claims under 'private law', or 'private law claims'. As private laws differ from state to state, if the nature of the dispute were to be determined in accordance with the law of any particular state, Section 29(a) would likely have been worded differently.[595] The reference to 'character' rather suggests a common denominator amongst private laws, that is, it may be referring to disputes that are typically governed by private law.[596]

In sum, as to the term 'disputes of a private law character' under Section 29(a) of the General Convention, the most that can be concluded in terms of its ordinary meaning is that such a character refers to:

- domestic law, not international law;
- the opposite of 'public law'; and
- a common denominator among domestic private laws, not a specific domestic law.

Otherwise, however, the meaning of the term 'private law character' remains ambiguous and obscure. It is therefore necessary to turn to the preparatory work of Section 29(a) of the General Convention.[597]

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[593] Cf. Art. 31 of the VCLT, which is identical to Art. 31 of the 1986 VCLT (not yet in force). The 'context' of the term 'disputes of a private law character', and the object and purpose of the General Convention point to the same: the privileges and immunities of the UN. The present author is unaware of either an agreement or instrument in connection with the conclusion of the General Convention in the sense of Art. 31(2) of the VCLT, nor of a subsequent agreement or practice in the sense of Art. 31(3) of the VCLT. With respect to the latter provision, it is noted that the UN Liability Rules (see paragraph 3.3.2.2.2 and subsubsection 3.4.3.2 of this study) were promulgated by the UNGA and, whilst UN member states include the states parties to the General Convention, these rules form part of the implementation *by the UN* of Section 29(a) of the General Convention.

[594] <dictionary.cambridge.org/dictionary/english/private-law> accessed 21 December 2021. See also Garner (2014), at 1390 ('private law . . . The body of law dealing with private persons and their property and relationships.').

[595] The French version refers to 'différends de droit privé'. Though the General Convention itself is silent as to its language versions, the text on the UN website is in both languages and it is certified as a 'a true copy of the English and French text of the Convention', <treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf> accessed 21 December 2021. Insofar as this means that the General Convention has been 'authenticated' in both English and French, each text version is equally authoritative (cf. Art. 33(1) of the VCLT).

[596] Cf. F. Mégret, 'La Responsabilité des Nations Unies aux Temps du Choléra' (2013) <ssrn.com/abstract=2242902> accessed 21 December 2021, heading I-A ('Il atteste simplement de ce qu'il y a une logique institutionnelle à réfléchir en termes de catégories du droit privé plutôt que de s'engager dans un délicat exercice de conflits de lois.').

[597] Art. 32 of the VCLT, which is identical to Art. 32 of the 1986 VCLT. As will be seen, according to the early *travaux*, the provision in Section 29 of the General Convention was conceived as the 'counterpart' to the UN's jurisdictional immunity.

3.4.2.1.2 Travaux préparatoires

The United Nations Audiovisual Library of International Law contains an extensive note on the drafting history of the General Convention,[598] which has been further explained by Miller in a series of articles.[599] Together with the relevant documents in the UN archives, these sources shed light on the drafting history of Section 29 of the General Convention. As will be seen, however, to the extent there is any insight into the drafters' intention behind the term 'private law character', this is provided by the travaux préparatoires of the Specialized Agencies Convention.

During the UN Conference on International Organization, which resulted in the signing of the UN Charter in June 1945, the possibility of a general convention on the UN's privileges and immunities was conceived, which led to Article 105(3) of the UN Charter.[600] Input for this provision had been provided, amongst others, by C.W. Jenks, the then legal adviser of the ILO. His advice to the drafters included:

> 'Immunities and Facilities to be Accorded to General International Organisation . . . it would seem essential that the text of the Charter should embody general principles which guarantee effectively the independence of the Organisation and its agents by the grant of appropriate immunities'.[601]

Around the same time, the agenda of the 26th session of the International Labour Conference in April 1944 in Philadelphia included

> 'as the first item the question of the future programme, policy and status of the Organisation. In taking that decision the Governing Body had in mind the desirability of the Organisation taking steps to map out the place it thought it should hold in the new world organization which would be designed after the war had been won, and also of reviewing its existing constitution and practice in the light of its twenty-five years' experience, with a view to there being incorporated in its Constitution and practice such amendments as might be necessary to enable it to deal effectively with its future responsibilities.'[602]

The International Labour Office presented the Conference with proposals concerning, amongst others, the ILO's status. However, the Conference did not have sufficient time to examine these proposals and referred them to the Committee on Constitutional Questions of the ILO's Governing Body.[603] The agenda for the Constitutional Committee's first session, in January 1945, included: 'the Status, immunities and other facilities to be accorded to the International Labour Organisation by governments'.

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[598] <legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html#1> accessed 21 December 2021.
[599] A. Miller, 'The Privileges and Immunities of the United Nations', (2009) 6 *International Organizations Law Review* 7, at 16 ff; A. Miller, 'Privileges and Immunities of United Nations Officials', (2007) 4 *International Organizations Law Review* 169, at 180 ff; A. Miller, 'United Nations Experts on Mission and Their Privileges and Immunities', (2007) 4 *International Organizations Law Review* 11, at 17 ff.
[600] Report of the Rapporteur of Committee IV/2 at the San Francisco Conference, Document 933, re-issued by secretariat of the UN Preparatory Commission as PC/LEG/22 (1945), at 3 ('the possibility is not excluded of a general convention to be submitted to all the members').
[601] Jenks (1961), at 13.
[602] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 111.
[603] Ibid., at 112, para. 4.

The International Labour Office submitted to the Constitutional Committee a revised text, containing a draft resolution and an explanatory commentary. These documents were included in a 'General Note', which Jenks subsequently referred to as the 'ILO Memorandum'.[604] The International Labour Office prepared these documents, having 'had the advantage of being able to take into consideration a number of recent discussions and decisions in regard to the status, immunities and facilities to be accorded to other public international organisations.'[605] These organizations were the UNRRA, the FAO, the Pan-American Union, the IMF and the IBRD.[606]

Article 18(2) of the 'suggested text of proposed resolution', which would evolve into Section 29 of the General Convention, read as follows:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
>
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
>
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
>
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[607]

The ILO's explanatory memorandum stated with respect to draft Article 18(2):

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[608]

According to Jenks, the ILO's legal adviser, the ILO Memorandum was of significant relevance for the drafting of the General Convention. That is,

> 'broadly speaking the General Assembly based itself squarely on League experience as interpreted by the ILO. The historical link, though never formally recorded, is sufficiently direct and

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[604] The 'General Note' was published in International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197-223. See Jenks (1961), at 14, fn. 17. Jenks referred to the 'General Note' as the 'ILO Memorandum'. Jenks (1961), at 15. The quote from the 'ILO Memorandum' in Jenks (1961), at 42, confirms that the ILO Memorandum and the General Note are the same document.
[605] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 198.
[606] Ibid.
[607] Ibid., at 223.
[608] Ibid., at 219 (emphasis added). The document stated elsewhere: 'It must never be forgotten that the special status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' Ibid., at 197.

> unquestionable for the memorandum explaining the original proposals submitted by the International Labour Office to the Governing Body to remain an important historical document to which, it is submitted, it is still permissible to refer as an exposition of the purpose of and justification for the various immunities, even though it does not formally constitute a part of the *travaux préparatoires* of the General Convention.'[609]

As to the drafting process of the General Convention, at the time of the signing of the UN Charter, the UN Preparatory Commission was established. A committee of the Preparatory Commission's Executive Committee prepared a study on privileges and immunities.[610] The study considered the following topics:[611] precedents afforded by the constitutions of specialized agencies; co-ordination of the privileges and immunities of the UN with those of the specialized agencies; creation of an international passport; taxation of officials in their state of nationality; and privileges and immunities of the Judges of the ICJ and those appearing before the Court. A separate paragraph concerning privileges and immunities concerned the position of UN officials. The only statement in the study that concerns the UN itself is relevant for present purposes. It provides that

> 'it is desirable that where the United Nations or a specialized agency concludes contracts with private individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts. Most of the existing specialised agencies have already agreed to do this.'[612]

In its final report, the Executive Committee recommended the Preparatory Commission to refer this study to the future UN General Assembly.[613]

The Preparatory Commission first referred the matter to its committee for legal matters, Committee 5. The delegation of Canada submitted to the Committee a 'Draft resolution concerning the question of immunities, facilities and privileges to the Organization, to representatives of the members and to the officials',[614] which included a draft convention. Article 9(2)(a)-(b) of the draft convention was materially identical to Article 18(2)(a)-(b) of the ILO's 'suggested text of proposed resolution'.

Committee 5 referred the matter to a sub-committee on privileges and immunities.[615] The sub-committee produced a draft convention on privileges and immunities.[616] Article 8(3)(a) of the draft convention

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[609] Jenks (1961), at 15. See also Miller (2007, 'Officials'), at 181. According to Jenks, the proposals were known to the Preparatory Commission while the discussions in the UNGA Sixth Committee were 'based largely' thereon. However, the available records of these bodies do not reflect this.
[610] The study is appended to the report of the Executive Committee to the Preparatory Commission of the United Nations, PC/EX/113/Rev.1 (1945), Part III, Chapter V, Section 5, at 69 ff.
[611] Ibid., at 69-71.
[612] Ibid., at 70.
[613] Ibid., at 69.
[614] PC/LEG/17 (1945).
[615] PC/LEG/10 (1945). The following states were represented on the sub-committee: Egypt, UK, Belgium, Cuba, Canada, USA, Yugoslavia, Belarus. See PC/LEG/16 (1945).
[616] PC/LEG/34 (1945), at 3 ff. See also 'Proposed additions to draft convention on immunities and privileges by

provided: 'The Organization shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the Organization is a party.'[617]

Thus, this draft no longer referred exclusively to contractual disputes of the Organization, but also to 'other disputes of a private law character'. The record does not reflect whether the broadening of the scope was discussed in the sub-committee; the debate largely concerned the relationship between the proposed convention and the UN's headquarters agreement.[618]

The debate in Committee 5 concerned the following questions: whether to submit a draft convention to the UNGA at all; the status of the draft convention as a working document; and the relationship between the work of the Committee and that of the committee on the privileges and immunities of the UN at its headquarters.[619] According to the available records, the debate did not concern the provisions on the settlement of disputes of a private law character. Article 8(3) was retained unchanged in the draft convention which Committee 5 recommended the Preparatory Commission to transmit to the General Assembly for its consideration, along with the Executive Committee's study on privileges and Immunities.[620]

In Chapter VII ('Privileges, immunities and facilities of the United Nations') of its report to the General Assembly, the Preparatory Commission transmitted said draft convention to the assembly for consideration at its first session, recommending: 'that the General Assembly, at its First Session should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the UN Charter, or propose conventions to the Members of the United Nations for this purpose.'[621]

At its first session in January 1946, the UNGA referred Chapter VII of the Preparatory Commission's report to its Sixth Committee, dealing with legal matters. The committee established a sub-committee on privileges and immunities. According to the sub-committee's first report, rather than to formulate recommendations on privileges and immunities, it

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Mr. Beckett, chairman of the Sub-Committee', PC/LEG/39 (1945), amongst others, adding a new Art. 10 to the draft convention establishing jurisdiction of the ICJ over disputes concerning the interpretation and application of the convention.

[617] PC/LEG/34 (1945), at 9 (emphasis added). According to Art. 8(3)(b): 'disputes involving any official of the Organization, who by reason of his official position enjoys immunity, if such immunity has not been waived by the Secretary-General.'

[618] PC/LEG/33 (1945); PC/LEG/33/Rev.1 (1945).

[619] PC/LEG/35 (1945), PC/LEG/37 (1945), PC/LEG/40 (1945) and PC/LEG/41 (1945).

[620] PC/LEG/42 (1945), at 1, para. 3.

[621] PC/20 (1945), Chapter VII, para. 2.

> 'agreed without reservation to request Committee 6 to recommend that the General Assembly should propose to the Members of the United Nations a general convention which would determine the details of application of paragraphs 1 and 2 of Article 105 of the Charter.'[622]

The first report contained reasons in favour of the adoption of a general convention but did not concern the substance of such a convention.[623] At its seventh meeting, on 28 January 1946, the Sixth Committee unanimously adopted this recommendation and agreed that the sub-committee should draft the convention.[624]

On 5 February 1946, following several meetings, the Sub-Committee submitted to the Sixth Committee a 'resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed'.[625] The resolution and its annex were included in a 'draft recommendation from the sixth committee to the General Assembly'.[626] The Sub-Committee's rapporteur clarified that 'the General Convention on privileges and immunities of the United Nations was based closely on the text in the report of the Preparatory Commission.'[627]

In terms of substance, the second report of the Sub-Committee concerns the interpretation of a provision concerning 'rates and taxes on mail' (Article 9). It also recalled that certain members made reservations regarding the provisions concerning the immunity of officials from national service obligations (Article 18) and dispute settlement by the ICJ (Article 30).[628] Similar reservations were made during the subsequent discussion in the Sixth Committee, together with a reservation concerning the exemption from taxation of officials.[629] The settlement of disputes of a private law character does not appear to have been the subject of debate either in the sub-committee or the Sixth Committee. On 7 February 1946, at its 11th meeting, the Sixth Committee unanimously adopted, with minor modifications, the sub-committee's 'draft recommendation concerning the General Convention on immunities and privileges',[630] that is, that the UNGA approve the draft convention.

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[622] UN Doc. A/C.6/17 (1946), para. 2. The following states were represented on the Sub-Committee: Australia, Belgium, Bolivia, China, Cuba, Czechoslovakia, Denmark, El Salvador, Egypt, France, Poland, United Kingdom, United States, USSR and Yugoslavia. Ibid.
[623] However, the report states: 'The adoption of a convention would not exclude the possibility of the adoption in addition of recommendations upon particular points which were not fully dealt with in the convention.' UN Doc. A/C.6/17 (1946), para. 4.
[624] UN Doc. A/C.6/19 (1946), at 16.
[625] UN Doc. A/C.6/31 (1946), at 1.
[626] UN Doc. A/C.6/28 (1946), to which a convention on the privileges and immunities of the United Nations was annexed.
[627] UN Doc. A/C.6/37 (1946), at 26.
[628] UN Doc. A/C.6/31 (1946).
[629] UN Doc. A/C.6/37 (1946), at 26-27.
[630] Ibid., at 28. The draft convention was contained in document UN Doc. A/C.6/28 (1946).

During the subsequent debate in the UNGA, according to the available record, only the delegations of the UK and the US spoke, both addressing reservations made. The UK moreover stated:

> 'Within the scope and the ambit of the Charter this Convention will give the United Nations Organization, in every Member State, a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its own functions independently, impartially and efficiently.'[631]

According to the record, there was no discussion of the issue of the settlement of disputes of a private law character.

On 14 February 1946, the General Assembly adopted the General Convention,[632] which entered into force on 17 September 1946.[633] Of the reservations made, none relate to Section 29.[634] The text of the chapeau and sub (a) of Article VIII, Section 29, is identical to the corresponding provision in the draft produced by the Sixth Committee, except that the Sixth Committee's draft contained the word 'provision' in the singular.[635] There are no records concerning that change known to the present author, much less whether it was intentional.

In conclusion, by the time the drafting of the General Convention commenced, it appeared to have been accepted that contractual disputes ought to be subject to dispute settlement. At some point in the drafting process, in the Sub-Committee of Committee 5 of the Preparatory Commission, the scope of disputes was widened to include also 'other disputes of a private law character'. However, the records regarding the drafting of the General Convention do not clarify the intention of that term.

By contrast, on 21 November 1947, the UNGA approved the Convention on the Privileges and Immunities of the Specialized Agencies ('Specialized Agencies Convention'). This convention contains a provision that is identical in substance to Section 29 of the General Convention. As discussed next, the convention's travaux préparatoires do shed some light on the intended meaning of the phrase 'dispute of a private law character'.

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[631] Records of the First Part of the First Sess. of the General Assembly, Plenary Meetings of the General Assembly, 10 January – 14 February 1946, verbatim record of 13 February 1946, at 452.
[632] UN Doc. A/RES/22(I)(A) (1946).
[633] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed 21 December 2021.
[634] Ibid.
[635] The text of Section 29 of the General Convention as authenticated by the UN and included in the UN treaty database <treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf> accessed on 21 December 2021, does not contain a comma before the phrase 'to which the Organization is a party', whereas the version of the text contained in UN Doc. A/RES/22 (I)A (1946) does.

*The Specialized Agencies Convention*

Article IX (Settlement of disputes), Section 31, of the Specialized Agencies Convention reads in relevant part: 'Each specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party'.

The differences with the corresponding text in Section 29 of the General Convention appear to be merely a matter of drafting.[636] These differences are that in the Specialized Agencies Convention, in addition to 'United Nations' being replaced by 'specialized agency', the word 'provision' is in the singular (which, as seen, was only pluralized in the General Convention after the text left the Sixth Committee). Also, the Specialized Agencies Convention refers to 'disputes of private character', without the article 'a' preceding 'private', and without the word 'law'. However, as will be seen, the records of the Sixth Committee refer to 'disputes of a private law character'(emphasis in original), underscoring that this is a mere drafting issue. It is these records that provide insight into the meaning of the phrase.

The Sub-Committee of the Sixth Committee that drafted the Specialized Agencies Convention commented as follows on the draft Convention:

> 'With reference to Section 31 (a), which provides that an Agency shall make provision for appropriate modes of settlement of disputes of a private law character to which a Specialized Agency is a party, *it was observed* that this provision applied to contracts and other *matters incidental to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions*. It applied, for example, to matters such as hiring premises for offices or the purchase of supplies. The provision relates to disputes of such a character, that they *might have come before municipal courts, if the Agency had felt able to waive its immunity*, but where the Agency had felt unable to do so.'[637]

Continuing from the above quote, the report provides further insight into the intended meaning of the term 'private law character' in connection with disputes concerning officials under paragraph (b):[638]

> 'This explanation with regard to (a) also illustrates the type of case to which (b) also refers. Officials (other than one or two high officials) have only immunity in respect of their official acts, and even in those cases immunity will be waived in respect of matters of a private law character if this is possible without prejudicing the interests of the Organization. If, however, in the case of such disputes, immunity is not waived, then the obligation to make provisions on an appropriate mode of settlement arises.'[639]

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[636] Cf. Miller (2009), at 96 ('Section 31 of the Specialized Agencies Convention is identical in substance to Section 29 of the General Convention.'), fn. 366 ('a mere drafting change').
[637] UN Doc. A/C.6/191 (1947), at 12-13, para. 32 (underlining in original; italics added).
[638] That provision, together with the chapeau, reads as follows: 'Each specialized agency shall make provision for appropriate modes of settlement of: . . . (b) disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of Section 22.' UN Doc. A.C.6/191 (1947), Appendix A.
[639] Ibid., at 13, para. 32 (emphasis added).

Among the available records, this is the most clearly articulated intended meaning of the term 'disputes of a private law character'. Thus, the following can be said to result from the travaux préparatoire:

- such disputes concern matters that are 'incidental' to the performance by the Agency of its 'main functions';
- those 'main functions' are defined under its constitutional instrument';
- such disputes do not relate to the 'actual performance of the constitutional functions';
- such disputes would have come before municipal courts but for the immunity of the agency; and
- the performance of 'official acts' may give rise to 'disputes of a private law character', but this is not the case with 'constitutional functions'. Thus, the term 'official acts' is not synonymous with 'constitutional functions'.

The report of the sub-committee is not specific as to who made the aforementioned observation regarding Section 31(a). The report merely states 'it was observed'. Elsewhere, the report also uses that formulation,[640] as well as similarly general formulations, such as: 'it was considered that';[641] 'it was noted that';[642] 'it must be noted';[643] and 'it was thought that'.[644] Conversely, in other places the report is more precise in attributing statements. For example: the 'delegation of the USSR proposed';[645] the 'Sub-Committee considered that';[646] the 'Sub-committee recommended that';[647] 'the majority of the Sub-Committee considered that';[648]'the delegations of Canada, Egypt and USSR placed it on record that';[649] 'the committee agreed that';[650] and the 'Sub-Committee did not consider that'.[651]

Notwithstanding the generality of the observation concerning Section 31, in light of the Sub-Committee report's overall degree of precision, as the foregoing examples illustrate, if members on the Sub-Committee had opposed the observation in point, this would likely have been reported. There is no indication in the available records that the settlement of disputes of a private law character to which the organisation is a party was at any point controversial. In those circumstances, it is submitted that the

[640] Ibid., e.g., paras. 20 and 31.
[641] Ibid., e.g., paras. 20 and 21.
[642] Ibid., para. 15.
[643] Ibid., para. 21.
[644] Ibid., para. 30.
[645] Ibid., para. 16.
[646] Ibid., para. 18
[647] Ibid., para. 18.
[648] Ibid., para. 23.
[649] Ibid.
[650] Ibid., para. 25.
[651] Ibid., para. 30.

absence of debate in the Sub-Committee and the Sixth Committee may be taken to mean that these bodies tacitly endorsed the observation.[652]

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The endorsement by the Sixth Committee of the intended meaning of the term 'disputes of a private law character' arguably applies not only to the Specialized Agencies Convention but also to the General Convention. This is because the drafting history of the Specialized Agencies Convention is closely linked to that of the General Convention.

That linkage goes back to the UN Preparatory Commission, which in Chapter VII ('Privileges, immunities and facilities of the United Nations') of its report to the UNGA dated 23 December 1945 recommended 'that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered. If necessary, negotiations should be opened for their co-ordination in the light of any convention ultimately adopted by the United Nations'.[653]

In 1946, the UNGA approved the General Convention as part of a set of six resolutions under the heading 'privileges and immunities of the United Nations'. Resolution A concerned the General Convention. Resolution D was entitled 'Resolution on the coordination of the privileges and immunities of the United Nations and the Specialized Agencies'. On the recommendation of the Sixth Committee's sub-committee on privileges and immunities,[654] as adopted (with one amendment) by the Sixth Committee,[655] Resolution D stated the following:

> 'The General Assembly considers that there are many advantages in the unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies.
>
> While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.
>
> *Therefore the General Assembly instructs the Secretary-General* to open negotiations with a view to the re-consideration, in the light both of the General Convention adopted by the United Nations and of the consideration above, of the provisions under which the specialized agencies at present enjoy privileges and immunities.'[656]

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[652] The Sixth Committee's report to the UNGA reproduced the comments and observations of the Sub-Committee. UN Doc. A/503 (1947), at 13, para. 32.
[653] PC/20 (1945), at 60.
[654] UN Doc. A/C.6/31 (1946), at 2, para. 4.
[655] UN Doc. A/C.6/34 (1946); UN Doc. A/C.6/38 (1946), at 34.
[656] UN Doc. A/RES/22(I)D (1946) (emphasis in original).

In March and July 1947, the Secretary-General undertook consultations with the specialized agencies. After it had been 'unanimously agreed that the adoption of a single instrument presents the best method for co-ordination and unification',[657] these consultations concentrated on a draft convention prepared by the UN Secretariat. The draft Convention on the Privileges and Immunities of the Specialized Agencies, as amended during said consultations, was annexed to the UNSG's report to the UNGA.[658]

At the second session of the UNGA, on 23 September 1947, the issue of the coordination of the privileges and immunities of the UN and of the Specialized Agencies was referred to the Sixth committee,[659] which in turn referred it to a sub-committee on privileges and immunities.[660] The Sixth Committee approved the Sub-Committee's conclusion that a single convention would be preferable[661] and the Sub-Committee then prepared a draft thereof. According to the final report of the Sub-Committee, the draft

> 'falls into two distinct parts, namely, the first part consisting of standard clauses (Articles II to IX) drawn up on the basis of the Convention on the Immunities and Privileges of the United Nations, and of a second part consisting of nine draft annexes relating to each of the Specialized Agencies at present in relationship with the United Nations. The privileges and immunities provided for in the standard clauses are modelled on those of the United Nations under its convention, and, indeed, in a certain number of cases are narrower in scope.'[662]

The provision on the settlement of private law disputes was contained in Article IX of the draft convention and, thus, falls into the first part of the draft, 'drawn up on the basis' and 'modelled on those' of the General Convention. The final report of the Sub-Committee contains the aforementioned explanation as to the phrase 'disputes of a private law character'. This explanation was reproduced in the Sixth Committee's report to the UNGA,[663] in which the Sixth Committee indicated its approval of the final report of its Sub-committee.[664]

The UNGA approved the Specialized Agencies Convention on 21 November 1947,[665] proposing 'it for acceptance by the Specialized Agencies and for accession by all Members of the United Nations and by

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[657] UN Doc. A/339 (1947), at 2.
[658] Ibid., at 3.
[659] UN Doc. A/C.6/134 (1947), point 3.
[660] The sub-committee's interim report is contained in UN Doc. A/C.6/148 (1947) and its final report is contained in UN Doc. A/C.6/191 (1947). The latter report identifies the following member states as having been represented on the sub-committee: Argentina, Canada, Cuba, Czechoslovakia, Egypt, India, Norway, USSR, UK, USA and Yugoslavia.
[661] UN Doc. A/C.6/148 (1947); UN Doc. A/503 (1947), at 2.
[662] UN Doc. A/C.6/191 (1947), para. 5.
[663] UN Doc. A/503 (1947), para. 32.
[664] Ibid., at 4.
[665] UN Doc. A/RES/179(II) (1947).

any other State member of a Specialized Agency'. The convention entered into force on 2 December 1948.[666] None of the reservations made relates to Section 31.[667]

In sum, once the Sixth Committee had produced the General Convention, it continued to draft the Specialized Agencies Convention in furtherance of the goal stated by the Preparatory Commission and the UNGA to coordinate and unify the respective legal regimes. Specifically, the provision concerning the settlement of disputes of a 'private character' in the Specialized Agencies Convention was taken directly from the General Convention. Thus, the same body, the Sixth Committee, approved both draft conventions. Moreover, of the 15 states[668] represented on the Sixth Committee's sub-committee that drafted the General Convention and the 11 states[669] identified as having been represented on the sub-committee that drafted the Specialized Agencies Convention, seven states were represented on both,[670] including three permanent members of the UN Security Council. Both sub-committees had the same rapporteur.[671]

In conclusion, the drafting processes regarding the two conventions were closely intertwined. Therefore, whilst the available records of the preparatory work of the General Convention shed little light on the meaning of the term 'disputes of a private law character', the insights on this term provided by the preparatory work of the Specialized Agencies Convention are relevant also for the General Convention.

3.4.2.1.3 'Private' v. 'public'

It results from the foregoing interpretation of Section 29 of the General Convention that disputes concerning the 'actual performance of the constitutional functions' of the UN under the Charter are not 'disputes of a private law character'. In keeping with the ordinary meaning of the term 'private', such constitutional disputes may be said to be disputes of a 'public law character'. According to Schmalenbach:

> 'Even though it was unthinkable for the drafters of the UN Charter that the UN could be capable of exercising sovereign State-like authority giving rise to claims of a "public law character", it is evident from the historical material that the performance of "constitutional" functions was considered of a genuine public international law character because they are based on international powers derived from the UN Charter'.[672]

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[666] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en> accessed 21 December 2021.
[667] Ibid.
[668] UN Doc. A/C.6/17 (1946), at 1, fn.
[669] UN Doc. A/C.6/191 (1947).
[670] Cuba, Czechoslovakia, Egypt, UK, USA, USSR and Yugoslavia.
[671] Mr. W.E. Beckett of the UK. See UN Doc. A/C.6/17 (1946) and UN Doc. A.C.6/191 (1947).
[672] Schmalenbach (2016), para. 46 (fn. omitted).

That said, the dichotomy between private and public does not make the interpretation and application of the term 'private law character' all that easier.[673] The key challenge is how to distinguish 'private law character' from 'public law character' in the case of the UN.[674] Mégret comments as follows:

> 'On remarquera néanmoins à titre liminaire que la distinction entre droit public et droit privé est historiquement et géographiquement construite et donc contingente, qu'elle revêt souvent un sens spécifique mais incertain au niveau international au point de s'avérer inapte à décrire certains des mécanismes les plus iconoclastes produits par la pratique, et qu'elle fait partie de ces dichotomies instables à la déconstruction desquelles la mondialisation s'est depuis longtemps attelée, et qui seraient peut être même entrées dans une phase de décadence terminale. Comme le notait déjà Hans Kelsen dans son ouvrage sur le droit des Nations Unies en 1947 « the differentiation between public and private law is highly problematical and justified only in so far as based on positive provisions of a legal order »'[675]

The following paragraphs make observations that may inform the interpretation and application of the term 'private law character' in the case of the UN.

*Typical 'private law' elements*

In applying the term 'private law character' in the case of the UN, it may be instructive to consider the four senses in which Barnett makes a distinction between private and public law in general:

> '(1) the kinds of substantive standards used to assess the types of conduct that may properly be subject to legal regulation; (2) the different status of persons or entities that may properly complain about violations of legal regulation; (3) the different status of persons or entities that are subject to legal regulation; (4) the different kinds of institutions that may be charged with adjudicating and enforcing legal regulations.'[676]

As to the third distinction, Barnett explained:

> 'We might call laws that are meant to regulate the internal conduct of governmental authorities and that define their relationship or duties to private individuals "public law." In contrast, laws that define the rights and duties that private individuals and groups owe *to each other* may be termed "private law."'[677]

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[673] Cf. Schmalenbach (2016), para. 47 ('What appears to be a relatively straightforward dichotomy—claims of private law in contrast to those of a public international law character—blurs in practice.').
[674] See likewise Mégret (2013), under heading IA ('La distinction publique/privée mérite d'être comprise dans un sens assez spécifique propre aux Nations Unies.').
[675] Ibid., under heading I (fns. omitted). The reference is to H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), at 318. See likewise S. Somers, 'De Drittwirkung van Grondrechten' (2012) 41 *Netherlands Journal of Legal Philosophy* 44, at 44 ('Tegen de achtergrond van de internationalisering van het recht lijken de grenzen tussen privaat- en publiekrecht stilaan te vervagen.'); D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1349. See generally M.J. Horwitz, 'The History of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1423.
[676] R. Barnett, 'Foreword: Four Senses of the Public Law-Private Law Distinction', (1986) 9 *Harvard Journal of Law and Public Policy* 267, at 267-268.
[677] Ibid., at 270 (italics in original, underlining added).

In the case of the UN, the basic idea is that, as Mégret explained:

> 'l'ONU ne devrait pas en règle générale avoir à répondre, même de manière interne, à des réclamations venant de l'extérieur mettant en cause l'exercice même de son mandat, cette contestation relevant au mieux de la logique politique et juridique propre à l'organisation. En revanche, les litiges de droit privé font l'objet d'un traitement préférentiel, un peu par analogie avec la manière dont les immunités des Etats cèdent en matière d'actes de jure gestionis, car ils remettent moins directement en question l'action des Nations Unies.'[678]

This corresponds to the travaux préparatoires insofar as they juxtapose the 'actual performance of constitutional functions' with matters that are merely 'incidental' to those functions.

The 1995 Report points to certain elements of 'private law character' in UN practice. Disputes of a private law character relating to peacekeeping operations, for example, concern 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by member of a United Nations peace-keeping operation within the "mission area" concerned'.[679]

In this connection, according to Schmalenbach, Section 29 of the General Convention

> 'is tailored towards disputes over rights and duties within the private law domain which traditionally embraces under domestic law subjects such as property, contracts, unjust enrichment, and tort (*i.e.* personal injury, illness, or death). In this area, it can be argued, the UN acts like a private person within the territory of its host State, subjected to the latter's private law and thus entering on an equal footing into legal relationships with other private persons. In line with the traditional perception of private law claims, all post 1998-SOFAs/SOMAs specify . . . "dispute or claim of a private law character" in their Art. VII para 54 as "third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to (the mission)".'[680]

Thus, three ingredients in the UN's practice may suggest—though without necessarily being determinative of—a 'private law character': the nature of the claimants (third non-state parties); the damage sustained (personal injury, illness or death, and property loss or damage); and the remedy requested (compensation). Mégret contended in this respect: 'On le voit, la caractéristique première d'une réclamation en responsabilité extra-contractuelle est le fait qu'elle émane de personnes privées ayant souffert un dommage à cause d'une faute de l'organisation internationale.'[681]

*'Private law character' and the 'normal' jurisdiction of national courts*

As seen, the travaux préparatoires clarify that Section 29 of the General Convention was designed as the 'counterpart' to the UN's immunities and that disputes of a private law character would have come

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[678] Mégret (2013), under heading I.
[679] 1995 Report, para. 15 (emphasis added).
[680] Schmalenbach (2016), para. 45 (fn. omitted).
[681] Mégret (2013), under heading I-A. Cf. Transnational Development Clinic, Yale Law School *et al*., 'Peacekeeping Without Accountability' (2013), at 31, referring to Barnett (1986).

before municipal courts but for the UN's immunity.[682] In this respect, according to Schmalenbach: 'It is the aim of Art. VIII Section 29 General Convention to ensure that the jurisdictional immunity of the UN before domestic courts does not result in a legal vacuum devoid of responsibility and redress.'[683]

As Mégret observes, disputes of a 'private law character' are disputes which would *normally* have come before domestic courts.[684] The implication is that disputes that would *not normally* be adjudicated by domestic courts do not have such a character. In this respect, according to Mégret: 'Les juridictions nationales n'aient pas a priori compétence pour juger d'actes purement internes à une organisation internationale, c'est-à-dire en définitive de se substituer aux mécanismes onusiens internes de production du droit.'[685]

In other words, the jurisdiction of domestic courts in private law disputes would normally exclude those disputes that are within the public realm of international organizations. In this respect, Reinisch has demonstrated the disinclination of national courts, using different techniques, to consider internal matters of international organizations. One such technique is an analogy to act-of-state doctrine,[686] which may be described as 'the principle (which is not a rule of public international law) that municipal courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.'[687] Applied to international organisations, domestic courts may be reluctant to scrutinize internal acts of these organisations, on the basis that they have been established by states conferring sovereign powers.[688] The less likely that domestic courts would 'normally' exercise jurisdiction over a dispute, the stronger the argument that the dispute is not of a private law character.

*The developing governance functions of the UN and the advent of human rights*

At the time of the conclusion of the General Convention in 1946, the functions of the UN and the position of individuals were different from today. As to the former, the UN was primarily state-oriented. As Fassbender put it in the context of targeted sanctions, 'the founders of the United Nations did not expect

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[682] This is reflected in UN practice, see, e.g., Para. 55 of the MINUSTAH SOFA ('any dispute or claim of a private-law character, . . . to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement'. [emphasis added]).
[683] Schmalenbach (2016), para. 87.
[684] Mégret (2013), under heading I-A ('il s'agit de litiges au sujet desquels ces tribunaux *auraient* normalement compétence si ce n'était du fait de l'opération des immunités de l'organisation internationale.' [emphasis in original]).
[685] Mégret (2013), under heading I-A.
[686] Reinisch (2000), at 375.
[687] I. Brownlie, *Principles of Public International Law* (2003), at 483-484.
[688] See generally D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005).

the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected.'[689]

In recent years, there has there been 'a global trend of shifting governance tasks from states (including their sub-entities) to non-state actors', [690] including notably international organizations. Or, as Fassbender put it, 'increasingly, the UN is entrusted with tasks of global governance that go beyond its traditional purposes and functions.'[691] Indeed, according to Reinisch, there are 'increasing attempts of international organizations to adopt measures directly regulating individual behaviour, of which the imposition of targeted economic sanctions is only one example.'[692] UN operations with the most far-reaching effect on individuals may be the administration of territories,[693] such as in Cambodia, East Timor,[694] and, as seen, Kosovo.

As to the latter, the position of individuals has changed with the advent of international human rights. As explained by Fassbender: 'Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of states under international treaty and customary law.'[695]

That development was borne out of the need to protect individuals against *state* power.[696] As Tomuschat put it, the

> 'international' protection of human rights denotes an ensemble of procedures and mechanisms which . . . are primarily designed to protect human beings against their own state. Protection is generally needed at home. Human rights have been brought into being as a supplementary line of defence in case national systems should prove to be of no avail. Although the state is on the one hand reckoned

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[689] Fassbender (2006), para. 6.2.
[690] A. Reinisch, 'Governance without Accountability?', (2001) 44 *German Yearbook of International Law* 306, at 270.
[691] Fassbender (2006), para. 6.3.
[692] Reinisch (2010), at 258.
[693] See generally E. de Wet, 'The Direct Administration of Territories by the United Nations and Its Member States in the Post Cold War Era: Legal Bases and Implications for National Law', (2004) 8 *Max Planck Yearbook of United Nations Law* 291.
[694] According to Wilde: 'It is common to describe the administration projects in Kosovo and East Timor as unique because of the plenary administrative powers asserted, the involvement of the United Nations in this activity, and the problems caused by the supposed lack of pre-existing institutions.' R. Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches', (2004) 15 *European Journal of International Law* 71, at 73. However, the exercise of administrative powers by international organizations is in fact not new, it goes back as far as 1920, when the League of Nations exercised territorial administration in the Free City of Danzig. The UN has on occasion exercised such powers since the 1960s. Ibid., at 76.
[695] Fassbender (2006), para. 8.4. Cf. Schmalenbach (2016), para. 8 ('in late 1945, some months before delegates to the UN discussed and drafted a universal declaration on the subject of human rights, the human rights dimension of Section 29 was at best only implicitly assumed to be present but was never officially brought up for discussion. This has changed with the growing human rights awareness of member States and their judiciaries.')
[696] That explains why major human rights treaties are only open to states, namely 'traditionally States (i.e., their governmental administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights'. Fassbender (2006), para. 3.3.

> with as the indispensable guarantor of human rights, historical experience has also made clear that the state . . . may use the sovereign powers at its disposal to commit violations of human rights".'[697]

The notion that human rights may also bind international organisations is more recent. The more the UN exercises public power over individuals, the more its accountability in terms of international human rights compliance is at issue.[698]

Fassbender summarises the foregoing developments as a

> 'dual process – the coming into existence of a firmly recognized body of human rights in international law, promoted by the United Nations, and the expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals'.[699]

That process postdates the adoption of the General Convention. The drafters of the UN Charter and the General Convention are unlikely to have envisaged the development whereby the UN came to exercise constitutional or governmental powers in relation to individuals. The quest for remedies concerning the current exercise of such powers by the UN may put pressure on the interpretation and application of Section 29 of the General Convention. But, the travaux préparatoires do not support this. That is moreover for good reasons, as the experience under Dutch law shows.

- The 'wrongful government act' under Dutch law

The question of the scope of Section 29 of the General Convention is reminiscent of a long-running debate under domestic law in the Netherlands as regards the 'wrongful government act' (onrechtmatige overheidsdaad*)*. The following observations regarding the legal situation in the Netherlands are provided by way of illustration; the focus on the Netherlands is in keeping with the focus on that jurisdiction in chapter 4 of this study.

As explained by Di Bella:

> 'The notion that the government can be held liable under the Civil Code for violating private-law norms was accepted early on. There was much debate, though, about whether the government was or should be liable, too, if it transgressed public-law norms . . . There was a consensus of opinion that the civil-law wrongful act sections in the DCC did not apply to the government's violation of public-law norms and that a separate scheme was desirable in this regard.'[700]

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[697] Tomuschat (2003), at 84.
[698] See generally Johansen (2020), at 3; Ferstman (2017), at 1.
[699] Fassbender (2006), para. 8.6. See also para. 6.3. ('a number of developments, in particular in the context of peacekeeping operations and the international administration of territories, have made it a possibility that violations of human rights and international humanitarian law occur that are attributable to the UN', referring to Mégret and Hoffmann (2003), at 325).
[700] L. Di Bella, *De Toepassing van de Vereisten van Causaliteit, Relativiteit en Toerekening bij de Onrechtmatige Overheidsdaad* (2014), at 208.

However, in spite of apparent consensus in legal thinking that there should be a separate scheme of liability for such transgressions,[701] such a scheme has developed only to the extent of allowing challenges to be brought against government *decisions*.[702] That is, no such separate scheme developed regarding wrongful acts committed by the government.

In order 'to fill in the gap in legal protection against the government',[703] the Supreme Court ruled as early as 1924 that 'the government's mere violation of a public-law statutory provision was wrongful within the meaning of the [civil code]. Until to date, under what is currently Article 6:162 of the Dutch Civil Code ('DCC'), Dutch 'civil courts . . . adjudicate government liability for violations of public-law norms based on the civil-law requirements'.[704] As Di Bella concluded:

> 'Wrongful government conduct is consequently based on a provision which is not necessarily appropriate here. This situation raises various obstacles. Due to its private-law character, Section 6:162 DCC does not give adequate attention to the government's special position under liability law. Whether the government can successfully be held liable in a specific case for wrongful conduct is not predictable enough under the current case law'.[705]

Thus, in the absence of a separate and comprehensive remedy system to scrutinise governmental action, the Dutch courts were left to stretch the application of private law, though it is not well-suited for that purpose.

The Dutch experience cautions against stretching the application of Section 29 of the General Convention to disputes that in essence concern the exercise of public, or governmental, functions (which would moreover be contrary to the travaux préparatoires). The changing role of the UN, coupled with the advent of human rights, rather militates in favour of designing an appropriate dispute settlement regime for disputes of a 'public law character' in connection with the developing right to a remedy (see subsection 2.4.2 of this study).

*'Official' v. 'constitutional' or public functions*

At some level, all disputes are likely to have a link to the UN's purposes. This is because acts of an international organization are necessarily related to its purposes and powers (save for *ultra vires* acts).

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[701] Ibid., at 210.
[702] As explained by Di Bella: 'According to the legislature that enacted the General Administrative Act, in determining whether a damages claim on account of wrongful government conduct exists, administrative courts have to utilise the same requirements which the civil courts apply in resolving disputes concerning wrongful government acts.' Ibid., at 209. More generally, Di Bella explained that 'this topic is politically sensitive and difficult, and no one wanted to stick his/her neck out on it. The legislature, it seems, has just kept putting off dealing with the issue. The court therefore has to (and still must) do the dirty work'. Ibid., at 210.
[703] Ibid., at 209.
[704] Ibid., at 210.
[705] Ibid., at 219. Challenges that arise in scrutinising the legality of government action under Art. 6:162 DCC concern, amongst others, causality, relatively and imputation requirements.

This does not mean, however, that all acts necessarily involve the performance of 'constitutional functions'; otherwise, all disputes would necessarily have a 'public' as opposed to a 'private' law character. The *travaux* of Section 29 clarify, as seen, that an 'official' act may conceivably give rise to a dispute of a 'private law character'. Indeed, if a vehicle used in a peacekeeping operation—and thus on 'official' business—is involved in an accident, according to the 1995 Report, the dispute may well have a 'private law character'.

#### 3.4.2.2 UN practice regarding 'private law character'

##### 3.4.2.2.1 The 1995 Report's exclusion of 'other claims'

As seen, the 1995 Report contains a category of 'other claims' which do not qualify for dispute settlement under Section 29(a) of the General Convention. Specifically, these are claims 'based on political or policy-related grievances against the United Nations', and claims by disappointed job applicants. As seen above, in UN practice, this category does not seem to imply an automatic exclusion from the scope of Section 29 of *any* claim that is not specifically mentioned in the 1995 Report. Rather, the criterion for exclusion seems to be whether any such claim is either from a disappointed job applicant or one that is 'based on political or policy-related grievances against the United Nations'.

That would mean that either category of claims lacks a 'private law character', which is after all the key criterion under Section 29 of the General Convention. That indeed seems to be the UN's position. As to 'political or policy-related grievances' (claims by disappointed job applicants are discussed below), in rejecting the claims relating to the Haiti cholera epidemic, the UN Legal Counsel stated that 'these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[706]

Disputes concerning the performance of the constitutional functions of the UN are likely to be more intensely subject to the political process. However, all claims, including those mentioned in the 1995 Report, at one level, have a political or policy dimension.[707] Mégret argued:

> 'Dans ces conditions, il paraît difficile, au terme du raisonnement du Secrétaire général, d'imaginer ce qui ne constituerait pas une question politique et donc comment l'exception « politique » à l'obligation de fournir des recours alternatifs n'aboutirait pas à vider celle-ci de son sens en ouvrant la voie à un pur arbitraire. Le fait qu'une faute causant un dommage implique de repenser les processus ayant mené à cette faute et pose donc des questions d'ordre institutionnel « politiques »

[706] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Brian Concannon, 21 February 2013, at 2 (emphasis added). In the context of the 1995 Report's categorical exclusion of 'political or policy-related grievances', Ferstman states that 'the organization's approach to the "private" "public" divide . . . has in practice foreclosed all major claims brought to the attention of the UN by third-party individuals'. C. Ferstman, 'Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations', (2019) 16 *International Organizations Law Review* 42, at 54.
[707] Cf. Mégret (2013), under heading I-A.

> paraît comme une évidence. Ainsi en droit interne dans de nombreux Etats le principe d'une responsabilité civile ou administrative de l'Etat et de ses démembrements est acquis d'assez longue date justement en ce qu'il implique vraisemblablement (et bénéfiquement) que certaines procédures soient repensées. L'idée qu'une question qualifiable de droit privé cesserait de l'être du seul fait qu'elle pose par ailleurs des questions politiques paraît fallacieuse car elle mène inévitablement à ce que pratiquement toute dispute puisse être qualifiée comme relevant du droit public.'[708]

The question is not whether a dispute is based on political or policy-related grievances. Insofar as the travaux préparatoires provide guidance (see paragraph 3.4.2.1.2 of this study), the question rather is whether the dispute concerns the performance of constitutional functions. If it does, it lacks a 'private law character'. Thus, only where a political controversy has constitutional dimensions proper is the dispute excluded from dispute settlement under Section 29 of the General Convention. To return to the 1995 Report, that is the only criterion on the basis of which 'other claims', that is, claims other than those specifically mentioned in the report, could be excluded from dispute settlement under Section 29 of the General Convention.

The UN seems to have recognised this in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory proceedings before the ICJ.[709] As seen, those proceedings arose from defamation claims against a Special Rapporteur of the UN Commission on Human Rights. The allegedly defamatory statements caused political controversy, as evidenced by the ensuing ICJ advisory proceedings. This notwithstanding, the UN Legal Counsel stated that the claims, which fell in the category of other claims in the 1995 Report, would be actionable under Section 29. Thus, while the Special Rapporteur acted 'in the course of the performance of his mission',[710] the dispute was deemed not to concern the 'actual performance' of the UN's 'constitutional functions'.

If the defamation claims underlying *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* gave rise to a dispute of a 'private law character', there may well be other such claims. Blatt stated in connection with the purported categorical exclusion of 'other claims' in the 1995 Report: 'Dass diese pauschale Verweigerung im Hinblick auf die zahlreichen Arten von Ansprüchen, die dem Typ other claims zuzuordnen sind, eine mehr als fragwürdige Praxis darstellt, kann wohl auch ohne nähere Prüfung festgestellt werden.'[711]

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[708] Ibid., fn. omitted.
[709] The dispute arose under Section 29(b) of the General Convention, but the UN's ratification of the conduct of its Special Rapporteur brought it within the scope of Section 29(a).
[710] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 56.
[711] H. Blatt, 'Rechtsschutz gegen die Vereinten Nationen. Internationale Immunitaten und die Streitbeilegung nach Section 29 des Ubereinkommens uber die Vorrechte und Immunitaten der Vereinten Nationen', (2007) 45 *Archiv des Völkerrechts* 84, at 99-100.

Blatt referred to the work of the Independent Inquiry Committee into the UN Oil-For-Food Programme, which might well have given rise to defamation claims.[712] The Committee was set up to investigate allegations of bribery and corruption in the administration of the Oil-For-Food Programme. The Committee's final report states

> 'that more than 2,200 companies worldwide paid kickbacks to Iraq in the form of inland transportation fees, after-sales-service fees, or both. Tables of all companies for which there is evidence that kickbacks were paid in connection with their contracts have been separately published by the Committee today.'[713]

Such public allegations could cause serious reputational damage to the companies concerned and might spur actions for damages on the basis of defamation. While no doubt politically sensitive, any link with the performance of the UN's constitutional functions may be rather tenuous. Like the defamation claims in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, any claims in connection with the Oil-For-Food Programme would conceivably qualify as private claims of a 'private law character'.

And, one can conceive of other claims that similarly need not concern the actual performance of constitutional functions of the UN, and may not even be politically controversial. For example, procurement processes for general services may give rise to challenges by disappointed bidders alleging procedural irregularities. It is not inconceivable that such claims give rise to disputes of a 'private law character'. The UN's establishment of the 'Award Review Board' in 2009 (discussed below) may evidence a recognition in that direction.[714]

As to the second type of claims mentioned under the heading 'other claims' in the 1995 Report, these are claims from 'disappointed job applicants, i.e. individuals who are aggrieved that they were not selected for a United Nations position. Such claims typically allege the occurrence of prejudice or some other impropriety in the selection process.'[715]

According to the 1995 Report, such claims do not qualify for dispute settlement under Section 29. Nonetheless, the report expressly refers to these claims as 'claims of a private law nature'.[716] The issue is whether the disputes to which these claims give rise have a 'private law character'.

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[712] Ibid., at 84 ff.
[713] Independent Inquiry Committee into the United Nations Oil-for-Food Programme, 'Manipulation Of The Oil-For-Food Programme by The Iraqi Regime' (2005), at 250.
[714] UN Doc. A/67/683/Add.1 (2012), para. 4.
[715] 1995 Report, para. 24.
[716] Ibid.

A related category concerns 'staff disputes', that is, disputes between staff (upon their recruitment) and the organisation in connection with the former's employment. According to Schmalenbach:

> 'Art. VIII Section 29(b) General Convention can be taken as the proper legal basis for the UN to provide appropriate modes of dispute settlement in cases of staff disputes . . . because the respondent to these applications is the UN Secretary-General as the chief administrative officer of the UN (Art. 97 UN Charter) and the appointing authority (Art. 101 UN Charter).'[717]

To recall, Article VIII, Section 29 ('Settlement of disputes') of the General Convention reads as follows:

> 'The United Nations shall make provisions for appropriate modes of settlement of:
> (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
> (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'

If, as Schmalenbach argued, staff cases are covered under subparagraph (b), then the implication would be that they are of a 'private law' nature. This is because, according to Schmalenbach,

> 'there is a strong case to be made for the primacy of lit a. If UN officials are exposed to lawsuits or criminal charges before domestic courts even if they acted in their official capacities, their jurisdictional immunity points towards Art. VIII Section 29(b) General Convention: the UN to which the act is attributable has to provide for modes of alternative dispute settlement. Due to the attribution of the official act to the UN . . . however, the proper addressee of the claim is the UN with the corresponding consequences for the applicable liability and dispute settlement regime. Consequently, the claim has to fulfil the lit a elements ('dispute of a private law character') in order to be receivable under Art. VIII Section 29 General Convention.'[718]

Where a dispute has a 'private law character', this may be taken to suggest that the rights at issue qualify as 'civil' under Article 6 of the ECHR. However, it is submitted that the argument that staff disputes are covered by subparagraph (b) of Section 29 of the General Convention fails to persuade.

Returning to the origins of the General Convention, the International Labour Office's 'suggested text of proposed draft resolution' provided in Article 18, paragraph 2:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[719]

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[717] Schmalenbach (2016), para. 3.
[718] Ibid., para. 61 (fn. omitted).
[719] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223.

Thus, staff disputes were specifically catered for in subparagraph (c), meaning that the International Labour Office envisaged those disputes to be distinct from disputes mentioned under (b), which developed into Section 29(b) of the General Convention. The provision in subparagraph (c) was excluded from Section 29 of the General Convention. There is no evidence in the drafting history of Section 29 of the General Convention that this was because staff disputes were understood to be covered by sub-paragraph (b). In commenting on the exclusion of subparagraph (c) concerning staff disputes, Jenks – the driving force behind the ILO proposals – merely noted that 'it is perhaps in this matter that most progress has since been made.'[720]

Furthermore, if Section 29(b) of the General Convention were the legal basis for the settlement of staff cases, one would have expected the UNGA to have referred to this in establishing the UN's Administrative Tribunal at the time.[721] But, the UNGA resolution contains no reference to Section 29 of the General Convention. Nor does the ICJ's advisory opinion in *Effects of Awards* Made by the United Nations Administrative Tribunal refer to that provision. That advisory opinion concerned the legal effect of awards rendered by the administrative tribunal at the time. The ICJ was called to consider whether the UN General Assembly was empowered to establish the tribunal.[722] It concluded that to this end the UN has an implied power, exercised by the General Assembly:[723]

> 'When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.
>
> In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.'[724]

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[720] Jenks (1961), at 45. Indeed, according to Schmalenbach, 'Lit c was not very innovative given that employment cases always fell under the jurisdiction of the Administrative Tribunal of the League of Nations, whose transferral to the ILO was foreseeable in 1945'. Schmalenbach (2016), para. 6.
[721] UN Doc. A/RES/351 (IV) (1949).
[722] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, International Court of Justice, (1954) ICJ Reports (*Effect of Awards*), at 56.
[723] Ibid., at 58.
[724] Ibid., at 57.

If Section 29(b) of the General Convention had applied, then the tribunal's establishment would presumably have been based on the chapeau of Section 29, according to which the UN 'shall make provisions for appropriate modes of settlement of' staff disputes. Rather than referring to an obligation under Section 29, however, according to the ICJ, the tribunal's establishment is a corollary of the aforementioned 'express aim' of the UN Charter.

It is submitted that for the ICJ, and earlier the UNGA, to not refer to Section 29 of the General Convention was unlikely to be an 'omission'.[725] Indeed, *Effect of Awards* rather appears to provide the legal underpinning for the establishment of the Administrative Tribunal, in furtherance of the legacy of the League of Nations Administrative Tribunal and the ILOAT.[726]

As a result, the settlement of staff disputes is arguably distinct from that of disputes under Section 29 of the General Convention. An early commentator, Harpignies, suggested this much by juxtaposing the two dispute settlement regimes:

> 'Section 29 of the Convention sets out the obligation of the United Nations to « make provisions for appropriate modes of settlement » concerning disputes of a private law character.
> . . . Similarly, the United Nations, following the example set by the League of Nations, established in 1950 an Administrative Tribunal having jurisdiction over its conflicts with its own officials'.[727]

Indeed, according to Harpignies, staff disputes 'are not strictly of a private law character since they are governed by a distinct body of law, namely, international administrative law'.[728]

#### 3.4.2.2.2 The Srebrenica genocide, Kosovo lead poisoning and Haiti cholera epidemic

The foregoing interpretation of Section 29 of the General Convention allows for an appraisal of the UN's interpretation and application of the phrase 'private law character' in rejecting liability in connection with the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic and rejecting dispute settlement in connection with the second and third dispute.

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[725] Schmalenbach (2016), para. 3. Cf. the IMF's opinion with respect to Section 31 of the Specialized Agencies Convention, which corresponds to Section 29 of the General Convention: 'One matter of contention is the applicability of section 31 of the specialized agencies Convention to staff members. IMF takes the view that the provision is not applicable.' 1985 Supplement to the 1967 Study, para. 229.
[726] As Powers recalls: 'The first administrative tribunal was established in 1927 by the League of Nations. When the League was dissolved in 1946, the League Tribunal was reconstituted, with minor modifications, by the International Labour Organisation and became the ILOAT.' J. Powers, 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?', in P. Quayle and X. Gao (eds.), *Good Governance and Modern International Financial Institutions: AIIB Yearbook of International Law 2018* (2019) 108, at 110, fn. 4. As to the UNAT, it 'was established in 1950, and its jurisdiction was extended to various UN specialized agencies and other organizations that accepted its jurisdiction.' Ibid., at 110 (fn. omitted).
[727] Harpignies (1971), paras. 3-4.
[728] Ibid., at 453.

As to the claims in connection with the IDP camps in Kosovo, as seen, Human Rights Advisory Panel ('HRAP') held that the complaint before it, in relevant part, fell '*prima facie* within the ambit of the UN Third Party Claims Process' and on that basis declared the complaint inadmissible. That is, according to the HRAP:

> '38. The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.
>
> . . .
>
> 40. The substantive complaints declared admissible by the Panel in its 5 June 2009 decision on admissibility are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall prima facie within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.'[729]

Conversely, according to HRAP, as seen:

> 'On 25 July 2011, the UN Under-Secretary-General for Legal Affairs informed the complainants of her decision to declare the claims non-receivable. She stated that under Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations . . . the UN Third Party Claims Process provided for compensation only with respect to "claims of a private law character", whereas the complainants' claims concerned "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo".'[730]

It took over five years for the UN to reject the claims. The process leading to that decision is not clear from the documents available to the present author. Contrary to Section 7 of UNMIK Regulation No. 2000/47, it seems that the claims were not settled by a Claims Commission (discussed below). Of note, the provisions of UNGA resolution 52/247 (1998), though developed and promulgated in the context of *peacekeeping operations*, were considered applicable—including by the UN Legal Counsel—to the present situation, which concerns a UN territorial (interim) administration.[731]

On the substance of the decision to reject the claims since they fell outside the 'private law character' scope of Section 29 of the General Convention, it is difficult to assess this on the basis of the reasoning relayed in the HRAP decision. However, there may be good arguments in support of that decision. That is, insofar as the claims concerned 'alleged widespread health and environmental risks arising in the

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[729] *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08.
[730] Ibid., Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19.
[731] The UN lists UNMIK amongst its peacekeeping operations, <peacekeeping.un.org/en/mission/unmik> accessed 21 December 2021.

context of the precarious security situation in Kosovo',[732] they may be taken to challenge the discharge by UNMIK of its governmental mandate.[733] Arguably, no private party would be in a position to address effectively the aforementioned risks, for example, by relocating the claimants from the IDP camps or otherwise improving their living conditions in the prevailing security situation. Only UNMIK would arguably have the powers to do so in the performance of its 'constitutional' mandate. The actions allegedly required of it involve public policy choices which, in terms of the travaux préparatoires of Section 29, arguably concern the performance of constitutional functions and are not merely incidental thereto. They represent administrative decisions that may give rise to disputes that have a public, rather than a private, law character. Therefore, in light of the UN Legal Counsel's reasoning, the dispute arguably lacked a 'private law character' within the meaning of Section 29(a) of the General Convention. This would mean that, in terms of substance, the UN had reasons to reject dispute settlement on the basis of that provision.

Conversely, it is submitted that there are good arguments for the proposition that the disputes arising out of the Haiti cholera epidemic were rather of a private law character in the sense of Section 29(a) of the General Convention.[734] As seen, in sum, the claim brought against the UN in 2011 was that it had failed to discharge its duty of care in connection with the spreading of cholera by Nepalese peacekeepers in Haiti.

In what has been referred to as '[o]ne of the most disputed decisions of the UN in this respect',[735] the UN Legal Counsel asserted that 'consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[736]

What are these political and policy matters that would necessarily be reviewed? It is true that the UN would not have incurred liability but for its decision to deploy peacekeepers to Haiti. The decision to deploy may not be reviewable under Section 29 as it represents the performance of the constitutional

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[732] *N.M. and Others v. UNMIK*, Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19.
[733] Cf. Rashkow (2015), at 87, fn. 27 ('there is a much stronger case for characterizing the actions of the 'Interim Administration' as addressing political or policy matters of a governmental nature that do not give rise to claims of a private law character within the meaning of Section 29, than there is in the Haiti situation').
[734] Cf. ibid., at 86 ('It is much more difficult to understand the decision of the United Nations declining to review the claims of the Haitian cholera victims in light of the longstanding practice of the Organization to address claims of a private law character in connection with peacekeeping missions and the terms of the Organization's new peacekeeping liability regime.').
[735] Schmalenbach (2016), para. 47.
[736] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Mr Brian Concannon, 21 February 2013, at 2. Related correspondence from the UN has been interpreted as narrowing the definition of private law character, by eliminating torts (other than in connection with motor vehicle accidents), and broadening the category of claims of a public law character. K. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', (2016) 16 *Chicago Journal of International Law* 341, at 360-361.

functions of the UN. However, the fact that, in furtherance of its humanitarian mandate, the UN conducted a humanitarian mission in Haiti does not mean that the UN's actions cannot be assessed under private law, notwithstanding the sensitive political realities.

It is the UN's responsibility for the epidemic in carrying out the deployment that gave rise to a dispute. The dispute arguably does not concern the performance of constitutional functions, but instead acts that are 'incidental' thereto. Indeed, contrary to the *UNMIK* case, an entity need not have public, or governmental, powers to discharge the duty of care alleged in that case. That duty applies to any person, be it natural or legal. The deficient black water waste disposal system of the camp seems to represent a classic tort.[737] Insofar as the UN would plead 'operational necessity',[738] that defence would not hold if only because that exemption from liability applies exclusively to property loss and damage, not to claims for personal injury, illness or death.[739]

As Mégret contended:

> 'Le tors immédiat a bien été causé par des actes commis par les soldats népalais en Haïti dont, si l'on exclue leur seule présence, au moins le fait d'avoir épanché les eaux dans le Maribonite est bien une action ayant entraîné le dommage. Le fait que ce tors soit l'objet d'une longue série de décisions dont certaines prises à New York ne devrait pas fondamentalement changer l'inscription du cas haïtien dans cette catégorie.'[740]

Mégret concluded:

> 'Dans le cas de la plainte haïtienne, il n'est aucunement question d'une ambition visant à remettre en cause une politique générale des Nations Unies. La plainte ne vise pas en soi et pour soi les pratiques sanitaires consistant à soumettre ou ne pas soumettre certains contingents de casques bleus à tel ou tel test médical, que dans son abstraction l'on aurait pu en d'autres circonstances qualifier de purement publique. En tant que décision de gouvernance, celle-ci pourrait si existait une « judicial review » être questionnée en elle-même, par exemple en fonction des obligations fondamentales à la charge des Nations Unies, dans une optique quasi-constitutionnelle. Mais ce qui se passe dans le cas haïtien est très différent dès lors qu'un dommage privé a été subi du fait d'une faute onusienne. Ces termes là sont, éminemment, ceux du droit privé.'[741]

In this respect, according to Schmalenbach:

> 'On the basis of the settlement practice of the UN, it is safe to say that all harm-inflicting interactions with private parties arising from or attributable to the UN mission can be the basis of tortious claims of a private law character that create a purely bilateral relationship in which the wrongdoer (*i.e.* the UN) has to make good to the sufferer without putting the mission's international mandate and its implementation under scrutiny. In principle, the international public character of the UN's function

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[737] Cf. comments by Professor J. Alvarez during panel discussion organized by the American Society for International Law, 26 February 2014 <asil.org/remedies-harm-caused-un-peacekeepers> accessed 21 December 2021.
[738] Cf. Mégret (2013), under heading I-B.
[739] 1996 Report, paras. 13-14.
[740] Mégret (2013), under heading I-A.
[741] Ibid., under heading I-B (emphasis provided).

> is irrelevant in this relationship because the claims can be legally assessed on the basis of the general principles of tort law alone, as is the practice of the local claims review boards . . . without putting the mission's international mandate and its implementation under scrutiny.'[742]

As to the final case study, the Srebrenica genocide, it is submitted that the character of the resulting dispute lies somewhere in between those arising out of the Haiti cholera epidemic and the Kosovo lead poisoning, though arguably closer to the latter. As seen, in *Mothers of Srebrenica*, the State of the Netherlands and the UN were sued as co-respondents before the Dutch courts. As discussed at length elsewhere in this study, the case against the UN was dismissed on account of its immunity from jurisdiction.

Whilst the Supreme Court upheld the UN's immunity, as seen, it suggested that Section 29 had been breached.[743] That implies that the Court considered the dispute to have a 'private law character'. As to the ECtHR, in declaring the case against the Netherlands inadmissible (on grounds discussed below), it left unresolved whether Section 29 of the General Convention required the UN to arrange for dispute settlement.[744] But, the ECtHR did accept that

> 'the right asserted by the applicants, being based on the domestic law of contract and tort . . . was a civil one. There is no doubt that a dispute existed; that it was sufficiently serious; and that the outcome of the proceedings here in issue was directly decisive for the right in question. In the light of the treatment afforded the applicants' claims by the domestic courts, and of the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the Mustafić and Nuhanović cases . . . the Court is moreover prepared to assume that the applicants' claim was "arguable" in terms of Netherlands domestic law . . . In short, Article 6 is applicable.'[745]

Regarding the ECtHR's reliance on *Mustafić* and *Nuhanović*, as discussed elsewhere in this study, the Dutch courts had found the Dutch State liable under the law of Bosnia and Herzegovina. If one follows the reasoning of the ECtHR in *Srebrenica*, the more pertinent analogy would be the subsequent decision of the Dutch courts in the same case to hold the State of the Netherlands liable under Dutch private law. It may be tempting to conclude, in line with the reasoning of the ECtHR, that as the dispute against the State was determined under Dutch private law, the dispute against the UN similarly had a 'private law character'.

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[742] Schmalenbach (2016), para. 47 (fn. omitted, emphasis added). Schmalenbach continued: 'By highlighting the difficult sanitary environment in which MINUSTAH had to fulfil its international mandate, the UN left the potentially tortious character of fresh water contamination caused by peacekeepers out of consideration when deciding on the applicability of Art. VIII Section 29 General Convention.' Ibid.
[743] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3.
[744] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case').
[745] Ibid., para. 120.

However, it is submitted that the analogy is not in fact helpful. This is because the liability of the State under Dutch private law involves a 'wrongful government act' (onrechtmatige overheidsdaad). As di Bella explained (see above), such an act may involve the exercise of governmental or 'public' authority—as di Bella explained, this presents certain challenges in terms of the application of private law. The application of Dutch private law in the dispute by the Dutch courts against the Netherlands does not necessarily dictate that the dispute against the UN has a 'private law character' under Section 29 of the General Convention.

As argued in chapter 4 of this study, whether Article 6 of the ECHR applied is to be determined with reference to the internal law of the UN—that is, Section 29 of the General Convention. *Mothers of Srebrenica*, properly considered in terms of that provision, concerned the exercise of public authority: the operation of a peacekeeping force with a Chapter VII mandate. The Hague Court of Appeal in *Mothers of Srebrenica* seems to have realized this insofar as it stated the following in the context of the UN's immunity from jurisdiction:

> 'Amongst the international organisations the UN has a special position, for under article 42 of the Charter the Security Council may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. No other international organisation has such far-reaching powers. In connection with these extensive powers, which may involve the UN and the troops made available to them in conflict situations more often than not entailing conflicting interests of several parties, there is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any action undertaken by the Security Council, or even preventing it altogether. It is not inconceivable, either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining to keeping peace and safety in the world. For this reason it is very important that the UN has the broadest immunity possible allowing for as little discussion as possible. In this light the Court of Appeal believes that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.'[746]

The ECtHR stated in a similar vein

> 'that since operations established by United Nations Security Council Resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field including with the effective conduct of its operations'.[747]

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[746] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.7.
[747] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 154.

The foregoing passages underscore that *Mothers of Srebrenica* was about the actions of a UN peacekeeping force—by employing military force—in the face of an imminent genocide. This goes to the heart of the powers of the UN and decision-making within the organization. No private party could conceivably face the same dilemmas at issue in this case. In this respect, the present author has submitted elsewhere that *Mothers of Srebrenica* clearly is no ordinary day-to-day dispute, but one that seems to touch on the core decision-making process within the UN,[748] that is, the performance of its constitutional functions.

Mégret similarly states with reference to the UN's inability to stop the genocide in Rwanda, and with reference also to the Srebrenica genocide:

> 'Sans doute peut on supputer que l'organisation a vu dans le défaut de mesures actives pour empêcher le génocide une décision fondamentalement publique (aussi déplorable qu'elle soit par ailleurs). Il ne conviendrait pas, dans cette ligne d'idées, que par le biais de la mise en cause d'omissions de ce type on en vienne à pouvoir exiger des comptes d'une organisation internationale à propos de la conception même d'une mission. Si l'on raisonnait en termes de « centre de gravité » normatif on pourrait ainsi prétendre que celui-ci penche dans le cas du défaut d'empêchement du génocide par la MINUAR plus vers le droit public car il s'agit de se prononcer sur l'échec ou le succès même d'une mission par rapport à ses buts et obligations. Quoiqu'il en soit d'un tel raisonnement en termes de principes (et l'on reviendra en conclusion sur la nécessité de plus en plus évidente de reconnaître des modes de responsabilité y-compris dans des situations plus caractéristiquement publiques), la situation du génocide rwandais ou du massacre de Srebrenica diffèrent manifestement du cas haïtien en ce que dans le scenario qui nous intéresse la question n'est pas le défaut d'exécution de la mission même, mais un aspect relativement annexe de sa mise en œuvre (fournir des soldats libres de maladies infectieuses).'[749]

It is submitted that *Srebrenica* rather resembles the case of UNMIK insofar as it leans, to use the terminology of Mégret, 'plus vers le droit public'.[750]

There is a further issue to be addressed in regard to *Mothers of Srebrenica* and this is the part of the claim concerning 'breach of contract'. The ECtHR articulated that part of the claim as follows:[751]

> '[T]he United Nations . . . despite earlier promises and despite their awareness of the imminence of an attack by the VRS, had failed to act appropriately and effectively to defend the Srebrenica "safe area" and, after the enclave had fallen to the VRS, to protect the non-combatants present. They therefore bore responsibility for the maltreatment of members of the civilian population, the rape and (in some cases) murder of women, the mass murder of men, and genocide. The applicants based their position both on Netherlands civil law and on international law.

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[748] See Henquet (2010), at 293, adding 'the functionality of the UN is intensely at stake'. Ibid.
[749] Mégret (2013), under heading I-B (fn. omitted, emphasis added).
[750] CF. Rashkow (2015), at 85-86 ('In the end, there is a real issue in this case whether the dispute over the actions of the United Nations forces are of a "private law character", or whether the dispute raises an issue of public policy or public international law that would take the matter outside the scope of Section 29.').
[751] This seems to correspond to the Dutch Supreme Court's reference to the claim that 'the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave'. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.2.1.

> . . . The argument under civil law was, firstly, that the United Nations . . . had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations . . . had failed to honour'.[752]

The issue is how to characterize the alleged 'agreement': does the dispute concerning such an agreement qualify for dispute settlement under Section 29 of the General Convention? Under that provision, the UN 'shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts, or other disputes of a private law character to which the United Nations is a party.' This phrase has two elements: 'contracts' and 'other disputes of a private law character'. The drafting suggests that both must have such a character. As a result, as with 'other disputes', the test regarding contracts is whether it concerns matters that are 'incidental' to the UN's 'constitutional functions'.

In *Mothers of Srebrenica* , the alleged contract seems to concern rather the opposite, that is, the 'actual performance' of constitutional functions. The purport of said contract was to protect the inhabitants of Srebrenica in exchange for the disarmament of the ARBH forces present. Such an agreement, if it existed, had everything to do with the performance of the UN's core functions. It served a public policy goal of the UN, disarmament of the enclave, and it concerned the exercise of the use of military powers. The dispute concerning the performance of the alleged contract is, therefore, no different in character than the 'other dispute' underlying the case (discussed above). That is, both disputes concern the exercise of governmental functions by the UN and have a public law character, not a private law character within the meaning of Section 29(a) of the General Convention.

That conclusion is supported by an analogy under Dutch law. The alleged agreement resembles an 'exercise-of-powers contract' (bevoegdhedenovereenkomst) under Dutch law, which may be defined as a 'contract between a public entity and private person(s) or another public entity, on the use of one of its specific public powers'.[753] As explained by Huisman, while such an agreement is an 'act of private law',[754] it is governed by rules of both private and administrative law.[755] Indeed, Huisman contended that the legal nature of the contract is 'ambiguous'[756] insofar as it

> 'moves into the twilight zone between the areas of private and public law. It is private, because of its form: a contract, which is traditionally seen as an act of private law in the Dutch legal system. But its content is on the use of a public power, hence public law.'[757]

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[752] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 54-55 (emphasis added).
[753] P.J. Huisman, *De Bevoegdhedenovereenkomst: De Overeenkomst over Het Gebruik van Een Publiekrechtelijke Bevoegdheid* (2012), at 729.
[754] Ibid., at 730.
[755] Ibid.
[756] Ibid., at 729.
[757] Ibid.

Huisman concludes that the classification of an exercise-of-powers contract as an act of private law 'has been shown to be problematic . . . [and it] is best classified as an act of public law'.[758] As seen, the same may be true of the purported contract at issue under Section 29(a) of the General Convention.

#### 3.4.2.3 Interim conclusions

This section concerned the interpretation and application of the phrase 'private law character' under Section 29(a) of the General Convention. It has been submitted that the ordinary meaning of the term dispute of a 'private law character' refers to the following: domestic law, not international law; the opposite of 'public law'; and a common denominator among domestic private laws, as opposed to one specific domestic law. It has furthermore been submitted that, according to the collective *travaux* of the General Convention and the Specialized Agencies Convention, 'disputes of a private law character' may be said to refer to disputes that: concern matters that are 'incidental' to the 'constitutional functions' of the UN and do not relate to the 'actual performance' of such functions; would have come before municipal courts but for the immunity of the UN, Section 29 of the General Convention being the 'counterpart' of the UN's immunities; and concern the performance of 'official acts', but not 'constitutional functions'.

In interpreting the phrase 'private law character', the key challenge is to distinguish 'public' from 'private'. This section offered a number of considerations to that end. Three ingredients suggest, but are not necessarily determinative of, a 'private law character': the nature of the claimants (third non-state parties); the damage sustained (personal injury, illness or death, and property loss or damage); and, the remedy requested (compensation). Furthermore, the jurisdiction of domestic courts in private law disputes would normally exclude those disputes that are within the public realm of international organizations. Moreover, since the adoption of the General Convention, there has been a development whereby the UN began to exercise governmental powers over individuals. A parallel development involved the advent of international human rights. This 'dual process' calls for the establishment of 'public law remedies'. The Dutch experience cautions against expanding the interpretation of the application of Section 29 to such disputes (which would moreover run contrary to its travaux préparatoires).

When this interpretation of 'private law character' is applied to the UN's practice, the 1995 Report's exclusion of disputes based on 'political or policy-related grievances' appears problematic. In determining whether a dispute has a private law character, what matters is whether the actual performance of constitutional functions is at issue. As seen, in UN practice, defamation claims qualify

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[758] Ibid., at 733.

as disputes of a private law character. And, there are possibly other claims the character of which requires close examination.

As to the three case studies, it is submitted that in the cases arising out of the Kosovo lead poisoning and the Srebrenica genocide there are arguments to reject dispute settlement under Section 29 of the General Convention on account of the prevailing public law character of the respective disputes. That is, the impugned decisions in these cases essentially concern policy choices by the UN in the exercise of its governmental or public authority. Conversely, regarding the Haiti cholera epidemic, it has been submitted that the UN's refusal to engage in dispute settlement under Section 29 is more difficult to justify. It is true that public policy decisions are at play. However, the dispute does not concern such decisions, but rather their operational implementation. The alleged deficiencies in so doing arguably amount to a failure to discharge a duty of care that applies to the UN as much as it does to anyone. In other words, the character of the *Haiti* dispute, properly considered, seems to fit the definition of 'private law' in accordance with the intention of the drafters of the General Convention.

Not only are decisions as to the public or private character of a dispute legally complex, they also have significant implications for the claimants. In addition, controversial decisions, such as with respect to the Haiti cholera epidemic, impact on the UN's reputation and thereby effectiveness, and may also potentially threaten its jurisdictional immunity (notwithstanding that in the cholera dispute the US courts upheld the immunity). This brings into sharp focus that, as seen previously, it is the UN itself that determines the character of disputes brought against it. That process is problematic, which is compounded by procedural problems in the implementation of Section 29(a), as discussed in the next subsection.

### 3.4.3 'Provisions for appropriate modes of settlement'

This subsection discusses the requirement contained in the chapeau of Section 29 of the General Convention to 'make provisions for appropriate modes of settlement'. The question that arises at the outset concerns the meaning of the obligation to 'make provisions'. The wording suggests that the UN is not required to have modes of settlement up and running continuously; rather, it seems to require the UN to ensure that such modes are available if and when necessary. As Schmalenbach put it, 'the UN has to anticipate future disputes and be prepared to enter into appropriate modes of settlement.'[759] That seems to correspond to UN practice. As submitted by the UN Legal Counsel in the *Difference Relating*

[759] Schmalenbach (2016), para. 11 (fn. omitted). Schmalenbach adds: 'The ways and means of how the UN achieves this task are not stipulated by Art. VIII Section 29, which requires neither specific institutional settings nor the adoption of UN rules or international agreements on dispute settlement for general application.' Ibid.

*to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* proceedings before the ICJ:

> 'as other claims of a private law nature could arise in any of the 185 member States, and could arise out of innumerable factual situations, it is neither feasible, practical or economical to establish standing claims bodies to deal with these questions.[760]

This subsection begins by addressing the term 'appropriate modes of settlement' under Section 29(a) of the General Convention (subsubsection 3.4.3.1). In so doing, upon briefly recapping modes of settlement in UN practice (paragraph 3.4.3.1.1), it provides an interpretation of the term in light of present-day criteria (paragraph 3.4.3.1.2). It then appraises the existing modes of settlement (paragraph 3.4.3.1.3). In turning to applicable law, the discussion focuses on the UN Liability Rules, that is, the legal basis for their adoption, and their legal qualification, scope of application and implementation, as well as with aspects of their contents.

#### 3.4.3.1 'Modes of settlement'

##### 3.4.3.1.1 Brief recap of modes in UN practice

As seen, according to the UN's reported practice, it has resorted to several procedural modes of settlement depending on the type of claim in point. These modes are, in brief (based on the 1995 Report, unless otherwise indicated):

- Negotiation: all claims. Settlement by way of negotiation has been institutionalised in the case of tort claims arising within UN headquarters district, both prior to (up to 5,000 USD) and following (from 5,000 USD) proceedings before the Tort Claims Board;[761] and claims relating to peacekeeping operations, following proceedings before claims review boards.
- Arbitration: conducted under the UNCITRAL rules and under the auspices of the AAA (claims arising within US) or ICC (claims arising outside US). Available for all types of contractual claims; claims arising within UN Headquarters District that cannot be settled through negotiation following proceedings before the Tort Claims Board; and tort claims arising on UN premises other than New York that cannot be settled through negotiation.
- Tort Claims Board:[762] tort claims arising within UN headquarters district where settlement by way of negotiation (up to 5,000 USD) has failed;

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[760] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12 (emphasis added).
[761] The continued existence of the board remains to be confirmed following the abolition of UN Doc. ST/SGB/230 (1989), pursuant to section 1(a) of UN Doc. ST/SGB/2017/3 (2017).
[762] Subject to its continued existence.

- Local claims review boards: all claims in connection with peacekeeping operations. Standing claims commissions are also foreseen for this type of claims, but they have never been established;
- Lump sum agreement: claims in connection with peacekeeping operations. The ONUC Settlement is the only example of this kind;
- Domestic courts: the UN waives its immunity from jurisdiction where necessary in connection with insurance coverage of tort claims in connection with car accidents; and
- Indemnification and holding the UN harmless: clause included in agreement with recipient states with respect to operational activities for development by UNDP and UNICEF.

3.4.3.1.2 'Appropriate modes of settlement': interpretation

Section 29 does not clarify what is meant by 'modes of settlement'. And, while it provides that such modes must be 'appropriate', it does not clarify the meaning thereof either. The ordinary meaning of 'mode' is:[763] 'a way of operating, living, or behaving'.[764] This seems to connote a process – in the present case: a settlement process. The plural 'modes' indicates that Section 29 envisages several such processes. This is to be contrasted with Article 18(2) of the ILO's 'suggested text of proposed resolution', which provided for the 'determination by an appropriate international tribunal'.[765]

The ordinary meaning of 'appropriate' is:[766] 'suitable or right for a particular situation or occasion'.[767] In the present case, the 'situation' or 'occasion' concerns third-party disputes with the UN that need

[763] Cf. Art. 31(1) of the VCLT.
[764] <dictionary.cambridge.org/dictionary/english/mode> accessed 21 December 2021.
[765] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223 (emphasis added). In *Manderlier*, concerning damages allegedly sustained by the claimant in connection with ONUC, the Brussels Court of First Instance ruled on 11 May 1966 ruled : 'Attendu que dans la section 29 de la Convention il est stipulé que l'organisation devra prévoir des modes de règlement appropriés pour les différends de droit privé dans lesquels elle serait partie ; Attendu qu'il s'ensuit normalement que la défenderesse doit élaborer des dispositions réglementaires pour ses rapports de droit privé et instituer des juridictions pour trancher les contestations qu'ils feraient naître ; Attendu que l'O.N.U. a bien institué certaines juridictions à compétence spéciale, tel le Tribunal administratif des Nations Unies ; que toutefois il n'est pas contesté qu'elle n'a pas institué de juridiction avec une compétence générale et entière.' *Manderlier v. United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, United Nations Juridical Yearbook 1966, 283, cited in Harpignies (1971), at 455. Harpignies concludes that the Court 'seems to have interpreted Article VIII, Section 29 (a) of the Convention as entailing the obligation for the Organization to establish a tribunal with complete and general jurisdiction over conflicts of a private law nature . . . It is indeed accurate that an Administrative Tribunal exists, but it was established under a resolution of the General Assembly. No such resolution was ever adopted or even contemplated with respect to the creation of a Tribunal which would have jurisdiction over conflicts of a private law nature between the Organization and third parties. In the absence of such enabling resolution, the Secretariat has of course no authority to establish such a Tribunal. Moreover such courts or tribunals as have been established by the United Nations do not enjoy a complete and general jurisdiction. Thus, for example, the Administrative Tribunal's judicial powers are severely restricted: it has in principle no jurisdiction over claims for a tort imputed to the Organization and its jurisdiction in disciplinary matters is also restricted to purely legal questions. Even its power to grant compensation for nonobservance of contracts of employment is restricted.' Ibid.
[766] Cf. Art. 31(1) of the VCLT.
[767] <dictionary.cambridge.org/dictionary/english/appropriate> accessed 21 December 2021.

settling. Therefore, the requirement under Section 29 concerns settlement processes that are 'suitable', or 'right', to end legal controversies between the UN and third parties. Given that Section 29 seems to envisage a plurality of processes, what is 'appropriate' may vary depending on the type of claim.[768] In this respect, according to Schmalenbach: 'The UN has certain discretion under the General Convention with regard to the choice of the proper modes of dispute settlement.'[769]

The travaux préparatoires, as supplementary means of interpretation,[770] do not shed light on the meaning of 'appropriate modes of settlement'. The term first appeared in the draft Convention on Privileges and Immunities, prepared by the sub-committee on privileges and immunities of the UN Preparatory Commission's Committee 5.[771] There is no record known to the present author containing a clarification or discussion regarding this term at any stage of the drafting of Section 29 of the General Convention.

That said, as seen, an early explanatory memorandum on the resolution proposed by the International Labour Office on the status, immunities, and other facilities to be accorded to the ILO stated with respect to draft article 18(2), which was to evolve in Section 29 of the General Convention:[772]

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[773]

Furthermore, the Sub-Committee of the Sixth Committee that drafted the Specialized Agencies Convention commented as follows on the draft Convention:

> 'With reference to Section 31 (a), which provides that an Agency shall make provision for appropriate modes of settlement of disputes of a private law character to which a Specialized Agency is a party, it was observed that this provision applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions. It applied, for example, to matters such as hiring premises for offices or the purchase of supplies. The provision relates to disputes of such a character, that they

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[768] CF. Schmalenbach (2016), para. 11 ('In short, Art. VIII Section 29 General Convention allows for ad hoc solutions for unforeseeable situations. The UN has certain discretion under the General Convention with regard to the choice of the proper modes of dispute settlement. Possible modes of dispute settlement that are adapted to the special nature of cases involving the UN and individual claimants range from UN internal claims review, negotiations (if need be with the aid of a mediator) to conciliation and arbitration.')
[769] Schmalenbach (2016), para. 11.
[770] Cf. Art. 32(a) of the VCLT.
[771] PC/LEG/34 (1945), at 9.
[772] In the 'General Note' accompanying the draft text, the Office stated: 'It must never be forgotten that the special status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197.
[773] Ibid., at 219 (emphasis added).

might have come before municipal courts, if the Agency had felt able to waive its immunity, but where the Agency had felt unable to do so.'[774]

The understanding early on, therefore, was that there is a close connection between, on the one hand, domestic court jurisdiction and immunity, and, on the other, alternative recourse. Specifically, the latter was considered to be the 'counterpart' to the former. This leads to a number of observations.

To begin with, the reason why alternative remedies are needed as a counterpart to jurisdictional immunity is that international organisations would otherwise escape accountability. As seen in chapter 2 of this study, and as further detailed in chapter 4 of this study, there are good reasons for that immunity, namely to preclude national courts from exercising jurisdiction over international organisations and thereby interfering in their independent functioning. In determining what alternative recourse is 'appropriate'—that is, 'suitable or right' for the occasion—such recourse must not undermine the UN's immunity, or deprive Section II of the General Convention of its effectiveness.[775] Alternative recourse would not be 'suitable' if it would expose the international organisation to national court jurisdiction (absent a waiver).

Furthermore, if alternative recourse truly is an 'alternative' for domestic litigation—by operating as the counterpart to jurisdictional immunity—then it must arguably meet the standards applicable in litigation before domestic courts. These include the procedural safeguards laid down in Article 6(1) of the ECHR and Article 14(1) of the ICCPR. The latter provides, in relevant part: 'In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

As seen in chapter 2 of this study, there are good arguments that, under the international organisations law framework governing third-party remedies, Article 14(1) of the ICCPR applies to the UN. The ICCPR specifies the human rights obligations of the UN that arguably arise for it under the UN Charter, as its constitution.[776] That provision provides guidance in interpreting and applying Section 29 of the General Convention.[777] The relevance of Article 14(1) of the ICCPR for that purpose results all the more

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[774] UN Doc. A/C.6/191 (1947), at 12-13, para. 32 (underlining in original; italics provided).
[775] According to Rietiker, the principle of effectiveness 'has not been explicitly enshrined in the [VCLT], but it can nevertheless be considered an underlying principle of that instrument.' D. Rietiker, 'Effectiveness and Evolution in Treaty Interpretation' (2019) <oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0188.xml> accessed 21 December 2021, Introduction.
[776] It possibly also forms part of general international law. In this respect, according to the Dutch Supreme Court in *Mothers of Srebrenica*, the Netherlands no longer contested that the right of access to court is part of customary international law. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.1.
[777] Cf. UN Doc. A/66/275 (2011), Annex II ('Proposal for recourse mechanisms for non-staff personnel. Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper'), para. 4 ('In simplifying arbitration procedures, it must be borne in mind that, pursuant

clearly from its French version, both language versions being equally authentic.[778] The French version reads as follows, in relevant part (emphasis added):

> 'Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera . . . des contestations sur ses droits et obligations de caractère civil.'

Moreover, in its General Comment 32, regarding Article 14 of the ICCPR, the Human Rights Committee

> 'notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.'[779]

As Article 14(1) of the ICCPR concerns the determination of rights in the areas of contracts, property and torts, it clearly relates to the issues central to Section 29 of the General Convention, that is, the 'settlement of . . . disputes of a private law character'.

The approach of interpreting Section 29 of the General Convention in light of Article 14(1) of the ICCPR would moreover be in line with the conclusions reached by the Study Group of the International Law Commission on Fragmentation of International Law—Difficulties Arising from the Diversification and Expansion of International Law:

> '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. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.'[780]

In the present case, the matter concerns a 'relationship of interpretation' (as opposed to one of conflict).[781] According to the ILC Study Group:

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to article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, the United Nations must provide an appropriate mode of settlement of disputes arising out of its contracts. Thus, procedures set out in the present concept paper seek to preserve essential features of due process.' [emphasis added]).

[778] Art. 53(1) of the ICCPR.

[779] General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007 (emphasis added), para. 16.

[780] UN Doc. A/CN.4/l.702 (2006), para. 14(1).

[781] Ibid., para. 14(2).

> 'This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.'[782]

In addition to the foregoing legal arguments for interpreting Section 29 of the General Convention in light of Article 14(1) of the ICCPR, there are policy arguments to the same effect. First, to be effective, the UN must be seen to observe the very standards it promotes, notably in discharging its purpose to 'achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all'.[783] More generally, the UN has an interest in preserving its reputation and legitimacy, which requires it to live up to the expectation that it will comply with the principles of rule of law and justice. As seen, the UNSG and the UNGA have firmly embraced those principles; therefore, the UN has itself given rise to such expectations. The UN understands the rule of law to include accountability to laws that are 'consistent with international human rights norms and standards'.[784] Those norms and standards include, the essence of, Article 14(1) of the ICCPR.

The second policy argument is an extension of the abovementioned argument regarding Section 29 offering an 'alternative' to domestic litigation. Chapter 4 of this study concludes that the lower Dutch courts not infrequently reject the jurisdictional immunity of international organisations absent adequate alternative recourse. As seen in chapter 2 of this study, and as further detailed in chapter 4, that immunity remains essential for the independent, and thereby effective, functioning of international organisations. Adequate alternative remedies, therefore, are a means to bolster the immunity and, thereby, the effectiveness of international organisations. Under ECtHR case law, alternative means qualify as 'reasonable' if the 'very essence of the right' under Article 6(1) of the ECHR, being the equivalent to Article 14 of the ICCPR, is not impaired.[785]

The 1997 Report suggests that the UN accepts to comply with such basic standards in practice. This results from the discussion concerning claims review boards. Whilst the 1996 Report stated that '[t]he existing mechanisms and procedures for dealing with third-party claims are not inadequate per se',[786] according to the 1997 Report:

> 'The Secretary-General maintains the view that no new procedures are called for and that the existing mechanisms should, as necessary, be modified and streamlined. He is also of the view that the standing claims commission envisaged in article 51 of the model agreement should be maintained,

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[782] Ibid.
[783] Art. 1(3) of the UN Charter.
[784] <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021. The UN's ambitions regarding the rule of law and justice are reflected in the UN Sustainable Development Goals <un.org/ruleoflaw/sdg-16/> accessed 21 December 2021.
[785] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59 ('It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.' [emphasis added]).
[786] 1996 Report, para. 30.

> mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[787]

The involvement of said 'neutral party' so as to avoid being 'perceived as acting as a judge in its own case' (nemo iudex in causa sua) corresponds to the requirement of impartiality and independence in Article 14 of the ICCPR, as discussed in chapter 6 (in the context of Article 6 of the ECHR).

Lastly, in discharging its extensive global mandate in the common interest, the UN is particularly exposed to third party claims. That also informs the interpretation of the qualifier 'appropriate'. As seen, as the UN Legal Counsel put it in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* at the time, 'claims of a private law nature could arise in any of the 185 member States, and could arise out of innumerable factual situations.[788] From this (policy) perspective, 'suitable' or 'right' points to processes that are not unduly burdensome for the UN, and also take into account its limited, public, resources.[789] At the same time, this should be balanced against modes of settlement under Section 29 presenting a genuine opportunity for claimants to have their claims adjudicated.[790] These modes must not be unduly burdensome for claimants to the point of rendering dispute settlement 'illusory'.[791]

In sum, 'appropriate modes of settlement' under Section 29 may be interpreted to amount to settlement processes to resolve disputes between the UN and third parties, which:

- do not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction;

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[787] 1997 Report, para. 10.
[788] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12 (emphasis added).
[789] Cf. 1997 Report, para. 12 ('As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.')
[790] Cf. Schmalenbach (2016), para. 25 ('the dispute settlement mechanism or process has to be suitable for all parties concerned, not only for the UN'.)
[791] Cf. *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67 ('It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'. [emphasis added]).

- conform to the essence of Article 14 of the ICCPR; and
- are neither unduly burdensome for the UN nor 'illusory' for the claimants.

3.4.3.1.3 Appraisal of existing 'modes of settlement'

*Settlement negotiations*

As a rule, the UN, like international organisations generally, seeks to settle third-party disputes amicably.[792] As a general proposition, it is good practice to do so and to resort to contentious proceedings only where amicable settlement efforts fail. Most international disputes are indeed settled by way of negotiation.[793] And, as Blackaby et al. noted: 'Even where commercial interests are at stake, a dispute need not necessarily lead to all-out confrontation. Initially, the opposing parties will generally attempt to settle matters by meeting and negotiating, sometimes with the assistance of an expert mediator.'[794]

Amicable dispute settlement may be in the best interest of the parties' relationship. It may also be less resource-intensive than contentious proceedings, and be perceived to better preserve confidentiality. Nonetheless, to be effective in resolving a dispute, negotiations need to be conducted in good faith.[795] There also needs to be a circumscribed process. Thus, a pre-agreed time-frame may be needed.[796] The services of a mediator or conciliator may be useful to facilitate the process, for example, under the UNCITRAL conciliation rules.[797]

Furthermore, without the potential for subsequent contentious proceedings, there may be too little incentive to reach a solution through a negotiated settlement. Conversely, concerns over aspects of

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[792] Rashkow (2015), at 79; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 9 ('I should emphasize . . . that the overwhelming majority of claims are settled through negotiation'); 1995 Report, para 7.
[793] J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999), at 20.
[794] N. Blackaby et al., *Redfern and Hunter on International Arbitration* (2015), para. 1.95.
[795] Schmalenbach points to the risk of an 'imbalance of negotiating power'. Schmalenbach (2016), para. 25.
[796] Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012) states: 'Any dispute, controversy, or claim between the Parties arising out of the Contract or the breach, termination, or invalidity thereof, unless settled amicably under Article 17.1, above, within sixty (60) days after receipt by one Party of the other Party's written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining.' [emphasis added].
[797] Cf. Art. 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services), cited above. Cf. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12.

contentious proceedings that may follow if negotiation fails—such as costs, duration, resource implications and publicity—may incentivise a party to agree to a settlement,[798] even at excessive cost.

*Arbitration*

It may not be possible to settle a dispute through negotiation. In that case, as Blackaby et al. put it, 'what is needed is a decision by an outside party, which is both binding and enforceable. The choice then is generally between arbitration before a neutral tribunal and recourse to a court of law.'[799]

Arbitration is an 'essentially *private and consensual* system of dispute resolution',[800] resulting in a legally binding decision by one or more arbitrators,[801] who are generally freely chosen by the parties.[802] As explained by Paulsson: 'The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.'[803]

Arbitration has a long history, both regarding disputes involving states and commercial disputes.[804] Indeed, it is 'now the principal method of resolving international disputes involving states, individuals, and corporations.'[805]

The perceived advantages of arbitration over domestic litigation are well-known. They notably include neutrality and enforcement,[806] but also confidentiality and flexibility in tailoring the proceedings to fit the particular requirements of a dispute.[807]

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[798] According to Schmalenbach, the 'UN's amicable settlement practice . . . is markedly influenced by its unwillingness to move on from the negotiation stage to third party adjudication'. Schmalenbach (2016), para. 25. According to Rashkow, in commenting on certain settlements, 'some of these settlements may have prompted questions in certain quarters whether they were overly generous in an effort to avoid the filing of claims in national courts or, possibly, further controversy and adverse publicity.' Rashkow (2015), at 83.
[799] Blackaby et al. (2015), para. 1.95.
[800] Ibid., para. 1.05 (emphasis in original).
[801] Ibid., para. 1.82; Collier and Lowe (1999), at 31.
[802] Blackaby et al. (2015), para. 1.71.
[803] J. Paulsson, *The Idea of Arbitration* (2013) <oxfordscholarship.com/view/10.1093/acprof:oso/9780199564163.001.0001/acprof-9780199564163> accessed 21 December 2021, at 1.
[804] Collier and Lowe (1999), at 32 and 45.
[805] Blackaby et al. (2015), para. 7.04.
[806] Ibid., para. 1.97. Regarding enforcement, one aspect is international enforceability: 'an award also differs from the judgment of a court of law, since the international treaties that govern the enforcement of an arbitral award have much greater acceptance internationally than do treaties for the reciprocal enforcement of judgments'. Ibid., 1.102. Such treaties notably include the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3, ('New York Convention'), and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 160 ('ICSID Convention').
[807] Blackaby et al. (2015), paras. 1.104-1.105.

Arbitration indeed seems to be the preferred (non-amicable) dispute settlement technique for third-party disputes involving international organisations.[808] However, arbitration does not necessarily qualify as 'appropriate' under Section 29 of the General Convention.

- The unattractiveness of UNCITRAL arbitration

Arbitration may be time-consuming, resource-intensive and costly (notably due to the fees of the tribunal and counsel). Indeed, even a brief review of the UNCITRAL Arbitration Rules, which are the UN's arbitration rules of choice, illustrates how elaborate the process can be:

- By default (Article 7(1)), an UNCITRAL tribunal is composed of three arbitrators. Each party appoints one arbitrator, and these arbitrators together choose the third, presiding, arbitrator (Article 9(1)). If following the appointment of the first arbitrator, the other party has not appointed its arbitrator within a period of 30 days, or if within such a period following the appointment of the latter arbitrator, the presiding arbitrator has not been appointed, the appointing authority may be requested to make the appointment (Article 9);
- The proceedings involve the submission of a statement of claim (Article 20), followed by a statement of defence (Article 21). The tribunal may require further written submissions from the parties (Article 24), such as a reply and rejoinder, and post-hearing briefs. Time periods for the submission of written statements, as fixed by the tribunal, run up to 45 days, but may be extended if the tribunal deems this justified (Article 25);
- The jurisdiction of the tribunal may be challenged (no later than in the statement of defence) (Article 23);
- The tribunal has the power to grant interim measures at the request of a party (Article 26);
- Hearings may take place, at the request of a party or pursuant to the tribunal's own decision, to hear evidence, including expert evidence, or for oral argument (Articles 17(3) and 28);
- The tribunal may request the parties to deposit an equal amount as an advance for certain costs of arbitration (Article 43); and
- The tribunal may resort to evidentiary rules such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration.[809] These rules

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[808] Notwithstanding the limited publicly available information due to the confidential nature of arbitration, this is illustrated, for example, by the cases administered by the PCA, as listed on <https://pca-cpa.org/en/cases> accessed 24 March 2022. See also P. Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privées* (1991), para. 312 ('le recours à l'arbitrage pour le règlement des litiges contractuels des Organisations est . . . la seule recommandation qu'on pourrait addresser aux Organisations sans la moindre hesitation.').

[809] IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council, 17 December 2020, International Bar Association <www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> accessed 12 April 2022.

> 'provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations.'[810]

Whilst the parties enjoy large freedom to agree on procedural aspects of the arbitration, any such agreement may be more difficult to reach in the context of a pending dispute. Notwithstanding that UNCITRAL tribunals are to 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process' (Article 17.1), in reality arbitration may be complex and cumbersome. In this respect, it has been commented:

> '"In its origins, the concept of arbitration as a method of resolving disputes was a simple one . . . Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted for his decision." (Redfern & Hunter 2014 at 1-03)
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> Arbitration has strayed quite far from this rosy picture, as business transactions have grown ever more complex and globalized over the past several decades. The trend has consistently led toward longer, more complex and resource-intensive proceedings, causing some users to complain of arbitrations that are over-lawyered and overly sophisticated and neither quicker nor more efficient than proceedings in national courts.'[811]

The impracticality of arbitration may well render it unattractive for claimants to the point of discouraging them from resorting to this means of dispute settlement. This is particularly so where the claimant is an individual or a small-sized company and the amount in dispute is relatively low.

Rashkow put it as follows:

> 'Of course, the opportunity for arbitration, while attractive and useful to large commercial entities with large claims, is not so attractive to individual contractors or consultants. The United Nations is considering revising its newly reformed internal justice system to address such small claimants that would offer Ombudsman services and/or some form of streamlined, inexpensive arbitration process more appropriate for such smaller claims.'[812]

Rashkow referred to proposals made by the UNSG—on the initiative of and in dialogue with, the UNGA—regarding the settlement of disputes with consultants and individual contractors. In brief, in 2010, the UNGA requested the UNSG

> 'with regard to remedies available to the different categories of non-staff personnel, to analyse and compare the respective advantages and disadvantages, including the financial implications, of the options set out below, bearing in mind the status quo concerning dispute settlement mechanisms for non-staff personnel, including the United Nations Commission on International Trade Law arbitration clause, in his report to be submitted to the General Assembly at its sixty-fifth session pursuant to paragraph 59 of resolution 63/253: (a) Establishment of an expedited special arbitration

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[810] Ibid., at 5. These rules, amongst others, provide for a document production process (Art. 3).
[811] A. Ipp, 'Expedited Arbitration at the SCC: One Year with the 2017 Rules' (*Kluwer Arbitration Blog*, 2018) <arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/?output=pdf> accessed 12 April 2022.
[812] Rashkow (2015), at 79 (emphasis added).

> procedure, conducted under the auspices of local, national or regional arbitration associations, for claims under 25,000 United States dollars submitted by personal service contractors'.[813]

The UNSG did so in his 2010 report on the Administration of justice at the UN ('AJUN report'), concluding as regards the option of expedited arbitration, amongst others:

> 'Initial exploration of the possibility of conducting a special arbitration under the auspices of arbitration associations indicates that arbitral organizations do have "fast track" procedures for arbitration, which allow arbitral proceedings to be completed in shorter time frames with some cost savings . . .
>
> . . . Although such expedited procedures exist, arbitrations within the United Nations context take place under UNCITRAL Arbitration Rules, which do not have a fast track procedure. However, the parties can agree on several elements contained in the "fast track" procedures referred to above, such as reduced timelines for the actions envisioned under the Rules; use of a sole arbitrator; and proceeding on the basis of documentary evidence or agreement to a limited number of oral hearings. Such agreements would have the effect of expediting the arbitral process. Arbitral associations having their own special procedures for fast track arbitrations do not necessarily agree to conduct such arbitrations under the UNCITRAL Arbitration Rules, and may require use of their own rules.
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> . . . Thus, based on the experience of the Organization, and taking into account the foregoing, initiating a formal arbitration even under special procedures, for claims valued at $25,000 or less, would not necessarily be efficient and effective for the Organization, giving the costs associated with such arbitrations, including the staff time and resources for handling of such arbitrations, and considering that they may not then take place on the basis of the UNICTRAL Arbitration Rules. Should the General Assembly wish to adopt such a mechanism for resolution of disputes with non-staff personnel, the Organization would require additional staff resources. Such small claims may continue to be addressed more effectively through direct negotiations with a view to reaching an amicable settlement'.[814]

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[813] UN Doc. A/RES/64/233 (2010), para. 9 (emphasis added). The further options are: '(b) Establishment of an internal standing body that would make binding decisions on disputes submitted by non-staff personnel, not subject to appeal and using streamlined procedures, as proposed by the Secretary-General in paragraphs 51 to 56 of his report on the administration of justice; (c) Establishment of a simplified procedure for non-staff personnel before the United Nations Dispute Tribunal, which would make binding decisions not subject to appeal and using streamlined procedures (d) Granting of access to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, under their current rules of procedure, to non-staff personnel'. Ibid. This follows the UNGA's 2008 request for information and recommendations on: '(a) The different categories of non-staff personnel performing personal services for the Organization, including experts on mission, United Nations officials other than staff members of the Secretariat and daily workers; (b) The types of dispute settlement mechanisms available to the different categories of non-staff personnel and their effectiveness; (c) The types of grievances the different categories of non-staff personnel have raised in the past and what bodies of law are relevant to such claims; (d) Any other mechanism that could be envisaged to provide effective and efficient dispute settlement to the different categories of non-staff personnel, taking into account the nature of their contractual relationship with the Organization'. UN Doc. A/RES/62/228 (2008), para. 66.

[814] UN Doc. A/65/373 (2010), paras. 170-172 (emphasis added). As to option (b), the report stated: 'One possibility for handling grievances raised by non-staff personnel would be the creation of an internal standing body that had the power to make binding decisions. The decisions of this internal standing body would not be subject to appeal and would employ streamlined procedures.' Ibid., para. 173. However, 'the establishment of a separate body would entail additional costs.' Ibid., para. 175. As to option (c), the report stated: 'adding non-staff personnel to the jurisdiction of the Dispute Tribunal at this stage would be detrimental to the new system. Ibid., para. 179. As to option (d), regarding the '[g]ranting of access to the [UNDT] and the [UNAT], under their current rules of procedure, to non-staff personnel', the report stated: 'The Secretary-General reiterates the comments made under subparagraph (c) above, which are equally applicable to this option, except that the costs would be greater given that the non-staff personnel would also have recourse to the Appeals Tribunal.' Ibid., para. 182.

In his 2011 AJUN report,[815] having been requested by the UNGA to provide more concrete information,[816] the UNSG further developed the option of expedited arbitration in a detailed 'Proposal for recourse mechanisms for non-staff personnel Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper' ('Expedited Arbitration Concept Paper').[817] The Expedited Arbitration Concept Paper

> 'presents possible means of establishing expedited arbitration procedures for the resolution of disputes between the United Nations and . . . consultants and individual contractors, by incorporating streamlined elements into the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).'[818]

The paper envisages:

> 'A new set of rules, called the Rules for Expedited Arbitration Procedures under United Nations Consultancy Contracts (hereinafter the "Expedited Rules"), would be prepared, using the UNCITRAL Arbitration Rules as a framework. The Expedited Rules would be based on the provisions of the UNCITRAL Arbitration Rules, modified as necessary to incorporate the expedited procedures discussed herein.'[819]

At the request of the UNGA,[820] the UNSG's 2012 AJUN report contained 'a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors, including the cost implications for various aspects of the proposal' ('Expedited Arbitration Implementation Proposal').[821] On the recommendation of the UNSG, his report having set out the significant additional recourses needed,[822] the UNGA in 2013 took

> 'note of the proposed expedited arbitration procedures for consultants and individual contractors developed by the Secretary-General contained in annex IV to his report on administration of justice at the United Nations, and decides to remain seized of the matter'.[823]

The UNSG's 2017 AJUN report,[824] contained extensive information on the remedies available to non-staff personnel.[825] The UNGA requested the Secretary-General 'to prepare a comprehensive analysis of

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[815] UN Doc. A/66/275 (2011).
[816] UN Doc. A/RES/65/251 (2011), para. 55 ('Requests the Secretary-General, with regard to the scope of the system of the administration of justice, in particular remedies available to the different categories of non-staff personnel, to provide more concrete information for consideration by the General Assembly at its sixty-sixth session, taking into account the different categories of non-staff personnel concerned, as noted in the report of the Secretary-General on administration of justice at the United Nations and paragraph 8 of its resolution 64/233, as well as the options referred to in paragraph 9 of that resolution'. [emphasis added]).
[817] UN Doc. A/66/275 (2011), Annex II.
[818] Ibid., para. 1 (emphasis added).
[819] Ibid., para. 6 (emphasis added).
[820] UN Doc. A/RES/66/237 (2012), paragraph 38(a).
[821] UN Doc. A/RES/67/265 (2012), Annex IV, para. 1.
[822] Ibid., para. 46.
[823] UN Doc. A/RES/67/241 (2013), para. 51.
[824] UN Doc. A/72/204 (2017).
[825] Ibid., Annex II.

that information with a view to informing the discussion at the seventy-third session.'[826] In his 2018 AJUN report, the UNSG reported:

> 'With respect to arbitration, which is the formal dispute resolution remedy for non-staff personnel engaged by the Secretariat, the funds and programmes and other international organizations (as reflected in document A/72/204, annex II, sects. A and D), the Secretary-General notes that such arbitration proceedings are currently conducted under the Arbitration Rules developed by UNCITRAL and adopted by the General Assembly in 1976 and 2010. This is also consistent with the decision of the Assembly that, in accordance with article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations, the final resolution of disputes arising out of contracts to which the United Nations is party should be arbitration under the UNCITRAL Arbitration Rules. In response to a request from the Assembly, the Secretary-General put forward a proposal for expedited arbitration proceedings for consultants and individual contractors (see A/66/275 and A/67/265). In its resolution 67/241, the General Assembly took note of the proposal for expedited arbitration proceedings and decided to remain seized of the matter.'[827]

According to the 2019 AJUN report:[828] 'Five initiatives, aimed at improving prevention and resolution of disputes involving non-staff personnel, are currently under implementation or are being proposed'.[829] One of these initiatives concerns expedited arbitration, which was described as follows:

> 'In his reports A/66/275 and Corr.1 (annex II) and A/67/265 and Corr.1 (annex IV), the Secretary-General submitted a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors, including a cost estimate for engaging a neutral entity which would, inter alia, vet arbitrators, promulgate and maintain a roster of arbitrators, appoint an arbitrator when a party initiates arbitration and provide certain administrative functions during an arbitration. Drawing on experience gained in handling formal dispute resolution involving non-staff personnel since the proposal was made in 2012, the Secretary-General proposes to explore more cost-effective means of engaging a neutral entity to undertake the above role'.[830]

In 2020, the UNGA requested the UNSG

> 'to submit new proposals, bearing in mind the need for budgetary discipline, in the context of his next report, on reviewing formal policies and issuances concerning dispute resolution with consultants and individual contractors, including but not limited to drawing on more cost-effective features of the expedited arbitration procedures for consultants and individual contractors'.[831]

The UN's exploration of expedited arbitration as a mode to settle disputes with consultants and individual contractors continues. Notwithstanding the limitation to consultants and individual contractors, the time-lapse in considering the proposals and the emphasis on financial implications, the UNGA seems to have taken an interest in expedited arbitration, as per the UNSG's elaborate proposals.

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[826] UN Doc. A/RES/72/256 (2018), para. 38.
[827] UN Doc. A/73/217 (2018), para. 102 (hyperlinks and fns. omitted, emphasis added).
[828] UN Doc. A/74/172 (2019).
[829] Ibid., para. 95.
[830] Ibid., para. 95(d) (hyperlinks omitted).
[831] UN Doc. A/RES/74/258 (2020), para. 21.

Indeed, as discussed in chapter 5, the UNSG's proposals provide a good basis for developing streamlined arbitration proceedings which, compared to the UNCITRAL Arbitration Rules, are better suited for purposes of Section 29(a) of the General Convention.[832]

- The perceived neutrality of arbitration

The advantage of neutrality of arbitration prompts a more fundamental (and extensive) observation for present purposes. Blackaby et al. explained that

> 'international arbitration gives the parties an opportunity to choose a 'neutral' place for the resolution of their dispute and to choose a 'neutral' tribunal . . .
>
> Parties to an international contract usually come from different countries and so the national court of one party will be a foreign court for the other party. Indeed, it will be 'foreign' in almost every sense of the word: it will have its own formalities, and its own rules and procedures developed to deal with domestic matters, not for international commercial or investment disputes. The court will also be 'foreign' in the sense that it will have its own language (which may or may not be the language of the contract), its own judges, and its own lawyers, accredited to the court . . .
>
> a reference to arbitration means that the dispute will be determined in a neutral place of arbitration, rather than on the home ground of one party or the other. Each party will be given an opportunity to participate in the selection of the tribunal. If this tribunal is to consist of a single arbitrator, he or she will be chosen by agreement of the parties (or by such outside institution as the parties have agreed), and he or she will be required to be independent and impartial. If the tribunal is to consist of three arbitrators, two of them may be chosen by the parties themselves, but each of them will be required to be independent and impartial (and may be dismissed if this proves not to be the case). In this sense, whether the tribunal consists of one arbitrator or three, it will be a strictly 'neutral' tribunal.'[833]

International organisations have a fundamental interest in being independent from states and for that reason enjoy immunity from the jurisdiction of national courts. It is indeed the neutrality of arbitration that makes it particularly attractive for the UN (and international organisations generally) in implementing the obligation under Section 29. That provision being, as seen, the 'counterpart' to the UN's immunity under the General Convention, arbitration is the quintessential alternative to domestic litigation. As Redfern and Hunter put it:

> 'If "alternative dispute resolution" is conceived as an "alternative" to the formal procedures adopted by the courts of law, as part of a system of justice established and administered by the state, arbitration should be classified as a method of "alternative" dispute resolution. It is indeed a very real alternative to the courts of law.'[834]

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[832] Any trimming of the arbitration process to fit the particular requirements of the dispute would depend on agreement amongst the parties. Cf. UN Doc. A/65/373 (2010), para. 171. In the context of a pending dispute, an international organisation may be less inclined to accommodate the needs of the claimant (and *vice versa* where the international organisation submits a counterclaim).
[833] Blackaby et al. (2015), paras. 1.98-1.100.
[834] Ibid., para. 1.137.

However, arbitration is in fact typically *not* disconnected from national courts. To the contrary, as explained by Blackaby et al.:

> 'The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it.'[835]

Indeed,

> 'Arbitration may depend upon the agreement of the parties, but it is also a system built on law, which relies upon that law to make it effective both nationally and internationally. National courts could exist without arbitration, but arbitration could not exist without the courts.'[836]

As explained by another commentator:

> 'It has been argued that to the extent that the phrase "alternative dispute resolution" indicates that the courts have no role in international arbitrations, it is a "serious and misleading oversimplification." Arbitrations are regulated pursuant to national laws and accordingly have a close relationship to the national courts. . . The role of the national court is said to be that of an "executive partner" to provide greater effectiveness to arbitral proceedings.'[837]

The support provided by national courts to arbitrations, which is often described in terms of 'supervision',[838] takes different forms depending on the stage of the arbitration. At the beginning of the arbitration, this includes enforcement of the arbitration agreement,[839] appointment of tribunal members,[840] and ruling on challenges of arbitrators.[841] During the arbitration, the support by national courts notably concerns maintaining the *status quo* and the preservation of evidence.[842] And, perhaps most significantly, at the end of the arbitration, national courts may exercise judicial control over the proceedings and the award in annulment proceedings.[843] In this respect, as one commentator put it, arbitration cannot do without 'emergency procedures . . . to flush out inequity and arbitrariness.'[844] According to the same commentator:

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[835] Ibid., para. 7.01.
[836] Ibid., para. 7.03.
[837] S. Sattar, 'National Courts and International Arbitration: A Double-Edged Sword?', (2010) 27 *Journal of International Arbitration* 51, at 52 (fn. omitted).
[838] See, e.g., ibid., at 52, 53.
[839] See, e.g., Arts. 1022 and 1074 of the DCCP (court declares itself incompetent where the parties entered into an arbitration agreement).
[840] See, e.g., Art. 1027 of the DCCP.
[841] See e.g., Art. 1035 of the DCCP. See generally Blackaby et al. (2015), para. 7.09 ('the enforcement of the arbitration agreement; the establishment of the tribunal; and challenges to jurisdiction.').
[842] See e.g., Arts. 1022a and 1022b of the DCCP. Cf. Blackaby et al. (2015), para. 7.37 ff. See generally Blackaby et al. (2015), paras. 7.22, 7.32 ff, 7.39 ff.
[843] Blackaby et al. (2015), para. 7.62.
[844] J. Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards', (2011) 26 *ICSID Review* 128, at 130.

> 'Arbitrators are human, and not immune to errors. They wield wide powers and are not immune to hubris. Arbitrators' powers cannot reign unfettered; there must be checks and balances to their prerogatives. They come in two forms: transparency and review.'[845]

The relationship between national courts and arbitral tribunals is notably established through the 'place of arbitration'. Under Article 18(1) of the UNCITRAL Arbitration Rules, which are the UN's arbitration rules of choice:

> 'If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.'

The 'place of arbitration' refers to a specific domestic jurisdiction. Rather than a place where (all) the arbitration proceedings take place, the 'seat of arbitration is . . . often intended to be its legal centre of gravity.'[846] The arbitration law of the place of arbitration (the '*lex arbitri*') sets forth the legal framework for the arbitration, including the involvement of national courts described above.[847]

The supervision by national courts, particularly when it comes to the review of an arbitral award, comes at a price insofar as arguably 'judicial interference is contrary to the very idea of arbitration'.[848] The 'Model Law on International Commercial Arbitration' of the United Nations Commission on International Trade Law ('UNCITRAL Model Law'), which inspired the development of national arbitration laws in many states, seeks to strike a balance when it comes to the annulment of an award. The balance is struck on the basis of four principles, which may be summarised as follows:

> '• Any party that feels aggrieved is entitled to seek protection from the courts at the place of arbitration;
> • Such judicial protection is limited to the annulment of the award;
> • The reasons for annulment are analogous to the reasons considered under the New York Convention for denying exequatur;
> • There is no appeal mechanism: the arbitrators' decision as regards the merits of the dispute cannot

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[845] Ibid., at 128. See also Sattar (2010), at 55 ('One of the other advantages why parties choose to make the arbitration subject to a system of national law is that it allows the national courts to review the awards made within its jurisdiction. This acts as a safeguard to ensure that the basic elements of fairness and impartiality are met and has been described as a "bulwark against corruption, arbitrariness, bias, improper conduct and-where necessary-sheer incompetence."' [fn. omitted]).
[846] Blackaby et al. (2015), para. 3.56.
[847] Ibid., para. 3.42 ('It is appropriate, at this stage, to consider what is meant by the *lex arbitri*. The question was posed rhetorically by a distinguished English judge: "What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (eg filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (eg removing an arbitrator for misconduct".'). For a more extensive overview of the role of national courts during the arbitration proceedings, see ibid., chapter 7.
[848] Fernández-Armesto (2011), at 129.

> be corrected by a judge, even if the judge finds that the award is premised on errors of fact or of law.'[849]

Concerning the reasons for annulment of an award by the courts at the place of arbitration (see the third bullet in the above quotation), based on Article V of the New York Convention, Article 34(1) of the UNCITRAL Model Law provides a limitative enumeration:

> '(2) An arbitral award may be set aside by the [competent court at the place of arbitration] only if:
> (a) the party making the application furnishes proof that:
> (i) a party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
> (b) the court finds that:
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
> (ii) the award is in conflict with the public policy of this State.'

The annulment system in commercial arbitration has been evaluated as follows:

> 'In practice, judges in most countries have shown a high level of deference towards arbitral awards, and decisions have only been annulled in exceptional circumstances. But this statement must be qualified: certain "problem jurisdictions" show a tendency to annul awards for unforeseeable reasons, especially if the home State is a party. Even in jurisdictions with a friendly attitude, from time to time polemic decisions are issued. But, all in all, the system has worked, because by choosing as place of arbitration a jurisdiction where judges are experienced and have shown a favourable attitude to arbitration, the risk of improper annulment of commercial awards can be minimized.'[850]

The potential for far-reaching involvement of courts in reviewing arbitral awards, for example, on the basis of the elusive notion of 'public policy', is in fact all but theoretical.[851] Indeed, 'there is still discontent amongst practitioners regarding the impact of local laws that are seen to operate unfairly and, at times, almost arbitrarily'.[852] In addition to interference by way of annulment of awards at the end of

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[849] Ibid., at 130 (fns. omitted).
[850] Ibid., at 130 (fn. omitted, emphasis added). Cf. Blackaby et al. (2015), para. 10.04 ('It is usually the law of the seat of the arbitration that contains these limited provisions for challenging an arbitral award. They are principally focused on ensuring that the arbitration has been conducted in accordance with basic rules of due process, respecting the parties' equal right to be heard before an independent and impartial arbitral tribunal within the boundaries of their arbitration agreement. Grounds of challenge are rarely concerned with a review of the merits of the tribunal's decision, thus distinguishing challenge from an appeal.' [fns. omitted]).
[851] Sattar (2010), at 62-64.
[852] Blackaby et al. (2015), para. 3.88.

the arbitration, another example of such impact concerns 'the problems caused by local courts that issue injunctions at the seat of the arbitration to prevent arbitral tribunals from carrying out their task.'[853] Furthermore, national courts may interfere with the power of tribunals to determine their own jurisdiction,[854] or revoke their authority.[855]

One commentator, writing with specific reference to the Asian subcontinent, upon discussing various examples of national court involvement before, during and after arbitration, went as far as stating:

> 'Notwithstanding the advantages, the supportive role of the national court through various forms of ancillary orders is overshadowed when one comes to the heart of the problem, which is the abuse of the powers of supervision and control exercised by the national courts over the arbitral process.'[856]

The abuse of supervisory powers by national courts may directly affect the outcome of the arbitration contrary to the interests of the international organisation. For example, to the extent an award is favourable to the international organisation, it may be annulled, in whole or in part, on grounds of conflict with 'public policy'. And, other forms of court interference, such as issuing an anti-arbitration injunction or revoking the authority of an arbitral tribunal, could be equally problematic for international organisations. After all, where the arbitration is frustrated, the dispute remains unresolved. This may impact negatively on the international organisation's reputation and thereby its effectiveness. It may moreover lead the claimant to initiate a case in a national court, with the respondent's claim to jurisdictional immunity being weakened due to the lack of available alternative recourse. In view of the international *modus operandi* of international organisations, a dispute with them may affect the interests of more than one state, including for example the state of nationality of the claimant. The courts of various states may potentially interfere in an arbitration.

In short, national courts are able to interfere in the functioning of international organisations by abusing their supervisory powers in connection with an arbitration. Even if such interference in connection with an arbitration is less direct than in the case of national courts adjudicating disputes against international organisations, the need to protect these organisations' independence applies no less. As seen, it is precisely for that purpose that international organisations have been endowed with immunity from jurisdiction. The problem, however, is that international organisations risk forfeiting their jurisdictional immunity before domestic courts in connection with their arbitral supervisory function. This is because

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[853] Ibid., para. 3.90. See likewise Sattar (2010), at 60-61.
[854] Sattar (2010), at 57-59.
[855] Ibid., at 59-60. Local courts outside the place of arbitration may also conceivably seize jurisdiction over matters related to the arbitration, for example, in connection with the appearance of witnesses.
[856] Ibid., at 55 (emphasis added). According to Sattar, 'what is needed more importantly is a harmonious balance which, on the one hand, supports the arbitral process and, on the other, ensures that such support does not unduly interfere with an independent arbitral process.' Ibid., at 73.

the arbitration agreement may be interpreted as a waiver from jurisdiction. A decision by the Paris Court of Appeal to this effect is cited with approval by Gaillard and Pingel-Lenuzza.[857] They add:

> 'For States, the agreement to submit disputes to arbitration is understood to encompass an implicit acceptance of the mechanisms enabling the proper functioning of the arbitral proceedings. It is for this reason that the waiver of immunity resulting from the acceptance of an arbitration agreement is deemed to cover ancillary proceedings as well. This reasoning has nothing to do with the nature of immunity and should, therefore, apply in the same way to both international organisations and States.'[858]

In arbitrations against *states*, the exercise of jurisdiction by national courts in connection with the arbitration is bolstered by the adoption of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property,[859] which provides in Article 17 ('Effect of an arbitration agreement'):

> 'If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
> (a) the validity, interpretation or application of the arbitration agreement;
> (b) the arbitration procedure; or
> (c) the confirmation or the setting aside of the award,
> unless the arbitration agreement otherwise provides.'

Insofar as the position in regard to states is therefore that their consent to arbitration precludes them from invoking their immunity from jurisdiction before domestic courts supervising the arbitration, courts may reach the same conclusion with respect to international organisations (as per the decision of the Paris Court of Appeal, cited with approval by Gaillard and Pingel-Lenuzza).

In an attempt to avoid that conclusion by national courts, international organisations may decline to agree on a place of arbitration.[860] Yet, absent an agreement amongst the parties, under Article 18(1) of the UNCITRAL Arbitration Rules, it is for the arbitral tribunal to determine the place of arbitration. It could be reasoned that in consenting to arbitration under the UNCITRAL Arbitration Rules, the international organisation merely delegated the determination of the place of arbitration to the tribunal.

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[857] E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass', (2002) 51 *International and Comparative Law Quarterly* 1, at 13, referring to CA Paris, 19 June 1998, *UNESCO v Boulois*, 1999 REV ARB 343.
[858] Gaillard and Pingel-Lenuzza (2002), at 14 (fn. omitted, emphasis added).
[859] UN Doc. A/59/508 (2004), Annex, (not yet in force) ('2004 UN State Immunity Convention').
[860] However, it is noted that according to UN Doc. ST/SGB/230 (1989) (abolished pursuant to UN Doc. ST/SGB/2017/3 (2017), para. 6, where, following review by the Tort Claims Board, claims arising in the UN Headquarters District could not be settled, the UN agreed to arbitration under the UNCITRAL rules (and administered by the American Arbitration Association), with New York City as the place of arbitration. See also 1995 Report, para. 12.

And, the courts at the place of arbitration potentially reject the jurisdictional immunity of the international organisation.

This explains why international organisations may make reservations with respect to their privileges and immunities, including in connection with arbitration agreements. The 1995 Report states regarding the settlement of disputes arising out of commercial agreements by way of arbitration:

> 'The United Nations also has a standard clause on privileges and immunities, which is incorporated in all of its commercial agreements. The clause normally used reads as follows:
>
> > "Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the United Nations, including, but not limited to, immunity from any form of legal process."
>
> This provision, which usually follows the arbitration clause, makes clear to the contractor/lessor that the United Nations, by entering into contractual relations with private firms or individuals and by accepting arbitration as the method of dispute settlement, has not agreed to waive its immunity from legal process, which the Organization enjoys in accordance with section 2 of the General Convention . . .
>
> It is clear, however, that the "privileges and immunities clause" does not adversely affect the commitment to arbitration since the Organization has agreed to be bound by the arbitration award as the final adjudication of the dispute, controversy or claim; the privileges and immunities clause provides protection to the Organization against possible court proceedings initiated prior to or after the award unless a waiver of immunity is expressly granted.'[861]

This statement suggests that, as a rule, the UN does not accept supervisory jurisdiction by national courts.

More recently, the UNSG proposed that the UN explicitly reserved its jurisdictional immunity in connection with arbitration. That is, the following clause is proposed for inclusion in the proposed 'Expedited Rules' for the settlement of disputes with consultants and individual contractors:

> 'Nothing in or related to these [use full name of Rules] shall be interpreted or applied in a manner inconsistent with the privileges and immunities of the United Nations, including its subsidiary organs, or be deemed a waiver of such privileges and immunities. For the avoidance of doubt, any arbitration conducted under these [use full name of Rules] shall not be subject to any local laws, and any reference to a 'place of arbitration' shall not be deemed or construed as a waiver of such privileges and immunities or an agreement of the United Nations to subject itself to any national jurisdiction.'[862]

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[861] 1995 Report, para. 6 (emphasis added). See also Art. 18 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012): 'PRIVILEGES AND IMMUNITIES: Nothing in or relating to the Contract shall be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations, including its subsidiary organs.' Art. 17 of the UN's General conditions of contract contains the dispute settlement clause, the arbitration agreement being contained in para. 17.2.

[862] UN Doc. A/66/275 (2011), Annex II ('Proposal for recourse mechanisms for non-staff personnel. Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper'), para. 40 (emphasis added).

The absence of jurisdiction by national courts in connection with an arbitration may be favourable to international organisations insofar as the courts would have no such powers to abuse. At the same time, however, both the international organisation and the private claimant would be denied the support of domestic courts to ensure the effectiveness and fairness of the arbitration. Without supervisory oversight, deficiencies in the arbitration cannot be remedied and the arbitration's legal framework is incomplete.

Where an international organisation maintains its immunity from jurisdiction in a given case before a national court, it remains to be seen whether the immunity is accepted by the court. This depends on such matters as the wording of the reservation of jurisdictional immunity, as well as the interplay between that reservation, the arbitration agreement and the determination of a place of arbitration. The uncertainty regarding the application of the immunity is detrimental to claimants; the very possibility of the arbitration's legal framework being incomplete due to the court denying itself jurisdiction may discourage claimants from resorting to arbitration. That uncertainty is equally unsatisfactory to international organisations as they cannot be certain that there will be no interference by the courts.

There have been efforts to 'denationalise' (or 'delocalise') arbitration, that is, to exclude national courts from the arbitration process. The disparities amongst *lex arbitri* seem to have motivated such efforts,[863] the aim being to create a level playing field for international arbitrations in general.[864] Blackaby et al. explained that the idea behind the delocalisation theory is that

> 'instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control: that of the place of enforcement. In this way, the whole world (or most of it) would be available for international arbitrations, and international arbitration itself would be "supranational", "a-national", "transnational", "delocalised", or even "expatriate". More poetically, such an arbitration would be a "floating arbitration", resulting in a "floating award".'[865]

As to the rationale underlying the denationalisation theory, it

> 'takes as its starting point the autonomy of the parties— the fact that it is their agreement to arbitrate that brings the proceedings into being—and rests upon two basic (yet frequently confused) arguments. The first assumes that international arbitration is sufficiently regulated by its own rules, which are either adopted by the parties (as an expression of their autonomy) or drawn up by the arbitral tribunal itself. The second assumes that control should come only from the law of the place of enforcement of the award.'[866]

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[863] Blackaby et al. (2015), para. 3.74 ('it is inconvenient (to put it no higher) that the regulation of international arbitration should differ from one country to another—and this has led to the search for an escape route.').
[864] Ibid., para. 3.73.
[865] Ibid., para. 3.76.
[866] Ibid., para. 3.78.

According to Blackaby et al., the success of the denationalisation theory in reality depends on the extent to which *lex arbitri* permit it.[867] A case in point is the Belgian arbitration law, which was amended on 27 March 1985 to allow for a substantial degree of de-localisation.[868] However, 'it appears that this legal provision discouraged parties from choosing Belgium as the seat of the arbitration and the law has since been changed.'[869] That is, 'Belgium set out to attract international arbitrations by denying any right of review for the local courts only to discover that such 'anational' arbitration dissuaded potential users and reintroduced supervisory control unless both parties agreed expressly to exclude it.'[870]

This goes to show that judicial overview by national courts over international arbitrations is in fact valued. In the end, notwithstanding certain proponents of the denationalisation theory, including notably Gaillard,[871] Blackaby et al.'s assessment is that '[i]t seems, for now, that the movement in favour of total delocalisation, in the sense of freeing an international arbitration from control by the *lex arbitri*, remains aspirational.'[872] And, according to Born,

> 'whatever the outcome of the foregoing debate about "a-national" or "international" arbitrations on a theoretical level, it is clear that the law of the seat has extraordinary practical importance. Indeed, as discussed below, even ardent proponents of "a-national" or "delocalized" arbitrations regard the possibility of a delocalized award as exceptional, with the law of the seat ordinarily and presumptively playing a central role in defining the legal framework for international arbitral proceedings.'[873]

There is one significant exception to the role of *lex arbitri*, and domestic courts, in international arbitration: the ICSID Convention. Arbitrations under this multilateral treaty, which currently has 155 states parties,[874] are directly governed by international law.[875] As Schreuer explained:

> 'The purpose of the ICSID Convention, as expressed in its Preamble, is to stimulate economic development through the promotion of private international investment. The recognition that private foreign investment is an important element in development has led many countries to strive to create conditions that attract foreign investors. An important part of a favourable legal framework for foreign investment is the availability of appropriate mechanisms for the settlement of disputes.
>
> In the absence of international mechanisms, dispute settlement between a State and a foreign investor takes place in the host State's domestic courts. Foreign investors frequently do not perceive the courts of the host State as sufficiently impartial to settle investment disputes. In addition, domestic courts are bound to apply domestic law even if that law should fail to protect the investor's rights under international law. Domestic courts of States other than the host State are usually not available since they will either lack territorial jurisdiction over investment operations taking place in another country

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[867] Ibid., para. 3.82. Likewise see G. Born, *International Commercial Arbitration* (2014), at 1590.
[868] However, according to Born 'For the most part . . . national legislatures have declined to follow the suggestions of proponents of "delocalized" international arbitration.' Born (2014), at 1589.
[869] Blackaby et al. (2015), para. 3.83.
[870] Ibid., para. 7.05. See also ibid., para. 10.69.
[871] Ibid., para. 3.82.
[872] Ibid., para. 3.88.
[873] Born (2014), at 1592.
[874] <icsid.worldbank.org/resources/rules-and-regulations/convention/overview> accessed 21 December 2021.
[875] Blackaby et al. (2015), para. 3.82.

> or be prevented from exercising jurisdiction by the host Sate's sovereign immunity. A further factor militating against the use of domestic courts is the often complex nature of investment disputes necessitating specialized knowledge.'[876]

As explained by Delaume:

> 'Within the framework of the Convention and of the Regulations and Rules adopted for its implementation, ICSID arbitration constitutes a self-contained machinery functioning in total independence from domestic legal systems.'[877]

The rationale underlying the ICSID Convention is therefore the same as the objective of the UN, and international organisations generally, namely, to settle disputes by way of arbitration to the exclusion of domestic courts. In the case of foreign investment protection, this is primarily in the interest of the claimants. In the case of the settlement of third-party disputes against international organisations, this would be primarily in the interests of organisations, namely, to preserve their independence. The ICSID Convention as a system of de-nationalised arbitration, 'in total independence from domestic legal systems',[878] therefore serves as a model for the proposals developed in chapter 5.

*Internal boards: Tort Claims Board and Claims Review Boards*

The 1995 Report discusses two types of internal boards: the Tort Claims Board for disputes arising in the UN Headquarters District,[879] and Claims Review Boards for disputes arising in connection with peacekeeping operations.

The Tort Claims Board and claims review boards are composed exclusively of UN representatives.[880] As such, therefore, they do not conform to the core requirements of independence and impartiality under Article 14 of the ICCPR.[881] As seen, the 1997 Report acknowledged as much with respect to local claims

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[876] C. Schreuer, 'International Centre for Settlement of Investment Disputes (ICSID) (Last updated May 2013)', in A. Peters and R. Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law* (2008) <mpepil.com> accessed 21 December 2021, paras. 3-4.
[877] G.R. Delaume, 'ICSID Arbitration and the Courts', (1983) 77 *American Journal of International Law* 784, at 784 (emphasis added).
[878] Ibid.
[879] Subject to its continued existence (see above).
[880] Also, as explained by Schmalenbach: 'The internal claims review system has been criticized as "less than transparent" . . . for the local population which is—in the absence of a protective host State—often uninformed about the UN process or hesitant to address it due to language and other barriers.' Schmalenbach (2016), para. 58. Furthermore, the proceedings of claims review boards are not public. That may be taken to contrast with the 'fair and public hearing' requirement under Art. 14 of the ICCPR. A further concern may be the legal quality of the work of claims review boards since their members do not necessarily have legal expertise, as seen from the 1996 Report: 'Normally, a typical claims review board consists of a minimum of three staff members performing significant administrative functions. Wherever possible, a Legal Adviser, or a staff member with legal training should also be a member'. 1996 Report, fn. 6 (emphasis added)].
[881] Zwanenburg (2008), at 28.

review boards, stating that these boards 'just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case.'[882]

That very same question arises with respect to procurement-related disputes. There is in fact an internal mechanism regarding such disputes, involving the Award Review Board ('ARB').[883] The ARB

> 'will review procurement challenges by unsuccessful bidders. The ARB is a UN administrative board that renders independent advice to the Under-Secretary-General for Management Strategy, Policy and Compliance (DMSPC). The Registrar of the ARB will make an initial assessment of the procurement challenge and determine its receivability and eligibility for a review by the ARB. The Registrar's determination is final and not subject to appeal by any party. Following a review of the case and upon receipt of the recommendation by the ARB, the USG, DMSPC takes a final decision, which is final and not subject to appeal by any party.'[884]

According to a 2012 report by the Secretary-General:

> 'Independent procurement challenge system. For the purpose of strengthening internal control measures and promoting ethics, integrity, fairness and transparency in the procurement process, an independent procurement challenge system was established by creating the Award Review Board in November 2010 at Headquarters as a pilot project. The purpose of the Review Board is to offer unsuccessful bidders who participated in tenders the opportunity of filing a procurement challenge on a post-award basis and to render independent advice on the merits of the procurement challenge to the Under-Secretary-General for Management, who takes the final administrative decision on the matter.'[885]

The addendum to said SG report clarified:

> 'The pilot project was launched in November 2009 with the establishment of the Award Review Board. The Chair of the Headquarters Committee on Contracts serves as the Registrar of the Board, and two staff members from the Committee's secretariat administratively support its operations. The Board has a roster of approved independent experts in procurement and procurement-related disputes who are called upon to provide written advice on the merits of a procurement challenge.'[886]

The ARW, in short, is an administrative board, made up of 'independent experts', that renders advice to the Under-Secretary-General for Management Strategy, Policy and Compliance, who takes the final decision on the challenge. Whilst independent, as a mere advisory board, the ARW may not conform to

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[882] 1997 Report, para. 10. Cf. Schmalenbach (2016), para. 24. This applies equally to the central review bodies involved in staff appointments (UN Doc. ST/SGB/2011/7 (2011)). In light of their composition and mere advisory powers, these bodies fail to meet the requirements of independence and impartiality. However, as discussed above, it remains to be seen whether disputes concerning staff appointments qualify as disputes of a 'private law character'.

[883] There also is a 'debrief procedure': 'The UN Secretariat offers UN vendors who participated in solicitations resulting in awards above US$ 200,000 an opportunity to obtain additional information on their unsuccessful proposals or bids through the debrief process described below. The debrief is not an adversarial proceeding; rather, it is a collaborative learning opportunity for unsuccessful bidders and for the UN to exchange additional information on the reasons why the bid/proposal was not successful.' UN Procurement Manual, Ref. No.: DOS/2020.9, 30 June 2020, para. 10.2.2.

[884] UN Procurement Manual, Ref. No.: DOS/2020.9, 30 June 2020, para. 10.2.3.

[885] UN Doc. A/67/683 (2012), para. 25(b) (emphasis added). The terms of reference of the ARB are not known to the present author.

[886] Ibid., para. 4.

the essential requirements of Article 14 of the ICCPR. That is relevant since, as discussed, it is not inconceivable that such claims give rise to disputes of a 'private law character'.

Returning to claims review boards, their aforementioned lack of independence and impartiality led the claimants in the Haiti cholera dispute to seek the establishment of a standing claims commission. [887]

*Standing claims commission*

The establishment of a standing claims commission is foreseen in the MINUSTAH SOFA.[888] That is in line with the 1997 Report, which expressed

> 'the view that the standing claims commission envisaged in article 51 of the model agreement should be maintained, mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[889]

Standing claims commissions, if established, could potentially make the UN's implementation of Section 29 compliant with the requirements of independence and impartiality under Article 14 of the ICCPR, notwithstanding the aforementioned shortcomings of claims review boards. It arguably is the appropriateness of the entirety of the claims review board, settlement negotiation and claims commission that needs to be assessed as a single mode of settlement under Section 29 of the General Convention. Similarly, in the case of claims arising in the UN headquarters district, it is the entirety of the Tort Claims Board,[890] settlement negotiations and arbitration that needs to be considered.

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[887] They contended that a claims review board 'fails to meet the requirement of independence and impartiality', Petition, para. 92.g.

[888] The MINUSTAH SOFA, in relevant part, is representative of modern SOFAs. See, e.g. Art. VII, paras. 54 and 55 Agreement between the United Nations and Sierra Leone concerning the status of the United Nations Mission in Sierra Leone, 4 August 2000, 2118 UNTS 190; Art. VII, paras. 54 and 55 Agreement between Ethiopia and the United Nations concerning the status of the United Nations Mission in Ethiopia, 23 March 2001, 2141 UNTS 34; Art. VII paras 54 and 55 Agreement between the United Nations and Sudan concerning the status of the United Nations Mission in Sudan (with Supplement Arrangements) 28 December 2005, 2351 UNTS 64 ; Accord entre l'Organisation des Nations Unies et le Gouvernement de la République du Mali relatif au statut de la Mission multidimensionnelle intégrée des Nations Unies pour la stabilisation au Mali, 1 July 2013, 51015 UNTS 25.

[889] 1997 Report, para. 10. According to the 1997 Report, however, 'the Secretary-General would propose the deletion from article 51 of the model agreement of the option of an appeal on the standing commission's award. The appeal to a tribunal, as provided for in article 53 of the model agreement, foresees a very similar procedure and composition to that of the standing claims commission, and may in fact be seen as a duplication of the proceedings in the standing claims commission.' Ibid., fn. 2. Indeed, modern SOFAs, such as the MINUSTAH SOFA, do not provide for the option of such a further appeal.

[890] Subject to its continued existence.

The problem arises with respect to the implementation of the contentious limb of these respective modes of settlement. The problems regarding the legal framework of arbitrations (following proceedings before the Tort Claims Board) have been discussed above. As to standing claims commissions, they are problematic not least as no such commission has ever been established.[891] With 12 peacekeeping operations ongoing,[892] that is a striking reality. This warrants enquiry into the legal framework of such commissions under the relevant SOFA provisions.

The MINUSTAH SOFA,[893] is particularly suited for present purposes since it takes into account UNGA resolution 52/247 (1998) and is directly relevant to the Haiti cholera dispute, discussed elsewhere in this study. Its relevant provisions read as follows, in full (emphasis added):

> 'VII. Limitation of liability of the United Nations
>
> 54. 'Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement, provided that the claim is submitted within six months following the occurrence of the loss, damage or injury, or, if the claimant did not know or could not have reasonably known of such loss or injury, within six months from the time he or she had discovered the loss or injury, but in any event not later than one year after the termination of the mandate of MINUSTAH. Upon determination of liability as provided for in the present Agreement, the United Nations shall pay compensation within such financial limitations as are approved by the General Assembly in its resolution 52/247 of 26 June 1998.'
>
> VIII. Settlement of disputes
>
> 55. Except as provided in paragraph 57, any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached by the two parties within 30 days of the appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either party, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the 30-day period there prescribed shall start as soon as there is a vacancy in the chairmanship. The commission shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of 30 days after the creation of a vacancy) and all decisions shall require the approval of any two members. The awards of the commission shall be final. The awards of the commission shall be notified to the parties and, if against a member of MINUSTAH, the Special

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[891] Schmalenbach (2016), para. 56. According to Schmalenbach, even though standing claims commissions have never been put to practice, 'the SOFA/SOMA dispute settlement clause implements Art. VIII Section 29 General Convention.' Schmalenbach (2016), para. 13.

[892] <peacekeeping.un.org/en/where-we-operate> accessed 21 December 2021.

[893] Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti. Port-au-Prince, 9 July 2004, entered into force on the same day. Included in United Nations Juridical Yearbook 2004, Part One. Legal status of the United Nations and related intergovernmental organizations, Chapter II. Treaties concerning the legal status of the United Nations and related intergovernmental organizations, at 28 ff.

> Representative or the Secretary General of the United Nations shall use his or her best endeavours to ensure compliance.'

These provisions warrant several observations, including notably regarding the establishment of the claims commission (point six, below). First, Paragraph 54 clearly envisages the approach involving an internal and external component for the resolution of third-party disputes arising in connection with peacekeeping operations:[894]

> 'Third party claims . . . which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement' (emphasis added).

These 'internal procedures' may be understood to refer to the mission's claims review board, followed by settlement negotiations; Paragraph 55 (discussed below) refers to the subsequent settlement of disputes by a standing claims commission. The wording of Paragraph 55 suggests that the standing claims commission will not consider a claim admissible (or 'receivable', in UN vocabulary) unless it has first been submitted to the claims review board, followed by settlement negotiations.[895] There is no further remedy following the claims commission: under Paragraph 55 of the MINUSTAH SOFA, '[t]he awards of the commission shall be final'. The option of an appeal to a tribunal in Article 55 of the 1990 Model SOFA has been struck as per the proposal in the 1997 Report.[896]

Second, apart from declaring applicable the financial limitations under UNGA resolution 52/247 (1998), Paragraph 54 of the MINUSTAH SOFA also reproduces the temporal limitations set forth in that resolution. Paragraph 54 moreover excludes claims arising from operational necessity. It is recalled that in resolution 52/247 (1998), the UNGA endorsed the Secretary-General's proposal that in the case of operational necessity 'liability is not engaged'. That rather is a substantive exemption from liability, which Paragraph 54 of the MINUSTAH SOFA seems to convert into a limitation of subject-matter jurisdiction of the standing claims commission:

> 'Third-party claims . . . except for those arising from operational necessity, which cannot be settled through the internal procedures . . . shall be settled . . . in the manner provided for in paragraph 55 of the present Agreement' (emphasis added).

Paragraph 55 repeats the exclusion of operational necessity as a limitation of the subject-matter jurisdiction of the standing claims commission.[897]

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[894] Art. 51 of the 1990 model SOFA (UN Doc. A/45/594 (1990)), to which the 1995 Report referred, does not clearly state the two-step process.
[895] Cf. Schmalenbach (2016), para. 55.
[896] 1997 Report, para. 10, fn. 2.
[897] Para. 55 does not repeat the temporal and financial limitations included in para. 54, though the intention appears to be for these limitations to apply to the proceedings before the claims commission.

Third, Paragraph 55 reflects Section 29 of the General Convention insofar as it limits the jurisdiction of the commission to 'any dispute or claim of a private-law character' (emphasis added).[898] As a result, any dispute or claim that lacks that character is not admissible (or 'receivable') as it falls outside the commission's subject-matter jurisdiction.

Fourth, as to the reference in Paragraph 55 to Paragraph 57 of the MINUSTAH SOFA, the latter provision concerns the settlement of disputes between MINUSTAH and the Government of Haiti concerning the interpretation or application of the SOFA. Such disputes are to be submitted to a three-member arbitration panel, to be established in the same way as the standing claims commission (discussed below). The reference in Paragraph 55 to Paragraph 57 suggests that a dispute between MINUSTAH and the Government may have a private-law character ('Except as provided in paragraph 57, any dispute or claim of a private-law character'. [emphasis added]). The Government's exclusion from the scope of claimants under Paragraph 55 underscores that that provision concerns the settlement of disputes of a private-law character between MINUSTAH and *third non-state parties*, although it does not state so explicitly.[899]

Fifth, as to the commission's procedural features, its 'tripartite' composition does not necessarily guarantee that, as the 1997 Report envisaged, 'both the Organisation and the claimant are treated on a par'.[900] Paragraph 55 does not in fact include any requirement to this effect, that is, to treat the parties 'on a par', meaning 'equally'.[901] Paragraph 55 merely tasks the commission to determine its own procedures, subject only to the requirements (discussed below) 'that any two members shall constitute a quorum for all purposes . . . and all decisions shall require the approval of any two members.'

In providing such considerable leeway to the commission to determine its own procedures, Article 55 of the MINUSTAH SOFA rather resembles the dispute settlement clause between international organisations and *states*. Indeed, for example, Article 44(2) of the IRMCT Headquarters Agreement, concerning the settlement of differences between the UN and the Netherlands on the interpretation or application of that agreement, is identical in relevant part to Paragraph 55 of the MINUSTAH SOFA. (In fact, as discussed below, there is one notable exception between the dispute settlement clauses: the default appointment procedure of members other than the chairman.)

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[898] Para. 54 does not explicitly refer to claims of a 'private law character', though presumably the reference is implied in wording '[t]hird-party claims for property loss or damage and for personal injury, illness or death'.
[899] This interpretation of para. 55 is furthermore supported by the 1997 Report, para. 10 ('claims commission envisaged in article 51 of the model agreement . . . provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par.' [emphasis added]).
[900] 1997 Report, para. 10.
[901] Cf. Schmalenbach (2016), para. 56 ('the host State (and thus its representative on the panel) does not necessarily advocate the interests of the complainant.').

Such broad leeway given to determine the applicable procedures contrasts with the more limited leeway given to arbitration tribunals. Arbitration, which, as seen, seems to be the preferred (non-amicable) dispute settlement technique for third-party disputes involving international organisations, may serve as a useful point of reference. Thus, for example, Article 17(1) of the UNCITRAL Arbitration Rules provides (emphasis added):

> 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

Accordingly, under Article 17 of the UNCITRAL Arbitration Rules, the power of a tribunal to determine its own procedures is qualified. In addition to the general qualifications set forth in Article 17(1), paragraphs (2) to (5) set forth rules regarding timetable, hearing, communications and joinder by third parties.

Similarly, according to Article 44 of the ICSID Convention:

> 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'

The ICSID Arbitration Rules include detailed procedural prescripts.

Furthermore, the core requirements of independence and impartiality under Article 14 of the ICCPR correspond to the requirements of impartiality and independence of arbitrators under arbitration rules. Thus, for example, Article 11 of the UNCITRAL Arbitration Rules provides (emphasis added):

> 'When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.'

Article 14(1) of the ICSID Convention provides regarding the Panel of Arbitrators (and the Panel of Conciliators) (emphasis added):[902]

> 'Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise

[902] Art. 40 of the ISCID Convention provides: '(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38. (2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.'

> independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.'

According to Schreuer:

> 'The debates that led to the insertion of the words concerning the ability "to exercise independent judgment" show that the delegates were actually concerned with the impartiality of members of individual conciliation commissions or arbitral tribunals and not so much with the qualities of Panel members in general . . . Therefore, the issue of independence and impartiality is prominent in the appointment of conciliators and arbitrators to particular commissions or tribunals'.[903]

In contrast, Paragraph 55 of the MINUSTAH SOFA is silent on the standing claims commission's compliance with such fundamental principles and requirements.

Paragraph 55 of the MINUSTAH SOFA does provide that 'any two members shall constitute a quorum for all purposes . . . and all decisions shall require the approval of any two members'. With reference to 'Art. VIII para 55 post-1998 SOFAs/SOMAs',[904] Schmalenbach asserts that

> 'decisions on the jurisdiction, admissibility, and merits of a . . . claim are not made by the majority vote as foreseen, for example, in commercial arbitration (UNCITRAL) but require the approval of the two members nominated by the UN and the host State; the jointly appointed or independently nominated chairman can be outvoted.'[905]

However, Paragraph 55 refers to 'any two members', which seems to mean: any two of the three members of the commission. Whilst the chairman is only referred to in that capacity (the others being referred to as 'members'), the chairman arguably is no less a 'member' of the commission. The reference to 'any two members' suggests that several combinations of two commission members are possible, including combinations involving the chairman. If the members appointed by the UN and the host state, respectively, would need to approve decisions, the text would likely have stated so clearly.

Majority decision-making as foreseen in Paragraph 55 is not unusual in arbitration. Thus, for example, Article 29 of the UNCITRAL Model Law (1985, as amended in 2006) provides:[906]

> 'In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.'

Article 48 of the ICSID Convention, concerning the award, provides in relevant part:

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[903] C. Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2009), at 49, para. 5.
[904] Schmalenbach (2016), para. 56.
[905] Ibid., para. 56.
[906] Cf. Art. 33 of the UNCITRAL Arbitration rules: '1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. 2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.'

> '(1) The Tribunal shall decide questions by a majority of the votes of all its members. (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.'

Article 16(1) of the ICSID Arbitration Rules provides more generally: 'Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.' The reason for the majority rule, amongst others, is that striving for unanimity may be neither realistic nor practical.[907]

Paragraph 55 contains a quorum requirement, namely, that 'any two members shall constitute a quorum for all purposes'. Like majority decision-making, a provision regarding quorum is not, as such, foreign to arbitration. Thus, for example, Rule 14 ('Sittings of the tribunal'), paragraph (2) of the ICSID Arbitration Rules provides: 'Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.' In that connection, Rule 20(1) provides in relevant part:

> 'As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure . . . He shall, in particular, seek their views on the following matters: (a) the number of members of the Tribunal required to constitute a quorum at its sittings'.

But, 'sittings of the Tribunal' is distinct from 'Deliberations of the Tribunal' (Rule 15), and 'Decisions of the Tribunal' (Rule 16) under the ICSID Arbitration Rules. Insofar as those rules only refer to a quorum in connection with 'sittings' of the tribunal, the implication may be that all members of the Tribunal are to participate in the arbitration in all other respects.

In this connection, as Gomez explained in the context of the UNCITRAL Model Law:

> 'When an arbitrator has been chosen and has accepted her mandate, she is expected to participate in the proceedings and contribute to the making of the decisions relevant to them. Hence, if the tribunal is composed of more than one member, all of them should contribute to the arbitration, and every decision made during the proceedings is deemed to emanate from all of the arbitrators, unless a dissent has been expressed. One of the reasons why the parties choose a panel instead of a sole arbitrator, after all, is to benefit from their collective wisdom.'[908]

This contrasts with Paragraph 55 of the MINUSTAH SOFA insofar as it provides that 'any two members shall constitute a quorum for all purposes' (emphasis added). This may be taken to mean that the commission is able to go about its entire business so long as two members participate. The risk is that

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[907] M.A. Gómez, 'Decision-Making by Panel of Arbitrators', in I. Bantekas and others (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020), 759 at 767, adding: 'A similar approach is taken by some of the leading sets of arbitration rules.' Ibid.
[908] Ibid., at 767.

one of its members—for example, the member appointed by either the UN or the host state—is structurally side-lined. That would fundamentally undermine the commission's integrity.

Sixth, and lastly, the commission's establishment process is set forth in Paragraph 55 of the MINUSTAH SOFA. The relevant part reads as follows:

> 'One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached by the two parties within 30 days of the appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either party, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the 30-day period there prescribed shall start as soon as there is a vacancy in the chairmanship.'

The procedure ensures that neither the UN nor the state can block the appointment of the chairman: the President of the ICJ may be requested to make the appointment in case of disagreement amongst the parties. But, that default procedure concerns only the appointment of the chairman – it does not concern the other two members of the commission who are to be appointed by the respective parties.[909] Of note, the notable difference between Paragraph 55 of the MINUSTAH SOFA and the aforementioned UN-Netherlands dispute settlement clause in Article 44(2) of the IRMCT Headquarters Agreement is that the default appointment procedure in the latter *does* extend to the appointment of *all* members of the tribunal:

> 'Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen (15) days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to.'

Conversely, in the case of the standing claims commission under Paragraph 55 of the MINUSTAH SOFA, if either party refuses to make the appointment, the commission does not come into existence. Thus, either party controls the coming into being of the commission. The clause governing the establishment of the standing claims commission is therefore incomplete, even defective.

This problem is far from theoretical, as the UN's position regarding the Haiti cholera dispute illustrates. As seen, according to Higgins et al.: 'As a result of the view that the claims were not receivable, the UN . . . declined a request for a standing claims commission'.[910]

Similarly, as seen, in the matter of the Kosovo lead poisoning, the UN rejected the claims on the basis that they lacked a private law character. It apparently did so without resorting to the claims commission

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[909] The passage regarding 'vacancy' appears to apply only when the member who was the subject of the 'original appointment' seizes to be a member.
[910] Higgins et al. (2017), at 709-710, para. 21.09, fn. 39.

foreseen in the applicable legal framework. The UN could equally decline to establish a standing claims commission if, in its view, any damage was incurred as a matter of operational necessity, thus exempting the UN from liability.

Even if Haiti had been minded to appoint its member on the commission, the UN would have been unlikely to appoint its member, thereby effectively blocking the establishment of the commission. The state party might consider that the UN's position to refuse to appoint its member triggers a dispute concerning the interpretation or application of the MINUSTAH SOFA under Paragraph 57. Under that provision, as seen, disputes are to be settled by a three-member tribunal. However, as that tribunal is to be established in the same manner as the claims commission, its coming into being may similarly be illusory.

In reality, it may never come to the UN or, for that matter, the state party refusing to appoint its respective member, thereby blocking the establishment of the commission. The 1997 Report speculated that the failure to establish standing claims commissions rather is

> 'due to the lack of political interest on the part of host States, or because the claimants themselves may have found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory. But whatever the reason, the very fact of not invoking the procedure provided for under the model agreement, in itself, is not an indication that the procedure is inherently unrealistic or ineffective.'[911]

This perceived 'lack of political interest' on the part of host states may in fact reflect the political reality that the state lacks the leverage to draw the UN into dispute settlement. Host states are unlikely to spend political capital for this purpose, particularly in the knowledge that a defective, or incomplete, dispute settlement clause awaits in case of disagreement. In the recent and particularly controversial case concerning the UN's alleged liability for cholera in Haiti, the state of Haiti was sued in a domestic court in an, unsuccessful, attempt to compel it to pursue the establishment of a standing claims commission.[912] Had it done so, as seen, the UN would have refused to appoint its member on the commission in view of its stated position that the claim lacked a 'private law' character and, therefore, is 'not receivable'.

The absence of a default appointment procedure for all commission members does raise a serious question as to whether the dispute settlement procedure under the MINUSTAH SOFA is, in the words of the 1997 Report, 'realistic or effective'. Indeed, the question arises whether the UN discharges its

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[911] 1997 Report, para. 8.

[912] F. Mégret, 'Beyond UN Accountability for Human Rights Violations: Host State Inertia and the Neglected Potential of Sovereign Protection', (2019) 16 *International Organizations Law Review* 68, at 100. See also F. Mégret, 'Remedying UN Abuses by Forcing the Host State's Hand: Current Case Calls for the Haitian Government to Trigger a Standing Claims Commission' (*Opinio Juris*, 2013) <opiniojuris.org/2018/10/24/remedying-un-abuses-by-forcing-the-host-states-hand-current-case-calls-for-the-haitian-government-to-trigger-a-standing-claims-commission/> accessed 21 December 2021.

obligation to 'make provisions' for an appropriate mode of settlement for claims arising in connection with peacekeeping operations.[913] The 1997 Report stated that as a standing claims commission

> 'has never been activated, it is difficult to suggest ways in which its procedure might be modified or amended. If, however, on the basis of future experience the procedure proves to be inadequate, the Secretary-General would revert to the matter.'[914]

More than twenty years since the 1997 Report, and with 12 peacekeeping operations currently underway, still no such commission has ever been 'activated'. That in itself is 'experience' that warrants review. Apart from procedural safeguards,[915] and quorum requirements, such review ought to concern first of all the procedure for the establishment of claims commissions.

*Lump-sums*

Contrary to 'modern' SOFAs like the MINUSTHA SOFA, which provide for the claims settlement mechanisms just discussed, the 1961 ONUC SOFA allowed for arbitration between individual complainants and the UN.[916] However, according to Schmalenbach: 'From the UN perspective, the conclusion of lump-sum agreements with Belgium, Switzerland, Greece, Italy, Luxembourg, and Zambia was *inter alia* procured by the wish to avoid case-by-case arbitration'.[917]

As seen, in the case of a lump-sum arrangement, claims by third parties are espoused by their state of nationality. Upon reaching a settlement with the UN, the state then pays proportionate shares to the claimants on whose behalf it acted.[918]

The 1996 Report proposed lump-sum agreements as one of two modified procedures for the settlement of third-party claims in connection with peacekeeping operations in view of problems with existing procedures (the second modified procedure concerned the strengthening of claims review boards). However, as seen, there was no follow-up to this proposal: neither the 1997 Report nor UNGA resolution

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[913] Cf. Schmalenbach (2016), para. 57 ('The fact that for the last 60 years of peacekeeping, the establishment of a SOFA/ SOMA standing claims commission has never been successfully pursued in practice strongly indicates that the individual claimant is not entitled or practicably able to make such a request.')
[914] 1997 Report, para. 11.
[915] Cf. Schmalenbach (2016), para. 56 ('with host States taking no interest in setting up the commission and the UN's efforts to reach amicable claims settlements, the judicial independence of the SOMA/SOFA standing claims commission will remain academic for the foreseeable future.' [fn. omitted]).
[916] Art. 10(b) of the 1961 ONUC SOFA, 414 UNTS 229, as reported in Schmalenbach (2016), fn. 199.
[917] Schmalenbach (2016), para. 59 (fns. omitted).
[918] According to Schmalenbach: 'Indisputably, Art. VIII Section 29 is not applicable if the UN chooses to forestall or handle individual private law claims directly with the host or home State on the international level'. Schmalenbach (2016), para. 19.

52/247 (1998) refers to lump-sum agreements. Indeed, the agreements regarding ONUC in the second half of the 1960s remain the only known example in the practice of the UN.[919]

The exclusivity of the ONUC settlement is telling. The complexities of diplomatic protection in general have been discussed above. These were exemplified in the *Manderlier* case, which arose in connection with the lumpsum agreement between Belgium and the UN in the context of ONUC. Mr Manderlier, a Belgian national, sought compensation from the UN for loss of property allegedly caused by UN forces. Dissatisfied with his share of the lumpsum settlement, Mr Manderlier sued Belgium and the UN before the Belgian courts. In seeking compensation, he asserted that the lumpsum agreement did not satisfy the requirement under Section 29 of the General Convention. Though upholding the jurisdictional immunity of the UN, which it found to be unconditional, the Brussels Court of Appeal agreed with this assertion:

> 'The [United Nations] consider quite wrongly that the [lump sum] Agreement, reached between the U.N. and Belgium on 20 February 1965, constitutes the appropriate method of settlement provided for by Section 29.…The defendant has thus in reality been judge in its own case. Such a procedure in no sense constitutes an appropriate method of settlement for deciding a dispute.' [920]

Insofar as this implies that the UN had unilaterally determined the lump-sum amount, that is incorrect: the settlement was the result of negotiations between Belgium, exercising diplomatic protection, and the UN.[921]

The Court of Appeal in *Manderlier* further considered that there was no court to which the claimant could submit his dispute with the UN, and that this 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights'.[922] That is in line with the advent of human rights, as set forth notably in the ECHR, as well as the ICCPR,[923] which had been adopted not long before the judgment in *Manderlier*.

Around the same time, the increased significance of human rights also impacted other fields of the law, notably, the protection of foreign investment. Following the adoption of the 1907 Convention on the Peaceful Resolution of International Disputes, diplomatic protection had become the norm. Thus, where a national of state A would invest in state B and a dispute would ensue concerning the investment, state A would exercise diplomatic protection, by espousing the claim, and resolve it with state B, including

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[919] Cf. ibid., para. 25 ('In recent peacekeeping missions, host and home States have by and large refused or failed to espouse tort claims.'), para. 26 (In practice, this mode of dispute settlement has been implemented by the UN only once, in the course of the ONUC mission (1960-64).').
[920] *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236, cited in Schmalenbach (2016), para. 23, fn. 71.
[921] Cf. ibid.
[922] *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 237.
[923] Adopted and opened for signature, ratification and accession by A/RES/2200 A (XXI) (1966), entry into force on 23 March 1976.

as necessary through arbitration.[924] The foreign investor did not have a direct (international) cause of action.

In the second half of the 20th century, that became problematic from the perspective of the individual claimant. As Brierley explained in 1963:

> 'He has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits; and even if it is willing to do so, there may be interminable delays before, if ever, the defendant state can be induced to let the matter go to arbitration … It has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal for the purpose, and if proper safeguards against merely frivolous or vexatious claims could be devised, that is a possible reform which deserves to be considered. For the time being, however, the prospect of states accepting such a change is not very great.'[925]

But times changed, as explained by Blackaby et al.:

> 'Since that text was written in 1963, the situation has changed dramatically and what Professor Brierley thought unlikely has become a commonplace reality. The validity of his concerns, and the inevitable 'politicisation' of disputes 'leaving investors, particularly small and medium-sized enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claim', led to a radical reform in the dispute-settlement provisions of many [bilateral investment treaties].[926]

That is,

> 'the rise of individuals as actors of international public law brought the development of investor state dispute settlement . . . in which investors were empowered to bring direct claims against their host states via international arbitration tribunals.'[927]

This development in the field of foreign investment protection is indicative of a climate in which individual rights were generally being increasingly protected. The Brussels Court of Appeal recognised this with respect third-party claims against the UN in *Manderlier*.

It is perhaps no surprise that the ONUC settlements are an isolated example of third-party claim settlement, and that the 1996 Report's proposal to revive lump-sum agreements was ignored. Diplomatic protection is difficult to reconcile with individual rights, much less with the procedural safeguards in

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[924] Blackaby et al. (2015), para. 8.04 ('the Convention [on the Peaceful Resolution of International Disputes] provided the framework for the conclusion of bilateral arbitration treaties. In accordance with these treaties, in the event of a dispute between two states arising out of the particular interests of a national of the other state, an independent arbitral tribunal would be formed. In effect, a state could espouse the claim of its national (the so-called right of diplomatic protection) by means of a horizontal inter-state procedure. There was no direct cause of action by the foreign national whose interests had been harmed.'

[925] Blackaby et al. (2015), para. 8.06, citing J.L. Brierley, *The Law of Nations* (1963), at 277.

[926] Ibid., para. 8.07 (fn. omitted).

[927] European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), at 6, para. 2.1 (emphasis added).

Article 14 ICCPR. If diplomatic protection was ever an 'appropriate' mode of settlement under Section 29 of the General Convention, it is unlikely to be so today.[928]

*Waiver of immunity: national courts*

The one exception to the UN's absolute immunity from jurisdiction under Article II of the General Convention is 'insofar as in any particular case it has expressly waived its immunity'. To be clear, where the UN feels able to do so and have a dispute adjudicated by a national court, this does not qualify as a mode of settlement under Section 29 of the General Convention.

The 1995 Report discusses the option of waiver exclusively in connection with Section 29(b) of the General Convention, concerning disputes involving UN officials. That said, under Section 29(a), concerning disputes to which the UN is a party, the 1995 Report states that the UN has taken out commercial liability insurance with worldwide coverage against third party claims arising in connection with accidents involving UN vehicles.[929] As seen, the 1985 supplement to the 1967 Study clarifies that cases involving third party liability insurance represent the only instance 'in which the Organization might normally waive its immunity'.[930] The need for a waiver would arise only where the claim cannot be settled: absent a waiver, the insurer would not be able to defend claims against the UN.

*Indemnification and holding harmless*

Lastly, regarding operational activities for development conducted by UNDP and UNEP, the 1995 Report states that arbitration agreements are included in contracts.[931] But, what about 'other disputes of a private law character'? According to the 1995 Report,

> 'it has been the practice of both UNDP and UNICEF to include in their agreements with recipient Governments a provision to shift liability to the latter in respect of third-party claims. In effect, the provision ensures that the Government concerned will be responsible for dealing with, and satisfying, third-party claims and will hold harmless the United Nations in respect of any such claims that may arise, except in cases of gross negligence or wilful misconduct on the part of the United Nations organ or its representatives'.[932]

[928] But it has not been forgotten as a potential remedy. In 2013, a suit was brought against the Haitian government 'summoning the Head of State, his Prime Minister and the Minister for Foreign Affairs, to intervene on behalf of the victims of the cholera epidemic by exercising diplomatic protection within 30 days or be sued.' The suit was dismissed. See Mégret (2019), at 100 (emphasis added).
[929] 1995 Report, para. 14.
[930] 1985 Supplement to the 1967 Study, at 159.
[931] 1995 Report, para. 22.
[932] Ibid., para. 22 (emphasis added).

It would be conceivable to 'shift liability' in the sense of agreeing that a state will hold the UN 'harmless' by 'satisfying' third-party claims. That is an internal arrangement between the UN and the state, which does not concern the claimant.

As to the undertaking by a state that it will be 'responsible for dealing with' third-party claims, the state could attempt to negotiate a settlement with a third-party claimant against the UN. However, it is unclear what contentious proceedings would look like in the event that an attempt fails. As the UN is the addressee of the claim, it is not clear how an agreement with a state could 'by and large relieve the UN from its obligations under Art. VIII Section 29 General Convention'.[933] Those obligations apply to the UN pursuant to the General Convention and are not extinguished by virtue of a bilateral agreement between the UN and a state. Where a third-party claim is maintained against the UN, the 1995 Report does not clarify what mode of settlement would apply, including, in any event, in the case of gross negligence or wilful misconduct (which would fall outside the scope of any agreement with the state).[934]

#### 3.4.3.2 Applicable law: the UN Liability Rules

The appropriateness of modes of settlement under Section 29(a) of the General Convention is moreover impacted by the substantive rules governing dispute settlement and the remedies available thereunder. This subsubsection concerns the UN Liability Rules, which apply to third-party disputes in connection with peacekeeping operations. This paragraph discusses the legal basis for the adoption of the UN Liability Rules and their legal qualification, scope of application and implementation, as well as with aspects of their contents.[935]

As will be seen, the UN Liability Rules give rise to important questions. To resolve these questions authoritatively and allow the UN Liability Rules to mature into a third-party liability regime proper, these rules are in need of consistent interpretation and application. That is needed to foster legal certainty, as required by the rule of law.[936]

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[933] Schmalenbach (2016), para. 17.
[934] It may be that the UN would resort to arbitration as the 'backstop' mode of settlement. Cf. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14. ('[the UN] will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules.')
[935] See generally Schmalenbach (2016), para. 73 ff.
[936] <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021.

3.4.3.2.1 Legal basis for adoption by UNGA

According to the 1997 Report, the power to limit financial liability results from Article 17 of the UN Charter.[937] Article 17(1) provides that the UNGA 'shall consider and approve the budget of the Organization'.[938] According to the 1997 Report:

> 'Article 17 entrusts the Assembly with the control over the finances of the Organization, the levying of the amounts necessary to defray the costs of carrying out its functions and the apportionment of such expenses among Members of the Organization in a legally binding manner. The budgetary authority of the Assembly to determine the expenses of the Organization also includes the power to limit such expenses in the form of a limited financial liability.'[939]

Considering that the principle of 'attributed powers' requires international organizations to have a legal basis for their activities,[940] the issue is whether the power to 'consider and approve the budget' includes the power to limit liability, as the UNSG contended. The purpose of budgeting is to estimate and control income and expenditure. The purpose of limiting liability is to reduce expenses. While those purposes are different, limiting liability will have a decreasing effect on the budget (even if the aggregate amount of claim-related expenditure remains unforeseen). One might accordingly argue that the power to budget as formulated in Article 17 of the UN Charter does encompass the power to limit liability.[941]

But even if one were to construe the wording of Article 17 of the UN Charter narrowly, the power to limit liability might be implicit in that provision under the doctrine of 'implied powers'. The international law doctrine concerning implied powers can be traced back to early advisory opinions of the ICJ. In *Reparation for Injuries*, the Court held: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'[942]

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[937] 1997 Report, para. 39.
[938] Art. 17 continues: '2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.'
[939] 1997 Report, para. 39.
[940] Schermers and Blokker (2018), para. 232.
[941] But see Schmalenbach (2016), para. 82 ('For all other member States, especially home States of injured persons, the authority of the General Assembly to limit the organization's liability stems from its budgetary authority under Art. 17 UN Charter. This is at least the legal opinion of the UN Secretary-General, which can be contested in the light of the ICJ's ruling that "[T]he function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the organization."' [fns. omitted]). The reference is to *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47 (*Effect of Awards*), at 59.
[942] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 182.

The ICJ's advisory opinion in *Certain Expenses* arose out of the UNGA establishing UNEF and exercising authority over ONUC. Peacekeeping is not foreseen in the UN Charter and the question before the Court was whether expenses in relation to such operations under auspices of the UNGA qualified as 'expenses of the organization' in the sense of Article 17 of the UN Charter. The Court concluded that this was the case, having considered that

> 'such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization".'[943]

As the Court further held,

> 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.'[944]

According to Schermers and Blokker, there are 'at least four limits' to the scope of implied powers.[945] One such limit concerns the existence of certain explicit powers in the relevant area. Campbell argued that 'the exercise of powers would have to be such as would not substantially encroach on, detract from, or nullify other powers.'[946] In the present case, that limitation would not seem to be at issue, the only other relevant power being that of the UNGA in relation to the budget of the UN under Article 17 of the UN Charter.

A further limit is that the use of such powers may not infringe on fundamental international legal principles and rules. In the present case, as discussed above, general international law arguably does not recognize a remedial right to compensation. This limit therefore does not seem to apply. Yet another limit is that implied powers may not change the division of functions within the organization. This would not be the case at present in view of the exclusive control of the UNGA over the finances of the UN. No other UN body would be more appropriately placed to decide on liability caps.

It is the limit that is mentioned first by Schermers and Blokker—[947] that implied powers must be 'necessary or essential' for the performance of the functions of the organization—that gives pause for thought. To determine whether the UNGA's limitation of financial liability meets that test, one must

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[943] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ. Rep. 151 (*Certain Expenses*), at 167.
[944] Ibid., at 168.
[945] Schermers and Blokker (2018), para. 233A. See also N.M. Blokker, 'Beyond "Dili": On the Powers and Practice of International Organizations', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002), 299 at 305-307. According to Amerasinghe, 'powers implied must bear some relationship to the functioning of the organization, the performance of its duties, or the achievement of its purposes'. Amerasinghe (2005), at 48.
[946] A.I. Campbell, 'The Limits of the Powers of International Organisations', (1983) 32 *International and Comparative Law Quarterly* 523, at 528, cited with approval in Schermers and Blokker (2018), para. 233A.
[947] Schermers and Blokker (2018), para. 233A.

consider the rationale of the limitation. The 1996 Report states that 'the principle of limitation on financial liability has been recognized in international practice.'[948] The report refers to the following treaties:[949]

- The 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface;[950]
- the 1960 Convention on Third Party Liability in the Field of Nuclear Energy;[951]
- the 1978 United Nations Convention on the Carriage of Goods by Sea;[952]
- the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the 1955 Hague Protocol and the 1975 Montreal Protocol No. 4;[953] and
- the 1969 International Convention on Civil Liability for Oil Pollution Damage.[954]

These treaties limit liability for damages arising in diverse situations, which are quite different from those that give rise to the UN's third-party liability. These treaties envisage liability on the part of entities which typically are private entities, not governmental agencies, much less international organizations. For example, the 1969 International Convention on Civil Liability for Oil Pollution Damage concerns the limited liability of the owner of a ship, who is defined under Article 1(3) as 'the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.'[955] The liability under, at least some of, these treaties is 'strict', 'as opposed to general tort law which is based on fault or negligence.'[956]

Notwithstanding these differences, the rationale underlying these treaties appears to have inspired the UN Liability Rules. Preambular paragraph 3 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy states (emphasis added):

> 'Desirous of ensuring adequate and equitable compensation for persons who suffer damage caused by nuclear incidents whilst taking the necessary steps to ensure that the development of the production and uses of nuclear energy for peaceful purposes is not thereby hindered.'[957]

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[948] 1996 Report, para. 39.
[949] Ibid., para. 39, fn. 10; para. 40, fn. 11.
[950] 310 UNTS 181.
[951] 1519 UNTS 329.
[952] 1659 UNTS 3.
[953] 2145 UNTS 36.
[954] 973 UNTS 3.
[955] The 1960 Convention on Third Party Liability in the Field of Nuclear Energy, provides a further example: it limits the liability of the '"operator" in relation to a nuclear installation', who under Art. 1(a)(vi) of that convention is defined as 'the person designated or recognized by the competent public authority as the operator of that installation.'
[956] <oecd-nea.org/jcms/pl_20196/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-paris-convention-or-pc> accessed 21 December 2021. Similarly, <imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx> accessed 21 December 2021.
[957] See likewise 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,

Transposed to the UN, the rationale of limiting liability is that meeting the liabilities of the UN must not hinder the attainment of its vast purposes. That is, the risk of excessive financial exposure must not stifle the proper functioning of the UN. Thus, in limiting its financial exposure, the organisation is guided by its functional demands. The 1997 Report states in this respect:

> 'As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.'[958]

However, this may not make limiting liability 'necessary or essential' for the performance of the functions of the organization. It arguably amounts to a moral justification of a policy that is ultimately self-serving. One could, therefore, debate whether the implied powers limit in point is met with respect to the UN Liability Rules.

Nonetheless, support for the legality of the UN Liability Rules may be found in two factors, which '[i]n practice are decisive in . . . discussions'[959] concerning alleged *ultra vires* actions of international organizations: the member states' views, and those of the organisation as expressed in practice. As to the former, as Blokker explained: 'If [the Member States] all support a particular act of the organization, they will find a way . . . to justify the conclusion that the organization has not exceeded its powers.'[960]

As to the UN Liability Rules, according to the available records, there was no debate concerning the powers of the UN to exempt and limit the liability of the organization. The financial exposure of the UN seems to have been the only matter of concern. Thus, in recommending that the UNSG prepare, what would become, the 1996 Report, the ACABQ expressed its concern over 'the magnitude and the number of outstanding third-party claims submitted to [United Nations Peace Forces].[961]

The 1996 Report, the 1997 Report and UNGA resolution 52/247 (1998) were channelled through the Fifth Committee.[962] One would have expected any debate over the powers of the UN to have taken place

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preamble, para. 1: 'moved by a desire to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport'.

[958] 1997 Report, para. 12. The 1997 Report elsewhere justifies the financial limitations on 'economic, financial and policy grounds'. Ibid., para. 37.

[959] Blokker (2004, 'Beyond Dili'), at 309.

[960] Ibid., referring to explicit and implied powers, as well as customary powers.

[961] UN Doc. A/50/903/Add.1 (1996), para. 19. The ACABQ is a subsidiary organ of the UNGA composed of individuals in their personal capacity. Its operations are governed by A/RES/14(I) (1946) and A/RES/32/103 (1977), and rules 155 to 157 of the rules of procedure of the UNGA <un.org/en/ga/about/ropga/> accessed 21 December 2021. In A/RES/50/235, para. 16 (1996), the General Assembly endorsed the ACABQ's recommendation for the preparation of the 1996 Report.

[962] Regarding the 1996 Report, see, e.g., UN Doc. A/C.5/51/SR.14; regarding the 1997 report, see, e.g., UN Doc. A/C.5/52/SR.7 (1997); regarding UN Doc. A/RES/52/247 (1998), see, e.g., UN Doc. A/52/PV.88 (1998), at 16.

in the Sixth (legal) Committee. However, in spite of the several legal questions that arise in connection with the UN Liability Rules—including the legal basis for their promulgation—that Committee does not appear to have been involved. Like the Fifth Committee, the UNGA adopted resolution 52/247 (1998) without a vote.[963]

In light of the clear resolve to limit the UN's liability, and in part exempt it from liability, the absence of discussion as to whether the UN had the power to do so suggests that according to the member states it did. Unanimous acceptance by member states is more than is legally required for powers to be implied.[964]

Still, however, one might contend that this acceptance has more to do with practical convenience than law: limiting liability saves expenses. It is here that the second factor becomes relevant: the practice of the organisation.[965] Such practice 'has increasingly been recognized as an independent legal basis for' the actions of international organizations.[966] Going back to the 1986 VCLT,[967] that notion is reflected in the definition of 'rules of the organization' in Article 2 of the ARIO, which includes 'established practice of the organization' (emphasis added). According to Schermers and Blokker,

> 'the qualifier "established" is somewhat vague. Its purpose is to add a legal dimension to a practice of an organization, as a requirement for this practice to qualify as a rule of the organization. In this way, it resembles *opinio iuris* as a requirement for rules of customary international law'[968]

The UN's third-party liability practice may qualify as 'established' in that sense insofar as the UN Liability Rules had developed in practice, in part at least, before being promulgated in UNGA resolution 52/247 (1998). The 1997 Report states this much with respect to, for example, the temporal limitation of liability and the types of compensable injury.[969] As part of a process of 'standardisation', discussed below, the UN Liability Rules also drew on rules applicable in other contexts at the UN. The liability exemption concerning military and operational liability developed in the practice of UN claims review

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[963] UN Doc. A/52/PV.88 (1998), at 16.
[964] Blokker (2004, 'Beyond Dili'), at 311.
[965] Ibid., at 309-310 ('if the views of the Member States were the only factor, the question whether the organization has or has not exceeded its powers would in most cases essentially be the same as the question whether there is enough political support for a particular decision. Hence, the importance of a second factor to these discussions; *the views of the organization*.' [emphasis in original]).
[966] Ibid., at 322.
[967] According to Art. 2(1)(j) of the 1986 VCLT, '"rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'.
[968] Schermers and Blokker (2018), para. 1144B.
[969] 1997 Report, para. 20 (referring, amongst others, to the 'practice of the Organization') and para. 25 (referring, amongst others, to 'the practice of United Nations peacekeeping operations').

boards.[970] According to Schmalenbach:

> 'the legal justification of an act on the grounds of its operational and military necessity can be said to be a general principle of international liability law, because this principle has been pleaded as a defense with impressive consistency by international organizations with military operations such as NATO, OAS, and the UN in order to ward off claims for damages.'[971]

Since their promulgation in 1998, the UN Liability Rules have moreover been included (by reference) in SOFAs,[972] and continue to be applied in the practice of UN claims review boards. Against this backdrop, the UN's third party-practice underlying the UN Liability Rules arguably is 'established'. This would support the conclusion that, in promulgating those rules, the UNGA was empowered to limit the UN's third-party liability.

In conclusion, it is submitted that there are good arguments that the UNGA was empowered to adopt the UN Liability Rules, if not explicitly then implicitly. The question of the legality of the adoption of the UN Liability Rules could conceivably come before the ICJ in advisory proceedings pursuant to Section 30 of the General Convention. However, as the rules were uncontroversial in the UNGA, it is unlikely that there will be sufficient political support for such a request. It is more likely that the question would arise in third-party litigation, although standing claims commissions have never been established (but the question could come before the Mechanism proposed in chapter 5).

#### 3.4.3.2.2 Legal nature of the UN Liability Rules and their relationship to general international law

The legal nature of the UN Liability Rules is particularly relevant in the context of their relationship to general international law. Zwanenburg, writing with reference to the then ongoing ILC discussions concerning the responsibility of international organisations, raised the issue of the compatibility of the liability limitations under the UN Liability Rules 'with the law of international responsibility'.[973] He referred to the requirement under the draft ARIO to make 'full reparation' for damage.[974] The relevant provision in the ARIO's final version is Article 36 ('Compensation'):

> '1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.'

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[970] 1996 Report, para. 15. According to Schmalenbach, 'A pattern was begun with the UNEF mission where the claims review board refused to settle claims related to damages that were caused by actions considered necessary from an operational point of view.' Schmalenbach (2016), para. 79.
[971] Schmalenbach (2006), at 51. On this basis, the UNSG may not have found it necessary to link the exemption from liability for operational and military necessity to Art. 17 of the UN Charter.
[972] See, e.g., Para. 54 of the MINUSTAH SOFA.
[973] Zwanenburg (2008), at 35.
[974] Ibid., at 35-36.

That obligation to compensate 'any financially assessable damage' contrasts with the financial limitations to compensation under the UN Liability Rules. However, Article 36 of the ARIO is included in Part Three of the ARIO, the scope of application of which does not extend to obligations owed to private parties.[975] Nor has the purported 'right to a remedy' under general international law developed to the point of entitling private parties to compensation, as discussed in paragraph 2.4.2.2 of this study.[976]

Zwanenburg also points to the incompatibility between 'operational necessity', as an exemption from liability under the UN Liability Rules, and 'necessity' as a 'circumstance precluding wrongfulness' under Article 25 of the ARIO. That provision features in Part Two of the ARIO, which *does* apply in the relationship between international organisations and private parties. The incompatibility between 'operational necessity' and 'necessity' arises insofar as the four-pronged test for the former under the UN Liability Rules is less burdensome than the test for the latter.[977] Consequently, the UN might simultaneously be exempt from liability under its own rules and incur responsibility under general international law.[978] However, the matter is inconsequential insofar as, as seen in subsubsection 2.4.2.2., general international law does not include a general entitlement of private parties to compensation.

However, as the right to a remedy may develop from *lex ferenda* to *lex lata*,[979] the question remains as to whether the internal law of the international organisation could lawfully deviate from general international law. The matter may be approached from the perspective of Article 64 to the ARIO ('*Lex specialis*') (emphasis added):

> 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

[975] As to the temporal limitations under the UN Liability Rules, they correspond to the provisions on the implementation of responsibility in Part Four of the ARIO, which, like Part Three, does not apply in the relationship between international organisations and private parties.
[976] Cf. Johansen (2020), at 37, fn. 46. Johansen considers the right to an (effective) remedy to be *lex ferenda*. Ibid., at 93ff.
[977] Notably, under Art. 25(1)(a) of the ARIO, the wrongfulness of an act may be precluded if it 'is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest'.
[978] Leaving aside questions that arise regarding the status, and definition, of the right to property under international law.
[979] Johansen (2020), at 93 ff.

The question arises, therefore, whether the UN Liability Rules qualify as 'special rules of international law'. Such rules may be included in the 'rules of the organization applicable in the relations between an international organization and its members'.

The UN Liability Rules qualify as 'rules of the organization' under the broad definition of Article 2(b) of the ARIO: [980]

> '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'

The UN Liability Rules would fit this definition under the head of 'resolutions' (having been promulgated by the UNGA in resolution 52/247 (1998)). Additionally, as seen, they may qualify as 'established practice of the organization' insofar as these rules had developed in practice prior to their formal promulgation by said resolution.

That being so, the UN Liability Rules would not be 'applicable in the relations between an international organization and its members', as per Article 64 of the ARIO.[981] The UN Liability Rules, as laid down in UNGA resolution 52/247 (1998) address the UN in its settlement of claims by private parties. The external effect of these rules is limited to third parties (through their incorporation in the terms of reference of claims review boards[982]).

Then again, the 'special rules of international law' contemplated in Article 64 of the ARIO are not limited to 'rules of the organisation applicable to the relations between an international organization and its members'. The question is whether the UN Liability Rules, being rules of the organisation, qualify as 'rules of international law' and, if so, whether they are 'special'. The drafting history of the UN Liability Rules does not suggest that their legal status was considered.

According to ILC Rapporteur Gaja: 'The question of the legal nature of the rules of the organization is controversial'.[983] As a general proposition, according to the report: 'It may well be that the legal nature of the rules of the organization depends on the organization concerned.'[984] Of note, however, the report

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[980] That definition is largely taken from the one contained in Art. 2(1)(j) of the 1986 VCLT. The main difference between the two definitions is that the ARIO definition is somewhat broader insofar as it includes a reference to 'other acts of the international organization'.
[981] The ARIO refer to 'rules of the organization' concerning the relations between the international organization and its members in several respects. See, for example, Art. 10 of the ARIO ('Existence of a breach of an international obligation'), para. 2.
[982] A/RES/52/247 (1998), para. 13
[983] G. Gaja, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553 (2005), para. 18.
[984] Ibid., para. 21.

continued to state that 'one may conclude that, according to the International Court of Justice, rules of the organization are part of international law at least insofar as the United Nations is concerned.'[985]

That would bring the UN Liability Rules, insofar as they can be deemed to be 'special', within the scope of the *lex specialis* provision in Article 64 of the ARIO. That seems to correspond to the views of the UN Secretariat, as articulated in an additional reply upon the ILC's adoption of the ARIO on first reading. The reply argued

> 'that full recognition of the "principle of speciality" is fundamental to the treatment of the responsibility of international organizations. As the International Court of Justice observed in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*
>
> > "… international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."
>
> It is, therefore, of the essence that in transposing the full range of principles set forth in the articles on the responsibility of States for internationally wrongful acts *mutatis mutandis* to international organizations, the International Law Commission should be guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures — in brief, their special character. The Secretariat notes that, while some effect is given to the principle through the application of draft article 63 on *lex specialis*, the principle of "speciality" cuts across many of the Secretariat's comments.'[986]

More specifically, and precisely on point for present purposes, the UN commented with respect to the draft provision in the ARIO on *lex specialis*:

> 'The most notable examples of *lex specialis* in the practice of the United Nations include the principle of "operational necessity", which precludes responsibility for property loss or damage caused in the course of United Nations peacekeeping operations under the conditions set out by the Secretary-General and endorsed by the General Assembly (see the comments on draft article 24), and the temporal and financial limitations adopted in the same resolution for injury or damage caused in the course of the same operations. Resolution 52/247 on third-party liability: temporal and financial limitations, adopted on 26 June 1998, sets temporal and financial limitations on the liability of the United Nations in respect of third-party claims arising out of United Nations peacekeeping operations, and as such prevails over the duty to provide full reparation under draft article 33. The resolution specifies, *inter alia*, that "no compensation shall be payable by the United Nations for non-economic loss", and that the amount of compensation payable for injury, illness or death of any individual, including for medical and rehabilitation expenses, loss of earnings, loss of financial support etc., "shall not exceed a maximum of 50,000 United States dollars". Pursuant to paragraph

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[985] Ibid., para. 20 (emphasis provided), referring to *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, [1992] ICJ Reports 3.

[986] UN Doc. A/CN.4/637/Add.1 (2011), at 4 (fn. omitted, emphasis added). According to Boon, 'most organizations took the position that the founding premise of the international legal framework applicable to them should be speciality not generality.' K. Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 135 at 135.

> 12 of General Assembly resolution 52/247, the Secretary-General consistently includes the limitations on liability in the status-of-force agreements concluded between the United Nations and the States where peacekeeping operations are deployed.'[987]

The assertion that the UN Liability Rules qualify as *lex specialis* remains to be tested,[988] the ARIO Commentaries having left the matter of the status of rules of the organisation open.[989] Careful consideration is to be given not only to the ILC's work on the ARIO and comments such as those of the UN cited above,[990] but also to the ILC's work on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,'[991] and scholarship on the matter.[992]

#### 3.4.3.2.3 Scope of application

Zwanenburg concluded that

> 'the limitations in resolution 52/247 only apply to peace operations that operate with the consent of the host state. This is not stated in the resolution itself, but follows from the justification given by the UN for the limitations, namely that the host state has expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory. Consequently, the limitations do not apply to so-called "peace-enforcement" operations.'[993]

It is true that the 1997 Report states:

> 'The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual

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[987] UN Doc. A/CN.4/637/Add.1 (2011), at 35 (fn. omitted, underlining added).
[988] Bodeau-Livinec challenged the qualification of the UN Liability Rules as *lex specialis* in the sense of Article 64 of the ARIO ('Ainsi qu'en témoigne l'exemple de la résolution 52/247, par laquelle l'Assemblée générale a entendu apporter des limitations temporelles et financières à la responsabilité des Nations Unies, l'invocation d'une *lex specialis* s'avère d'un maniement peu aisé en pratique. Pour neutraliser les effets du cadre général, encore faudrait-il que le régime de responsabilité invoqué soit, notamment, opposable à ceux qu'il vise. De ce point de vue, la résolution 52/247 apparaît moins comme une veritable *lex specialis* que comme une simple pétition de principe.'). P. Bodeau-Livinec, 'Les Faux-semblants de la lex specialis—l'exemple de la résolution 52/247 de l'Assemblée générale des Nations Unies sur les limitations temporelles et financières de la responsabilité de l'ONU', (2013) 46 *Revue Belge de Droit International* 117, at 117. See also Klein (2016), at 1028, who refers to the aforementioned publication by Bodeau-Livinec.
[989] Thus, for example, the ILC Commentaries stated concerning the existence of a breach of an international obligation pursuant to in the context of Art. 10 of the ARIO: 'Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue'. ARIO Commentaries, Art. 10, at 98, para. 7 (emphasis added).
[990] Together with other relevant provisions under the ARIO, including notably Art. 32 ('Relevance of the rules of the organization') and Art. 67 ('Charter of the United Nations').
[991] See, e.g., UN Doc. A/CN.4/L.702 (2006).
[992] See, e.g., B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 *European Journal of International Law* 483.
[993] Zwanenburg (2008), at 35 (emphasis added).

> peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed'.[994]

However, its precursor, the 1996 Report, stated:

> 'In view of the fact that such damage has occurred both in traditional peacekeeping operations (the so-called "Chapter VI" operations) and in enforcement actions conducted under Chapter VII of the Charter, the approach of the present study to the question of United Nations third-party liability cuts across the peacekeeping/peace-enforcement divide. It distinguishes instead between the tortious liability of the Organization for damage caused in the ordinary operation of the force regardless of the type of operation and its liability for combat-related damage whether in the course of a Chapter VII operation or in a peacekeeping operation where force has been used in self-defence'.[995]

To cut across the divide between peacekeeping and peace-enforcement operations avoids complexities associated with the notion of 'consent'. UNPROFOR, which Schmalenbach considered a peace-enforcement operation,[996] illustrates such complexities.[997] Gray concluded:

> 'The early problems in securing the consent of the "concerned parties" to the deployment of UNPROFOR in Yugoslavia were ominous, and the Secretary-General's fears that the force would not be able to operate effectively without the cooperation of all those involved proved prophetic. The initial consent to the establishment of UNPROFOR was grudgingly given by some of the parties, and the formal consent of the host-state governments, even though accompanied by consent to the details of the initial mandate of UNPROFOR, was not sufficient to guarantee cooperation. The lack of active support for UNPROFOR on the ground was made manifest when host-state governments were reluctant to conclude SOFAs to protect the forces' rights and freedom of movement.'[998]

The UNSC eventually resorted to Chapter VII of the UN Charter, among other things, to secure cooperation with UNPROFOR. According to Gray:

> 'This sequence of events not only shows the practical problems encountered by the U.N. peacekeeping forces in Yugoslavia with regard to consent, it also vividly illustrates the complexity and multifaceted nature of the concept of consent in the context of peacekeeping.'[999]

It may be that 'consent' similarly is an unworkable criterion for determining the application of the UN Liability Rules. This might explain the 1996 Report's aforementioned proposal to cut across the peacekeeping-peace-enforcement divide and suggests that the UNGA used the term 'UN peacekeeping

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[994] 1997 Report, para. 12 (emphasis added).
[995] 1996 Report, para. 4 (emphasis added).
[996] Schmalenbach (2006), at 48.
[997] By way of background, UNPROFOR was replaced by the United Nations Confidence Restoration Operation in Croatia (UNCRO) and the United Nations Preventive Deployment Force (UNPREDEP) in the Republic of Macedonia, <peacekeeping.un.org/en/past-peacekeeping-operations> accessed 21 December 2021. It is the financing of, amongst others, these operations that gave rise to the 1996 Report and the 1997 Report. As to UNCRO, Croatia consented to its deployment to a degree, see C. Gray, 'Host-State Consent and United Nations Peacekeeping in Yugoslavia', (1996) 7 *Duke Journal of Comparative & International Law* 241, at 270. As to UNPREDEP, its mandate has been extended at the request of the Republic of Macedonia. S.T. Ostrowski, 'Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond', (1998) 30 *New York University Journal of International Law & Politics* 793, at 817.
[998] Gray (1996), at 270.
[999] Ibid.

operations' in UNGA resolution 52/247 (1998) in a general sense. That is, the UNGA intended it to apply to UN operations irrespective of the particular type of operation and the extent of consent.

Indeed, that seems to be the case in practice, as the experience with the claims review board set up by UNMIK seems to underscore. According to Schmalenbach, 'the liability rules applied by the UNMIK claims review board appear to be derived from the well-established liability practice in the course of peacekeeping missions.'[1000] UNMIK is a 'territorial administration,' as opposed to a peacekeeping (or peace-enforcement) operation. In its resolution establishing UNMIK, the UNSC welcomed that the FRY accepted the principles and other required elements for a political solution for the Kosovo crisis, including the deployment of UNMIK.[1001] Yet, the resolution was adopted under Chapter VII of the UN Charter and it 'demands the full cooperation of the Federal Republic of Yugoslavia in [the] rapid implementation' of said principles and elements'.[1002] The UNSC is unlikely to have done so if the FRY had unequivocally consented to the deployment of UNMIK.

However, if host state consent is not legally relevant for the application of the UN Liability Rules, their underlying premise—that the host state shares in the liability of the UN towards third-party claimants—is problematic.

*Shared liability?*

The above-cited passage in the 1997 Report that led Zwanenburg to conclude that the UN Liability Rules apply only to consensual operations reads in full:

> 'The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for damage arising from such an operation.'[1003]

It may appear reasonable to expect the host state to share that liability as the UN operation is deployed for its benefit. However, the premise of shared liability seems flawed for several reasons. Leaving aside that host state consent arguably is not required, even if the state consents, it may not be prepared to share in the UN's liability.

The 1997 Report merely postulates the premise of shared liability. That premise does not appear to have been operationalized, for example, by obliging the host state to share liability under the SOFA. Any

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[1000] Schmalenbach (2006), at 47.
[1001] S/RES/1244 (1999), para. 2.
[1002] Ibid. (emphasis in original).
[1003] 1997 Report, para. 12 (emphasis added).

obligation to share liability with the UN towards private parties may depend on national law.[1004] Furthermore, the question would arise as to how to determine the respective share of the UN and the host state.

In the end, even if a host state were legally obliged to pay supplemental compensation, and if the UN and the state came to an arrangement on their respective shares, it may well be illusory for a private claimant to receive such compensation. This is because UN operations typically take place in underdeveloped or failed states that are unlikely to have the necessary funds.[1005]

3.4.3.2.4 Observations on implementation

The UNGA endorsed the proposals for implementing the principles of limitations on the liability of the UN.[1006] The 1997 Report envisaged three levels of legislative action. The first level is an UNGA resolution on the basis of Article 17 UN Charter. According to the 1997 Report: 'A General Assembly resolution stipulating the temporal and financial limitations is necessary to give the Organization the legislative authority for limiting its liability vis-à-vis Member States.'[1007] That is UNGA resolution 52/247 (1997).

The second level is a liability clause in the relevant status of forces agreement with the host state which 'would set out the principles of the limitations and incorporate them in the agreement by reference to the General Assembly resolution limiting the Organization's liability'.[1008] According to the 1997 Report, such a clause

> 'would ensure that in the relationship between the Organization and the host country, the temporal and financial limitations on the liability of the Organization would be binding within the territory of the host State on the basis of its express consent.'[1009]

As explained by Schmalenbach: 'The limitation of UN liability is part of all SOFAs/SOMAs concluded after 1998'.[1010] Even so, however, the issue is whether the liability clause would have the intended effect, that is, whether it is 'binding within the territory of the host state'.[1011] The direct application of

[1004] Cf. Zwanenburg (2008), at 35 ('There is no obligation on the host state to compensate individuals, unless this is part of that state's domestic law.').
[1005] Ibid.
[1006] UN Doc. A/RES/52/247 (1998), para. 3.
[1007] 1997 Report, para. 39.
[1008] Ibid., para. 40.
[1009] Ibid.
[1010] Schmalenbach (2016), para. 82. However, it is conceivable that there is no such agreement, for example, in the case of a 'failed state'.
[1011] 1997 Report, para. 40.

international law within the domestic legal order of a state, and its relationship to domestic law, depends on the particular legal system of the state in point.

This is perhaps all academic in light of the third level of implementation referred to in the 1997 Report. That is:

> 'Temporal and financial limitations along the lines adopted by the General Assembly should also be included in the terms of reference of the local claims review boards as a basis for their jurisdiction. As such they would be binding upon any potential claimant who would choose to institute proceedings before such boards.'[1012]

The UNGA specifically requested the UNSG to ensure that the limitations on liability are included in the terms of reference of the local review boards and that they rely on those limitations 'as a basis for their jurisdiction and recommendations for compensation for third-party claims against the organization resulting from its peacekeeping operations.'[1013] Indeed, the claimant is faced with a *fait accompli*. According to Schmalenbach:

> 'For individual complainants, the liability limitation is of no direct legal effect; it merely forestalls the compensation offer made by the local claims review board. However, when assessing the limited offer the aggrieved person has to take into consideration that the standing claims commission will apply the resolution as it is integrated into the SOFA/SOMA dispute settlement clauses. In the unlikely case that outside of the SOFA/SOMA dispute settlement clause an ad hoc arbitral tribunal is established to adjudicate a case, the financial limitation will certainly be introduced by the UN in the *compromis* to be negotiated with the claimant.'[1014]

3.4.3.2.5 Observations on the content of the UN Liability Rules

*Origin and development*

As to the origins of the UN Liability Rules, they appear to be based on, as Schmalenbach explained, 'general provisions on national law of torts and on local provisions of the host states. The former are mainly deduced from Anglo-American law of tort. The latter are limited to issues concerning the amount of compensation.'[1015]

The UN Liability Rules developed in the practice of the UN. Having initially served as guidance for the UN in settlement negotiations,[1016] the UNGA promulgated them in UNGA resolution 52/247 (1998).

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[1012] Ibid., para. 41.
[1013] UN Doc. A/RES/52/247 (1998), para. 13.
[1014] Schmalenbach (2016), para. 83 (fn. omitted).
[1015] Schmalenbach (2006), at 43 (fns. omitted).
[1016] Ibid.

The UN Liability Rules evidence a development anticipated by Jenks in exploring, as far back as 1962, the 'proper law of international organisations'.[1017] Jenks highlighted the need for 'an approach to the problem of the law governing the legal transactions of international organisations'.[1018] That law 'may not be limited to a choice between different systems of municipal law but may provide for the application of rules of an international character, including the domestic law of an international organisation.'[1019]

The UN Liability Rules are succinct and rudimentary. They are primarily of a 'secondary nature' insofar as they concern the consequences of liability (financial limitations) and its implementation (temporal limitations), and exempt liability in the case of operational/military necessity. Certain aspects are implied; for example, the obligation of the UN to pay compensation where it is liable. Substantive (or 'primary') rules may also be implied. For example, for the UN to incur liability for personal injury and death implies that the UN is bound to observe the rights to health and life. Similarly, liability for property loss or damage implies that the UN is bound to respect property rights. Other issues, however, remain unclear. For example, as to the definition of 'personal property', does it exclude intangible property/economic rights? And, regarding compensation for loss or damage to personal property, when can it be said that damage is 'arising from the activities of the operation or in connection with the performance of official duties by its members'?[1020]

If the UN Liability Rules are to develop into a liability regime proper, they are in need of clarification and development through consistent interpretation and application, just as domestic tort law regimes develop through regulation, jurisprudence and scholarship. From the perspective of the rule of law, as understood by the UN, that development is required to foster legal certainty.[1021]

The process of developing the UN Liability Rules ought to further the *sui generis* nature of these rules.[1022] The *sui generis* nature of the rules is amplified by an underlying policy objective to *standardize* the legal regime governing the UN's third-party liability. That objective is clearly expressed in the 1997

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[1017] C.W. Jenks, *The Proper Law of International Organisations* (1962).
[1018] Ibid., at xxxi.
[1019] Ibid. (emphasis added).
[1020] UN Doc. A/52/RES/247 (1998), para. 11(a) (emphasis added).
[1021] UN Doc. S/2004/616 (2004), para. 6 (referring to 'measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' [emphasis added]).
[1022] Local rules are relevant insofar as the actual amount of compensation payable for injury, illness or death 'is to be determined by reference to local compensation standards. UN Doc. A/RES/52/247 (1998), para. 9(d). The only other reference to local standards is: 'Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team'. Ibid., para. 10(a) (emphasis added).

Report, which states the following regarding the compensable types of personal injury, death and illness in the context of peacekeeping operations:

> 'In the practice of peacekeeping operations, compensation payable to third-party claimants for personal injury is based on the types of injury and loss compensable under local law and the prevailing practice in the mission area, in particular, as well as on the past practice of the Organization. In the view of the Secretary-General, a list of compensable types of personal injury or loss should now be established on a global basis regardless of the place where the act causing the injury or loss took place. Such an approach would be simple to implement and create the least disparities among claimants worldwide. It is also the approach adopted in Headquarters regulation No. 4 limiting the liability of the Organization in respect of compensation for injury or loss occurring in the United Nations Headquarters district in New York and by the United Nations Compensation Commission.'[1023]

Thus, with respect to *compensable types of damages*, the objective is for claimants with claims arising in the *same context*, that is, peacekeeping operations, across the world to be treated alike.

In doing so, the UN Liability Rules standardize the treatment of claims arising in certain *different contexts*. Thus, said *types of compensable injury and loss* under the UN Liability Rules regarding injury, illness or death in peacekeeping operations are based, amongst others, on Headquarters Regulation No. 4, concerning the tort liability of the UN within its headquarters district (i.e. an area including and surrounding the UN building in New York).[1024]

Moreover, in establishing *maximum amounts of compensation* for third party claimants, the UN Liability Rules draw on such amounts applicable to claimants that are 'associated' with the organisation, as opposed to third parties proper, who are external to it. That is, regarding such maximum amounts, the 1997 Report drew on the 'Notes for guidance of military/police observers on assignment' and the 'Rules governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations (Rules Governing Compensation to Members of Commissions)',[1025] whilst the 1997 Report also referenced the 'Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations', which apply to UN staff.[1026]

Such members, observers and staff consent to perform official duties on behalf of the UN and are in that sense 'associated' with the organisation. Conversely, third parties proper have no such relationship with

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[1023] 1997 Report, para. 24 (fns. omitted, emphasis added).
[1024] Ibid., para. 25. Other sources are the criteria developed by the UN Compensation Commission as well as the practice of UN peacekeeping operations. Non-economic loss and punitive or moral damages are excluded, as are homemaker services and legal expenses. Ibid., para. 26. The exclusion of the last-mentioned services and expenses contrasts with Headquarters Regulation No. 4.
[1025] UN Doc. ST/SGB/103/Rev.1 (1980). These rules are in turn 'based on those governing compensation for staff members for service-incurred death, injury or illness as set out in ST/SGB/Staff Rules/Appendix D/Rev.1 (1966) and Amend.1 (January 1976).' See 1995 Report, fn. 6.
[1026] 1997 Report, para. 27, fn. 13.

the organisation. Yet, the rules applicable to such associated persons lay the foundation for the UN Liability Rules, applicable to third parties proper, thus 'externalising' the application of the former rules.[1027]

A further example of this process of 'externalisation' concerns the temporal limitations under the UN Liability Rules. In that regard, the proposals contained in the 1997 Report drew inspiration from the Rules Governing Compensation to Members of Commissions and the 'Notes for guidance of military/police observers on assignment'.[1028]

*Liability 'exemptions'*

As seen, there are two liability exemptions in the practice of the UN: military necessity and operational necessity. Regarding the former, according to the 1996 Report, the liability of the UN 'would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".'[1029] While the UNGA did not endorse the concept as a liability exemption in UNGA resolution 52/247 (1998),[1030] it has been applied in UN practice, as explained by Schmalenbach, 'for example, in the ONUC claims settlement'.[1031]

Military necessity reflects a fundamental principle of international humanitarian law. As Hayashi warns, the principle

> 'may appear straightforward and easily grasped; yet few concepts so fundamental to warfare and its regulation are more elusive. It is prone to misunderstanding, manipulation and invocation at cross-purposes.'[1032]

According to Hayashi, most commentators consider that military necessity only has a role to play where rules of international humanitarian law state so *explicitly*.[1033] An example is Article 53 of Convention

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[1027] Conversely, the UNSG did not deem it fit to apply the maximum compensation standards set out in UN Doc. ST/AI/149/Rev.4 (1993) on compensation for loss of or damage to personal effects attributable to service (usually incorporated by reference in the 'Notes for guidance of military/police observers on assignment' issued for a particular peacekeeping operation) to compensation for personal property of third parties. 1997 Report, para. 36.
[1028] 1997 Report, para. 19.
[1029] 1996 Report, para. 16. It is referred to twice more: in para. 36, in connection with the ONUC settlement, and in fns. 5 and 8.
[1030] Nonetheless, according to Schmalenbach: 'Since 1998, the operational necessity principle has been incorporated in all SOFAs/SOMAs, which include military necessity considerations'. Schmalenbach (2016), para. 79.
[1031] Ibid.
[1032] N. Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', (2010) 28 *Boston University International Law Journal* 39, at 41.
[1033] Ibid., at 55 and literature cited in fn. 54. Hence, according to Hayashi, military necessity comes into play as exceptional clauses to principal international humanitarian law rules where such rules envisage such clauses 'expressly and in advance.' Ibid., at 139. Hayashi develops a four-pronged cumulative test of what he terms 'exceptional military necessity': 'that the measure was taken primarily for the attainment of some specific military

(IV) relative to the Protection of Civilian Persons in Time of War ('Geneva Convention (IV)') (emphasis added):[1034]

> 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'

This suggests that military necessity operates at the level of *primary rules*: it is prohibited to destroy property, pursuant to Article 53 of Geneva Convention (IV), except where such destruction is 'required by military necessity'. Likewise, ILC Special Rapporteur Crawford stated with respect to military necessity:

> 'That doctrine "appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality", and not in the confined context of necessity as a circumstance precluding wrongfulness. As to the question whether military necessity is an excuse for non-compliance with international humanitarian law, the answer is clearly that it cannot be: "even in regard to obligations of humanitarian law which are not obligations of *jus cogens* ... to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with" the relevant conventions: necessity is thus excluded by the terms of the very obligation itself. Although no specific conclusion is reached, the commentary by implication denies any separate existence to a doctrine of "military necessity".'[1035]

Conversely, it seems that in the practice of the UN, the notion of military necessity did develop as a circumstance precluding wrongfulness. This is suggested by the above-quote passage from the 1996 Report.[1036] This is reinforced by a footnote to the 1996 Report, according to which

> 'the concept of "operational necessity" as used herein has been developed in the practice of United Nations operations. It is distinguishable from the concept of "military necessity", which is limited to combat operations and is governed by the laws of war. Both concepts are, however, conceptually similar in that they serve as an exemption from liability, or a legitimization of an act that would otherwise be considered unlawful.'[1037]

ILC Special Rapporteur Gaja indeed referred to the notions of military and operational necessity in the practice of the UN in the context of 'necessity', as a 'circumstance precluding wrongfulness' under

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purpose, that the measure was required for the purpose's attainment, that the purpose was in conformity with international humanitarian law, and that the measure itself was also otherwise in conformity with the law.' Ibid.

[1034] 75 UNTS 287.

[1035] A/CN.4/498/Add.2, Addendum (1999), para. 280.

[1036] 1996 Report, para. 16. The exemption from liability in the case of military necessary under the ONUC settlement is referred in ibid., para. 36. The UNOC settlements excluded claims for damages 'which were found to be solely due to military operations or military necessity'. See letter of UNSG to the Permanent Representative of the USSR, reproduced in 1967 Study, para. 56. See also 1996 Report, fn. 8. As seen, in discussing the 1996 Report, the ACABQ recalled that 'the concept of "operational necessity" . . . has been formally presented in a document for the first time, although it has already been applied in the practice of Claim Review Boards as an exception from liability.' UN Doc. A/51/491 (1996), para. 8.

[1037] 1996 Report, para. 13, fn. 5 (emphasis added).

Article 25 of the ARIO.[1038] Rather than extinguishing an international obligation, such circumstances justify or excuse non-performance.[1039]

The end result may be the same: the UN does not incur responsibility. But the notion of military necessity has developed out of sync with international law. That is, the UN applies a *sui generis* concept that originates from international law, but is distinct from it. That is to be borne in mind in interpreting and applying the notion of military necessity in practice.

The notion of operational necessity is 'conceptually similar' to that of military necessity.[1040] Having developed in practice,[1041] the notion was described in the 1996 Report, which set forth the circumstances under which it applies as an exemption from liability. This involves a cumulative four-pronged test. As parallel notions, the rationale of operational necessity may be understood with reference to the rationale of military necessity. The rationale of the latter arises in the context of international humanitarian law. That body of law 'has been developed with a view to striking a realistic balance between military necessity and humanitarian considerations whenever they collide.'[1042] Similarly, operational necessity reflects the public interest in international organisations carrying out non-combat operations. Provided the cumulative four-pronged test is met, that interest outweighs private property interests. Where operational necessity applies, the organisation is exempt from liability and compensation.

According to Schmalenbach,

> 'the legal justification of an act on the grounds of its operational and military necessity can be said to be a general principle of international liability law, because this principle has been pleaded as a defense with impressive consistency by international organizations with military operations such as NATO, OAS, and the UN in order to ward off claims for damages.'[1043]

Indeed, the consistent interpretation and development of these liability exemptions, and the UN Liability Rules generally, in view of their *sui generis* nature, is of significant importance to ensure legal certainty.

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[1038] G. Gaja, Fourth Report on Responsibility of International Organizations, UN Doc. A/CN.4/564 (2006), para. 37.
[1039] ARIO Commentaries, at 109, para. 1 (preceding Art. 20). Thus, for example, the ICJ stated that 'the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.' *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 40, para. 51 (emphasis added).
[1040] 1996 Report, para. 13, fn. 5 (emphasis added).
[1041] Ibid., para. 15.
[1042] Hayashi (2010), at 50.
[1043] Schmalenbach (2006), at 51. See also ibid., at 44.

*Substantive remedies*

The UN Liability Rules do not stipulate the substantive remedies applicable in case the UN is liable towards third parties. However, the financial limitations necessarily imply that compensation is due. As Schmalenbach concluded,

> 'on account of the widespread compensation practice by international organizations with military operations, that the principal obligation to compensate harmful acts attributable to the relevant organization – provided that the facts of the case fulfill certain conditions – is a general principle of liability law of international organizations. The refusal to pay compensation to individuals unlawfully damaged through negligence or intent would therefore constitute a violation of international law.'[1044]

The position of OLA is that the UN's internal financial organisation has no bearing on its liability. That is,

> 'the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations. This has been recognised in two advisory opinions of the International Court of Justice and it follows from general principles of law.'[1045]

In its advisory opinion *Effect of Awards*, the ICJ held that

> 'the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements.'[1046]

In its subsequent Advisory Opinion in *Certain Expenses of the United Nations*, the ICJ cited that finding and added:

> 'Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements".'[1047]

Thus, according to OLA: 'If for some reason a legal liability arising under a contract or other agreement exceeds the amount that the General Assembly has appropriated for that contract, additional funding would have to be obtained'.[1048]

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[1044] Ibid., at 51.
[1045] 2001 OLA Memorandum to the Controller, para. 16. Likewise, ARIO Commentaries, Art. 31, at 122, para. 4.
[1046] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47 (*Effect of Awards*), at 59.
[1047] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ. Rep. 151 (*Certain Expenses*), at 169.
[1048] 2001 OLA Memorandum to the Controller, para. 14.

The remedial scope of the UN Liability Rules is limited in two respects. First, as seen, these rules limit both the type of compensable damages and the amount of compensation payable to third parties. Second, they do not foresee (or imply) any consequences of liability other than payment of compensation.

Insofar as one can generalize, these limitations seem to contrast with domestic laws. That is, domestic laws may provide for *full* reparation and they may provide remedies other than compensation. Thus, according to one author, seemingly with reference to Anglo-American law: 'The point of tort damages is to compensate, to restore the *status quo ante*, to make the plaintiff whole.'[1049] The same may be said to be the case under Dutch, Belgian, German and, indeed, English law.[1050] As to remedial relief other than compensation, restitution is a case in point. Dutch law, whilst awarding primacy to pecuniary compensation,[1051] confers the right to restitution, for example, in the case of undue payment ('onverschuldigde betaling').[1052] Furthermore, as a parallel to 'cessation' under general international law, a claimant may be able to obtain injunctive relief under domestic law.[1053]

The Legal Complaint in *Georges et al.* before the US courts may reflect the type of damages available under domestic law in the United States. That is, the claimants sought

> 'declaratory relief, and . . . actual, injunctive, compensatory and punitive damages to remedy the injuries sustained by the Plaintiffs and the Class, including remediation of Haiti's waterways and provision of adequate sanitation to Plaintiffs and Class members in amounts to be determined at trial, including $2.2 billion that the Haitian government requires to eradicate cholera.'[1054]

Such claims would have little prospect of success under the UN Liability Rules. For one, those rules explicitly exclude punitive damages.[1055]

Conversely, compared to applicable international law, the remedies under the UN Liability Rules are rather more extensive. It is true that the scope of remedies under international law is *generally* broad.

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[1049] J.C. Goldberg, 'The Conceptions of Tort Damages: Fair v. Full Compensation', (2006) 55 *De Paul Law Review* 435, at 435.
[1050] S.D. Lindenbergh, *Schadevergoeding: Algemeen, Deel 1* (2020), Nr. 7. ('In dat verband pleegt als doel van schadevergoeding te worden genoemd het goedmaken van de schade . . . In ons omringende landen is dat niet anders.' With references to Dutch law, as well as Belgian, German and English law).
[1051] Cf. Art. 6:103 of the Dutch Civil Code ('Schadevergoeding wordt voldaan in geld. Tekst kan de rechter op vordering van de benadeelde schadevergoeding in andere vorm dan betaling van een geldsom toekennen. Wordt niet binnen redelijke termijn aan een zodanige uitspraak voldaan, dan herkrijgt de benadeelde zijn bevoegdheid om schadevergoeding in geld te verlangen.'). For the position under English law, see, e.g., G. Virgo, *The Principles of the Law of Restitution* (2006).
[1052] Art. 6:203 of the Dutch Civil Code.
[1053] On the role of injunction in English, French and German tort law, see, e.g., W.H. Van Boom, 'Comparative Notes on Injunction and Wrongful Risk-Taking', (2010) 17 *Maastricht Journal of European and Comparative Law* 10.
[1054] *Georges et al. v. United Nations et al.*, United States District Court, Southern District of New York, 9 October 2013, Legal complaint, prayer for relief.
[1055] UN Doc. A/RES/52/247 (1998), para. 9(b).

The ASR and the ARIO reflect that an internationally wrongful act has two 'general consequences':[1056] cessation (Article 30 of the ASR and the ARIO) and reparation (Article 31 of the ASR and the ARIO).

Article 31 of the ARIO provides:

> '1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.'

According to Article 34 of the ARIO: 'Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.'

The authority often cited in connection with 'full reparation' is the *Factory at Chorzów* case in which the Permanent Court of International Justice formulated the obligation to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[1057] Article 35 of the ARIO affirms the primacy of restitution as a matter of legal principle. Under Article 36 of the ARIO:

> '1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.'[1058]

In general, there is therefore a broad pallet of remedies under international law. However, the scope of application of these remedies under the ARIO does *not* include the relationship between private parties and international organizations. And, the right to a remedy under international law has not developed to the point of granting substantive remedies to private. The implication, therefore, is that in (implicitly) granting compensation to private parties where the UN is liable towards them, the UN Liability Rules go beyond applicable international law.

*Temporal limitations*

Under the UN Liability Rules, claims arising in the context of peacekeeping operations must be submitted within six months of sustaining, or discovering, the damage, loss or injury, and in any event

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[1056] ASR Commentaries, Art. 30, at 89, para. 4.
[1057] *Factory at Chorzów*, Merits, Judgment of 13 September 1928, Rep. PCIJ Series A No. 17, at 47.
[1058] The ILC commented in the context of the ASR that restitution is 'frequently unavailable or inadequate'. ASR Commentaries, at 99, para. 3. And, '[o]f the various forms of reparation, compensation is perhaps the most commonly sought in international practice.' Ibid, at 99, para. 2.

within a year of the termination of the mandate of the operation. The 1997 Report explained the considerations underlying these temporal limitations:

> 'A temporal limitation on the submission of claims against the Organization is designed to ensure that third-party claims are submitted within a reasonable period of time and before witnesses and evidence disappear and memories fade. It is also intended to free the Organization from unknown and possibly large financial liabilities for past operations which could otherwise be asserted against the Organization at any time in the future. Furthermore, in many peacekeeping operations of limited duration, the Organization withdraws from the area when the mandate of the operation ends. This means that the United Nations personnel with knowledge of the circumstances of claims arising in the area are dispersed to other posts in the Organization or leave the Organization altogether. As a consequence, unless the Organization is given timely notice of a claim, its ability to investigate the claim and defend itself is severely restricted
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> . . . At the same time, any temporal limitation must be of a reasonable duration so as not to unduly deprive claimants of their right to seek compensation in the event they suffer injury or loss in situations which entail the liability of the Organization.'[1059]

The temporal limitations are cast in terms of jurisdiction *ratione temporis* of claims review boards. Claims filed out of time are inadmissible (or, in UN terminology: 'not receivable'). The policy reasons underlying such periods under domestic law include legal certainty and the availability of evidence. Such reasons are amplified by the operational challenges facing a UN peacekeeping operation, as highlighted in the aforementioned excerpt from the 1997 Report.

As such, temporal limitations may therefore be reasonable. The question, however, is whether the period of *six months* is reasonable. By comparison, under domestic laws, prescription periods typically are several years. For example, under Article 3:310 of the Dutch Civil Code, the prescription period for compensation claims for damages is five years. As seen, the temporal limitations are based on rules applicable between the UN and those internal to the organization.[1060] As a result of their 'consensual' relationship, such persons are likely to have taken note of the applicable periods and they may have been well aware of, and have easy access to, claims settlement procedures. The same cannot necessarily be said of third non-state parties that did not enter into a consensual relationship with the UN.[1061] The six-month period may indeed be overly short, which underscores the importance of the discretionary power to accept, in exceptional circumstances, the consideration of claims submitted at a later date.[1062]

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[1059] 1997 Report, paras. 15-16.
[1060] 1997 Report, para. 19, took note of the 'Notes for guidance of military/police observers on assignment', as well as the 'Rules Governing Compensation to Members of Commissions', UN Doc. ST/SGB/103/Rev.1. (1980).
[1061] Likewise, Ferstman (2019), at 60-61.
[1062] 1997 Report, para. 20; UN Doc. A/RES/247 (2008), para. 8. One exceptional circumstance is the one described in para. 20 of the 1997 Report, concerning claims arising during the wind-up period of the operation.

#### 3.4.3.3 Interim conclusions

The phrase ‘appropriate modes of settlement’ under Section 29 may be interpreted to amount to settlement processes to resolve disputes between the UN and third parties. In light of the international organisations law framework governing third party remedies, to qualify as ‘appropriate’, such processes arguably must: (i) conform to the essence of Article 14 of the ICCPR; (ii) not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction; and (iii) not be unduly burdensome for either the UN or the claimants (so as to render dispute settlement ‘illusory’ for claimants).

The UN’s practice in implementing Section 29 of the General Convention is fragmented—there is a wide variety of disparate modes of settlement under Section 29 of the General Convention. Concretely, the UN, like other international organisations, pursues the amicable settlement of third-party disputes as a matter of course. Whilst that may be good practice in general, a circumscribed process would benefit good faith and timely negotiations.

Arbitration is a key dispute settlement technique resorted to by the UN, as well as other international organisations, and indeed in international practice generally. However, two distinct challenges arise. First, arbitration under the UNCITRAL Arbitration Rules is not necessarily an ‘appropriate’ mode of settlement insofar as, in reality, it may be overly burdensome, particularly for private claimants.

The second challenge concerns the perceived neutrality of arbitration, being a private and consensual form of dispute settlement, as a principal advantage over domestic litigation. Indeed, because of its perceived neutrality, arbitration is an attractive alternative to domestic litigation for international organisations. However, arbitration is subject to the supervision of national courts, which is aimed to ensure the arbitration’s effectiveness and fairness. The link between arbitration and national courts is notably established through the ‘place of arbitration’, as per Article 18 of the UNCITRAL Arbitration Rules.

The problem is that national courts may abuse of their arbitral supervisory powers in a variety of ways. This may amount to interference in the independent functioning of international organisations. Therefore, in addition to potentially declining to agree on a place of arbitration, international organisations may reserve their privileges and immunities in connection with arbitrations. This unsettles the arbitration, it being unclear whether the court will uphold the immunity. The result is unsatisfactory either way. Where the court accepts the international organisation’s immunity, the potential for abuse is removed, but the arbitration is not ‘anchored’ and lacks the necessary safeguards for the claimant and international organisation alike. Where, conversely, the court rejects the jurisdictional immunity, the international organisation’s independence is at risk due to the potential for interference.

In arbitration generally, attempts to remove national courts from the arbitration process, that is, by 'de-nationalising' arbitration, have not been successful. But, the objective of arbitration without national court involvement *has* been successfully pursued in another context: the protection of foreign investment under the ICSID Convention. This multilateral treaty provides for properly 'internationalised' arbitration that is 'self-contained', that is, separate from domestic jurisdictions. The ICSID Convention provides a useful model for re-designing an alternative arbitration regime for purposes of implementing Section 29 of the General Convention.

Claims review boards, like the Tort Claims Board for the UN headquarters district,[1063] do not meet the core requirements of independence and impartiality under Article 14 of the ICCPR. This is because they are composed of UN representatives. The Award Review Board for procurement-related challenges suffers the same fate as it has mere advisory powers. Claims review boards (as well as the Tort Claims Board) are elements of a broader settlement process. In addition to settlement discussions, that process was designed to include standing claims commissions. However, no such commission has ever been established, their legal framework being peculiar and problematic in several respects.

Thus, for example, the standing claims commission's jurisdiction over disputes of a 'private law character' with third-parties excludes disputes arising from 'operational necessity'. This, while in resolution 52/247 (1998), the UNGA recognised 'operational necessity' as a *substantive* exemption from liability. Furthermore, in tasking the commission to determine its own procedures, the MINUSTAH SOFA does not require compliance with fundamental requirements like independence and impartiality under Article 14 of the ICCPR, though that is common in arbitration. And, the quorum requirement of two commission members 'for all purposes' risks side-lining the third member, thus undermining the commission's integrity.

Most significantly, the procedure for the commission' establishment is incomplete. This is because of the absence of a default appointment procedure for the members to be appointed by the UN and the host state, respectively. Thus, in the matter of the Haiti cholera epidemic, the UN rejected the establishment of a standing claims commission on the basis that, in its view, the dispute lacked a private law character as a consequence of which the claims were not 'receivable'. The outcome with respect to the claims against UNMIK regarding the Kosovo lead poisoning was the same—the claims were rejected on the basis that they were not 'receivable', apparently without a claims commission having been established.

In the case of a lump-sum arrangement, a state espouses third-party claims of its nationals against the UN, by way of diplomatic protection. In such a case, the UN incurs international responsibility towards

[1063] Subject to its continued existence (see above).

the state of nationality. The ONUC settlement, which dates back to the 1960s, is the only known example of this kind. The 1996 Report's proposal to revive this technique received no follow-up. The ONUC settlement exemplified the complexities surrounding diplomatic protection. Coupled with the advent of human rights over time, as witnessed also, for example, in the area of foreign investment, diplomatic protection is unlikely to be an 'appropriate' mode of settlement under Section 29 of the General Convention today, if it ever was.

As to the UN waiving its immunity from jurisdiction, it may do so in the case of traffic accidents involving UN vehicles. However, such waiver is governed by Article II of the General Convention; it does not qualify as a 'mode of settlement' under Article VIII, Section 29 of the General Convention. Lastly, as to arrangements whereby recipient states of operational activities for development agree to indemnify the UN and hold it harmless, it is not clear what 'modes of settlement' apply in the event of a dispute with the UN.

The appropriateness of modes of settlement is moreover impacted by the rules governing dispute settlement and the remedies available thereunder. The UN Liability Rules, promulgated in UNGA resolution 52/247 (1998), are an important component of the UN's nascent liability regime. However, they give rise to several legal questions, and require clarification and development through consistent interpretation and application.

As to the adoption of the UN Liability Rules, the UNGA's power to approve the budget under Article 17 of the UN Charter arguably encompasses the power to limit liability. The power to do so may also be implicit in that provision under the doctrine of 'implied powers'. As to the legal nature of the UN Liability Rules, whilst they fit the definition of 'rules of the organization' under the ARIO, their international law status remains resolved, as does their relationship to general international law.

As to the scope of application of the UN Liability Rules, in practice they apply irrespective of the consent of the host state, that is, they apply both in peacekeeping and peace-enforcement operations, as well in regard to UNMIK as Kosovo's (temporary) interim administration. But if host state consent is not relevant, a problem arises with respect to the premise underlying the UN Liability Rules, namely that the host state shares in the UN's third-party liability. That premise is flawed if only because it has not been operationalised and states are indeed unlikely to share in the UN's third-party liability. Further, the UN Liability Rules have been implemented in modern-day SOFAs. These rules are binding on claimants insofar as their inclusion in the terms of reference of local claims review boards presents them with a *fait accompli*.

In terms of substance, the UN Liability Rules are succinct and encompass a developing liability system. These rules are primarily of a 'secondary nature' insofar as they concern the consequences of liability

(financial limitations) and its implementation (temporal limitations), and exclude liability in the case of operational (and military) necessity. The nature of the liability regime developing on the basis of the UN Liability Rules is *sui generis*. Underlying this regime is a policy objective to standardize rules governing the third-party liability of the UN, whilst drawing on rules applicable to persons associated with the organisation.

As to exemptions from liability, whilst the doctrine of military necessity is not part of the UN Liability Rules as promulgated in UNGA resolution 52/247 (1998), it seems to form part of UN practice. The doctrine has developed as a 'secondary rule' of international law (namely as a circumstance precluding wrongfulness), whereas under (general) international law it is considered in terms of 'primary rules'. This underscores the *sui generis* character of military necessity as a liability exemption. Operational necessity, which was endorsed as an exception to liability in the aforementioned resolution, is 'conceptually similar' to military necessity. It embodies the public interest in the achievement of the goals of the international organization in non-combat situations. Where the cumulative four-pronged test set forth in the 1996 Report is met, that interest outweighs private property interests. The UN Liability Rules' *sui generis* nature underscores the need for consistent interpretation and application.

As to substantive remedies under the UN Liability Rules, their remedial scope is limited in two respects. First, as seen, these rules limit both the type of compensable damages and the amount of compensation payable to third parties. Second, they do not foresee (or imply) any consequences of liability other than the payment of compensation. As such, they are more limited than domestic law, but more extensive than applicable (general) international law. The temporal limitations under the UN Liability Rules operate as prescription periods. As such, they serve a legitimate purpose, but the six-month period seems to be overly short. This underscores the importance of the discretionary power to extend the period where warranted.

### 3.5 Conclusions

This chapter examined the first research question of this study: how to interpret Section 29(a) of the General Convention and assess its implementation by the UN in light of the international organisation law framework governing third-party remedies and against the broader backdrop of the rule of law?

The UN is significantly exposed to a variety of third-party claims as a result of its many and diverse operations across the world. In dealing with such claims, and whilst the primary focus of the member states seems to be on curbing expenses, the UN's implementation of Section 29(a) of the General Convention has largely developed in practice. Various complexities arise in interpreting Section 29(a) of the General Convention, not least as the provision lacks specificity.

This chapter set out to discuss the binding nature of the General Convention for the UN. It concluded that failure on the part of the UN to implement Section 29 of the General Convention has no bearing on its entitlement to immunity from jurisdiction. In particular, the UN's immunity from jurisdiction is not conditional on its implementation of that provision.

Next followed an overview of the UN's practice in implementing Section 29 of the General Convention on the basis of available information. That practice can be gleaned from a variety of documents; the 1995 Report remains the most comprehensive document to date.

The discussion of Section 29(a) of the General Convention that followed began with general observations. Notably, the question arises as to *who* determines the legal character of third-party claims. In reality, it is the UN that does so unilaterally, thereby effectively controlling its own accountability. This is at odds with core notions of justice and the rule of law (and arguably Article 14 of the ICCPR), which are central to the UN's very purposes and operations, and which it has embraced.

The discussion then addressed the main elements of Section 29(a) of the General Convention: 'private law character' and 'appropriate modes of settlement'. As to the former, the interpretation of the term 'private law character' is particularly complex. From the perspective of the travaux préparatoires, the UN's categorical exclusion of disputes based on 'political or policy-related grievances' appears problematic, as does its characterisation of the dispute in connection with the Haiti cholera epidemic.

As to the latter, for 'modes of settlement' to qualify as 'appropriate', they arguably must comply with (the essence of) Article 14 of the ICCPR. Furthermore, they must neither expose the UN to national court jurisdiction by undermining its immunity from jurisdiction, nor be unduly burdensome, particularly for private claimants. Considered in light of these requirements, the various modes of settlement to which the UN resorts in practice give rise to various problems.

The UN's implementation of Section 29(a) of the General Convention is due to be revised if it is to amount to, in the words of the UN Legal Counsel in the ICJ advisory proceedings in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, a 'complete remedy system to private parties' in accordance with present-day requirements. Whilst the broad variety of modes of settlement currently resorted to bear little resemblance to a 'system', the main problems with the implementation of Section 29(a) identified in this chapter may be summarised as follows:

1. Only disputes of a 'private law character' qualify for dispute settlement under Section 29. That triggering criterion is complex and illusive. Arguably the single biggest challenge with the current implementation of Section 29, as illustrated in the disputes in connection with the

Kosovo lead poisoning and the Haiti cholera epidemic, is that the UN itself determines whether a dispute has a 'private law character'. In doing so, the UN in effect controls its own accountability;

2. Standing claims commissions for peacekeeping operations are hardly appropriate modes of settlement if only because they have never been established. Their legal framework, notably regarding their establishment, is peculiar and problematic in several respects. Furthermore, the UN Liability Rules, promulgated in UNGA resolution 52/247 (1998), are an important component of the UN's liability regime. However, they give rise to several legal questions and require clarification and development through consistent interpretation and application; and
3. Arbitration under the UNCITRAL Arbitration Rules is not necessarily an 'appropriate' mode of settlement. In reality, arbitration under those rules may be overly burdensome, particularly for private claimants. More fundamentally, arbitration is subject to the supervisory oversight by national courts. That risks undermining the independence of international organisations;

To solve these problems properly, a structural revision of the implementation of Section 29(a) of the General Convention is required, as discussed in chapter 5 of this study. Such a revision is warranted if Section 29 is to operate as the counterpart to the UN's jurisdictional immunity. The premise underlying that idea is that jurisdictional immunity is effective in shielding international organisations against third-party claims before domestic courts. That premise, first of all, remains to be verified.

# 4 THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS IN THE NETHERLANDS AND THE VIEW FROM STRASBOURG

## 4.1 Introduction

This chapter returns to the starting point of the study in chapter 2 of this study. That is, international organisations typically are endowed with domestic legal personality, but their privileges and immunities restrict the application of domestic laws and the exercise of jurisdiction by domestic courts. In the case of the UN, immunity from jurisdiction is bestowed on it under Article II, Section 2 of the General Convention:[1064]

> 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

The rationale of jurisdictional immunity, as for privileges and immunities generally, is to protect international organisations against domestic interference in their independent and efficient functioning. As discussed further in this chapter, that rationale continues to apply at present.

As to the effectiveness of jurisdictional immunity, it largely depends on whether it can be reconciled with the claimants' rights under Article 6(1) of the ECHR, that is, the right of 'access to court'. Such reconciling can be done through alternative remedies. This is evidenced by the jurisprudence of the Dutch courts and the ECtHR on the jurisdictional immunity of international organisations.[1065] The present chapter examines that jurisprudence, and the law concerning the jurisdictional immunity of international organisations in the Netherlands, by way of a case study. This serves the broader purpose of the study for several reasons.[1066] First, the relevant jurisprudence of the ECtHR, which is discussed comprehensively, concerns a broad variety of international organisations and domestic jurisdictions.

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[1064] Reinisch (2016, 'Immunity'), para. 1 ('core provision of the General Convention dealing with the organization's immunity from legal process').

[1065] The chapter is limited to immunity from jurisdiction of international organisations. It does not concern immunity for jurisdiction of the officials of international organisations. It only incidentally refers to immunity from execution, which—as Blokker asserts, and the Netherlands' Advisory Committee on Issues of Public International Law endorses—is of a fundamentally different nature than immunity from jurisdiction. See N.M. Blokker, 'Korte Reactie Op: "Fundamentele Arbeidsrechten en Immuniteit", NJB 2015/1326; Advisory Committee on Issues of Public International Law, 'Advisory Report on Responsibility of International Organisations' (No. 27, 2015), at 25.

[1066] The chapter builds on previous publications by the present author: T. Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 279; T. Henquet, 'The Supreme Court of the Netherlands: Mothers of Srebrenica Association et al. v. the Netherlands', (2012) 51 ILM 1322; and T. Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts', (2010) 57 *Netherlands International Law Review* 267. On the immunity from jurisdiction of international organisations in Netherlands, see also R. van Alebeek and A. Nollkaemper, 'The Netherlands', in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013), 179.

Second, host to about 40 international organisations,[1067] the Netherlands is a representative jurisdiction for present purposes—many of the issues that arise concerning the jurisdictional immunity of international organisations arise elsewhere as well.[1068] Third, the *Mothers of Srebrenica* case before the Dutch courts and the ECtHR is a leading case worldwide concerning the UN's jurisdictional immunity.[1069]

In sum, *Spaans v. IUSCT* was the first of nine cases identified in this study concerning the jurisdictional immunity of international organisations decided by the Dutch Supreme Court to date. It upheld the immunity in each of them. Similarly, in the nine cases before the ECtHR to date, as identified in this study, starting with the landmark case of *Waite and Kennedy* (1999), the Court found that upholding the immunity was not in breach of Article 6 of the ECHR. Alternative remedies were available in each of the cases before the Supreme Court and the ECtHR—except in *Mothers of Srebrenica*. That case arose from the Dutch courts having upheld the UN's immunity from jurisdiction. Though there were no alternative remedies available to the claimants, the ECtHR held that this did not amount to the Netherlands breaching Article 6 of the ECHR. As will be seen, the circumstances of the case are particular, not least as the priority rule under Article 103 of the UN Charter was at issue.

An important preliminary question arises, namely whether the right of access to court applies. That turns on the application of Article 6 of the ECHR; it will be submitted that this is to be assessed by reference to the internal law of the international organisation (that is, in the case of the UN, Section 29 of the General Convention). Where there is such a conflict (and leaving aside Article 103 of the UN Charter in the case of the UN), there may be good arguments to prioritise the obligation to confer jurisdictional immunity over the obligation to grant access to court. However, the lower Dutch courts not infrequently hold the opposite. That is, absent alternative recourse, the jurisdictional immunity of an international organisation comes under pressure (as does its legitimacy). Therefore, international organisations and their members ought to invest in international remedies. National courts contribute to filling 'accountability gaps' by incentivising the development of alternative remedies.

This chapter is structured as follows. It begins by discussing the rationale of the jurisdictional immunity of international organisations, and the interpretation and application of that immunity by the Dutch courts (section 4.2). Thereafter follows a discussion of the right to jurisdictional immunity versus the

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[1067] <rijksoverheid.nl/onderwerpen/internationale-organisaties-in-nederland> accessed 21 December 2021.
[1068] This chapter contains mere incidental references to the case law of other jurisdictions. For UK, Austria, Belgium and Italy, see the respective contributions in Blokker and Schrijver (2015). See also A. Reinisch (ed.), The Privileges and Immunities of International Organizations in Domestic Courts (2013), discussing a broad range of jurisdictions.
[1069] For studies specifically regarding the jurisdictional immunity of the UN, WHO, WIPO, EU and NATO, see the respective contributions in Blokker and Schrijver (2015).

right of access to court (section 4.3). That discussion begins by examining the ECtHR's landmark ruling in *Waite and Kennedy* (subsection 4.3.1), followed by cases in which 'reasonable alternative means' were available to claimants (subsection 4.3.2). On the basis of the *Mothers of Srebrenica* case, it then discusses separately the situation in which 'reasonable alternative means' are absent (subsection 4.3.3). The extent to which national courts play a role in closing 'accountability gaps' is addressed next (section 4.4), which is followed by the conclusion (section 4.5).

## 4.2 Immunity from jurisdiction

In discussing the immunity from jurisdiction of international organisations, this section is structured as follows. It begins by briefly recalling the rationale underlying the immunity (subsection 4.2.1). With specific reference to the Netherlands and the case law of the Dutch courts, it then discusses sources (subsection 4.2.2), procedural aspects (subsection 4.2.2) and the 'functional immunity' test (subsection 4.2.4).

### 4.2.1 Rationale

The starting point is a fundamental one: international organisations belong to their member states collectively and the involvement of those states with the organisation is governed by its constitutional arrangements. To enable an organisation to carry out the functions for which it was established in accordance with said framework, it needs to be independent, including from its host state.

International organisations share the essential need for independence with states. As recalled by Max Huber in the 1928 Island of Palmas arbitration between the Netherlands and the USA: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[1070]

The independence of states is therefore inherently linked to their territories. In contrast to states, international organisations not only lack territories, they operate on the territories of states. The independence of international organisations is instead safeguarded through a legal construct: privileges and immunities. This notably includes their immunity from the jurisdiction of domestic courts.

[1070] *Island of Palmas case (Netherlands v. USA)*, 4 April 1928, Reports of International Arbitral Awards, Vol. II (2006), 829-871, at 838.

There is a wealth of literature regarding the immunity from jurisdiction of international organisations.[1071] Amongst the many explanations of the rationale and justification for jurisdictional immunity,[1072] Schermers and Blokker recall three explanations articulated early on by McKinnon Wood. These are, in sum:

> '(1) National courts may be prejudiced . . .
> (2) International organisations must be protected against baseless actions . . .
> (3) The legal effects of acts performed by international organizations should not be determined, quite possibly in divergent ways, by national courts.'[1073]

According to Schermers and Blokker:

> 'This is still largely true today. Immunity rules belong to the traditional standard rules of international organizations. They were codified in the 1940s for the UN and the specialized agencies, remained unchanged since then, and were more or less copied when new organizations were created. It is generally recognized that international organizations need immunity from jurisdiction in order to be able to perform their functions. While state immunity is based on the *par in parem non habet imperium* principle, the immunity of international organizations is generally founded on the principle of functional necessity. They would not be able to do what they are asked to do if a national court could interfere in their work. Member States would not accept the exercise of jurisdiction by a court of one of them over acts or activities of "their" organization.'[1074]

In other words, national courts are not well placed to adjudicate cases against international organisations. To do so would be to interfere in their independent and efficient functioning. Thus, as explained by Reinisch: 'It has been generally accepted that international organizations enjoy immunity from suit and enforcement measures in order to be able to operate independently and efficiently.'[1075]

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[1071] See, e.g., Schermers and Blokker (2018), paras. 1610-1612A ; Blokker and Schrijver (2015); Reinisch (2013); Miller (2009); Amerasinghe (2005), at 315 ff; J. Klabbers, *An Introduction to International Institutional Law* (2009), chapter 8; Muller (1995); P.H. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994).

[1072] On the origins of, and attempts at, codification of immunity rules, see N.M. Blokker, 'International Organizations: The Untouchables?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 1.

[1073] Schermers and Blokker (2018), para. 1611.

[1074] Ibid., para. 1611 (fns. omitted). See also L. Diaz-Gonzalez, Fourth Report on Relations between States and International Organizations (second part of the topic), UN Doc. A/CN.4/424 (1989), reproduced in Yearbook of the International Law Commission (1989), Vol. II (Part One), 153–168, at 157, para. 24 ('It is undeniable that, in order to guarantee the autonomy, independence and functional effectiveness of international organizations and protect them against abuse of any kind, and because national courts are not always the most appropriate forum for dealing with lawsuits to which international organizations may be parties, some degree of immunity from legal process in respect of the operational base of each organization must be granted'). On the work of the ILC regarding the immunity of international organisations, see generally J.G. Lammers, 'Immunity of International Organizations: The Work of the International Law Commission', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 18.

[1075] Reinisch (2016, 'Immunity'), para. 11.

Stating that '[i]nternational organization immunity serves a useful and essential purpose which is often too easily ignored',[1076] De Brabandere explained:

> 'The grant of privileges and immunities to an international organization and its staff is based on functionalism, namely to preserve and ensure the independence of the organization, and to enable it to fulfil its functions which could otherwise be compromised by unwarranted interference from the host state.'[1077]

Such interference is unlikely to be direct, that is, through enforcement of a domestic court judgment against the assets of an international organisation. This is because of the immunity from *execution*, which international organisations typically enjoy separately from their jurisdictional immunity. However, a domestic court judgment against an international organisation could complicate its legal transactions.[1078] For example, the successful claimant, or assignee of the claim awarded in the judgment, could seek to off-set the claim against a claim by the international organisation. Furthermore, where an international organisation is found liable by a domestic court, this may complicate the organisation's relationship with the forum state. This would be particularly so where this is its host state, with which an international organisation has constant interactions and on the cooperation of which it depends.[1079] A domestic judgment against an international organisation may moreover impact the position of the forum state, and possibly other states, as members of the organisation. For example, they may internally pressure the organisation to comply with the judgment, such as by requiring it to waive its immunity from execution. Yet other states may be deterred by the potential for liability with respect to the actions scrutinised in the domestic judgment and this may influence their decision-making. Not least, finally, a judgment against an international organisation may impact its reputation and thereby undermine its effectiveness.

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[1076] E. de Brabandere, 'Belgian Courts and the Immunity of International Organizations', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 206 at 207. See also De Brabandere (2010), at 81 ('the functional and other reflections that lie at the basis of the immunities system of international organizations seem to remain extremely pertinent, even when organizations exercise administrative duties in place of a state. The functional underpinning of institutional immunity is perhaps even more crucial under these circumstances, in order to guarantee the independent accomplishment of such intrusive and comprehensive mandates by an organization's subsidiary organ. We therefore claim that there is a need to maintain immunities in order to preserve institutional autonomy, even when the UN or another international organization has taken up administrative duties in a state or territory.').

[1077] De Brabandere (2015), at 211. For a critical discussion of functionalism, see, e.g., J. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', (2014) 25 *European Journal of International Law* 645.

[1078] In addition, as a further example of indirect interference, if multiple litigations were initiated before various domestic courts, the resource implications for the international organisation could be significant and impact on the performance of its functions.

[1079] Cf. *United States Diplomatic and Consular Staff in Tehran of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, para. 43 ('As a result the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith'. [emphasis added]).

The rationale underlying the jurisdictional immunity continues to apply today as it remains necessary to protect international organisations from interference. As explained by Blokker and Schrijver, there does not seem to be a

> 'development that would urge an adaptation of the fundamentals of the current regime of immunity rules. International organizations continue to need such rules. It is therefore not surprising to see that organizations created in recent years have been given immunity rules that are more or less similar to those given to almost all international organizations established since the Second World War.'[1080]

And, 'the regime of immunities rules is and continues to be a key part of the law of international organizations, essential for their independent functioning, generally accepted and respected in practice.'[1081]

Writing in 1961, Jenks stated that immunities are essential '[i]n the present stage of development of world organisation' to enable international organisations properly to discharge their responsibilities.[1082] This applies all the more today as multilateralism through international organisations is indispensable to address ever-increasing international challenges.

Indeed, the rationale for the jurisdictional immunity of international organisations is recognised in contemporary jurisprudence. For example, in one of the key cases discussed in this chapter, *Mothers of Srebrenica*, concerning claims against the UN for its role in connection with the genocide, the ECtHR stated in connection with the UN's immunity:

> 'To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field including with the effective conduct of its operations.'[1083]

### 4.2.2 Sources

There is no general convention on the privileges and immunities of international organisations akin to the 2004 UN State Immunity Convention.[1084] However, a proposal for a general arrangement goes back decades. As explained by Blokker,

> 'in the interbellum period, the question sometimes arose as to whether each international organization should have its own specific rules on privileges and immunities, or whether a *general* set of rules on the privileges and immunities of international organizations should be developed. This question was discussed most extensively in 1936 by Åke Hammerskjöld, the first Registrar, and subsequently a

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[1080] Blokker and Schrijver (2015), at 343 (emphasis added).
[1081] Ibid., at 345. Otherwise put: 'While a regular update of the immunity regimes is recommendable, there does not seem to be a need for a complete overhaul of that regime.' Ibid., at 357.
[1082] Jenks (1961), at xiii.
[1083] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 154.
[1084] The nearest equivalent is the Specialized Agencies Convention.

> judge, of the Permanent Court of International Justice. He concluded that a *"réglementation générique est dans l'air et que la tendance dominante y est favorable"*.'[1085]

In 2006, the idea of a general convention was put forward in a paper by Gaja, at the time a member of the ILC. The paper was drawn up in connection with the topic 'Jurisdictional immunity of international organizations', which is part of the 'long-term programme of work since the forty-fourth session of the Commission (1992)'.[1086] According to the paper:[1087]

> 'The recent adoption through UNGA resolution 59/38 of the UN Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.'[1088]

More specifically, according to the paper: 'Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the Convention on jurisdictional immunities of States and their property.'[1089] To date, however, the topic 'Jurisdictional immunity of international organizations' has remained on the ILC's long-term programme of work.[1090]

Absent a convention for international organisations generally, the jurisdictional immunity of an international organisation is typically provided for in one or more applicable treaties specifically with respect to that organisation. Building on a general provision on privileges and immunities in an organization's constituent treaty,[1091] this may be a protocol to that treaty,[1092] or a separate treaty.[1093]

Although international organizations are typically not parties to such multilateral treaties, in the Netherlands they may rely on treaty provisions that are 'self-executing', provided the treaty has been published. This follows from Article 93 of the Constitution of the Netherlands: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.'[1094] In addition, Article 94 of the

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[1085] Blokker 2015, at 9 (emphasis in original), referring to Å. Hammarskjöld, 'Les Immunités des Personnes Investies de Fonctions Internationales', (1936) 56 *Recueil des Cours de l'Académie de Droit International* 107, at 194.
[1086] UN Doc. A/61/10 (2006), para. 260, sub (m).
[1087] Ibid., Annex B, 'Jurisdictional immunity of international organizations', at 455-458.
[1088] Ibid., para. 1.
[1089] Ibid., para. 11.
[1090] <legal.un.org/ilc/status.shtml> accessed 21 December 2021. Webb concluded against the 2004 UN State Immunity Convention serving as a model or starting point for a future UN convention on the immunity of international organisations. See P. Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 61.
[1091] See, e.g., Art. 48 of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3; Art. 3 of the 1973 Convention on the Grant of European Patents (European Patent Convention), 1065 UNTS 254.
[1092] See, e.g., the 1973 Protocol on the Privileges and Immunities of the European Patent Organisation, 1065 UNTS 500 ('EPO Protocol').
[1093] E.g. the General Convention or the APIC.
[1094] Translation available at <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021.

Constitution provides that statutory regulations—such as those granting jurisdiction to the Dutch courts—are inapplicable insofar as they conflict with such treaty provisions.

Provisions conferring immunity from jurisdiction on international organizations will typically qualify as self-executing. Thus, for example, although the United Nations is not itself a party to the General Convention, rights accrue directly to it under Article II, Section 2 thereof: 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'

This notwithstanding, the practical relevance of self-executing provisions of multilateral treaties nowadays is limited. This is because of a further type of treaty conferring privileges and immunities—headquarters agreements—which the Netherlands typically concludes with the international organisations that it hosts. Such bilateral treaties typically include a clause granting the international organisation immunity from jurisdiction, which the organisation can invoke as a party to the treaty.

But even absent a treaty provision to this effect, the Dutch Supreme Court held in *Spaans v. IUSCT*:

> 'It must be assumed that even in cases where there is no treaty [in which privileges and immunities are conferred upon the international organisations] it follows from unwritten international law that an international organization is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in [such treaties], in any event in the State in whose territory the organisation has its seat, with the consent of the government of that State.
> This means that, according to unwritten international law as it stands at present, an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performances of the tasks entrusted to the organisation in question.'[1095]

The case arose out of the IUSCT's dismissal of Mr Spaans. At the time, the IUSCT did not have a headquarters agreement with the Netherlands and the issue was whether it was entitled to immunity

[1095] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4. The District Court Maastricht earlier opined similarly in an employment case against the European Organization for the Safety of Air Navigation. See District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('since . . . the Parties to the [1960 International Convention Relating to Co-operation for the Safety of Air Navigation, 'Eurocontrol'] established a public international organization to whom they transferred a limited amount of sovereignty for the safety of air navigation over their territories, it follows that the Organization is entitled to immunity from jurisdictin [*sic*] on the grounds of customary international law to the extent that it is necessary for the operation of its public service'). However, the position is disputed as a matter of international law. See Wood (2015), at 59 ('There nevertheless remains a debate, particularly among writers, as to whether international organizations enjoy immunity under customary international law, at least vis-à-vis their member states. Notwithstanding certain pronouncements of domestic courts, generally *obiter*, to the effect that organizations do enjoy immunity under customary international law, on the basis of the materials examined in this chapter it would be difficult to conclude that any such rule exists.' [emphasis in original]).

under general international law. The Supreme Court concluded this was the case, however, without identifying the specific international law basis for the immunity[1096] or giving reasons for its conclusion.

In terms of the practical relevance of this finding by the Supreme Court, international organisations sued before the Dutch Courts are mostly able to rely on one or more treaties conferring immunity from jurisdiction on them. As for the IUSCT, it subsequently concluded a headquarters agreement with the Netherlands, as its host state.[1097]

But a treaty is not always in place, such that the Supreme Court's ruling in *Spaans v. IUSCT* provides important residual protection. This is illustrated by a 2017 case (*Supreme*) against NATO's Allied Joint Force Command Headquarters Brunssum ('JFCB'),[1098] based in the Netherlands, and Supreme Headquarters Allied Powers Europe ('SHAPE'), based in Belgium. Both entities were sued before the District Court of Limburg by private parties ('Supreme') in a dispute concerning the provision of fuel in connection with NATO's command over the International Security Assistance Force ('ISAF') in Afghanistan. In incidental proceedings, the respondents claimed immunity from jurisdiction. The District Court concluded that while such immunity did not result from a treaty, such as the 1964 headquarters agreement between the Netherlands and SHAPE,[1099] it did result from general international law as per the Supreme Court's conclusion in *Spaans v. IUSCT*.[1100]

On appeal, the Court of Appeal of 's-Hertogenbosch affirmed this part of the District Court's judgment. It added with respect to SHAPE that, though it was not based in the Netherlands, it nonetheless benefited from immunity from jurisdiction. In this respect, the Court of Appeal referred to the aforementioned passage in *Spaans v. IUSCT* according to which

> 'it follows from unwritten international law that an international organisation is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in [such treaties], in any event in the State in whose territory the organisation has its seat, with the consent of the government of that State.'[1101]

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[1096] The Supreme Court referred to 'unwritten international law', see Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.

[1097] Headquarters agreements were concluded subsequently, see, e.g., 1990 Exchange of letters constituting an Agreement between the Kingdom of the Netherlands and the Iran-United States Claims Tribunal on the granting of privileges and immunities to the Tribunal, 2366 UNTS 445 ('IUSCT Headquarters Agreement').

[1098] Editorial note: The District Court referred to Allied Joint Force Command Headquarters Brunssum as 'AJFCH', whereas the Court of Appeal of 's-Hertogenbosch referred to this entity as 'JFCB'. For the sake of consistency, the latter abbreviation will be used throughout this text, except when quoting the District Court judgment.

[1099] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), paras. 4.3-4.10.

[1100] Ibid., paras. 4.11-4.17. More specifically, given the heading of the relevant passage in the judgment, the District Court appears to have concluded that the immunity arises under customary international law.

[1101] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.7.9.1, referring to Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de

According to the Court of Appeal, the qualifier 'in any event' does not preclude that other international organisations benefit from immunity under customary international law. In the case in point, the Court found that there existed grounds to extend said 'privilege' to Belgium-based SHAPE. Otherwise, the jurisdictional immunity of JFCB would be nullified, given that it operated under the direction and responsibility of SHAPE.[1102]

In its judgment of 24 December 2021 in *Supreme*, the Supreme Court affirmed the Court of Appeal's judgment on this point,[1103] having confirmed that jurisdictional immunity applies under current unwritten international law, as per *Spaans*.[1104]

As noted above, the priority rule in Article 94 of the Dutch constitution is limited to self-executing provisions of *treaties* and to *resolutions* by international institutions. However, an international organization's immunity under *general international law* equally limits the jurisdiction of the domestic courts. This results from Article 13a of the *General Provisions (Kingdom Legislation) Act*, which provides: 'The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law'.[1105]

#### 4.2.3 Procedural aspects

In the Netherlands, it is for the courts to decide whether the immunity of a defendant organisation applies in a given case. In this respect, Article 1 of the Dutch Code of Civil Procedure ('DCCP') provides:

> 'Without prejudice to what is regulated with regard to jurisdiction in treaties and EC regulations, and without prejudice to Article 13a of the General Provisions (Kingdom Legislation) Act, the jurisdiction of the Dutch courts is subject to the following provisions.'[1106]

The reference to Article 13a of the General Provisions (Kingdom Legislation) Act was added to this provision by way of an amendment in 2011. This amendment was meant to reflect the legislature's intention that the courts would consider on their own motion whether immunity applies under international law.[1107]

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Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4 (emphasis added by present author).

[1102] Ibid. The Court of Appeal overruled the District Court and upheld the respondents' jurisdictional immunity.

[1103] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (*Supreme*), para. 3.1.2-3.1.3.

[1104] Ibid., para. 3.1.2.

[1105] Translation available at <cahdidatabases.coe.int/contribution/details/414> accessed 21 December 2021. In the original Dutch text: 'De regtsmagt van den regter en de uitvoerbaarheid van regterlijke vonnissen en van authentieke akten worden beperkt door de uitzonderingen in het volkenregt erkend.'

[1106] Present author's translation. In the original text: 'Onverminderd het omtrent rechtsmacht in verdragen en EG-verordeningen bepaalde en onverminderd artikel 13a van de Wet algemene bepalingen wordt de rechtsmacht van de Nederlandse rechter beheerst door de volgende bepalingen.'

[1107] See Kamerstukken II (2008–2009) 32 021, No. 3, at 39-40.

While that intention is rather subtly expressed in the text of Article 1 DCCP, it was recognized by the Supreme Court in a 2017 judgment concerning (state) immunity in default proceedings.[1108] The case arose out of a default judgment rendered in 2000 by the Hague Court of Appeal against, amongst others, the Republic of Iraq. In subsequent summary proceedings, Iraq sought suspension of the execution of the default judgment, arguing, amongst others, that under international law the Court of Appeal should *on its own initiative* have considered Iraq's entitlement to immunity.[1109] According to the Supreme Court in its 2017 judgment, the courts are indeed required to do so (though only in cases initiated after 1 January 2018, and not therefore in the case in point). The Court held that this results from Dutch civil procedural law, rather than international law.[1110] In this respect, it considered Article 1 of the DCCP and Article 13a of the General Provisions (Kingdom Legislation) Act.[1111] The Supreme Court explicitly held that this requirement applies not only in cases involving foreign states, but *also international organisations*.[1112]

The Supreme Court recognised that, to a certain extent, this was a departure from its previous case law,[1113] including *Azeta* v. *Republic of Chile*[1114] and the 1994 case of *Kingdom of Morocco v. De Trappenberg*, both regarding the immunity of foreign states.[1115] In the former case, which involved default proceedings, the Supreme Court had ruled that the courts were authorised but *not obliged*, to consider immunity from jurisdiction of foreign states in default proceedings. With the Supreme Court's ruling in 2017,[1116] this discretion no longer applies: in default cases against states and international organisations alike, the courts are required to consider on their own initiative whether the defendant would be entitled to immunity.

The latter case, *Kingdom of Morocco v. De Trappenberg*, concerned regular (i.e., non-default) proceedings. Morocco had appeared in court, though without invoking its immunity from jurisdiction. According to the Supreme Court at the time, under those circumstances there was no room for the courts to consider on their own initiative whether the immunity applied.[1117] While the Supreme Court 2017 judgment references *Kingdom of Morocco v. De Trappenberg*, the operative part of the 2017 judgment

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[1108] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*).
[1109] Ibid., para. 3.3.2.
[1110] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*), para. 3.4.3.
[1111] Ibid., para. 3.6.2.
[1112] Ibid., para. 3.6.2, 3.6.3.
[1113] Ibid., para. 3.4.5. and 3.6.3.
[1114] Supreme Court 26 March 2010, ECLI:NL:HR:2010:BK9154 (*Azeta v. Chili*), para. 3.5.3.
[1115] Supreme Court 25 November 1994, NJ 1995/650 (*Kingdom of Morocco v. De Trappenberg*).
[1116] On the judgment, see generally G.R. Den Dekker, 'Immuniteit van Jurisdictie en Verplichte Ambtshalve Toetsing—een Eerste Verkenning', O&A 2018/5.
[1117] Supreme Court 25 November 1994, NJ 1995/650 (*Kingdom of Morocco v. De Trappenberg*), para. 3.3.3.

explicitly concerns default proceedings.[1118] This raised the question as to whether in regular (i.e., non-default) proceedings, Article 13a of the General Provisions (Kingdom Legislation) Act could nonetheless lead the courts to consider on their own motion whether an international organisation would be entitled to jurisdictional immunity. In a 2019 judgment, the Supreme Court clarified this is not the case:

> 'A foreign state or international organisation who appears before the Dutch courts as a defendant in a case and does not wish to waive the immunity from jurisdiction to which it is possibly entitled pursuant to article 1 of the DCCP in conjunction with article 13a of the General Provisions (Kingdom Legislation) Act must invoke such immunity in accordance with the manner prescribed in Article 11 of the DCCP.'[1119]

Invoking immunity from jurisdiction pursuant to Article 11 of the DCCP ('exceptie van onbevoegdheid') is done by way of claiming, in incidental proceedings, that the court denies itself jurisdiction. Under Article 150 of the DCCP, the party asserting immunity—that is, the international organisation—bears the burden to prove that the immunity applies.[1120]

Lastly, as to waiving immunity from jurisdiction, in the case of the UN, Section 2 of the General Convention, requires that this be done 'expressly'.[1121] According to Reinisch: 'Apparently, no considerable practice of waivers of immunity on the part of the UN exists'.[1122] There is no known case law in recent years of Dutch courts having assumed jurisdiction in cases against the UN or other international organisations on the basis of a waiver. One question that remains, as seen (paragraph 3.4.3.1.3), is whether international organisations that have agreed to arbitration are deemed to have

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[1118] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*), para. 3.6.3.

[1119] Supreme Court 17 May 2019, ECLI:NL:2019:732, para. 4.1.4 (translation by present author). The Supreme Court added that the immunity must be invoked 'timely', on the understanding that it may be done at the same time as raising other defences, including defences on the merits. Id., para. 4.1.3. Of note, the procedural position of international organisation may be addressed in an applicable treaty. Thus, for example, Art. 4 of the IUSCT Headquarters Agreement provides: '1. If the Tribunal institutes or intervenes in proceedings before a court in the Netherlands, it submits, for the purpose of those proceedings, to the jurisdiction of the Netherlands courts. 2. In such cases the Tribunal cannot claim immunity from the jurisdiction of the courts in respect of a counterclaim if the counterclaim arises from the legal relationship or the facts on which the principal claim is based.' Art. 5 further provides: 'If the Tribunal appears before the courts in order to assert immunity, it shall not thereby be deemed to have waived immunity'.

[1120] That burden is to be taken seriously. In a case against the OPCW arising out of an employment dispute between the organization and one of its (former) security guards, OPCW did not appear in court but merely advised the court in a letter of its immunity. Under Art. 4 of the headquarters agreement between the OPCW and the Netherlands, that immunity is functional in nature. The court ruled that 'in view also of the case law cited by Claimant, the Defendant has not, or has in any event insufficiently, made clear why it would be entitled to rely on its immunity from jurisdiction in this particular Dutch employment dispute, in which diplomatic and the like interests do not play a role.' See District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo v. OPCW*), present author's translation.

[1121] The provision continues: 'It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

[1122] Reinisch (2016, 'Immunity'), para. 3.

waived their immunity from the 'supervisory jurisdiction' of national courts in connection with the arbitration.

#### 4.2.4 'Functional immunity'

Moving from procedure to substance, this subsection will consider the test on the basis of which the courts decide whether to grant immunity. The judgment of the Supreme Court in *Spaans v. IUSCT* sets forth the benchmark test and it has been further explained, to some extent, in subsequent case law. In *Spaans v. IUSCT*, the Supreme Court clarified that the immunity that accrues to international organizations under international law is 'functional' in nature. That is to say, according to the Supreme Court, 'an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization in question.'[1123]

The Supreme Court upheld the immunity of the IUSCT on that basis. In so doing, the Supreme Court affirmed the judgment of the District Court of The Hague, which in turn had set aside the judgment of the Sub-District Court which had declared itself competent to hear the case.[1124]

The test developed by the Supreme Court in *Spaans v. IUSCT* may be referred to as a 'functional immunity' test. This is because it is linked to the functions that the member states entrusted to the international organization. Most treaty clauses granting immunity to international organizations provide for such a test.[1125]

By contrast, certain international organizations enjoy absolute (or unqualified or unconditional) immunity in the sense that the immunity applies irrespective of the nature of the dispute in point. This is notably the case with the United Nations under Article II, Section 2 of the General Convention (reproduced above). A case in point in the Netherlands is the IRMCT Headquarters Agreement, which provides in Article 10(1) (emphasis added):

> 'The Mechanism, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Secretary-General has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution'.

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[1123] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.
[1124] Ibid., para. 1. The first instance court had done so on the basis of an analogy with the law on state immunity, that is, it had dismissed the immunity on the basis that the agreement orally entered into between Mr Spaans and the IUSCT qualified as *jure gestiones*.
[1125] See Reinisch (2000), at 140.

In this respect, according to Reinisch: 'The view that "immunity from every form of legal process" means absolute immunity is also widely adhered to by other courts and seems to represent the dominant opinion.'[1126] The test is rather straightforward insofar as the immunity applies at all times.[1127]

Conversely, where the immunity is qualified in functional terms, the *Spaans v. IUSCT* approach requires proof of two matters: (a) the tasks entrusted to the organization; and (b) the immediate connection of the dispute to the performance of these tasks. As to (a), it may be possible to prove what tasks are entrusted to an international organization by reference to its constituent instrument. However, as to (b), the question remains how to prove the requisite immediate connection. As to employment disputes, the Supreme Court clarified in *Spaans v. IUSCT* that such disputes 'between an international organization and those who play an essential role in the performance of its tasks in any event belong to the category of disputes which are immediately connected with the performance of these tasks.'[1128]

The question remains how to determine whether a person plays an essential role in the performance of the organization's tasks. Spaans had worked as a translator and interpreter of judicial documents from and into Farsi, one of the two working languages of the IUSCT. Whether this satisfies the aforementioned test is a factual assessment. In this respect, the Supreme Court recalled the finding on appeal of The Hague District Court that Spaans' work 'formed part of the essential work of the tribunal which was necessary in order to enable it to perform its duties properly'.[1129]

In a case against the EPO, upholding the jurisdictional immunity of the defendant, the Supreme Court in 2009 reiterated the *Spaans v. IUSCT* test concerning employment disputes, notwithstanding that

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[1126] Reinisch (2016, 'Immunity'), para. 82 (fn. omitted). But see District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*). Under Art. 3(1) of the PCA Headquarters Agreement, 'the PCA, and its Property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process' (except in case of waiver of certain traffic offences). *Pichon v. PCA* arose out of an employment dispute. The District Court rejected the PCA's jurisdictional immunity, which the PCA had invoked. Though the immunity is cast in absolute terms, the District Court stated that 'the purpose of the immunity is to allow the PCA to conduct the work for which it was established without hindrance. Litigation between the PCA and a former employee in the context of an employment contract cannot in any way influence that work. After all, the present case concerns a purely private law dispute'. Ibid., at 2 (present author's translation).

[1127] Cf. Blokker and Schrijver (2015), at 347 ('In cases in which the relevant immunity rules of an international organization provide for absolute immunity (such as those of the United Nations), there is indeed little room for national courts to exercise jurisdiction. This is limited to cases in which a dispute relates to the question of whether or not a particular act or activity of the organization was performed *ultra vires*. However, even in such cases it may be questioned whether this should be decided by a national court, given it involves a consideration of the organization as a whole and all of its members. It is indeed open to debate whether it is appropriate for a domestic court to engage in such a legal assessment of the functions and powers of an international organization.' [fn. omitted]).

[1128] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.

[1129] Ibid., para. 3.1, sub. 8.

EPO's immunity from jurisdiction is treaty-based.[1130] The case arose out of a dispute between the EPO and one of its former employees, who claimed the EPO was liable for damages in connection with his disability. The Court of Appeal, like the small claims court in first instance, had upheld the immunity of EPO.[1131] The Court of Appeal had ruled that as a patent examiner, the claimant had without doubt contributed to the performance of the tasks of the international organization.[1132] Before the Supreme Court, the claimant asserted that the Court of Appeal had applied an overly broad definition of 'employment dispute'. The Supreme Court rejected the appeal, reiterating that what matters is 'whether the impugned acts of the international organization are immediately connected to the performance of the tasks entrusted to it.'[1133] Furthermore, the Supreme Court held that to determine whether there is an employment dispute warranting immunity, the test is *not* 'whether the litigation would hinder the official functioning of the organisation.[1134]

In 2012, The Hague Court of Appeal relied on some of the subtleties in *Spaans v. IUSCT* in another employment case against the IUSCT. The case was brought by a former IUSCT 'Secretary/Registry Clerck [*sic*]'[1135] in connection with the abolition of her post. Under Article 3 of the IUSCT Headquarters Agreement, the tribunal enjoys functional immunity ('within the scope of the performance of its tasks'). The District Court had ruled that the IUSCT enjoyed immunity.

The claimant appealed and the issue on appeal was whether the dispute was 'immediately connected' with the performance of IUSCT's tasks. The court of appeal considered that the appellant performed administrative tasks: handling (litigation) documents, managing calendars of supervisors, managing the registry's database, and managing the tribunal's general email account.[1136] Against this backdrop, the Court of Appeal concluded that the appellant took part in the IUSCT's 'primary process' and that she played a 'necessary' role.[1137] The appellant conceded that she performed such a role; however, she argued that this did not meet the *Spaans v. IUSCT* test, according to which the issue is whether she

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[1130] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.2. The treaty-base consists of the 1973 Convention on the Grant of European Patents (European Patent Convention), 1065 UNTS 199, and its Protocol on Privileges and Immunities, 1065 UNTS 500.
[1131] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 1.
[1132] Ibid., para. 3.3.
[1133] Ibid., para. 3.3 (translation as per Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.).
[1134] Ibid. But see District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*), at 2 ('the purpose of the immunity is to allow the PCA to conduct the work for which it was established without hindrance. Litigation between the PCA and a former employee in the context of an employment contract cannot in any way influence that work. After all, the present case concerns a purely private law dispute'. Present author's translation, emphasis added).
[1135] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition of post*), para. 2.
[1136] Ibid., para. 9.
[1137] Ibid., para. 10. Present author's translation of 'noodzakelijke rol' in the original Dutch text.

played an 'essential' role.[1138] The Court of Appeal dismissed this reasoning. It pointed out that according to *Spaans v. IUSCT*, disputes with 'those who play an essential role in the performance of its tasks in any event belong to the category of disputes which are immediately connected with the performance of [the tasks entrusted to the organization].'[1139] According to the Court of Appeal, this does not exclude other employment disputes,[1140] implying that the present dispute was included. In other words, where a claimant is merely 'necessary' and not 'essential', this does not mean that the dispute is not immediately connected with the performance of the tasks entrusted to the organization.

It would seem, however, that the case involved a play on words insofar as 'essential' is rather a synonym for 'necessary'. This is supported by the reasoning of the very same Court of Appeal in a judgment one year later in another employment dispute with the IUSCT.[1141] The 2013 case was initiated by the (former) secretary of the IUSCT's President in connection with the non–extension of her contract. The District Court had ruled that the *Spaans v. IUSCT* test was met (however, as discussed below, it had rejected the IUSCT's immunity as the claimant was denied access to an independent and impartial judicial authority). The Court of Appeal affirmed the District Court's ruling on the application of *Spaans v. IUSCT*, considering that disputes between an international organization and those who play a 'necessary'[1142] role in the performance of its tasks 'in any event' belong to the category of disputes which are immediately connected with the performance of the tasks entrusted to the organization.[1143] These cases raise more salient matters, which are discussed below.

Moving on from employment disputes, in a rare criminal case involving immunity from jurisdiction the Supreme Court further clarified what the *Spaans v. IUSCT* test does *not* entail. The case arose from a petition by Greenpeace to the competent Amsterdam Court of Appeal to direct the prosecution services to prosecute the European Atomic Energy Community ('Euratom') for breaching licence conditions and committing other environmental offences through its Joint Nuclear Research Centre in the Netherlands. The issue before the Court of Appeal was whether Euratom enjoyed immunity from the criminal jurisdiction of the Courts. The Court of Appeal decided that this was not the case, holding that the

> 'contraventions perpetrated by [Euratom] in this connection can never be deemed to fall within the fulfilment of its task, and therefore within the activities Euratom must be able to carry out in order to fulfil that task, since it cannot be argued that the fulfilment of Euratom's task would be impeded if it

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[1138] Ibid., para. 11.
[1139] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.5 (underlining added).
[1140] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition of post*), para. 11. It appears that the judgment was not appealed to the Supreme Court.
[1141] The Hague Court of Appeal 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*). It appears that the judgment was not appealed to the Supreme Court.
[1142] Present author's translation of 'noodzakelijk' in the original Dutch text.
[1143] The Hague Court of Appeal 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 4.2.

> were to be held liable under criminal law for compliance with these rules and regulations by the Centre.'[1144]

The Court of Appeal reached that conclusion having considered whether Euratom would have been able to fulfil its tasks without committing the offences in question.[1145] In other words, the Court applied a test as to whether it was *necessary* for Euratom to commit these offences. The Supreme Court held that this test was overly restrictive.[1146] Applying the 'immediate connection' test under *Spaans v. IUSCT* test, the Supreme Court held that Euratom enjoyed immunity from jurisdiction.[1147]

However, a 'necessity' test may apply to an international organization under applicable treaty law. The EPO is a case in point. Article 3(1) of the EPO Protocol provides: 'Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution.' Article 3(4) of the Protocol specifies that (emphasis added) 'the official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.'

In a 2011 judgment in summary proceedings, The Hague Court of Appeal applied those provisions in a case arising out of a dispute concerning the public procurement of catering services.[1148] The Court upheld the judgment of the District Court in first instance and rejected the EPO's immunity, ruling against EPO on the merits. Regarding the immunity, the Court of Appeal stated that

> 'insofar as there would be . . . any (and immediate) connection between offering a catering facility for (mainly) employees and for the benefit of gatherings and meetings, on the one hand, and the (technical or administrative implementation) of granting European patents, on the other, then in any event this facility (whether or not it is subsidized by EPO) cannot, in the preliminary opinion of the Court, be considered as 'strictly necessary' to that end.'[1149]

This illustrates that, at least in the perception of the Court of Appeal, a 'necessity' test is more stringent than the 'immediate connection' test set out in *Spaans v. IUSCT*.

In sum, in explaining the *Spaans v. IUSCT* test—including what it does *not* mean—the Supreme Court has in various cases adopted a broad interpretation of 'functional immunity'. The lower courts generally

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[1144] Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), para. 5, citing the judgment of the Court of Appeal, para. 6.4. See generally Wessel (2015), at 152-153.
[1145] As the Supreme Court understood the test applied by the Court of Appeals, Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), para. 6.3.
[1146] Ibid., para. 6.4.
[1147] Ibid.
[1148] Court of Appeal The Hague (summary proceedings) 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour*). The Court applied the test in the context of its determination of whether the limitation of the right of access to court was proportionate in relation to the aim served by the immunity. The Court held that it was not and that said limitation amounted to a violation of Art. 6 of the ECHR. Ibid., para. 3.14.
[1149] Ibid., para. 14 (present author's translation).

follow suit. Thus, for example, in *Supreme* in which the District Court of Limburg concluded that JFCB and SHAPE were entitled to functional immunity under general international law as per *Spaans v. IUSCT*, the issue was whether their functional immunity applied in the case in point. The question before the Court therefore was whether the dispute was 'immediately connected' to the performance of the tasks entrusted to the organisation. The Court ruled that this was indeed the case, dismissing the claimants' contention that the adequate provision of fuel was not part of the tasks entrusted to NATO in exercising command over ISAF.

More specifically, the District Court held that what is *not* determinative of the matter is the *nature* of the underlying legal relationship between the parties (commercial fuel supply contracts) or of the disputed act (failure to comply with agreements and/or failure to pay outstanding invoices). Of relevance, according to the Court, to ensure a strategically and operationally responsible supply of fuel is inextricably linked to the implementation of a military mission of any sort. The Court held that it would be an overly restrictive interpretation of the *Spaans v. IUSCT* criterion to dismiss an 'immediate connection' on the basis that the fuel was, or could have been, supplied by others, and that NATO merely deemed it desirable to arrange the fuel out of strategic, tactical, operational or other considerations.

The Court went on to consider that the UNSC established ISAF by resolution 1386 (2001) under Chapter VII of the UN Charter. Pursuant to that resolution, and subsequent ones, the Security Council authorised participating states to take all necessary measures for the success of ISAF's mission, without specifying what those measures entailed. In 2003, NATO took over from the individual states the command, and strategic and operational military implementation of the mission; the UNSC accepted this without detailing NATO's tasks. As of 2006, NATO coordinated the fuel supply for the troops of contributing states. In so doing, according to the District Court, NATO (and the JFCB and SHAPE) acted within the scope of the tasks assigned to individual states and subsequently transferred to it.[1150] The respondents' functional immunity was therefore engaged. However, as we will see, the court ultimately rejected the immunity defence for lack of an alternative remedy.

On appeal, the Court of Appeal of 's-Hertogenbosch ruled that procuring fuel in relation to ISAF activities, which is to be supplied in the relevant operational area in Afghanistan and beyond, is immediately connected with the performance of the mandate of SHAPE and JFCB in the context of ISAF, such that functional immunity applies in full.[1151] The commercial nature of the contract does not change the context within which the supplies were made.[1152]

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[1150] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.18-4.23.
[1151] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.7.9.2.
[1152] Ibid.

The case of *Supreme* illustrates that the determination of whether a dispute engages the functional immunity of the defendant organisation is highly fact-specific.[1153] From a more theoretical perspective, it is challenging to define whether a dispute is immediately connected to the performance of the tasks entrusted to an international organization. The difficulties inherent in designing a workable functional immunity test are well known.[1154] The present author has submitted elsewhere that

> 'the rationale for the immunity is to ensure that the international organization can function independently in the interest of its collective membership. That interest is expressed in the constitutive document in which the members defined the tasks of the international organization, as well as during the decision-making within the organization in accordance with the procedure which the member states have agreed to this end. Upon joining the international organization, states may be said to subscribe to decision-making within the organization in accordance with this procedure. Member states must only partake in decision-making in respect of the organization in accordance with the agreed process. This applies equally to the host state of the international organization, which must not unilaterally, including through its courts, interfere with this process . . . In sum, in ruling on the immunity defence of an international organization the courts may look for evidence of the decision-making process in respect of the organization. The more intense that decision-making process is and the more the impugned act or omission of the international organization is connected thereto, the more the functionality of the organization is at stake and the more its immunity is warranted.'[1155]

That said, as Reinisch states, 'some, if not the majority of jurists, suggest that the notion of functional immunity is merely synonymous with absolute immunity'.[1156] Indeed, according to the same author, the fact is that 'even under a functional necessity concept international organizations regularly enjoy absolute immunity'.[1157] The case law of the Dutch Supreme Court supports this conclusion.[1158]

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[1153] Concerning the related issue of the competence of the Dutch courts in this litigation, see De Brabandere (2020).
[1154] Reinisch (2000), at 205. See also Reinisch (2016, 'Immunity'), para. 17 ('broadly diverging interpretations of the inherently vague and general notion of functional immunity').
[1155] See Henquet (2010), at 282–283.
[1156] Reinisch (2000), at 205.
[1157] Reinisch (2000) at 341. See also U.A. Weber and A. Reinisch, 'In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', (2004) 1 *International Organizations Law Review* 59, at 64 ('At the end of the day, most attempts to make functional immunity work in a way that does not lead to absolute immunity have not been very successful.') However, as Reinisch explained: 'Some recent privileges and immunities instruments contain specific exceptions from an organization's broad jurisdictional immunity, for example, for claims arising from car accidents.' Reinisch (2016, 'Immunity'), para. 19 (fn. omitted). A case in point in the Netherlands, by way of example, is Art. 3(1) of the IUSCT Headquarters Agreement: 'Subject to the provisions of Article 4 the Tribunal, within the scope of the performance of its tasks, shall enjoy in the Netherlands immunity from jurisdiction and execution, except: a. to the extent that the Tribunal shall have expressly waived such immunity in a particular case; b. in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Tribunal, or in respect of a motor traffic offence involving such a vehicle.'
[1158] But see District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo* v. *OPCW*). The case arose out of the non-extension of an employment contract of an OPCW security guard. Upon being sued, the OPCW relied on its jurisdictional immunity, which under Art. 4(1) of the OPCW Headquarters Agreement is formulated in functional terms: 'Within the scope of its official activities the OPCW shall enjoy immunity from any form of legal process'. The District Court held that 'the Defendant has not, or in any event insufficiently, made clear why it would be entitled to rely

In view of the strong policy rationale underlying the jurisdictional immunity of international organisations, that immunity is not lightly 'overcome'.[1159] In this respect, Reinisch wrote: 'Such 'functionalist', organization-centred thinking neglects the effect of a grant of immunity to international organizations, in that potential claimants may be deprived of their ability to raise claims against international organizations before the "natural forum" of domestic courts'.[1160]

### 4.3 Immunity from jurisdiction and 'access to court'

By suing an international organization before a domestic court, a claimant relies on the right of access to court. This right is enshrined, albeit implicitly,[1161] in Article 6(1) of the ECHR, as well as its global counterpart, Article 14(1) of the ICCPR. The wording of the former is as follows: 'In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

If in a case between a private claimant and an international organization the court determines that the latter is entitled to immunity, then by the same token it denies the former access to court. The Supreme Court in *Spaans v. IUSCT* recognised this conflict.[1162] Its reasoning may be deconstructed as follows:

- In principle, immunity from jurisdiction applies (para. 3.3.4);
- The question arises as to 'the extent to which exceptions may be made to this principle' (para. 3.3.4);
- That question 'may be disregarded here, as will appear from the findings at 3.3.5 and 3.3.6.' (para. 3.3.4);

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on its immunity from jurisdiction in this particular Dutch employment dispute, in which diplomatic and the like interests do not play a role.' Ibid., at 2 (present author's translation).

[1159] Also referred to as 'piercing of the immunity veil', see Reinisch (2015), at 320.

[1160] Ibid., at 314.

[1161] Smits (2008), at 31, para. 2.1.1 ('Het recht op toegang tot de (burgerlijke) rechter is het enige recht dat niet expliciet in art. 6 EVRM is opgenomen, maar uit dat artikel is afgeleid.'). According to Reinisch, 'most human rights treaties do not explicitly contain a right of access to court. Instead, instruments like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, or the European Convention of Human Rights (ECHR), provide for due process or fair trial guarantees. However, in the actual application of such standards it has become clear that the right to a fair trial requires not only a trial to be fair if one is provided for under national procedural law, but also the right to have a trial in the first place.' A. Reinisch, 'Privileges and Immunities', in J. Katz Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (2017), 1048 at 1062 (fns. omitted). With respect to the ICCPR, see UN Human Rights Committee (HRC), General comment no. 32, Art. 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 9: 'Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law.' (emphasis added).

[1162] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), paras. 3.3.2-3.3.6 (emphasis added).

- Those findings in 3.3.5 and 3.3.6. relate to a 'special procedure (either inside or outside the organization) for the resolution of disputes of this kind relating to employment relations which have been removed from the jurisdiction of the host State.' (para. 3.5, emphasis added);
- Earlier in its judgment the Supreme Court had explained what this 'special procedure' involved, that is,

> 'nowadays the Tribunal includes in its agreements with its employees a clause to the effect that disputes between the Secretary-General of the Tribunal, who represents the Tribunal in personnel matters, and the relevant employee will be dealt with and decided by the Tribunal as the final authority' (para. 3.1 sub (6))

- This procedure was open to Mr Spaans (para. 3.3.6); and
- The fact that he had not availed himself of that procedure does not detract from the conclusion that the IUSCT enjoys jurisdictional immunity.

In short, because Mr Spaans had access to the said special procedure, the IUSCT's immunity applied in full.[1163] The judgment has been criticised because this procedure lacked independence.[1164] This notwithstanding, at its core, the Supreme Court's reasoning foreshadowed the reasoning by the ECtHR a decade and a half later in its landmark judgment concerning Article 6 of the ECHR and the immunity of international organizations in *Waite and Kennedy*.[1165] The ECtHR's judgment in *Waite and Kennedy* is its first, and continues to be its leading, ruling on the immunity from jurisdiction of international organisations.

*Spaans v. IUSCT* and *Waite and Kennedy* are central to this section, the key theme being the tension between jurisdictional immunity and the rights under Article 6(1) of the ECHR. The discussion begins

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[1163] On appeal against the judgment of the court in first instance, the District Court held that the absence of legal recourse for IUSCT staff members would *not* have rendered the Dutch courts competent. District Court judgment (included in publication of Supreme Court judgment in NJ 1986/438, m.nt. P.J.I.M. de Waart), para. 8. In essence, the Supreme Court's reasoning is similar to that of District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('Eurocontrol uncontestedly argued that the ILO Administrative Tribunal was easily accessible because of the absence of procedural requirements and the element of costs, since no court fees were charged; that it was not necessary to consult the Geneva bar because of *ex officio* instruction, with possible review by the International Court of Justice, and that, in fact, the officials of Eurocontrol did apply to that Tribunal. All these considerations lead the Court to the opinion that the objection advanced by Eurocontrol is well-founded; that consequently . . . the judgment of the Local Court shall be reversed, that the District Court lacks jurisdiction').

[1164] In his annotation to the Supreme Court's judgment in *Spaans v. IUSCT*, De Waart criticised the 'special procedure' available to Mr Spaans on the basis that it lacked independence insofar as 'disputes between the Secretary-General of the Tribunal, who represents the Tribunal in personnel matters, and the relevant employee will be dealt with and decided by the Tribunal as the final authority'. Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), note De Waart, at 12. Following the Supreme Court judgment, Spaans brought his case before the European Commission of Human Rights, which was in existence at the time. However, the Commission declared the complaint inadmissible on the ground that it was incompatible with the scope *ratione personae* of the ECHR. *Spaans v. The Netherlands* (1988), 58 DR 119, at 3.

[1165] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*).

by examining the ECtHR's landmark ruling in *Waite and Kennedy* and the main ECtHR case law on which it builds (subsection 4.3.1). It then proceeds in two ways. First, it discusses in largely chronological order the case law of the Dutch courts and the ECtHR following *Waite and Kennedy* in which 'reasonable alternative means' were available to claimants (subsection 4.3.2). Second, principally on the basis of the ECtHR's key ruling in *Mothers of Srebrenica*, it considers the situation in which there are no 'reasonable alternative means' (subsection 4.3.3). *Mothers of Srebrenica* allows for a discussion of several broader themes, including the relationship between immunity from jurisdiction, access to court and alternative remedy; and the existence of 'civil rights' under Article 6(1) of the ECHR. The section thereafter discusses how, in the absence of alternative recourse, to resolve the conflict between the obligations to grant jurisdictional immunity to the respondent international organisations, and to grant access to court to the claimant. As will be seen, notwithstanding legal and policy arguments to prioritise the former over the latter, the lower case law not infrequently points in the opposite direction.

### 4.3.1 *Waite and Kennedy*

The case arose out of an employment-related lawsuit by Messrs. Waite and Kennedy against ESA before the German courts.[1166] The claimants argued that they had acquired an employment relationship with ESA, having worked for it for years through contracting firms.[1167] The German courts upheld the immunity of ESA, as an international organization, and dismissed the case. The claimants then sued Germany before the ECtHR, alleging that their right of access to court had been violated. According to the ECtHR,

> 'the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[1168]

[1166] *Beer and Regan v. Germany*, Judgment of 18 February 1999, ECHR (App. no. 28934/95) (*Beer and Regan*), as far as the Court's legal considerations are concerned, is materially identical to *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I). For a discussion of the opinions of the European Commission of Human Rights in these cases, as well as in *Spaans* and other cases concerning the immunity from jurisdiction of international organisations and the right of access to court, see Lawson (1999), chapter 9.3.
[1167] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), paras. 13-15.
[1168] Ibid., para. 59 (emphasis added).

The court dismissed the application, holding that there had been no violation of Article 6(1) of the ECHR.

*Waite and Kennedy* builds on a long line of cases concerning Article 6 ECHR, going back to the 1980s (though not concerning international organizations). For example, *Ashingdane* arose from the claimant's detention at a mental hospital and the authorities' refusal to transfer him to another hospital.[1169] The issue was whether Article 6 ECHR was breached because of the authorities' protection from suit before the domestic courts under the relevant mental health legislation. The Court dismissed the application, *inter alia*, since there was no complete bar from suit.[1170]

*Lithgow* arose from a dispute over compensation following an expropriation in the aircraft and shipbuilding industries.[1171] The applicable legislation provided for the collective settlement of such disputes before an arbitration tribunal. The claimant contended that this was in breach of Article 6 ECHR since this mechanism did not allow for individual claims. The Court dismissed the application on the basis that under the circumstances it was a legitimate aim to avoid a multiplicity of claims and that the collective system was a proportionate means.[1172]

The Court in *Waite and Kennedy* specifically mentioned *Fayed*,[1173] another case in which it had dismissed the application. The dispute in that case arose from the state-commissioned investigation into, and reporting on, the affairs of a public company in connection with its (indirect) acquisition by applicants. The investigation did not lead to criminal prosecution, but the reporting was damaging to the applicants' reputation. They argued, among others, that

> 'there was no opportunity under English law, whether by way of defamation proceedings or by way of judicial review, to challenge the Inspectors' condemnatory findings of fact or conclusions before a tribunal satisfying the requirements of Article 6 para. 1'.[1174]

Indeed, the Court held that 'it was common ground that any defamation action brought by the applicants against the Inspectors or the Secretary of State would have been successfully met with a defence of privilege'.[1175]

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[1169] *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, ECHR (Ser. A no. 93) (*Ashingdane*).
[1170] The Court left unresolved whether 'civil rights' in the sense of Art. 6 ECHR were at stake. Ibid., para. 54.
[1171] *Lithgow and Others v. the United Kingdom*, Judgment of 8 July 1986, ECHR (Ser. A no. 102) (*Lithgow*).
[1172] Ibid., paras. 193-197. The Court held that the applicable right to compensation 'is without doubt a civil right'. Ibid., para. 192.
[1173] *Fayed v. the United Kingdom*, Judgment of 21 September 1990, ECHR (Ser. A no. 294-B) (*Fayed*).
[1174] Ibid., para. 64. Without making a judicial finding as to whether Art. 6 ECHR applied, the Court proceeded on the assumption that it did. Ibid., para. 67.
[1175] Ibid., para. 70.

Nevertheless, the Court considered that the investigation and reporting were in the public interest of the proper conduct of public companies and, thus, pursued legitimate aims. The Court continued:

> 'Having regard in particular to the safeguards that did exist in relation to the impugned investigation, the Court concludes that a reasonable relationship of proportionality can be said to have existed between the freedom of reporting accorded to the Inspectors and the legitimate aim pursued in the public interest.'[1176]

In *Stubbings* the claimants contended that a time bar for civil suits for damages in connection with child abuse violated Article 6(1) of the ECHR.[1177] The Court again dismissed the application, holding that the very essence of the right of access to justice was not impaired.[1178] The Court found that under the circumstances the time-bar served a legitimate aim, that is, protecting finality and legal certainty, and that it was proportionate as it prevented the courts from having to adjudicate events of long ago.

Conversely, in *Tinnelly* the court found that Article 6(1) of the ECHR had been breached by the state.[1179] The claimants alleged that they had been denied

> 'access to a court or tribunal for a determination of their claims that they had been unlawfully refused public works contracts or the security clearance necessary to obtain those contracts on account of their religious beliefs or political opinions.'[1180]

The Northern Ireland authorities had issued a document certifying national security concerns, which document was not reviewable in court. Whilst it was not in dispute that the protection of national security qualified as a legitimate aim, according to the Court, the means to achieve that aim lacked proportionality. It considered, among others, that

> 'the right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive'.[1181]

Similarly, in *Osman*,[1182] to which the Court referred in *Waite and Kennedy*, the Court concluded that Article 6(1) of the ECHR had been violated. The case arose out of allegations of police negligence. The claimants sued the police for negligence in connection with the deadly shooting of their relative. The case before the UK courts was barred on account of the police's immunity from civil suit. According to the Court, immunity from suit may be in the interest of the effectiveness of the police service and thus

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[1176] Ibid., para. 82.
[1177] *Stubbings and Others v. the United Kingdom*, Judgment of 22 October 1996, [1996] ECHR (IV) (*Stubbings*).
[1178] Ibid., paras. 47-57.
[1179] *Tinnelly & Sons Ltd. And Others and Mcelduff and Others v. the United Kingdom*, Judgment of 10 July 1998, [1998] ECHR (IV) (*Tinnelly*).
[1180] Ibid., para. 56.
[1181] Ibid., para. 77.
[1182] *Osman v. the United Kingdom* [GC], Judgment of 28 October 1998, [1998] ECHR (VIII) (*Osman*).

constitute a legitimate purpose.[1183] Yet, in the instant case the immunity served to

> 'confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.'[1184]

In other words, according to the Court, the immunity was a disproportionate limitation of the right of access to court. Of note, the UK Government had contended

> 'in defence of the proportionality of the restriction on the applicants' right to sue the police that they could have taken civil proceedings against [the killer]. Moreover, they had in fact sought to sue [the psychiatrist who had assessed the killer] but subsequently abandoned their action against him. In either case they had full access to a court.'[1185]

However, the Court was not

> 'persuaded either by the Government's plea that the applicants had available to them alternative routes for securing compensation . . . In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Neither an action against [the killer] nor against [the psychiatrist who had assessed the killer] . . . would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent [the killer] from exacting a deadly retribution against [the victims]. They may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.'[1186]

Thus, any such legal action would be against other parties than the intended respondent, and in relation to other actions or omissions, and they were therefore irrelevant in terms of proportionality.

Returning to the Court's *Waite and Kennedy* judgment, which built on the foregoing case law, the Court applied the usual test of legitimate aim and proportionality. As to the former, the Court opined that

> 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.
> The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.
> Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.'[1187]

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[1183] Ibid., para. 150. The Court concluded that Art. 6 of the ECHR applied as the applicants' right was derived from the law of negligence. Ibid., para. 139.
[1184] Ibid., para. 151.
[1185] Ibid., para. 145.
[1186] Ibid., para. 153 (emphasis added).
[1187] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 63 (emphasis added).

On the latter issue, concerning proportionality, the Court stated that it 'must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case.'[1188] It then reached the following conclusions:

> 'The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial . . .
>
> For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.'[1189]

In other words, where there is an alternative remedy against the international organization, this goes towards the proportionality of the limitation of the right under Article 6 of the ECHR due to the immunity.

The ECtHR dismissed the application in this case, '[t]aking into account in particular the alternative means of legal process available to the applicants'.[1190] In this connection, the Court first stated:

> 'The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation . . .
> Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board. In accordance with Regulation 33 § 1 of the ESA Staff Regulations, the ESA Appeals Board, which is "independent of the Agency", has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staffmember"'.[1191]

The court added: 'As to the notion of "staff member", it would have been for the ESA Appeals Board […] to settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members".'[1192]

Of note, the ECtHR considered that, under the ESA's Staff Regulations, the appeals board is 'independent of the Agency' and that it 'has jurisdiction to "hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member"'.[1193] In this respect, the ECtHR referred back to paragraphs 31 to 40 of its judgment, in which it in turn cited regulation 33

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[1188] Ibid., para. 64.
[1189] Ibid., paras. 67-68 (emphasis added).
[1190] Ibid., para. 73.
[1191] Ibid., para. 69.
[1192] Ibid.
[1193] Ibid., para. 68.

of the ESA Staff Regulations. That provision clarifies that the appeals board has the power to render binding decisions in staff disputes—as opposed to mere non-binding recommendations—including by rescinding impugned administrative decisions and ordering the administration to repair any damage sustained as a result of such decisions.

The ECtHR then proceeded to state the following:

> 'Moreover, it is in principle open to temporary workers to seek redress from the firms that have employed them and hired them out. Relying on general labour regulations or, more particularly, on the German Provision of Labour (Temporary Staff) Act, temporary workers can file claims in damages against such firms. In such court proceedings, a judicial clarification of the nature of the labour relationship can be obtained.'[1194]

At first glance, this might be taken to contrast with *Osman*, rendered shortly before *Waite and Kennedy*. As seen, in that case the Court held that the claimant's ability to sue another party than the one claiming immunity, and in relation to other actions or omissions, did not satisfy the right of access to court in relation to the latter party. In *Waite and Kennedy* the 'firms that have employed [the applicants]' were other parties than the ESA. However, as the Court went on to explain:

> 'The significant feature of the instant case is that the applicants, after having performed services at the premises of ESOC in Darmstadt for a considerable time on the basis of contracts with foreign firms, attempted to obtain recognition of permanent employment by ESA on the basis of the above-mentioned special German legislation for the regulation of the German labour market.'[1195]

Arguably, litigation against the ESA and the firms served the same purpose, namely, to clarify the employment status of the applicants. Thus, the Court stated that 'it would have been for the ESA Appeals Board . . . to settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members"'.[1196] Similarly, in court proceedings against the firms that had hired the applicants, 'a judicial clarification of the nature of the labour relationship can be obtained.'[1197] Therefore, in the specific circumstances of *Waite and Kennedy*, the similarity of the

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[1194] Ibid., para. 70.
[1195] Ibid., para. 71 (emphasis added).
[1196] Ibid., para. 69.
[1197] Ibid., para. 70 (emphasis added). In the parallel case of *Beer and Regan*, following the ECtHR's 1999 judgment in that case, the complainants proceeded to seize the ESA Appeals Board. The board dismissed the claims on the basis that the complainants did not qualify as staff members of the ESA. The complainants thereupon once more seized the ECtHR, again alleging a violation of Art. 6 of the ECHR. In its 2003 decision, the ECtHR recalled its 1999 judgment, specifically para. 60 (which is identical to para. 70 of its judgment in *Waite and Kennedy*). See *Beer and Regan v. Germany*, Judgment of 18 February 1999, ECHR (App. no. 28934/95) (*Beer and Regan*), at 10. The Court concluded that the complainants had in fact availed themselves of domestic recourse against the firms that had hired them. In the context of those proceedings, the complainants had reached amicable settlements with the firms, pursuant to which they had been indemnified for the loss of employment. According to the EctHR, 'les requérants ne peuvent passer pour avoir dû supporter, du fait de la décision de la Commission de recours rejetant leur demande, une charge disproportionnée'. The Court declared the application inadmissible. Ibid. Along similar lines, see District Court The Hague (summary proceedings) 3 October 2013, ECLI:NL:RBDHA:2013:16952

purpose of the potential litigation against ESA and the firms arguably is what distinguishes the case from *Osman*.

The ECtHR further stated

> 'that, bearing in mind the legitimate aim of immunities of international organisations . . . the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.'[1198]

The ECtHR concluded:

> 'In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.'[1199]

#### 4.3.2 'Reasonable alternative means': beyond *Waite and Kennedy*

In its subsequent case law on the jurisdictional immunity of international organisations, the ECtHR has applied and refined its *Waite and Kennedy* judgment, particularly concerning 'reasonable alternative means'. It is significant to note from the outset that the immunity of the international organisation prevailed in all opinions by the ECtHR and the Dutch Supreme Court. This is because reasonable alternative means were deemed to be available. The one case in which reasonable alternative means were not available is *Srebrenica*—though the UN's immunity prevailed—which is the primary reason for discussing the case separately.

Shortly after *Waite and Kennedy*, in *A.L.* the ECtHR was called to consider the jurisdictional immunity of NATO in an employment dispute.[1200] The applicant was a (civilian) staff member of NATO and the case arose out of decisions in connection with the termination of his contract. He unsuccessfully challenged the decisions before NATO's appeals board. As per its arrangements with Italy, NATO

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(*EPO*). The claimant sued the EPO, along with two private companies. He had worked for the EPO on the basis of contacts with the private companies in connection with which he sought payment of money. According to the Complainant, as he was not a staff member of the EPO, he did not have recourse to the ILOAT. The District Court ruled that there was no violation of Art. 6 of the ECHR as the complainant had recourse against the private companies. Ibid., para. 3.3.

[1198] Ibid., para. 72.

[1199] Ibid., para. 73. See M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (2010), at 144. ('The judgments of Waite and Kennedy v. Germany and Beer and Regan v. Germany . . . lack a critical assessment of the alternative remedies which were available to the applicants.').

[1200] *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) (*A.L.*).

enjoyed immunity from suit before the Italian courts in matters concerning employment contracts of civilian staff. The applicant, an Italian national, complained that by agreeing to the immunity, Italy had violated his right of access to justice under Article 6 of the ECHR.

The ECtHR recalled its considerations in *Waite and Kennedy*, including that the rationale for according jurisdictional immunity to international organisations is to protect their proper functioning. It then went on to consider the following:

> 'Pour déterminer si l'immunité d'une organisation internationale devant les juridictions de l'un des Etats contractants de la Convention est admissible au regard de celle-ci, il importe d'examiner s'il existe d'autres voies raisonnables pour assurer efficacement la protection des droits protégés par la Convention'.[1201]

The ECtHR noted at the outset that a problem could arise as to the application of Article 6 of the ECHR in the case in point.[1202] This is an important matter, which is discussed further below. For purposes of the present case, the Court assumed that Article 6 *did* apply and then proceeded to consider the Applicant's contention that the proceedings before the NATO Appeals Board lacked independence. In declaring the application inadmissible, it considered that:

> 'les membres de cette Commission ne sont membres ni de l'OTAN, ni des délégations parlementaires auprès du Conseil de l'OTAN, sont indépendants dans l'exercice de leurs fonctions, et sont nommés pour trois ans parmi des personnes possédant une compétence notoire.
>
> En outre, la procédure devant la Commission est contradictoire et ses décisions sont motivées. En l'espèce, le requérant était représenté par trois avocats et n'a pas mis en cause le déroulement de la procédure.
>
> S'il est vrai que les audiences devant la Commission de recours se tiennent à huis clos, l'exclusion du public et de la presse peut se justifier au sens de l'article 6 § 1 dans l'intérêt de l'ordre public et de la sécurité nationale dans une société démocratique, l'OTAN étant une organisation dont l'activité se déploie dans le domaine militaire.
>
> En conclusion, la Cour considère que la Commission de recours de l'OTAN remplit essentiellement les conditions prévues par l'article 6 de la Convention et n'a pas de raisons de douter que ladite Commission constitue une « voie raisonnable pour protéger efficacement » le droit du requérant à un procès équitable. Par conséquent, on ne saurait dire que la restriction de l'accès aux juridictions italiennes pour régler le différend du requérant avec l'OTAN ait porté atteinte à la substance même du droit de celui-ci à avoir accès à un tribunal ou qu'elle ait été disproportionnée sous l'angle de l'article 6 § 1 de la Convention.'[1203]

In *Mazéas*,[1204] the ECtHR considered the jurisdictional immunity of the Union Latine, an international organization whose General Secretariat was based in Paris. The case arose out of Ms Mazéas' dismissal

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[1201] Ibid., at 4, referring to *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), paras. 67-68 (the latter paragraph contains the 'material factor' consideration).
[1202] *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) (*A.L.*), at 4 ('la Cour observe en premier lieu qu'un problème pourrait se poser quant à l'applicabilité de l'article 6 en l'espèce').
[1203] Ibid., at 5 (underlining added).
[1204] *Mazéas v. France,* Decision of 13 November 2008, ECHR (App. no. 11270/04) (*Mazéas*).

by the organisation. Ms Mazéas sued the Union Latine before the French courts. The Supreme Court, in final instance, upheld the organisation's jurisdictional immunity under its headquarters agreement with France.

Ms Mazéas then sued France before the ECtHR, alleging a violation of Article 6 of the ECHR. In relying on *Waite and Kennedy* (and *Beer and Regan*), the ECtHR held:

> 'Les agents de l'Union latine sont dans une situation comparable. En effet, si en raison de l'immunité de juridiction dont jouit leur employeur ils ne peuvent en principe saisir les juridictions internes des litiges les opposant à celui-ci, ils ont un « droit de recours » spécifique (chapitre VIII du statut du personnel) : ils peuvent dans les soixante jours suivant la décision leur faisant grief adresser une réclamation à leur secrétaire général et, le cas échéant, dans les soixante jours, introduire un recours contentieux contre sa décision de rejet devant une « commission de recours » indépendante, laquelle peut prononcer l'annulation de l'acte contesté.'[1205]

The Court added that whilst the Appeals Board procedure was adopted after the dismissal of Ms Mazéas, it was nonetheless available to her on the basis of an ad hoc arrangement.[1206] That is, 'du fait d'une prorogation ad hoc du délai de saisine, la requérante avait la possibilité d'user de ce recours, ce qu'elle n'a pas fait.'[1207] The Court concluded:

> 'Dans ces circonstances et compte tenu des modalités dudit recours (cidessus), on ne saurait dire qu'il y a eu atteinte à la substance même de « droit à un tribunal » de la requérante du fait de la reconnaissance par la Cour de cassation de l'immunité de juridiction de l'Union latine ni que les moyens employés étaient disproportionnées par rapport au but poursuivi.'[1208]

The next year, the ECtHR decided *Lopez Cifuentes*, concerning the immunity of the International Olive Council ('IOC'), based in Spain.[1209] Mr Lopez was an IOC staff member who was dismissed following internal disciplinary proceedings. He challenged his dismissal before the ILOAT, which dismissed the complaint.

In parallel to the ILOAT proceedings,[1210] the applicant brought a case before a Spanish court against the IOC. The domestic court declined to hear the case on account of the organization's immunity. This, amongst others, led the applicant to contend before the ECtHR that Spain had violated Article 6 of the ECHR. The ECtHR declared the application inadmissible, finding that the limitation of the right of access to justice did not impair the essence of the right and that it was not disproportionate for purposes of Article 6 of the ECHR. In so doing, the Court referred to the passage in its judgment in *Waite and Kennedy* in which it considered the availability of alternative means. In the present case, such means

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[1205] Ibid., at 7.
[1206] Ibid., at 7-8.
[1207] Ibid., at 8.
[1208] Ibid., at 8.
[1209] *Lopez Cifuentes v. Spain*, Decision of 7 July 2009, ECHR (App. no. 18754/06) (*Lopez Cifuentes*).
[1210] Ibid., para. 31.

existed by way of the ILOAT, of which the applicant had in fact availed himself.[1211] The ECtHR stated the following with respect to the ILOAT:

> 'L'Organisation internationale du Travail, fondée en 1919 sous l'appellation « Bureau international du Travail », est depuis 1946 une agence tripartite de l'Organisation des Nations unies qui rassemble les gouvernements, employeurs et travailleurs de ses États membres. Son tribunal administratif connaît des requêtes formées par les fonctionnaires ou anciens fonctionnaires de l'Organisation et des autres organisations internationales qui ont reconnu sa compétence juridictionnelle. Les dispositions du Statut du TAOIT pertinentes en l'espèce sont les suivantes :
> Article II
> « (...)
> 5. Le Tribunal connaît en outre des requêtes invoquant l'inobservation, soit quant au fond, soit quant à la forme, des stipulations du contrat d'engagement des fonctionnaires ou des dispositions du Statut du personnel des autres organisations internationales satisfaisant aux critères définis à l'annexe au présent Statut qui auront adressé au Directeur général une déclaration reconnaissant, conformément à leur Constitution ou à leurs règles administratives internes, la compétence du Tribunal à l'effet ci-dessus, de même que ses règles de procédure, et qui auront été agréées par le Conseil d'administration. »
> Article VI
> « 1. Le Tribunal statue à la majorité des voix ; ses jugements sont définitifs et sans appel.
> 2. Tout jugement doit être motivé. II sera communiqué par écrit au Directeur général du Bureau international du Travail et au requérant.
> (...) »
> . . . L'article XII, paragraphe 1, de l'annexe au Statut du TAOIT se lit ainsi :
> « Au cas où le Conseil exécutif d'une organisation internationale ayant fait la déclaration prévue à l'article II, paragraphe 5, du Statut du Tribunal conteste une décision du Tribunal affirmant sa compétence ou considère qu'une décision dudit Tribunal est viciée par une faute essentielle dans la procédure suivie, la question de la validité de la décision rendue par le Tribunal sera soumise par ledit Conseil exécutif, pour avis consultatif, à la Cour internationale de justice. »
> . . . Par une lettre adressée au Directeur général du Bureau international du Travail du 19 septembre 2003, le COI reconnut la compétence du TAOIT. Cette reconnaissance fut approuvée par le Conseil d'administration du BIT.'[1212]

Of note, in March 2016, the ILO International Labour Conference adopted amendments to the ILOAT Statute. This notably involved the removal of Article XII of the Statute and Article XII of its Annex, under which the defendant organizations, but not the complainants, could challenge a decision of the ILOAT before the ICJ. According to the ILOAT website, 'these provisions had been criticized as being contrary to the principles of equality of access to justice and equality of arms.'[1213]

By way of further background, according to information on the ILOAT website, the tribunal

> 'It is currently open to more than 58,000 international civil servants who are serving or former officials of 58 international organisations. The Tribunal is composed of seven judges, all of different nationalities.'[1214]

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[1211] Ibid.
[1212] Ibid., paras. 18-20.
[1213] <ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_498369/lang—en/index.htm> accessed 21 December 2021.
[1214] <ilo.org/tribunal/lang–en/index.htm> accessed 21 December 2021.

Under Article III of the ILOAT Statute, the Tribunal's judges are appointed by the International Labour Conference.

The Dutch Supreme Court in *EPO disability*, concerning a work-related injuries dispute, likewise pointed to the availability of the ILOAT. In that case, the EPO's 'Intern [*sic*] Appeal Committee'[1215] had dismissed the claim. Instead of lodging a complaint before the ILOAT, the claimant opted to sue the EPO before the domestic courts in the Netherlands. Both the District Court and the Court of Appeal of The Hague granted the EPO's claim for immunity. According to the Court of Appeal, the Dutch courts lack jurisdiction; however, an exception must be made if as a consequence of that immunity, the employee would be denied access to a procedure that offers protection comparable to Article 6 of the ECHR.[1216] The Court held the appellant could have availed himself of the ILOAT and that it had not been established that the procedure before that tribunal was not in conformity with the requirements of Article 6 of the ECHR.[1217] More specifically, the Court of Appeal held that whilst the claimant had contended that the ILOAT tends to reject requests for oral hearings, he had not contended, nor did it seem to be the case, that the ILOAT rejects reasoned requests for an oral hearing in cases where this is

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[1215] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.1.

[1216] Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.'). The District Court The Hague had reasoned similarly in an early case arising out of an employment dispute with the International Service for National Agricultural Research (ISNAR). District Court The Hague 28 November 2001 (*ISNAR*), para. 5.10, cited in District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*) ('every person is entitled, under international law too, to an effective legal process in cases such as the present one. If it should therefore transpire that the legal process in accordance with the Staff Regulations is not effective in this specific case, the Dutch courts would have a function after all.' [emphasis added]).

[1217] See likewise District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*), para. 1.4 ('It is not in dispute that the [ILOAT] should be designated as an independent tribunal established by law'); District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('Eurocontrol uncontestedly argued that the ILO Administrative Tribunal was easily accessible because of the absence of procedural requirements and the element of costs, since no court fees were charged; that it was not necessary to consult the Geneva bar because of *ex officio* instruction, with possible review by the International Court of Justice, and that, in fact, the officials of Eurocontrol did apply to that Tribunal. All these considerations lead the Court to the opinion that the objection advanced by Eurocontrol is well-founded; that consequently . . . the judgment of the Local Court shall be reversed, that the District Court lacks jurisdiction'). But see Reinisch and Weber (2004) at 109-110 ('a closer scrutiny of the actual practice of the most important alternative dispute settlement mechanism in the context of cases brought against international organizations, various administrative tribunals, in particular, the ILOAT, reveals serious deficiencies with regard to their adequacy and effectiveness. In particular, the mechanism for appointing judges to the ILOAT and the regular denial of oral hearings fall short of internationally required standards of a fair trial, as expressed, inter alia, in Article 6 (1) ECHR. Furthermore, the law applied by these alternative means appears to lack the clarity required to enable an applicant to effectively defend his rights.').

warranted.[1218] It could not be concluded beforehand that the complainant would be denied an oral hearing if he would submit a reasoned request for such a hearing.[1219]

Before the Supreme Court, the complainant argued that the Court of Appeal's judgment on this point was incomprehensible (one of the limited grounds for quashing a judgment in cassation proceedings) as out of 2,200 cases decided at the time since 1992, ILOAT had only once held an oral hearing. However, the Supreme Court dismissed the appeal, finding that the Court of Appeal's reasoning was not in fact incomprehensible.[1220]

Returning to the ECtHR, in *Chapman*, the ECtHR declined to rule that Article 6 of the ECHR had been violated on account of NATO's immunity from jurisdiction.[1221] The case arose out of another labour dispute. Mr Chapman sued NATO before a Belgian labour court, arguing that he was employed under a permanent contract and claiming the attendant benefits.[1222] The court awarded the claim.[1223] However, the Belgian authorities appealed (NATO did not appear) and the appellate court ruled that NATO did enjoy immunity from jurisdiction.[1224] Chapman then sued Belgium before the ECtHR. Like the appellate court, it found that NATO's Appeals Board would have been available to him, even as a former staff member, and that he had failed to make use thereof.[1225] Mr Chapman contended that the Appeals Board hearings were not fair, including because 'meetings held in private, no mandatory representation, appointment of members by governmental representatives, etc.'[1226] However, the ECtHR found that, as he had not seized the Appeals Board, he had failed to substantiate that contention.[1227]

Returning briefly to the Netherlands, the salient issues in the judgments in the two aforementioned cases against the IUSCT adjudicated by the Hague Court of Appeal in 2012 (*IUSCT abolition*) and 2013 (*IUSCT non-extension*) concerned the issue of the claimants' recourse to an alternative remedy. The Court of Appeal upheld the immunity of the IUSCT in both cases, affirming the first instance judgment in *IUSCT abolition*, but setting aside the first instance judgment of the District Court The Hague in *IUSCT non-extension* in which the lower court had dismissed the immunity defence for lack of

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[1218] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.5.
[1219] Ibid.
[1220] Ibid. As seen above (under the heading 'functional immunity'), in a subsequent case against the EPO, *Restaurant de la tour*, the Court of Appeal of The Hague ruled that the limitation of the right of access to court was disproportionate in relation to the aim served by the immunity. That conclusion was based on the Court's finding that the applicable functional immunity test was not met.
[1221] *Chapman v. Belgium*, Decision of 5 March 2013, ECHR (App. No. 39619/06) (*Chapman*). See generally De Brabandere (2015), at 232-233.
[1222] *Chapman v. Belgium*, Decision of 5 March 2013, ECHR (App. No. 39619/06) (*Chapman*), para. 4.
[1223] Ibid., para. 6.
[1224] Ibid., paras. 9-11.
[1225] Ibid., para. 54.
[1226] Ibid., para. 41.
[1227] Ibid., para. 55.

alternative recourse.[1228] Combined, both judgments provide the following insights into The Hague Court of Appeal's approach to the matter at the time.

According to the Court of Appeal, under *Waite and Kennedy*, upholding an international organisation's immunity from jurisdiction does not violate Article 6 of the ECHR, provided certain conditions are met, including the availability to the claimant of an alternative remedy for the settlement of private law disputes.[1229]

As to the reasonable alternative mean available to the claimants, as seen in connection with *Spaans v. IUSCT*, under the IUSCT's Staff Rules, the IUSCT's nine arbitrators are competent to hear employment disputes.[1230] The claimants in neither case had availed themselves of this internal remedy.[1231] In *IUSCT abolition*, the claimant did not as such contest the availability of the internal remedy.[1232] Conversely, the claimant in *IUSCT non-extension* argued that the internal remedy was limited to disputes concerning disciplinary matters or concerning the interpretation of the Staff Rules, and that the dispute in point was of a different nature.[1233] The Court of Appeal rejected this argument, holding that the internal remedy would have been available in the case in point.[1234]

According to the Court of Appeal in *IUSCT abolition*, the availability of the internal remedy underscores that the IUSCT's immunity from jurisdiction extends to the dispute,[1235] considering that the Supreme Court in *Spaans v. IUSCT* stated:

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[1228] District Court The Hague 13 February 2012 (*IUSCT non-extension*), as paraphrased in Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (*IUSCT non-extension*), para. 1.4 ('In verband met zijn bevoegdheid overweegt de kantonrechter dat het Tribunaal als internationale organisatie functionele immuniteit geniet en dat, nu [eiseres] in haar functie van secretaresse bijdroeg aan de vervulling van de taken van het Tribunaal en de door haar aan het Tribunaal verweten gedragingen met de vervulling van die taken onmiddellijk verband houden, de Nederlandse rechter geen rechtsmacht toekomt, tenzij [eiseres] daardoor de toegang tot een onafhankelijke en onpartijdige rechterlijke instantie wordt onthouden. Omdat van de zijde van het Tribunaal verzuimd is [eiseres] te wijzen op de mogelijkheid van een interne rechtsgang of de zaak door te verwijzen naar de Tribunal Judges, is naar het oordeel van de kantonrechter voor [eiseres] niet een procedure mogelijk gemaakt, die gelijkwaardig is aan artikel 6 EVRM, en acht de kantonrechter zich bevoegd van het geschil tussen [eiseres] en het Tribunaal kennis te nemen.' Underlining added).
[1229] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (IUSCT non-extension), para. 3.4.
[1230] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 2(vi).
[1231] Ibid; Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.6.
[1232] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 12.
[1233] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.7.
[1234] Ibid.
[1235] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 12.

> 'Generally, the rules (such as Staff Regulations) governing relations between an international organization and such employees, whether contractual or otherwise, will provide for a special procedure (either inside or outside the organization) for the resolution of disputes of this kind relating to employment relations which have been removed from the jurisdiction of the host State'.[1236]

In terms of the adequacy of the alternative means, the claimant in *IUSCT abolition* contended that the internal remedy did not provide sufficient protection of her rights under Article 6 of the ECHR because the IUSCT is not an independent adjudicator of employment disputes with its own employees.[1237] However, according to the Court of Appeal, *Waite and Kennedy* requires there to be an alternative remedy and an internal remedy may qualify as such. The claimant referred to the critical note by De Waart regarding *Spaans v. IUSCT*—who had questioned the IUSCT's independence in deciding disputes with its own employees. However, according to the Court of Appeal, she did not present facts, circumstances, grounds or objections that warrant scrutiny of the internal remedy, considering also that the remedy involves all nine arbitrators of the IUSCT.[1238] Similarly, in *IUSCT non-extension* the Court of Appeal held that the claimant had not convincingly contested the adequacy of the internal remedy.[1239]

The Court of Appeal Judgment in *IUSCT non-extension* was appealed to the Supreme Court (it appears that the judgment in *IUSCT abolition* was not). The Supreme Court dismissed the appeal without giving reasons since, according to the Court, the grounds of appeal did not require that questions of law be answered in the interest of legal unity or the development of law.[1240] It appears from the opinion of the Advocate-General that the grounds of appeal regarding the adequacy of the internal remedy did not concern the rather fundamental issues central to Professor De Waart's note on *Spaans v. IUSCT*. Rather, the relevant ground of appeal turned on the issue of procedural access to, and practical implementation of, the internal remedy.[1241]

Returning to the ECtHR, in 2015 the court rendered its oft-cited judgment in *Klausecker*.[1242] The court found that the applicant had failed to make use of available alternative remedies, dismissing his challenge to the fairness of those remedies. The case arose out of the EPO's refusal to recruit Mr Klausecker due to his disability. He lodged a complaint against the EPO before the ILOAT, which the tribunal dismissed for lack of jurisdiction: the case was irreceivable as the complainant was not an

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[1236] Ibid., para. 11, referring to Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.1, sub 6.
[1237] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 14.
[1238] Ibid., para. 15.
[1239] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.7.
[1240] Supreme Court 20 March 2015, ECLI:NL:HR:2015:687 (*IUSCT non-extension*).
[1241] Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (*IUSCT non-extension*), para. 2.7-2.8.
[1242] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*).

official of the defendant organisation.[1243] However, recognising that its judgment left a 'legal vacuum', the ILOAT urged the EPO either to waive its immunity from jurisdiction, or offer arbitration proceedings.[1244] The EPO opted for the latter, proposing to Mr Klausecker arbitration proceedings, whereby each party would appoint one arbitrator, and both arbitrators would appoint a third arbitrator; the arbitrator's fees and expenses would be borne by the EPO; the applicable law would be the law ILOAT would have applied if it had had jurisdiction;[1245] and there would be a non-public hearing.[1246]

Mr Klausecker refused the offer of arbitration, arguing that the proposed proceedings did not conform to the requirements of Article 6 of the ECHR, notably the right to a public hearing within a reasonable time.[1247] Importantly, and as discussed below, there was debate before the ECtHR as to whether Article 6 of the ECHR applied. The Court left this unresolved and proceeded on the basis that it did.[1248] The Court then recalled its key considerations in *Waite and Kennedy*, holding that the limitation of Article 6 in this case served a legitimate aim, namely, to guarantee the proper functioning of the EPO.[1249] As to the proportionality of the limitation of the applicant's rights of access to court under Article 6 of the ECHR, the Court considered it 'decisive whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention'.[1250] The Court concluded: 'This offer of arbitration made to the applicant had awarded to the applicant a reasonable opportunity to have his complaint about the [EPO]'s decision examined on the merits.'[1251]

As to the applicant's challenge to the fairness of the proposed arbitration proceedings, the Court considered

> 'that the fact alone that the oral hearing before the arbitral tribunal, in which the parties could be represented by counsel, was not to be public did not make the arbitration procedure offered an unreasonable alternative to domestic court proceedings either. It refers in this respect, mutatis mutandis, to its findings in the case of Gasparini (cited above), in which it had considered that the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention.'[1252]

This reference in *Klausecker* to *Gasparini* in the context of the jurisdictional immunity of international organisations is noteworthy.[1253] To begin with, *Gasparini*—which did not concern the issue of

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[1243] Ibid., para. 19.
[1244] Ibid., para. 20.
[1245] Ibid., para. 27.
[1246] Ibid., paras. 25-27.
[1247] Ibid., para. 26.
[1248] Ibid., para. 52.
[1249] Ibid., para. 67.
[1250] Ibid., para. 69.
[1251] Ibid., para. 71.
[1252] Ibid., para. 74 (emphasis added).
[1253] *Gasparini v. Italy and Belgium*, Decision of 12 May 2009, ECHR (App. no. 10750/03) (*Gasparini*).

immunity— is significant as it extended the application of a strand of ECtHR case law concerning state responsibility in the context of international organisations.[1254] *Klausecker* then further extended that application by referring to *Gasparini* specifically in the context of the jurisdictional immunity of international organisations.

The case arose out of a dispute between NATO and Gasparini, a NATO staff member, concerning an increase in NATO's pension levy. The NATO Appeals Board had dismissed the claim that the increase was unlawful. Gasparini subsequently sued Italy, his state of nationality, and Belgium, NATO's host state, before the ECtHR. Gasparini contended that these states had failed to ensure that NATO's internal dispute resolution mechanisms complied with the requirements of the ECHR. In the court's own summary,

> 'the applicant had expressly alleged that NATO's internal dispute resolution mechanism did not protect fundamental rights in a manner which was equivalent to that of protection under the Convention. The applicant had challenged certain intrinsic features of the system and the Court therefore had to ascertain whether the impugned dispute resolution mechanism, namely proceedings before the NATO Appeals Board, was "manifestly deficient", such as to rebut the presumption of compliance by the respondent States with their Convention obligations. However, the scrutiny exercised by the Court in order to determine whether the proceedings before the NATO Appeals Board, an organ of an international organisation having its own legal personality and not being a party to the Convention, were "manifestly deficient", would necessarily be less extensive than its scrutiny under Article 6 in respect of domestic proceedings in States that were parties to the Convention and thus bound by its provisions. The Court, in reality, had to ascertain whether the respondent States, at the time they joined NATO and transferred to it some of their sovereign powers, had been in a position, in good faith, to determine that NATO's internal dispute resolution mechanism did not flagrantly breach the provisions of the Convention.'[1255]

The Court in *Gasparini* declared the application inadmissible, considering that, as it would subsequently paraphrase in *Klausecker*, 'the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention'.[1256] This reference to 'manifest deficiency' is central to the reasoning in *Gasparini*, which is itself the culmination of several decisions by the ECtHR on the responsibility under the ECHR of states as member states of international organisations.[1257]

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[1254] For a critical assessment of *Gasparini* from the perspective of NATO, see Olson (2015).
[1255] Information Note on the Court's case-law No. 119, May 2009, *Gasparini v. Italy and Belgium* – 10750/03, Decision 12.5.2009 [Section II] (emphasis added).
[1256] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 74 (underlining added).
[1257] See generally T. Lock, 'Beyond "Bosphorus": The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', (2010) 10 *Human Rights Law Review* 529; C. Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations', (2011) 60 *International and Comparative Law Quarterly* 997.

This line of cases begins with *Bosphorus*[1258] which arose out of the impounding of an aircraft by Ireland on Irish territory in furtherance of a European Communities regulation, which was in turn based on a UNSC resolution. In the case against Ireland before the ECtHR, the Court held that as the aircraft was detained by Ireland on Irish territory, the applicant company fell under Irish jurisdiction in the sense of Article 1 of the ECHR. Whilst ECHR states parties are not prohibited from transferring sovereign power to international organisations, according to the ECtHR:

> 'State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . . By "equivalent" the Court means "comparable". . .
> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.'[1259]

In a parallel series of cases—*Behrami and Saramati*,[1260] *Boivin*[1261] and *Conolly*[1262]—the ECtHR declared the applications irreceivable for lack of involvement by the respondent states in the impugned act or omission by the relevant international organisation. However, in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij*,[1263] concerning an alleged violation of Article 6 of the ECHR by the European Community and the Netherlands, the ECtHR's reasoning rather converged towards its approach in *Bosphorus*. The involvement ('nexus') of the state (the Netherlands) in that case was tenuous. In *Gasparini*, the nexus between, on the one hand, Belgium and Italy, and, on the other, NATO's decision to increase the pension levy was altogether absent.

Returning to *Klausecker*, the ECtHR interlinked the 'reasonable alternative means' tests under *Waite and Kennedy* and the 'manifest deficiency' test under *Bosphorus*. *Klausecker* concerned not only the complaint that Germany had violated Article 6 of the ECHR due to its courts having upheld EPO's

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[1258] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment of 30 June 2005, [2005] ECHR (VI) (*Bosphorus*).
[1259] Ibid., paras. 155-156 (emphasis added). As to the 'interest of international cooperation', the Court recognised the "growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations". Ibid., para. 150.
[1260] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01) (*Behrami and Saramati*).
[1261] *Boivin v. 34 member States of the Council of Europe*, Decision of 9 September 2008, [2008] ECHR (IV) (*Boivin*).
[1262] *Connolly v. 15 Member States of the European Union*, Decision of 9 December 2008 (App. no. 73274/01) (*Connolly*).
[1263] *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*, Decision of 20 January 2009, [2009] ECHR (I) (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij*).

immunity from jurisdiction;[1264] it also concerned the complaint that EPO's internal appeal process and the process before the ILOAT were in breach of Article 6 of the ECHR.[1265]

On the first complaint, the Court considered whether the arbitration proceedings offered by the EPO qualified as 'reasonable alternative means' under the *Waite and Kennedy* test.[1266] The applicant argued that the arbitration proceedings did not include a public hearing. However, the Court concluded that the reasonable alternative means test was met. In this respect, the Court referred to *Gasparini,* in which

> 'it had considered that the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention.'[1267]

Regarding the second complaint, the Court also recalled, amongst others, *Gasparini*. It concluded that the EPO offered 'equivalent protection'.[1268] The Court then went on to state that it is

> 'therefore called upon to examine whether the fact that a candidate for a job is denied access to the procedures for review of the decision of the European Patent Office not to recruit him before the European Patent Office itself and before the Administrative Tribunal of the ILO, which is at issue in the present case, disclosed a manifest deficiency in the protection of human rights within the EPO.'[1269]

In conducting this examination, the Court referred to the *Waite and Kennedy* test with respect to immunity from jurisdiction. It then stated, with reference to its findings regarding the first complaint,

> 'that the limitations placed on the applicant's access to the German domestic courts had been proportionate to the legitimate aims pursued by the grant of immunity from jurisdiction to the EPO and the very essence of the applicant's right of access to court under Article 6 § 1 was not impaired. This finding was based, in particular, on the fact that the offer of arbitration made by the EPO to the applicant had made available to him a reasonable alternative means to have his complaint about the European Patent Office's decision examined on the merits (see paragraphs 68-74 above).
> . . . The Court considers that therefore, the fact that the applicant was denied access to the review procedures set up by the EPO, an international organisation with legal personality which is not a party to the Convention, in relation to the decision of the President of the European Patent Office not to recruit him, but was offered by the EPO an arbitration procedure to have the impugned act of the Office examined, a fortiori does not disclose a manifestly deficient protection of fundamental rights within the EPO.'[1270]

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[1264] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), paras. 44-77.
[1265] Ibid., paras. 78-107.
[1266] The issue was whether the applicant invoked a 'civil right' under Art. 6(1) of the ECHR as regards his recruitment to the civil service. The Court proceeded on the basis that Art. 6(1) of the ECHR applied. Ibid., para. 52.
[1267] Ibid., para. 74.
[1268] Ibid., para. 101.
[1269] Ibid., para. 101 (emphasis added).
[1270] Ibid., paras. 105-106. Arguably, the Court in *Klausecker* interlinked the tests under *Waite and Kennedy* and *Bosphorus* in a somewhat circular fashion. This is because, in applying the *Waite and Kennedy* test, the Court held that the arbitration proceedings offered qualified as 'reasonable alternative means', considering that the lack of publicity of the hearing did not render the proceedings 'manifestly deficient' in terms of *Bosphorus*. In turn, in applying the *Bosphorus* test, the Court held that the protection of fundamental rights was not manifestly deficient,

It may be concluded that alternative means qualify as 'reasonable' in terms of *Waite and Kennedy*, insofar as they are not 'manifestly deficient' in terms of *Bosphorus*.[1271]

Next, in *Kokashvili* the ECtHR once more found that the proportionality test was met as internal remedies had been available to the applicant of which she had failed to avail herself.[1272] This case arose out of Ms Kokashvili's termination of appointment with the OSCE. She challenged the termination before a Georgian court.[1273] The court awarded the claim, ordering, amongst others, her reinstatement.[1274] However, upon the intervention of the Georgian executive authorities, the enforcement of the judgment (which was not appealed) was discontinued. Before the ECtHR, the applicant complained about the executive authorities' failure to enforce the judgment. At the outset, the Court held that a complaint about such failure 'represents an aspect of the inability to exercise fully the right to a court, within the meaning of Article 6 § 1 of the Convention'.[1275]

Having referred to, amongst others, *Waite and Kennedy* and *Klausecker*, the ECtHR then concluded that 'the applicant could have filed her complaint about the forthcoming termination of her employment contract first with the OSCE's Internal Review Board and then, if need be, with that organisation's quasi-judicial body, the Panel of Adjudicators'.[1276] Thus, as 'the applicant had a reasonable alternative opportunity of having her dispute adjudicated internally within the OSCE's organisational setting . . . the very essence of the applicant's right of access to court under Article 6 § 1 of Convention was not impaired'.[1277] On that basis, the ECtHR rejected the application as manifestly ill-founded.[1278]

It is noted that appendix 8 to the OSCE's staff regulations, then in force,[1279] sets forth, in significant detail, the terms of reference of the panel of adjudicators. Amongst other things, it provides that a panel of adjudicators consists of three members (Article 1); members are appointed upon their nomination by participating OSCE states (Article 3); adjudicators must have competence and experience (Article 3) and be independent in their decision-making (Article 12). Significantly, the 'adjudication decisions . . .

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considering the offer of arbitration, which it had already concluded satisfied the reasonable alternative means test under *Waite and Kennedy*.

[1271] The ECtHR did not state that to be reasonable, alternative means must necessarily not be manifestly deficient. However, that seems to be implied, considering that the *Waite and Kennedy* test aims to ensure that the 'very essence' of the applicant's right of access to court under Art. 6 § 1 is not impaired. In other words, it would be difficult to conceive that alternative means could qualify as 'reasonable', thereby protecting the very essence of the right of access to court, if they were manifestly deficient for the protection of human rights.

[1272] *Kokashvili v. Georgia*, Decision of 1 December 2015, ECHR (App. no. 21110/03) (*Kokashvili*).

[1273] Ibid., para. 8.

[1274] Ibid., para. 11.

[1275] Ibid., para. 31.

[1276] Ibid., para. 37.

[1277] Ibid., para. 38.

[1278] Ibid., para. 39.

[1279] Ibid., para. 24: Decision No. 366, Amendment of the OSCE Staff Regulations, 20 July 2000.

shall be final, and binding within the OSCE. Each decision shall state the reasons on which it is based' (Article 20).[1280]

The *Waite and Kennedy-Bosphorus* test was more prominently at issue in proceedings against ESA, which led to a Dutch Supreme Court judgment in 2015, upholding ESA's jurisdictional immunity.[1281] The case arose out of the claim that ESA had denied the claimants an expatriation allowance on discriminatory grounds.[1282] The claimants—of which there were 103 in the Dutch court proceedings—were denied that allowance because they had been locally recruited. The claimants contended that this was discriminatory since they experienced the same personal and financial disadvantages as non-locally recruited staff, who did receive the expatriation allowance.[1283]

ESA's Appeals Board rejected the claim. The subsequent litigation before the Dutch courts, in three instances, was limited to the incidental proceedings concerning ESA's claim for immunity from jurisdiction. This turned largely on the adequacy of the Appeals Board and the proceedings before it, as 'reasonable alternative means' in the sense of *Waite and Kennedy*. The claimants argued that the reasonable alternative means test was not met in light of Article 6 of the ECHR.

In testing adequacy, the district court applied the test in *A.L.,* distinguishing four prongs: (1) whether the members of the Appeals Board are imminent persons with sufficient legal training and knowledge; (2) whether the board's members are independent in the discharge of their functions, and impartial; (3) whether the proceedings before the board are adversarial, and the parties are being heard and treaty equally; and (4) whether the board's decision is reasoned.[1284] The district court concluded that each of the prongs of the test was met and, therefore, that upholding the immunity did not contravene Article 6 of the ECHR.

On appeal, the Court of Appeal of The Hague affirmed the district court judgment, upholding ESA's immunity. As to the applicable legal test, the Court of Appeal held that the issue is not whether the alternative recourse provides the same level of protection, but whether that protection is 'comparable'. The key question, according to the court, was whether the essence of the 'right to a court' is impaired and whether the protection of the rights under the ECHR is 'manifestly deficient'. The court referred to *Waite and Kennedy* and other ECtHR case law, including *Bosphorus*. Of note, the Court of Appeal's

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[1280] Decision No. 366, Amendment of the OSCE Staff Regulations, appendix 8.
[1281] Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609 (*ESA expatriation allowance*).
[1282] Ibid., para. 3.1.
[1283] Ibid., para. 3.1. sub (vi).
[1284] As recalled in Court of Appeal The Hague 6 May 2014, ECLI:NL:GHDHA:2014:1762 (*ESA expatriation allowance*), para. 1.9.

judgment was rendered in May 2014 and thus predated *Klausecker*, in which the ECtHR had inter-linked *Bosphorus* and *Waite and Kennedy*.

The Court of Appeal did not address ESA's question as to whether under *Mothers of Srebrenica* it must decline to check the adequacy of the alternative means and uphold the immunity of ESA in any event.[1285] This is because the Court concluded that in fact reasonable alternative means were available.[1286] In this respect, upon a rather detailed and lengthy analysis, the Court of Appeal ruled that the appeals board and the proceedings before it did not impair the essence of the right of access to the courts, including when considering the various complaints regarding these proceedings in conjunction with one another and in light of the totality of the litigation.[1287] The appellants had submitted six grounds of appeal, contesting various aspects of the adequacy of the Appeals Board and the proceedings before it. The Court of Appeal dismissed each of these.[1288]

In its December 2015 judgment, the Supreme Court affirmed the Court of Appeal's judgment. As to the test regarding reasonable alternative means, with reference to *Waite and Kennedy* and *Klausecker*, the Supreme Court held that the Court of Appeal had not erred in law. It added that this conclusion is no different because the Court of Appeal had relied on the *Bosphorus* test ('comparable'), even though that case did not concern immunity from jurisdiction.[1289] According to the Supreme Court:

> 'the [Court of Appeal] apparently equated the criterion developed in [Bosphorus] with the criterion of impairing the essence of the right of access to a court, and subsequently evaluated the assertions of the claimants exclusively on the basis of the latter criterion'[1290]

In applying the reasonable alternative means test, the Supreme Court specifically examined the Court of Appeal's judgments regarding the Appeals Board's competence and its application of EU law. On the former issue, the Supreme Court held that the Court of Appeal's judgment was not tainted by a mistake of law or insufficient reasoning, as it appeared that the Court had examined the Appeal's Board's competence and considered it to be satisfactory.[1291] The Appeals Board decision confirms that the board dismissed the claims following a substantive assessment of the claimants' arguments to which end the Appeals Board manifestly found itself competent.[1292]

On the latter issue, the Supreme Court recalled that the Court of Appeal had ruled that even if the Appeals Board had wrongly applied EU law, this would not have impaired the essence of the rights

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[1285] Ibid., para. 2.2.
[1286] Ibid.
[1287] Ibid., para. 8.1.
[1288] Ibid., paras. 3.2-3.4, 4.2, 4.7, 5.3-5.8, 6.5, 7.2.
[1289] Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609 (*ESA expatriation allowance*), para. 3.3.3.
[1290] Ibid., para. 3.3.3 (present author's translation).
[1291] Ibid., para. 3.4.3.
[1292] Ibid., para. 3.4.3.

under Article 6 of the ECHR. The Supreme Court concurred with the Court of Appeal that even if the Appeals Board erred in applying EU law, ESA's immunity from jurisdiction applies.[1293]

On 20 January 2017, the Supreme Court rendered two judgments in cases against the EPO, each in favour of the organisation. The first case is not dissimilar to the case that led to the Supreme Court's aforementioned 2009 judgment,[1294] insofar as both arose out of a dispute concerning disability and both turned on the adequacy of ILOAT proceedings. The present case specifically concerned the length of ILOAT proceedings. Like the District Court, the Court of Appeal denied itself jurisdiction.[1295] In so doing, in terms of the adequacy of ILOAT proceedings, the Court of Appeal focussed on whether the essence of the right of access to court was impaired, respectively, whether the protection afforded to the complainant was manifestly deficient.[1296] The Court dismissed the challenge to the EPO's jurisdictional immunity considering the purported length of proceedings, taking into consideration the complexity of the matters at issue; the possibility of a 'fast-track procedure'; and the possibility, in certain cases, of provisional measures.[1297] In its 20 January 2017 judgment, the Supreme Court affirmed the Court of Appeal's judgment.[1298]

The litigation leading to the Supreme Court's second judgment on that date arose from an employment-related dispute with the EPO.[1299] In upholding the immunity of the international organisation, the Supreme Court overruled the Court of Appeal, which, like the interim relief judge in first instance, had rejected the EPO's claim to immunity from jurisdiction. The availability of alternative remedies in the context of immunity was once more key to the litigation.

The case arose out of a conflict between the EPO and two staff unions, who argued that the EPO's rules concerning the right to strike were unlawfully restrictive. The unions initiated summary proceedings against the EPO. In its February 2015 judgment, dismissing EPO's appeal in the incidental proceedings, The Hague Court of Appeal rejected the immunity. It proceeded to award the claims, including by ordering the EPO to revoke regulatory limitations on the right to strike.[1300] But for the Supreme Court

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[1293] Ibid., para. 3.5.3.
[1294] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*).
[1295] Supreme Court 20 January 2017, ECLI:NL:HR:2017:56 (*EPO disability II*), para. 3.2.2 and para. 3.2.3, respectively.
[1296] Court of Appeal The Hague 2 June 2015, ECLI:NL:GHDHA:2015:1245 (*EPO disability II*), para. 2.10.
[1297] Ibid., paras. 2.13-2.14.
[1298] Supreme Court 20 January 2017, ECLI:NL:HR:2017:56 (*EPO disability II*), para. 3.4.2.
[1299] Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*).
[1300] In the summary of the Supreme Court: 'Het hof heeft (i) EOO geboden om VEOB c.s. onbelemmerde toegang tot het e-mailsysteem van EOO te geven, (ii) EOO verboden om toepassing te geven aan art. 30a leden 2 en 10 van het Dienstreglement, en (iii) EOO geboden om VEOB c.s. toe te laten tot collectieve onderhandelingen.' Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*), para. 3.2.3. The Minister of Security and Justice precluded enforcement of the Court of Appeal's judgment by issuing a notification under Art. 3(a) of the Bailiff's Act, according to which enforcement would be in violation of the obligations of the

overruling the decision on immunity, the Court of Appeal's judgment would have had far-reaching consequences for EPO's independence.

The Court of Appeal's judgment warrants closer examination. Having considered *Waite and Kennedy* and *Klausecker*, the Court concluded—contrary to its previous judgments in *IUSCT abolition, IUSCT non-extension, EPO Restaurant de la Tour* and *EPO disability*—[1301] that the mere unavailability of alternative recourse does not mean that a violation of Article 6 of the ECHR must be assumed and that the immunity from jurisdiction must be set aside.[1302] Furthermore, in considering the issue of reasonable alternative means,[1303] the Court considered that the question is not whether the alternative means offer the same protection as Article 6 of the ECHR, but whether this protection is comparable. The Court found it to be decisive whether the limitation of access to the domestic court impairs the essence of the

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Kingdom of the Netherlands under international law. See generally C. Ryngaert and F. Pennings, 'Fundamentele Arbeidsrechten en Immuniteit', NJB 2015/859; Blokker (2015, 'Korte Reactie'); C. Ryngaert and F. Pennings, 'Korte Respons Op de Reactie van Niels Blokker', NJB 2015/1327.

[1301] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.5 ('Het hof is daarom van oordeel dat het door het Tribunaal gedane beroep op zijn immuniteit van jurisdictie slechts gehonoreerd kan worden als voor [geïntimeerde] voorzien was in een alternatieve rechtsgang voor de beslechting van het door haar opgeworpen geschil waarvan zij gebruik kon maken.'); Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 15 ('Uit de eerdergenoemde beslissing van het EHRM in de zaak Waite en Kennedy/Duitsland blijkt dat een alternatieve rechtsgang beschikbaar moet zijn'. Underlining added); Court of Appeal (summary proceedings) The Hague 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour*), para. 12 ('Anders dan EPO heeft betoogd kan deze immuniteit echter niet zonder meer met zich brengen dat Restour daarmee iedere toegang tot de rechter moet worden ontzegd. Weliswaar is het in artikel 6 EVRM gewaarborgde recht op toegang tot een onafhankelijk en onpartijdig gerecht niet absoluut en kan dit recht aan beperkingen worden onderworpen, maar die beperkingen dienen proportioneel te zijn ten opzichte van het nagestreefde doel en zij mogen niet zover gaan dat daardoor het wezen van het recht op rechterlijke toegang wordt aangetast, bijvoorbeeld indien de belanghebbende geen redelijk alternatief voor het effectief inroepen van zijn rechten onder het EVRM ter beschikking staat.' [emphasis added]); Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO Disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.' [emphasis added]).

[1302] Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), para. 3.4 ('Dit betekent dat, zoals EOO terecht betoogt, het enkele feit dat een alternatieve rechtsgang ontbreekt, niet betekent dat een schending van art. 6 EVRM moet worden aangenomen en dat de immuniteit van jurisdictie moet worden doorbroken. Dit laatste heeft de voorzieningenrechter echter ook niet aangenomen.'). Contrary to the Court of Appeal's interpretation of the District Court's judgment in first instance, however, it is submitted that the latter judgment does in fact suggest that the immunity was rejected for lack of reasonable alternative means. See District Court The Hague (summary proceedings) 14 January 2014, ECLI:NL:RBDHA:2014:420 *(EPO unions)*, para. 3.6 ('In het kader van de beoordeling van de proportionaliteit is voorts van belang of aan de VEOB en SUEPO alternatieve rechtsmiddelen ter beschikking staan die hun recht op toegang tot de rechter effectief beschermen. Naar het oordeel van de voorzieningenrechter is dat niet het geval. Hoewel tegen beslissingen van (organen van) de Octrooiorganisatie de rechtsgang bij ILOAT bestaat, staat die rechtsgang enkel open voor individuele (ex)werknemers van de Octrooiorganisatie (zie artikel 13 EOV en de geschillenregeling in het Dienstreglement). Dat de VEOB en SUEPO de belangen van die individuele werknemers vertegenwoordigen en dat de toetsing van algemeen beleid mogelijk is via een individueel geval, laat onverlet dat voor de VEOB en SUEPO zelf geen directe toegang tot de rechter bestaat . . . Een en ander leidt ertoe dat het beroep van de Octrooiorganisatie op immuniteit van jurisdictie wordt verworpen.' [emphasis added]).

[1303] The Court of Appeals referred to the ECtHR's ruling *Bosphorus*, but it did not refer to the ECtHR's decision in *Klausecker*, rendered the previous month.

right to a court, or whether the protection of the rights under the ECHR is manifestly deficient.[1304] In so doing, the Court appears to have equated the test regarding 'essence of the right' with that regarding 'manifest deficiency', that is, where there is a manifest deficiency in the protection of a human right, the essence of that right is impaired.

The Court of Appeal then turned to apply the law to the facts before it. It held that, whilst the immunity must not necessarily be set aside in the absence of alternative remedies, this was nonetheless warranted. This is because of 'additional circumstances': at issue were the right of labour unions to collectively hold actions and conduct negotiations. The unions lacked standing before the ILOAT and could not avail of any alternative recourse provided by EPO. The ability for individual employees to complain internally within EPO and, subsequently, to the ILOAT of a violation of their right to strike did not amount to an effective remedy given the collective nature of that right. According to the Court of Appeal, the protection of the rights under the ECHR was therefore manifestly deficient.[1305] In essence, therefore, using the *Waite and Kennedy* proportionality test, the Court of Appeal balanced the right to immunity against the right of access to court, prioritising the latter.

The Supreme Court reversed the Court of Appeal's judgment. It considered the key issue to be whether—in terms of proportionality—there were reasonable alternatives to protect the rights of the unions under Article 11(1) of the ECHR,[1306] insofar as there were alternative means for the unions' *members* to vindicate the rights protected under that provision.[1307] The Supreme Court concluded that it

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[1304] Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), para. 3.6 ('Doorslaggevend is of de beperking in de toegang tot de nationale rechter "the essence of their "right to a court" ("la substance même du droit") aantast, of dat de bescherming van de door het EVRM gewaarborgde rechten "manifestly deficient" is.').

[1305] Ibid., para. 3.7 ('Anders dan EOO betoogt oordeelt het hof dat in dit geval de bescherming van de door het EVRM gewaarborgde rechten manifestly deficient is. Niet in geschil is immers dat VEOB c.s. voor hun onderhavige vorderingen geen rechtsingang hebben bij ILOAT noch in enige andere door EOO opengestelde rechtsgang.); para. 3.10 ('Zoals hiervoor is aangestipt, betekent het enkele feit dat een alternatieve rechtsgang ontbreekt niet dat een schending van art. 6 EVRM moet worden aangenomen en dat de immuniteit van jurisdictie moet worden doorbroken. Het hof is echter van oordeel dat er bijkomende omstandigheden zijn waardoor daar in het onderhavige geval wel aanleiding voor is. Het gaat in deze zaak immers om de rechten van vakbonden op het voeren van collectieve actie en collectieve onderhandelingen, dat wil zeggen om rechten die behoren tot de fundamentele beginselen van een open en democratische rechtsstaat en die erkenning hebben gevonden in meerdere (hiervoor genoemde) verdragen. De stellingen van VEOB c.s. houden bovendien in dat deze rechten door EOO stelselmatig en op vergaande wijze worden geschonden, doordat het recht op staking op ontoelaatbare wijze wordt ingeperkt en VEOB c.s. het recht om deel te nemen aan collectieve onderhandelingen geheel wordt ontzegd, hoewel zij voldoende representatief zijn. Van deze stellingen kan in ieder geval niet gezegd worden dat zij *prima facie* ongegrond zijn. Dit betekent dat het beroep van EOO op de haar verleende immuniteit van jurisdictie disproportioneel is. De Nederlandse rechter is dan ook in dit geval bevoegd van de vorderingen van VEOB c.s. kennis te nemen, hetgeen ook kan betekenen dat die rechter beslissingen neemt die gevolgen hebben voor de organisatie van EOO.' [emphasis added]).

[1306] 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'

[1307] Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*), para. 5.4.

does not necessarily result from the right to form and join trade unions that such unions are themselves entitled to access to court.[1308]

As discussed below, this illustrates the important point that for there to be a violation of Article 6 of the ECHR, there must first be a right of access to court (involving the determination of 'civil rights'). Having recalled, in particular, ECHR case law on Article 11 of the ECHR and the ECtHR's rulings in *Waite and Kennedy*, *Mothers of Srebrenica* and *Klausecker*, the Supreme Court found that the individual recourse available to union members—namely, internal recourse within EPO and access to ILOAT—presented a sufficiently reasonable alternative.[1309]

Lastly, the issue of reasonable alternative means is central to the litigation between Supreme (which is the joint indication of three foreign companies), and JFCB and SHAPE (which are NATO-entities). To recall, the District Court of Limburg had rejected the respondents' immunity, but its judgment was set aside by the Court of Appeal of 's-Hertogenbosch.

On the basis of the first instance and appeal judgments, the background to the dispute may briefly be described as follows. JFCB, on behalf of SHAPE and for the benefit of ISAF troop-contributing states, entered into two so-called basic fuel ordering agreements with Supreme ('BOAs') in 2006 and 2007.[1310] According to the BOAs, amongst others: invoices were to be settled retroactively by the relevant states; JFCB was to seek resolution in case of any unpaid invoices within a thirty-day time-period; and under at least one of the BOAs,[1311] JFCB was to assume liability for unpaid invoices.[1312] Furthermore, JFCB itself also procured fuel from Supreme, for which it paid from a communal NATO budget.[1313] The BOAs were governed by Dutch law and they did not include a dispute settlement clause.[1314]

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[1308] Ibid., para. 5.6.
[1309] Ibid., para. 5.8. The Supreme Court explicitly added that this is the case even though the available protection falls short of the standard under domestic law. Furthermore, insofar as the union's claims were based on the right of 'collective negotiation', the Supreme Court rejected these along similar lines. Ibid., para. 5.9. In parallel to this case, following Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), the controversy between EPO and the unions led to further litigation. This arose out of various investigations into alleged misconduct by board members of the unions, which the EPO started following the Court of Appeal's judgment. The unions sued the EPO once more in summary proceedings before the District Court of The Hague, seeking various orders with respect to the investigations, including to appoint an external and independent expert to scrutinise the investigations, and to suspend the investigations meanwhile. The District Court denied itself jurisdiction considering, amongst others, that individual staff members had recourse to the ILOAT. See District Court The Hague (summary proceedings) 5 August 2016, ECLI:NL:RBDHA:2016:9444 (*EPO unions II*), para. 4.5. The ruling was affirmed in Court of Appeal The Hague (summary proceedings) 7 March 2017, ECLI:NL:GHDHA:2017:445 (*EPO unions II*), noting Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*).
[1310] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 2.8.
[1311] Ibid., para. 2.9, see Art. 17.5 of the Herat BOA.
[1312] Ibid., para. 2.9.
[1313] Ibid., para. 2.10.
[1314] Ibid.

In addition to the BOAs, JFCB and Supreme entered into an escrow agreement in 2013. On the basis of this agreement, any residual claims on the basis of the BOAs could be submitted to a Release of Funds Working Group ('RFWG'), composed of representatives of JFCB and SHAPE. Any claims verified by the RFWG were to be paid from the escrow account.[1315] Moreover, in connection with alleged fraud on the part of the group of companies of which Supreme forms part,[1316] in 2015, Supreme and JFCB conducted discussions about claims by Supreme. These discussions, which did not yield results, were led by an agency of the US Ministry of Defence.[1317]

In the incidental proceedings in which the respondents claimed immunity from jurisdiction, the availability of alternative means was at issue. The District Court, upon concluding that NATO's functional immunity was engaged, went on to consider whether such means were available to the claimants under the *Waite and Kennedy* test.[1318] The defendants had argued that the escrow agreement and the RFWG established thereunder, as well as the US-led discussions qualified as such means.[1319] However, according to the District Court:

> 'Reasonable alternative means need not necessarily amount to independent judicial recourse. What matters is the following: 1) its members are eminent persons with sufficient legal training and/or knowledge, 2) they are independent and impartial in the performance of their tasks, 3) the proceedings are adversarial, the principle 'audi alteram partem' applies and, procedurally, the parties are treated equally, 4) the decision is reasoned.'[1320]

Resembling the analysis by the ECtHR in *A.L.*, this test appears to correspond to an assessment as to whether the first step under the *Waite and Kennedy-Bosphorus* test is met. That is, the Court was arguably exploring whether an 'equivalent', or 'comparable', protection of ECHR rights was available to the complainants.

The District Court concluded that there were no such reasonable alternative means, there being no contractually agreed dispute settlement clause in connection with the supply of goods and services in point (contrary to another such agreement entered into by the respondents).[1321] More specifically, as to the escrow account and the RFWG, the defendants had not contended that the court's aforementioned first criteria (imminence/expertise) and fourth criteria (reasoned decision) were met. As to the second criterion (independence and impartiality), importantly, the Court found that it had not been met as all members of the working group were linked to the respondents. The Court deemed that the third criterion

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[1315] Ibid., para. 2.11.
[1316] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.1.11.
[1317] Ibid; District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 2.12.
[1318] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.33.
[1319] Ibid., para. 4.35.
[1320] Ibid., para. 4.34 (present author's translation).
[1321] Ibid., para. 4.33.

(adversarial nature of the proceedings and procedural equality) was equally not met as the RFWG did not comply with the requirements of a reasonable alternative procedure.[1322]

As to the settlement discussions, the District Court found that as they were internal to the US ministry of defence (more precisely, they were led by an agency of the US defence ministry[1323]), they lacked objective legal safeguards. The respondents having failed to substantiate their position in this respect, according to the court, these discussions could not qualify as reasonable alternative means.[1324] Lastly, the respondents contended that the claimants had failed to seek recourse from the NATO member states. Be that as it may, according to the District Court, this did not preclude the claimants from seeking payment from the respondents.[1325]

For these reasons, the District Court found that the respondents' jurisdictional immunity would contravene the claimants' right to a fair trial under Article 6 of the ECHR.[1326] The Court therefore upheld its own jurisdiction to decide the dispute, though it suspended consideration of the merits and allowed for interlocutory appeal in view of the principled matters at issue.[1327] In essence, therefore, the absence of reasonable alternative means led the District Court to set aside the immunity, there being an unacceptable breach of the right to a 'fair trial'.[1328]

The Court of Appeal of 's-Hertogenbosch reversed the District Court's judgment in the incidental proceedings.[1329] It found that there is no balancing of interests (that is, jurisdictional immunity v. access to court).[1330] This notwithstanding, the Court continued to address the issue of reasonable alternative means. To begin with, the Court considered that Supreme had insufficiently contested that it could hold the individual states in ISAF liable, notwithstanding that this would possibly involve a broad range of

[1322] Ibid., para. 4.36.
[1323] Ibid., para. 2.12.
[1324] Ibid., para. 4.3.7.
[1325] Ibid., paras. 4.39-4.40.
[1326] Ibid., para. 4.41.
[1327] Ibid., para. 4.42.
[1328] Ibid., para. 4.33 ('Het ontbreken van een geschilbeslechtingsmechanisme in de BOA's Herat en Kandahar, terwijl in een vergelijkbare BOA die met andere leverancier is afgesloten een beroep op de International Chamber of Commerce is overeengekomen, maakt de claim van een ontoelaatbare schending van het recht op een fair trial dan ook gerechtvaardigd, tenzij moet worden geoordeeld dat de alternatieven die Supreme ter beschikking staan, voldoen aan de standaard in het Waite en Kennedy-arrest: er moet sprake zijn van "reasonable means to protect effectively the rights".').
[1329] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*).
[1330] Ibid., para. 6.7.10. The Supreme Court reversed the Court of Appeal's judgment on this point. Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (*Supreme*), para. 3.2.4.

legal proceedings.[1331] In this respect, it is recalled that according to the BOAs, invoices were to be settled retroactively by the relevant states.[1332]

Furthermore, the Court of Appeal held that the agreed RFWG process does represent 'reasonable alternative means'.[1333] In its judgment of 24 December 2021, upholding the respondents' jurisdictional immunity, the Supreme Court affirmed the Court of Appeal's judgment on this point.[1334] However, that is problematic insofar as the RFWG process arguably does not conform to the 'essence' of the rights under Article 6 of the ECHR as per the *Waite and Kennedy-Bosphorus* test. As seen, the District Court applied a four-pronged test inspired by ECtHR case law. One of the concerns identified by the District Court, and arguably the main one, is that all RFWG members are linked to the respondents—that is difficult to reconcile with the core requirements of independence and impartiality under Article 6 of the ECHR.

The requirements of independence and impartiality may be said to be institutional in nature.[1335] The requirements of fairness, publicity and timeliness under Article 6 of the ECHR may be said to be procedural in nature.[1336] Under ECtHR case law, 'independence' and 'impartiality' are closely linked concepts, which in the circumstances may require joint examination.[1337]

As to the concept of independence, the ECtHR's Guide on Article 6 of the ECHR states the following:

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[1331] Ibid., para. 6.8.1. As to direct claims against JFCB and Shape, the Court of Appeal considered that these entities may qualify as agents of the underlying states, and that it is the states who remain ultimately liable for any debt towards Supreme. Ibid., para. 6.8.2. See also subsection 4.3.3.
[1332] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002, para. 2.9.
[1333] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.3. ('Het hof vermag niet in te zien waarom een dergelijke vrijwillig aangegane nadere afspraak, gezien de ter zake in het Nederlands recht getroffen wettelijke regelingen, geen "redelijk alternatief" zou vormen.').
[1334] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (Supreme), para. 3.3.2 ('Naar het oordeel van het hof is met dit afwikkelingsmechanisme in beginsel al sprake van een redelijk alternatief, en voert het te ver om thans reeds de vraag te beantwoorden of na het doorlopen van het redelijk alternatief in alle gevallen – dus onafhankelijk van de uiteindelijke uitkomst daarvan en van de wijze waarop de RFWG zich heeft laten informeren en debat heeft toegestaan – een beroep op immuniteit van jurisdictie kan worden gedaan. Die vraag zal naar het oordeel van het hof eerst kunnen worden beoordeeld na het doorlopen van de alternatieve "procedure" met inachtneming van de alsdan beschikbare informatie over de gevolgde procedure en over de door de RFWG genomen beslissingen. Dit oordeel moet aldus worden begrepen dat (i) het tussen Supreme, SHAPE en JFCB overeengekomen en in de escrow-overeenkomst neergelegde financiële afwikkelingsmechanisme – in het licht van de ten tijde van de uitspraak van het hof beschikbare informatie – als een redelijk alternatief middel ter bescherming van de door het EVRM toegekende rechten kan worden aangemerkt, en (ii) als op een later moment de procedure bij de RFWG is doorlopen – en daardoor meer informatie beschikbaar is over de wijze waarop de RFWG zich heeft laten informeren en debat heeft toegestaan – de vraag of sprake is van een redelijk alternatief middel wederom aan de rechter kan worden voorgelegd. Dit oordeel getuigt niet van een onjuiste rechtsopvatting en is niet onvoldoende gemotiveerd gelet op hetgeen partijen in de processtukken hebben aangevoerd over de werkwijze van de RFWG.').
[1335] Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), Chapter III.
[1336] Ibid., Chapter IV.
[1337] Ibid., para. 208.

> 'The term "independent" refers to independence vis-à-vis the other powers (the executive and the Parliament) (Beaumartin v. France, § 38) and also vis-à-vis the parties (Sramek v. Austria, § 42). Compliance with this requirement is assessed, in particular, on the basis of statutory criteria, such as the manner of appointment of the members of the tribunal and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures (see, for example, Ramos Nunes de Carvalho e Sá v. Portugal [GC], §§ 153-156). The question whether the body presents an appearance of independence is also of relevance (*ibid*., § 144; Oleksandr Volkov v. Ukraine, § 103).'[1338]

As to the concept of impartiality, under ECtHR case law it is normally understood to denote the absence of prejudice or bias. According to the ECtHR's Guide on Article 6:

> 'The existence of impartiality must be determined on the basis of the following (Micallef v. Malta [GC], § 93; Nicholas v. Cyprus, § 49):
> i. a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also
> ii. an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.'[1339]

Returning to *Supreme*, as all RFWG participants were internal to JFCB and SHAPE, it is difficult to see how the working group would satisfy these institutional requirements under Article 6 of the ECHR. In the result, it is doubtful that the immunity of SHAPE and AJF could be reconciled with *Supreme*'s rights under Article 6 of the ECHR on account of the availability of alternative recourse. (But, as discussed below, there may be grounds that nonetheless warrant the immunity prevailing over the rights under Article 6 of the ECHR.)

#### 4.3.2.1 Interim conclusions

Whilst the lower courts have on occasion rejected the immunity, the Supreme Court has upheld the immunity of international organisations in all nine cases before it (as identified in this study), starting with *Spaans v. IUSCT* in 1985. The Supreme Court so decided on the basis that reasonable alternative means were available to the claimants (except in *Mothers of Srebrenica*, which is discussed below).[1340] Likewise, the jurisdictional immunity of international organisations has without exception prevailed in all nine cases before the ECtHR (as identified in this study), starting with its landmark judgment in *Waite and Kennedy* in 1999. In each of these cases (again, bar *Mothers of Srebrenica*), the ECtHR concluded that reasonable alternative means were available.

The test for determining whether alternative means qualify as 'reasonable' has crystalised in ECtHR case law, starting with *Bosphorus* and culminating in *Gasparini*. The question is whether the

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[1338] Ibid., para. 213.
[1339] Ibid., para. 234.
[1340] As well as Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), where the issue did no arise as it concerned a criminal case.

international organisation protects fundamental rights in a manner that is at least 'equivalent' or 'comparable' to that provided under Article 6 of the ECHR. If so, it will be presumed that there is no violation of the ECHR, but that presumption can be rebutted if the claimant establishes that the protection of Convention rights is 'manifestly deficient'.

In *Klausecker*, the ECtHR interlinked the *Bosphorus* test with the *Waite and Kennedy* test concerning the immunity from jurisdiction of international organisations. As a result, insofar as 'alternative means' meet the *Waite and Kennedy-Bosphorus* test, they qualify as 'reasonable'. Such means allow to 'effectively protect' the rights under Article 6(1) of the ECHR,[1341] that is, the limitation on access to court is not disproportionate and the essence of the rights thereunder is not impaired.

In none of the cases before them did the ECtHR and Supreme Court accept challenges to the adequacy, or 'reasonableness', of alternative means. The alternative means that have withstood judicial scrutiny include proceedings before the following bodies: the ESA Appeals Board; the NATO Appeals Board; the ILOAT; an *ad hoc* arbitration tribunal; and the OSCE panel of adjudicators.[1342]

Of note, the decisions by the ECtHR and the Supreme Court discussed in this subsection all concern employment-related disputes. Such disputes can be distinguished from two other types of cases between third non-state parties and international organisations: contractual disputes; and disputes concerning the acts and omissions of international organisations (i.e., non-contractual, or tortious, liability).[1343] There is no legal reason, however, why the *Waite and Kennedy-Bosphorus* test would not guide the assessment of the availability of reasonable alternative means in those other types of cases. Indeed, the reasoning of the Court of Appeal in *Supreme*, which in essence concerns a commercial contractual dispute, illustrates that the application of the test is not as such problematic.[1344]

The cases discussed in this subsection all turned on the availability of 'reasonable alternative means'. Without such means, how could the 'very essence' of the rights under Article 6(1) of the ECHR be

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[1341] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 68.

[1342] But see *Perez v. Germany*, Decision of 6 January 2015, ECHR (App. no. 15521/08). In deciding that the application was inadmissible for failure to exhaust local remedies, the Court was critical of the adequacy of the UN's staff dispute machinery prior to the 2007 overhaul. Ibid., para. 66.

[1343] Cf. Advisory Committee on Issues of Public International Law, 'Advisory Report on Responsibility of International Organisations' (No. 27, 2015), para 2.3. The Committee noted that 'cases concerning the working conditions of the staff of an international organisation are different from cases involving, say, claims by surviving dependants for reparation for the consequences of acts or omissions of an organisation in an armed conflict.' Ibid., at 8.

[1344] As will be seen next, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), notwithstanding ambiguities in the Court's reasoning, further illustrates the application of the balancing test under *Waite and Kennedy* to a non-employment dispute.

protected, such that they are 'practical and effective'?[1345] That question was brought to the fore in *Mothers of Srebrenica*, which is the only case before the ECtHR concerning the jurisdictional immunity of international organisations were there where no such means.

### 4.3.3 Absence of reasonable alternative means: *Mothers of Srebrenica*

The Srebrenica genocide is central to several international and domestic cases before courts in The Hague.[1346] In one such case, as seen, the Stichting Mothers of Srebrenica Association and ten relatives of genocide victims sued the UN and the state of the Netherlands before the Dutch courts in connection with Dutchbat's failure to prevent the fall of the 'safe area' of Srebrenica.[1347]

The case on the merits was stayed pending incidental proceedings concerning the UN's immunity from jurisdiction. The courts never ruled on the merits of the case against the UN because, in April 2012, the Supreme Court upheld the judgment of The Hague Court of Appeal according to which the United Nations enjoyed immunity from jurisdiction.[1348] According to the Supreme Court: 'That immunity is absolute'.[1349]

The Stichting Mothers of Srebrenica and the other claimants then lodged a complaint against the Netherlands to the ECtHR, claiming that the state—due to its courts having denied themselves jurisdiction in the case against the UN—had contravened Article 6 of the ECHR. In a decision dated 11 June 2013, the ECtHR declared the application inadmissible, without having heard the parties.[1350]

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[1345] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67 (emphasis added).
[1346] See also, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43; *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, ICTY.
[1347] In the summary of the ECtHR: 'The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (onrechtmatige daad) against them by sending insufficiently-armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.' *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 55.
[1348] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*); Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*).
[1349] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.6.
[1350] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*). The claimants also contended that the Netherlands had violated Art. 13 of the ECHR, essentially 'seeking to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the United Nations, which, given that the United Nations had been granted absolute immunity, amounted to an attempt by the

According to the ECtHR in *Mothers of Srebrenica*:

> 'The General Assembly of the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution A/RES/60/147, 16 December 2005) reiterate a "right to a remedy for victims of violations of international human rights law" found in a variety of international instruments. In so doing they refer to, among other things, Article 13 of the Convention (cited in the preamble). They are addressed to States, which are enjoined to take appropriate action and create the necessary procedures. In so doing, however, they state a right of access to justice as provided for under existing international law (see, in particular, paragraphs VIII, "Access to justice", and XII, "Non-derogation").
> . . The only international instrument on which individuals could base a right to a remedy against the United Nations in relation to the acts and omissions of UNPROFOR is the Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina of 15 May 1993, 1722 United Nations Treaty Series (UNTS) 77, which in its Article 48 requires that a claims commission be set up for that purpose. However, it would appear that this has not been done.
> . . . As the applicants rightly point out, in Waite and Kennedy (cited above, § 68) – as in Beer and Regan (cited above, § 58) – the Court considered it a "material factor" in determining whether granting an international organisation immunity from domestic jurisdiction was permissible under the Convention whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. In the present case there is no doubt that such an alternative means existed neither under Netherlands domestic law nor under the law of the United Nations.'[1351]

The Supreme Court had held:

> 'Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.'[1352]

As to the Court of Appeal, it noted that 'it has been admitted between the parties' that the UN failed to implement Section 29(a) of the General Convention.[1353] This notwithstanding, according to the Court of Appeal,

> 'it has not been established for a fact that the Association et al. have no access whatsoever to a court of law with regard to what happened in Srebrenica. In the first place it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR. If the Association et al. have omitted this

State to evade its accountability towards the applicants altogether.' Ibid., para. 166. However, according to the Court this would have required it to prejudge the outcome of the case on the merits against the Netherlands before the Dutch courts. Ibid, paras. 166–168 and 176–178. Separately, the ECtHR rejected the claim by the first claimant, Stichting Mothers of Srebrenica, for lack of standing *ratione personae*. Ibid., para. 117.

[1351] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 161-163 (emphasis added). The Supreme Court's Procurator General concluded that the UNPROFOR Sofa provides for an alternative dispute settlement mechanism, involving the setting up of a claims commission. Supreme Court Procurator General 27 January 2012, ECLI:NL:PHR:2012:BW1999 (*Mothers of Srebrenica*), para. 2.25. The Procurator General appears to have deemed this to satisfy the reasonable alternative means test under *Waite and Kennedy*, though he left aside whether the victims of the fall of Srebrenica had had sufficient opportunity to avail themselves of this mechanism.

[1352] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3.

[1353] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.11.

> because the persons liable cannot be found or have insufficient assets for compensation, the Court of Appeal observes that article 6 ECHR does not guarantee that whoever wants to bring an action will always find a (solvent) debtor.
> . . . Secondly, to the Association et al. the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open. This course has indeed been taken by the Association et al The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway. This will be no different if in that case, as the Association et al. say they expect . . . the State argues that its actions in Srebrenica must strictly be imputed to the UN. Even if this defence is put forward . . . a court of law will fully deal with the claim of the Association et al. anyway, so that the Association et al. do have access to an independent court of law.
> . . . The above implies that it cannot be said in this case that the right of access to a court of law of the Association et al. is violated if the UN's invocation of immunity from prosecution is allowed.'[1354]

As to the perpetrators of the genocide, several have been found guilty.[1355] Criminal liability may expose the perpetrators to civil liability. As to the State of the Netherlands, the claimants in *Mothers of Srebrenica* did in fact sue it as a co-respondent alongside the UN. In 2019, the Supreme Court, in final instance, found the State to be liable.[1356] Therefore, it is true, as the Court of Appeal in the immunity proceedings put it, that the claimants had access 'to a court of law with regard to what happened in Srebrenica.' But that does not correspond to the test under *Waite and Kennedy*. That test is rather 'whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.'[1357]

Suing the perpetrators of the Srebrenica genocide arguably does not meet that test. It is recalled that in *Osman*, the ECtHR opined that suing the victim's killer, or the psychiatrist who had assessed the killer, did not qualify as adequate alternatives to suing the police in negligence. That negligence is different from the alleged actions or omissions of the killer and the psychiatrist, respectively. By the same token, in *Mothers of Srebrenica*, suing the perpetrators of the genocide arguably would not qualify as reasonable alternative means to protect effectively their rights under Article 6(1) with respect to actions and omissions imputed to the UN. This is because those actions and omissions are different: whereas the perpetrators *committed* genocide, the UN allegedly *failed to prevent* genocide.

That failure was also imputed to the State of the Netherlands. Yet, suing the State arguably neither meets the *Waite and Kennedy* test of 'reasonable alternative means'. This is because, as the Supreme Court held in the case on the merits against the State, the actions and inactions of Dutchbat are attributable to the UN and the State, respectively, during *different time periods*. The State of the Netherlands came to exercise effective control over Dutchbat on 11 July 1995 at 23:00 hours—after the fall of Srebrenica—

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[1354] Ibid., paras. 5.11-5.13 (emphasis added).
[1355] See, e.g., *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, ICTY.
[1356] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*).
[1357] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 68.

such that Dutchbat's actions and inactions from then on only are attributable to the State. Previously during the events at Srebrenica, the UN exercised command and control over Dutchbat, without the State exercising effective control.[1358] As a consequence, according to the Supreme Court, the State cannot be held liable for the fact that Dutchbat was unable to prevent the conquest of Srebrenica by the Bosnian Serbs.[1359] By the same token, the implication is that the UN could not be held liable for actions and inactions on the part of Dutchbat from the moment the State exercised effective control over Dutchbat.

In other words, according to the Supreme Court, the liability of the State and the UN did not coincide.[1360] As a result, litigation against the former cannot qualify as reasonable alternative means to protect effectively the claimants' right under Article 6(1) of the ECHR with respect to the actions and inactions of the latter.[1361] Indeed, as seen, the ECtHR in *Mothers of Srebrenica* stated unambiguously: 'In the present case there is no doubt that [reasonable alternative means to protect effectively their rights under the Convention] existed neither under Netherlands domestic law nor under the law of the United Nations.'[1362]

This notwithstanding, the ECtHR and the Supreme Court, like the Supreme Court's Advocate General and the lower Dutch courts, all concluded that the UN´s immunity prevailed over the claimants' right of

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[1358] For a critical appraisal, see T. Dannenbaum, 'A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands' (*EJIL: Talk!*, 2019) <ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/> accessed 21 December 2021('The power-to-prevent standard . . . recognizes the levers of control retained by the state in peacekeeping operations (troop selection and promotion, training, disciplinary authority, and criminal jurisdiction) as necessarily relevant to the attribution of wrongful conduct by its troops. It attributes wrongs to the actor(s) holding the levers of control relevant to preventing those wrongs.').

[1359] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*), para. 5.1 ('De Staat kan niet aansprakelijk worden gehouden voor het feit dat Dutchbat de verovering van Srebrenica door de Bosnische Serven niet heeft kunnen voorkomen.'). During the time-period when Dutchbat's actions and inactions were attributable to the State, the Supreme Court found it liable in connection with one specific event: the evacuation of about 350 Bosnian Muslim men from the Dutchbat compound in the afternoon of 13 July 1995. More specifically, it found that the failure to offer these men the option to stay at the compound was unlawful. The Supreme Court estimated that the men would have had a 10% chance of staying out of the hands of the Bosnian Serbs. Accordingly, the Court limited the State's liability to 10% of the damage suffered by the survivors.

[1360] An alternative approach would be to consider the matter from the perspective of 'shared responsibility'. See generally A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in *The Practice of Shared Responsibility in International Law* (2017), at 3 ('we use the concept of shared responsibility to refer to situations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.'), and at 8 ('In the context of the genocide in Srebrenica, there is merit in seeing the responsibility of Serbia, the United Nations, the Netherlands and possibly other states, General Mladić, and other individual perpetrators in their mutual relationship – and each actor in that relationship can be appraised in legal terms').

[1361] It is here that the case may differ from that of *Supreme*. Whilst JFCB and SHAPE enjoy jurisdictional immunity, the states participating in ISAF were ultimately liable towards Supreme, such that litigation against those states could conceivably qualify as reasonable alternative means to protect effectively Supreme's right under Art. 6(1) of the ECHR. Cf. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.1.

[1362] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 163.

access to court. However, the Dutch opinions were starkly divided as to the legal grounds on which the UN's immunity prevailed. On the one hand, the Court of Appeal (like the Advocate General of the Supreme Court) applied the balancing test under the ECtHR's *Waite and Kennedy* judgment, holding that reasonable alternative means were available. On the other, the Supreme Court held that *Waite and Kennedy* did not apply. Instead, the Supreme Court seems to have upheld the UN's immunity on the basis of the priority rule under Article 103 of the UN Charter. As for the ECtHR, its judgment in *Mothers of Srebrenica* is ambiguous regarding the application of *Waite and Kennedy* and Article 103 of the UN Charter.

The purpose of the following is to highlight those aspects of the *Mothers of Srebrenica* case that are relevant in the broader context of this study.[1363]

#### 4.3.3.1 Immunity from jurisdiction, access to court and reasonable alternative means

Following its conclusion that there were no reasonable alternative means, the ECtHR in *Mothers of Srebrenica* held:

> 'It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), § 101). As regards international organisations, this Court's judgments in Waite and Kennedy and Beer and Regan cannot be interpreted in such absolute terms either.'[1364]

The issue considered here by the ECtHR, therefore, was whether jurisdictional immunity without an alternative remedy inevitably results in a violation of Article 6(1) of the ECHR. The Court concluded that that is not the case. In reaching that conclusion, the Court relied on the ICJ´s judgment in

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[1363] See the aforementioned publications by the present author for a more detailed discussion of the cases before the Dutch courts and the ECtHR. Following the *Mothers of Srebrenica* litigation, the UN's immunity was at issue in another case before the District Court of The Hague. See District Court The Hague 5 November 2014, ECLI:NL:RBDHA:2014:14620 (*ICTR compensation*). The case arose out of the acquittal of a person by the ICTR who had spent many years in its custody. Together with several family members, he sought compensation from the UN for unlawful detention. The District Court denied itself jurisdiction on the basis, amongst others, of the UN's immunity from jurisdiction. In this respect, building on the reasoning by the Supreme Court and the ECtHR in *Mothers of Srebrenica*, the District Court held that whilst the investigation and prosecution of international crimes by the ICTR is undeniably another activity than peacekeeping, both are conducted on the basis of chapter VII of the UN Charter and they are, therefore, activities in the context of the performance of the UN's core activities, that is the maintenance of peace and security. Furthermore, according to the District Court, the absence of alternative remedies—including under Section 29 of the General Convention, see ibid., para. 7.3—does not lead to a violation of a fundamental right of acquitted persons. Ibid., para. 7.19 (on the interpretation of 'civil right' under Art. 6 of the ECHR, see subsubsection 4.3.3.2 of this study).

[1364] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 164 (emphasis added).

*Jurisdictional Immunities of the State*,[1365] as well as *Waite and Kennedy*. However, it is submitted that these opinions do not in fact support that conclusion.

As to the former judgment, it is not on point.[1366] The case arose out of the Italian courts accepting jurisdiction over claims brought against Germany in connection with crimes committed during the Second World War. Before the ICJ, Germany argued that it was entitled to state immunity. Italy contested that immunity on the basis, amongst others, that the claimants lacked alternative remedies. The ICJ ruled in favour of Germany. In paragraph 101 (to which the ECtHR referred in the above-quoted passage in *Mothers of Srebrenica*), the ICJ held (emphasis added)

> 'that it could find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.'

The issue before the ICJ, therefore, was whether Germany's *entitlement* to state immunity was conditional on the existence of alternative means. The ICJ rejected such conditionality, that is, the right of a state to jurisdictional immunity does not depend on the availability of alternative recourse.[1367] Contrary to what the ECtHR stated in *Mothers of Srebrenica*, the ICJ did *not* consider a rule to the effect that jurisdictional immunity absent an alternative remedy is *ipso facto* constitutive of a violation of the right of access to court. Much less has the ICJ 'explicitly denied the existence of such a rule'. Therefore, the ICJ's judgment in *Jurisdictional Immunities of the State* does not support the ECtHR's conclusion in *Mothers of Srebrenica* on this point.

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[1365] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99 (*Jurisdictional Immunities of the State*).

[1366] The ECtHR's reliance on *Jurisdictional Immunities of the State* seems to be warranted in another respect. This concerns the ECtHR's rejection of the claimants' argument that 'since their claim is based on an act of genocide for which they hold the United Nations (and the Netherlands) accountable, and since the prohibition of genocide is a rule of ius cogens, the cloak of immunity protecting the United Nations should be removed'. *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 156. The ECtHR considered that the current position regarding state immunity under customary international law was stated in *Jurisdictional Immunities of the State*. That is, as paraphrased by the ECtHR: 'International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of ius cogens.' *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 158. The ECtHR concluded that 'this also holds true as regards the immunity enjoyed by the United Nations.' Ibid. Similarly, Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.10 ff. There seem to be good arguments for that conclusion. To consider that jurisdictional immunity depends on the nature of the claim would be to ignore the essence of the immunity as a procedural bar to the exercise of jurisdiction. It is a preliminary matter, distinct from the merits of a claim.

[1367] Similarly, as concluded in subsection 3.2.2, there are good arguments that the right to jurisdictional immunity under Section 2 of the General Convention is not conditional on the implementation of Section 29 thereof.

As to the ECtHR's reliance on *Waite and Kennedy*, it is true that the proportionality test in that judgment is not cast in absolute terms—the availability of reasonable alternative means rather is a 'material factor' in determining proportionality. That wording suggests that the limitation of the rights under Article 6 can be proportionate *without* reasonable alternative means. However, the ECtHR in *Waite and Kennedy* found that alternative means were in fact available such that the Court was not called to make a principled ruling on this point. This notwithstanding, the ECtHR did state in *Waite and Kennedy,*[1368] as it recalled in *Mothers of Srebrenica*:[1369] 'It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.'[1370]

In reality, it is difficult, indeed impossible, to conceive that the 'very essence' could be preserved without alternative means. That is, upholding jurisdictional immunity absent such means necessarily violates Article 6 of the ECHR (assuming that provision applies in the first place, which is discussed below). As Reinisch paraphrased *Waite and Kennedy*: 'In the Court's view, the proportionality of the grant of immunity depended upon the availability of 'reasonable alternative means' to protect their rights'.[1371] Where such means are not available, the grant of immunity is not proportionate and Article 6 of the ECHR is breached. In other words, contrary to the ECtHR in *Srebrenica*: in the absence of an alternative remedy, the recognition of immunity *ipso facto* is constitutive of a violation of the right of access to a court.

In *Mothers of Srebrenica*, in resolving the conflict between the right of access to court and the right to immunity from jurisdiction, in the absence of reasonable alternative means, the Dutch courts and the ECtHR concluded that the immunity prevailed. The question arises as to the legal basis for that conclusion. Whilst the opinions are ambiguous, the priority rule under Article 103 of the UN Charter plays a key role, as will be briefly considered below.

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[1368] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59.
[1369] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 139(b).
[1370] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59 (emphasis added). The Court continued to state, in the context of proportionality: 'It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'. Ibid., para. 67 (emphasis added).
[1371] Reinisch (2016, 'Immunity'), para. 33 (emphasis added). Cf. Irmscher (2014), at 473 ('The European Court of Human Rights has recognized that immunities may constitute a proportionate limitation of the right of access to court, provided there exists an alternative remedy for the claimant.' [emphasis added]).

A preliminary question that arises is whether there is a conflict to begin with, that is, whether Article 6 of the ECHR applies – where it does not, there is no conflict with the obligation to confer jurisdictional immunity to resolve.

#### 4.3.3.2 'Civil right' under Article 6(1) of the ECHR in light of Section 29 of the General Convention

With reference to its constant case law, in *Mothers of Srebrenica* the ECtHR set out the following test regarding the application of Article 6 of the ECHR:

> 'Article 6 § 1 applies to disputes (contestations) concerning civil "rights" which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not they are also protected by the Convention . . . The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the right in question (see, among many other authorities, . . . Markovic and Others v. Italy [GC], no. 1398/03, § 93, ECHR 2006-XIV'.[1372]

The Court then went on to apply that test to *Mothers of Srebrenica*:

> 'The Court accepts that the right asserted by the applicants, being based on the domestic law of contract and tort (paragraph 55 above), was a civil one. There is no doubt that a dispute existed; that it was sufficiently serious; and that the outcome of the proceedings here in issue was directly decisive for the right in question. In the light of the treatment afforded the applicants' claims by the domestic courts, and of the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the Mustafić and Nuhanović cases (see paragraph 110 above), the Court is moreover prepared to assume that the applicants' claim was "arguable" in terms of Netherlands domestic law . . . In short, Article 6 is applicable.'[1373]

The concept of 'civil rights and obligations' under ECtHR case law is complex and evolving. It has two aspects: 'arguable right' at the domestic level; and 'civil' right.[1374] The following is limited to the former aspect, as it allows to demonstrate the relevance of the internal law of the international organisation.[1375]

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[1372] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 119 (emphasis added).
[1373] Ibid., para. 120 (emphasis added).
[1374] The matter of the application of Art. 6 of the ECHR to staff disputes with international organisations remains to be explored. As seen, in *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) and *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), the ECtHR referred to its case law on civil service disputes (which notably includes *Vilho Eskelinen and Others v. Finland* [GC], Judgment of 19 April 2007, [2007] ECHR (II)). It then proceeded on the basis that Art. 6 applied as reasonable alternative means—that is, the NATO Appeals Board and *ad hoc* arbitration, respectively—were available. As submitted in paragraph 3.4.2.2.1., staff disputes may not qualify as disputes of a 'private law character' under Section 29 of the General Convention. However, that is unlikely to be determinative of whether such rights qualify as 'civil' in terms of Art. 6 of the ECHR. In this respect, the ECtHR held in *König*: 'Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned'. *König v. Germany*, Judgment of 28 June 1978, ECHR (Ser. A no. 27) (*König*), para. 89.
[1375] Notwithstanding the autonomous character of Art. 6 of the ECHR. According to the Guide on Article 6 of the European Convention on Human Rights, the concept 'cannot be interpreted solely by reference to the respondent

Whether there is an arguable right must be determined with reference to domestic law. As the ECtHR recalled in *Mothers of Srebrenica*: 'the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned.[1376] This means that, as one ECtHR observer put it, 'where there is no actionable claim in domestic law, because of substantive national law, individuals cannot claim that Article 6 should apply.'[1377]

In *Mothers of Srebrenica*, the ECtHR assumed that the 'claim is arguable in terms of Netherlands domestic law*'* (emphasis added) on two grounds: the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the *Mustafić* and *Nuhanović* cases. And, the 'treatment afforded the applicants' claims by the domestic courts'. However, neither ground seems to support that assumption.

As to the ECtHR's reference to the *Mustafić* and *Nuhanović* cases, it suggests that these cases were decided under Dutch law. They were not. The background to the cases may be gleaned from the Court of Appeal's judgments:

> 'Mustafic was working as an electrician for Dutchbat . . . After the fall of Srebrenica, Mustafic had sought refuge in the compound . . . Mustafic expressed his intention that he wanted to stay at the compound together with his family. Aide-de-camp Oosterveen reacted to this by saying that that was not possible because everybody had to leave, with the exception of UN personnel. At the end of the afternoon on 13 July 1995, after the remaining refugees had left the compound, Mustafic also left with his family. Outside the gate of the compound Mustafic was separated from his family by the Bosnian Serbs, he was deported and killed by the Bosnian Serb Army or related paramilitary groups; his family survived.'[1378]

As for Mr Nuhanović, he was a United Nations employee who worked as an interpreter with Dutchbat. As Bosnian Serb forces overran Srebrenica, Nuhanović together with his parents and minor brother Muhamed sought refuge at a compound outside the city where Dutchbat units were quartered. Nuhanović was entitled to be evacuated as a United Nations employee but, insofar as relevant for present purposes, Muhamed was left behind and was killed.[1379]

Nuhanović and Mustafić sued the Netherlands before the Dutch courts, holding it liable in tort (and breach of contract), in sum, for failing to offer protection against the Bosnian Serb forces. The District

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State's domestic law; it is an "autonomous" concept deriving from the Convention. Article 6 § 1 applies irrespective of the parties' status, the nature of the legislation governing the "dispute" (civil, commercial, administrative law etc.), and the nature of the authority with jurisdiction in the matter (ordinary court, administrative authority etc.)'. Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), para. 1 (emphasis added).

[1376] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 168.

[1377] Interights, 'Manual for Lawyers – Right to A Fair Trial under the ECHR (Article 6)' (2009), at 5.

[1378] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 2.29.

[1379] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR0133 (*Nuhanović*), paras. 2.28-2.29.

Court of The Hague dismissed the claims on the basis that the alleged conduct was attributable to the UN, and not to the Netherlands.[1380]

The District Court judgment was overturned on appeal. The Court of Appeal found—in essentially identical interim judgments—[1381] that the conduct of Dutchbat could in fact be attributed to the State of the Netherlands.[1382] It then went on to opine:[1383]

> 'Apart from the State's opinion - which has been considered to be incorrect in the above - that the Court should judge Dutchbat's conduct strictly in accordance with international law, it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina. Additionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound. The Court assumes that, by advancing the argument in its defense that these conventions are not applicable, the State did not mean to assert that it does not need to comply with the standards that are laid down in art. 2 and 3 ECHR and art. 6 and 7 ICCPR in peacekeeping missions like the present one.
> 6.4 In addition, as pleaded by Mustafic et al. and not challenged by the State, pursuant to art. 3 of the Constitution of Bosnia and Herzegovina, provisions from treaties to which the Republic of Bosnia and Herzegovina is a party have direct effect and constitute a part of the law of Bosnia and Herzegovina. Because the ICCPR was in force in any case in 1995, the articles 6 and 7 ICCPR constitute a part of Bosnian law that the Court must apply in accordance with international private law and consequently these provisions have priority over the law of Bosnia and Herzegovina, in so far as this law were to deviate from the provisions of this treaty.'[1384]

The Court of Appeal held that

> 'Dutchbat, according to the standards of the law of Bosnia and Herzegovina and under the legal principles (with binding effect on the State) that are laid down in art. 6 and 7 ICCPR, did not have the right to send Mustafic away from the compound. According to those standards it is not allowed to surrender civilians to the armed forces if there is a real and predictable risk that the latter will kill or submit these civilians to inhuman treatment.'[1385]

And so:

> 'The Court concludes that the State acted wrongfully towards Mustafic by ensuring that he left the compound against his will. The Court also believes that Mustafic would still be alive (except for special circumstances that are not under discussion) if the State had not acted wrongfully towards him.'[1386]

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[1380] Ibid., para. 3.8; Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 3.9.
[1381] The interim judgments were rendered in 2011. The subject matter of the remaining litigation is not relevant for present purposes.
[1382] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 5.20.
[1383] The following references are to the Court of Appeal's judgment in *Mustafić*.
[1384] Ibid., paras. 6.3–6.4 (emphasis added).
[1385] Ibid., para. 6.8.
[1386] Ibid., para. 6.14.

More specifically,

> 'The Court concludes that the State, by ensuring that Mustafic left the compound and by not taking him along to a safe area, which resulted in the death of Mustafic, acted wrongfully towards Mustafic et al., under the provisions of art. 154 Act on Obligations of Bosnia and Herzegovina as well as based on a violation of the right to life and the prohibition on inhuman treatment. Pursuant to art. 171 paragraph 1 Act on Obligations of Bosnia and Herzegovina, the State is liable for the conduct of the Dutchbat members, who were employed by the State and who caused the damage "in the course of their work or in connection with work"'.[1387]

On 6 September 2013, the Supreme Court dismissed the appeal by the State of the Netherlands in both cases.[1388] The law governing the disputes—that is, the law of Bosnia and Herzegovina, supplemented by customary international law—was not contested before it.[1389]

The point here is that the *Mustafić* and *Nuhanović* cases would have warranted closer examination before being cited as evidence that the claims in *Mothers of Srebrenica* were arguable under Dutch law. Contrary to what the ECtHR suggests, those cases were *not* decided under Dutch law. The Dutch courts only applied *Dutch private international law*, which is procedural in nature and, as far as domestic law is concerned, pointed to the substantive law of Bosnia and Herzegovina.

The other ground on the basis of which the ECtHR assumed that the *Mothers of Srebrenica* 'claim is arguable in terms of Netherlands domestic law' concerns 'the treatment afforded the applicants' claims by the domestic courts'. But, what 'treatment' was the Court referring to? By the time the ECtHR rendered its *Mothers of Srebrenica* decision regarding the immunity of the UN, on 11 June 2013, the Dutch courts had dealt exclusively with the incidental proceedings with respect to the UN's immunity from jurisdiction. None of the judgments in those proceedings considered the nature of the claim in terms of Article 6 of the ECHR. As to the case on the merits against the Netherlands (insofar as relevant by analogy for claims against the UN, discussed below), it was decided only *after* the ECtHR rendered its judgment on the UN's immunity.[1390] The District Court's judgment in first instance in the case on the merits is dated 16 July 2014. It is therefore not clear how the ECtHR's reference to 'treatment afforded the applicants' claims by the domestic courts' would support its assumption that the claim in *Mothers of Srebrenica* was arguable under Dutch law.

Notwithstanding the ECtHR's unsubstantiated assumption at the time, however, the subsequent proceedings on the merits against the State of Netherlands do support that assumption *retroactively*.

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[1387] Ibid., para. 6.20.
[1388] Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Nuhanović*); Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*Mustafić*).
[1389] Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Nuhanović*), para. 3.15.5; Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*Mustafić*), para. 3.15.5.
[1390] Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*), paras. 4.3-4.4.

That is, these proceedings suggest that the claims against the UN were in fact arguable under Dutch law. This is because the courts in those proceedings found the Netherlands liable under Dutch tort law.

In deciding to apply Dutch law, the District Court reasoned as follows, in relevant part:

> 'Just as Claimants the District Court is of the opinion that the unlawfulness according to national law of the actions of which Dutchbat is accused and that are attributable to the State must be assessed according to the law of The Netherlands. As to this it deliberates as follows.
> . . . The State correctly has not denied that unlawful actions of the State as Claimants argue consist of the exercise of public authority i.e. acta jure imperii. Till the current Section 10:159 BW came into force the international private law of The Netherlands contained no codified special rule governing the choice of law for acta jure imperii. Section 10:159 BW stipulates that acta jure imperii should be assessed according to the law of the State that exercised said authority. According to the explanation the basis of said indicative ruling is that: "the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability." (Note of amendment to the proposed law Enacting and introducing Book 10 on International private law in the Civil Code (Law to enact and introduce Book 10 of the Civil Code) (TK 2009/10, 32137, no.7).
> . . . In 1995 no legal community-wide rule governing the choice of law existed for law applicable to agreements based on unlawful acts. There did exist however the COVA judgment referred to by the State (HR November 19th 1993, NJ 1994, 622) that formulated a jurisprudential rule governing the choice of law that meant the starting point was the applicable law of the country where the unlawful act had taken place. This rule governing the choice of law was codified in 2001 in the Wet Conflictenrecht Onrechtmatige daad (hereinafter to be referred to as: WCOD) [= Unlawful Act (Conflict of Laws) Act].
> . . . In the Explanatory Memorandum to the WCOD that contains no special rule for acta jure imperii there is inter alia the following: "The legislative bill only lays down the most important rules of the international unlawful act and in so doing ties in with the COVA judgment referred to." (TK 1998/99, 26608, no. 3, p. 2.). From this explanation the District Court deduces that not all of the rules of unwritten private law in The Netherlands are codified in the WCOD and this apparently includes the now codified rule governing the choice of law that relates to the very rare situation whereby the State becomes liable for government troops outside The Netherlands.
> . . . The District Court further considers that the acta jure imperii has for decades had a special place in the international private law of The Netherlands when answering the question whether a state enjoys immunity from jurisdiction. In that connection the thought in the explanation to 10:159 BW lies equally at the basis of the starting point namely that in cases of acta jurii imperii it may only be summoned to appear before a court of law on its own territory and beyond that enjoys immunity from jurisdiction.
> . . . The foregoing leads the District Court to the opinion that the law of The Netherlands applies to Claimants' valid claim concerning the unlawful act. That we are dealing here with actions in the context of a UN mission does not lead to any other opinion given the fact that as earlier deliberated upon it may be attributed to the State. Nor does the fact that Bosnian law was applied to the Nuhanović and Mustafić cases where likewise there was a valid claim based on an unlawful act having taken place lead to any other opinion. In those cases the applicable law was not in dispute and for that reason did not have to be officially determined.'[1391]

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[1391] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), paras. 4.166-4.171 (emphasis added). The reference to TK 2009/10, 32137, no. 7 is to: 'Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek) nr. 7, Nota van Wijziging, Ontvangen 17 maart 2010 ("Aan dit voorstel ligt ten grondslag dat de uitoefening van overheidsgezag bij uitstek een terrein is dat is overgelaten aan de soevereiniteit van de staat om wiens overheidsgezag het gaat. Daarbij past niet dat vreemd recht zou moeten worden toegepast op de vraag of bij de uitoefening van dat gezag sprake is van onrechtmatig handelen en, zo ja, in hoeverre dit tot aansprakelijkheid leidt. Overigens zou in de

The grounds of appeal did not challenge the District Court's conclusion as to the applicability of Dutch law.[1392] The Court of Appeal, noting that the applicable law was not in dispute, decided to apply Dutch law,[1393] as did the Supreme Court in final instance.[1394]

To be clear, there were significant differences between the judgments of the courts regarding the extent of the liability of the Netherlands.[1395] This notwithstanding, the courts all adjudicated the dispute under Dutch law and in doing so found the Netherlands liable in tort. This is relevant for the case against the UN since according to the ECtHR, the claims against the Netherlands and the UN were near identical, that is:

> 'The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (onrechtmatige daad) against them by sending insufficiently-armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.'[1396]

Against this backdrop—the Netherlands having been found liable under Dutch tort law, and the claims against the Netherlands and the UN being near identical—there is support for the proposition that the claims against the UN were equally arguable under Dutch law.

However, the fundamental question arises whether it is appropriate to assess the lawfulness of the UN's actions and inactions pursuant to Dutch law or, for that matter, *any* domestic law. It is submitted that, rather than domestic law, it is Section 29 of the General Convention that is best suited for that purpose. Its application to the UN and its operations across the world reflects the Organisation's universal character and ensures that its liability is determined uniformly and consistently. That is a distinct advantage over the application of domestic laws, which differ widely in substance and are at risk of

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meeste gevallen ook op grond van artikel 3 van de Wet conflictenrecht onrechtmatige daad Nederlands recht toepasselijk zijn op de aansprakelijkheid voor schade als gevolg van de uitoefening van Nederlands openbaar gezag.")'.

[1392] Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*), para. 33.

[1393] Ibid., para. 33.

[1394] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*), para. 4.1. For examples of the Supreme Court applying Dutch law (more specifically Art. 6:162 DCC, the key provision on tort), see, e.g., ibid., paras. 4.2.2 and 4.2.5.

[1395] Indeed, Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*) quashed District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*) and Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*) quashed Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*).

[1396] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 55 (emphasis added).

manipulation. The approach of determining the application of Article 6 of the ECHR on the basis of Section 29 of the General Convention corresponds to Jenks' anticipation that the 'proper law of international organisations' would in future 'not be limited to a choice between different systems of municipal law but may provide for the application of rules of an international character, including the domestic law of an international organisation.'[1397] According to Jenks, more specifically, 'an increasing number and proportion of legal transactions will be removed from the domain of conflict to that of common international rules.'[1398]

The ECtHR laid the groundwork for that approach, having stated the following in *Mothers of Srebrenica*, in line with its constant case law:

> 'The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, among other authorities and mutatis mutandis, Loizidou v. Turkey (merits), judgment of 18 December 1996, § 43, Reports 1996-VI; Al-Adsani, cited above, § 55; and Nada v. Switzerland [GC], no. 10593/08, § 169, ECHR 2012). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of immunity to a State (the Court would add: or to an international organisation) (see Loizidou, cited above, § 43; Fogarty, cited above, § 35; Cudak, cited above, § 56; and Sabeh el Leil, cited above, § 48).'[1399]

Section 29 of the General Convention being a treaty provision, it is submitted that it ought to be taken into account as 'rules of international law'.[1400] As a result, the test under Article 6(1) of the ECHR would be whether there is an arguable right under *Section 29 of the General Convention*.

Somewhat paradoxically, additional support for this approach may be found in the reasons underlying the District Court's decision in *Mothers of Srebrenica, merits* to apply Dutch law in the case against the State of the Netherlands. As seen, the court held the following, in relevant part:

> 'The State correctly has not denied that unlawful actions of the State as Claimants argue consist of the exercise of public authority i.e. acta jure imperii. Till the current Section 10:159 BW came into force the international private law of The Netherlands contained no codified special rule governing the choice of law for acta jure imperii. Section 10:159 BW stipulates that acta jure imperii should be assessed according to the law of the State that exercised said authority. According to the explanation the basis of said indicative ruling is that: "*the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability*.'[1401]

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[1397] Jenks (1962), at xxxi (emphasis added).
[1398] Ibid., 263.
[1399] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 139I (emphasis added).
[1400] See also UN Doc. A/CN.4/L.682 (2006), para. 35 ff, discussed below.
[1401] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), para. 4.167 (underlining added).

This reasoning is geared towards states insofar as it draws on the core features of the state: the exercise of public, or government, authority; and sovereignty. Nonetheless, international organisations may be said to have corresponding features. As to the exercise by states of public, or government, authority, this arguably corresponds to the exercise by international organisations of the powers bestowed on them to perform the functions for which they were established. As to sovereignty, though an exclusive quality of states,[1402] its underlying value—independence—applies equally to international organisations.

As the District Court recalled in *Mothers of Srebrenica, merits*, in amending Dutch private international law, the Dutch legislature explained that the lawfulness of core state action is most aptly assessed under the State's own law. This is because 'the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned.'[1403] By the same token, the lawfulness of an international organisation's exercise of its powers arguably warrants being assessed under its own internal rules. Indeed, the more the core functionality of an international organisation is at issue, the stronger the argument for assessing its liability pursuant to its own rules.

Applying the foregoing to the case in point, the question is whether the claims in *Mothers of Srebrenica* would be arguable under the Section 29(a) of the General Convention. Under that provision, the UN's liability is limited to disputes of a 'private law character'. As submitted in chapter 3, there are good arguments to conclude that the *Mothers of Srebrenica* dispute is not of a private law character.[1404] The implication would be that there is no right of action in this case against the UN. Hence, Article 6 of the ECHR, duly taking into account the UN liability regime, would not apply.

That conclusion would not be entirely foreign to the ECtHR. Amongst the cases in which the Court concluded that there was no arguable right under domestic law, the circumstances in *Markovic* are not altogether different from those in *Mothers of Srebrenica*.[1405] *Markovic* arose from a lawsuit which victims of the NATO bombing of Belgrade brought against Italy before the Italian courts. They alleged that Italy's support for the military action was illegal. The case turned on the application of Italian tort

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[1402] However, states may be said to confer sovereign powers on international organisations. See Sarooshi (2005), at 1.
[1403] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), para. 4.167.
[1404] Contrary to Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3, the ECtHR left open the question whether Section 29 of the General Convention was at play. *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 . . . can be construed so as to require a dispute settlement body to be set up in the present case.').
[1405] *Markovic and Others v. Italy* [GC], Judgment of 14 December 2006, [2006] ECHR (XIV).

law. The proceedings before the Italian courts ended with the Italian Court of Cassation ruling that, as the ECtHR summarized,

> 'the impugned act was an act of war; since such acts were a manifestation of political decisions, no court possessed the power to review the manner in which that political function was carried out; further, the legislation that gave effect to the instruments of international law on which the applicants relied did not expressly afford injured parties a right to claim reparation from the State for damage sustained as a result of a violation of the rules of international law.'[1406]

The Italian Court of Cassation's judgment was highly relevant for the ECtHR's determination as to the existence of an arguable right under Italian law. In this respect, the ECtHR considered the following:

> 'In assessing therefore whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see Masson and Van Zon v. the Netherlands, 28 September 1995, § 49, Series A no. 327-A). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see Z and Others v. the United Kingdom, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.'[1407]

In a similar vein, the ECtHR held that

> 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.
> . . . Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.'[1408]

Against this backdrop, the Court of Cassation's judgment having been central to the ECtHR's analysis, the latter's conclusion in *Markovic* was that

> 'it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a 'right' to reparation under the law of tort existed in such circumstances.'[1409]

Furthermore, the Court

> 'considers that the Court of Cassation's ruling in the present case does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in

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[1406] Ibid., para. 106. Along similar lines, the UK Government, as an intervening party, contended in the *Markovic* proceedings before the ECtHR that 'the rule of national law that the State was not liable to compensate individuals for losses which they had suffered on account of the State's decisions in the conduct of foreign relations limited the scope of the general rules of liability in their application to the State for reasons of public policy'. *Markovic*, para. 88.
[1407] Ibid., para. 95 (emphasis added).
[1408] Ibid., paras. 107-108.
[1409] Ibid., para. 111.

> domestic law. At the relevant time, the position under the domestic case-law was such as to exclude in this type of case any possibility of the State being held liable. There was, therefore, no limitation on access to a court of the kind in issue in *Ashingdane*'.[1410]

The claim underlying *Markovic* was against Italy, it was brought before the Italian courts and decided under Italian law. Notwithstanding these differences with the *Mothers of Srebrenica* case, the claims underlying *Mothers of Srebrenica* are arguably no less political than Italy's support for the NATO bombing as the *Mothers of Srebrenica* claims relate to the exercise of Chapter VII powers under the UN Charter. In these circumstances, having concluded in *Markovic* that there was no arguable right under Italian law, the ECtHR in *Mothers of Srebrenica* could conceivably have reached the same conclusion, applying the UN's own liability law based on Section 29 of the General Convention.

However, of note, in *Markovic* the ECtHR ruled that, while there was no arguable right under domestic law, Article 6(1) of the ECHR *did* apply. In essence, this is because in the proceedings before the Italian courts, the right had been arguable until the Court of Cassation settled the matter in final instance. The ECtHR considered that

> 'there was from the start of the proceedings a genuine and serious dispute over the existence of the right to which the applicants claimed to be entitled under the civil law. The respondent Government's argument that there was no arguable (civil) right for the purposes of Article 6 because of the Court of Cassation's decision that, as an act of war, the impugned act was not amenable to judicial review, can be of relevance only to future allegations by other complainants. The Court of Cassation's judgment did not make the applicants' complaints retrospectively unarguable (see Z and Others v. the United Kingdom, cited above, § 89). In these circumstances, the Court finds that the applicants had, on at least arguable grounds, a claim under domestic law.
>
> . . . Accordingly, Article 6 is applicable to the applicants' action against the State. The Court therefore dismisses the respondent Government's preliminary objection on this point. It must therefore examine whether the requirements of that provision were complied with in the relevant proceedings.'[1411]

This means that during the proceedings leading up to the Court of Cassation's judgment, the claimants were entitled to the protection under Article 6 of the ECHR, involving the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' In this respect, the ECtHR in *Markovic* considered, amongst others, that

> 'the applicants cannot argue that they were deprived of any right to a determination of the merits of their claims. Their claims were fairly examined in the light of the domestic legal principles applicable to the law of tort. Once the Court of Cassation had considered the relevant legal arguments that brought the applicability of Article 6 § 1 of the Convention into play, the applicants could no longer claim any entitlement under that provision to a hearing of the facts.'[1412]

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[1410] Ibid., para. 114.
[1411] Ibid., paras. 101-102.
[1412] Ibid., para. 115.

The ECtHR in *Markovic* concluded that in the relevant proceedings Article 6 of the ECHR had not been violated. Conversely, a challenge may arise when it comes to the UN, because of the *process* to determine whether such a right exists under the UN Liability Rules. As discussed elsewhere in this study, that process does not conform to the requirements of Article 6(1) of the ECHR, or Article 14(1) of the ICCPR, particularly as it is the UN itself that determines the character of a dispute.

Finally, even if it is determined that there is an 'arguable right', it remains to be determined whether that right qualifies as 'civil' in the sense of Article 6 of the ECHR. The ECtHR's ruling in *Klausecker* illustrates that this determination may not be straightforward, notably as regards civil service disputes.[1413] The ECtHR left unresolved in that case whether Article 6 of the ECHR applied and proceeded on the basis that it did.[1414] It dismissed the application on the basis that reasonable alternative means were available.[1415]

Notwithstanding the foregoing, as seen, the ECtHR in *Mothers of Srebrenica* concluded that Article 6 of the ECHR did apply.[1416] In the absence of alternative remedies, the question arises of how the Court resolved the conflict between access to court and jurisdictional immunity.

#### 4.3.3.3 Resolving the conflict between jurisdictional immunity and access to court absent reasonable alternative means

The issue is how to determine which obligation takes priority: the obligation to grant jurisdictional immunity to the defendant international organisations, or the obligation to accord access to court to the claimant. In the case of the UN, Article 103 of the UN Charter is at play as a potential basis to prioritise the former. However, as will be briefly seen, the *Mothers of Srebrenica* opinions are ambiguous on this point. Aside from Article 103 of the UN Charter—and of relevance to international organisations other

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[1413] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 48 ff. Cf. Lawson (1999), at 456 ('Naar mijn mening is artikel 6 bij de huidige stand van het recht niet van toepassing op arbeidsgeschillen tussen de internationale organisatie en haar werknemers voorzover deze essentiële taken verrichten, en *behoort* artikel 6 ook niet van toepassing te zijn.' [emphasis in original]). As with the question whether an 'arguable right' can be said to exist under Art. 6 of the ECHR, the internal law of the international organisation may be taken into account here, as the 'proper law' of the international organisation (see Jenks (1962), at xxxi). As seen in paragraph 3.4.2.2.1 of this study, staff disputes arguably do not qualify as disputes of a 'private law character' under Section 29 of the General Convention. However, under ECtHR case law, it is the 'substantive content and effects of the right – and not its legal classification' that is relevant. See Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), para. 28 ('Whether or not a right is to be regarded as civil in the light of the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take into account the Convention's object and purpose and the national legal systems of the other Contracting States'. [emphasis added]).

[1414] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 52.

[1415] Ibid., paras. 76-77.

[1416] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 120.

than the UN, which do not benefit from a provision like Article 103 of the UN Charter— there are good arguments that militate in favour of prioritising the immunity from jurisdiction over the right of access to court. However, the case law of the lower Dutch courts not infrequently points in the opposite direction.

#### 4.3.3.3.1 Prioritising jurisdictional immunity over access to court under Article 103 of the UN Charter

The various opinions in *Mothers of Srebrenica* referenced the priority rule under Article 103 of the UN Charter. That provision reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

The obligation to accord the UN jurisdictional immunity arises under Section 2 of the General Convention, which in turn is based on Article 105 of the UN Charter. In light of the UN Charter basis of that obligation, the question arises as to whether, under Article 103 of the UN Charter, it takes priority over the obligation to access to court under Article 6(1) of the ECHR.

The application of Article 103 of the UN Charter was a source of disagreement and confusion in the various opinions in *Mothers of Srebrenica*.[1417] Whilst the Court of Appeal concluded that Article 103 of the UN Charter applied in principle, it held that this provision 'was not intended to allow the Charter to just set aside like that fundamental rights recognized by international (customary) law or in international conventions'.[1418] Conversely, the Supreme Court seems to have prioritised the UN's jurisdictional immunity on the basis of Article 103 of the UN Charter, though its reasoning in this respect is limited.[1419] Important questions remain unresolved. Notably, Article 103 of the UN Charter is limited to competing obligations under 'any other international agreement'. However, the Supreme Court stated explicitly that the Netherlands no longer contested that the right of access to court is part of customary international law.[1420] Did the Supreme Court imply that the priority rule in Article 103 of the UN Charter applies to competing obligations under general international law as well?[1421]

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[1417] See generally G.R. Den Dekker, 'Absolute Validity, Absolute Immunity: Is There Something Wrong with Article 103 of the UN Charter?', in C. Ryngaert and others (eds.), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (2015), 247.
[1418] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.5.
[1419] In finding that the UN's immunity is absolute, the Supreme Court stated: 'respecting it is among the obligations on UN member states which, as the ECtHR took into consideration in *Behrami and Saramati*, under Art. 103 of the UN Charter, prevail over conflicting obligations from another international treaty.' Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.6.
[1420] Ibid., para. 4.3.1.
[1421] According to the ILC Study Group on 'fragmentation of international law: difficulties arising from the

As for the ECtHR in *Mothers of Srebrenica*, its reasoning regarding Article 103 of the UN Charter is particularly ambiguous. The Court referred to this provision in the context of Article 31(3)(c) of the VCLT, which provides that 'there shall be taken into account, together with the context: . . . (c) Any relevant rules of international law applicable in the relations between the parties'.[1422] In this context, all the Court stated regarding Article 103 of the UN Charter is that it

> 'has had occasion to state its position as regards the effect of that provision, and of obligations flowing from the Security Council's use of its powers under the United Nations Charter, on its interpretation of the Convention (see Al-Jedda v. the United Kingdom [GC], no. 27021/08, § 102, ECHR 2011)'.[1423]

However, *Al-Jedda* is of limited relevance, because it did not, as such, concern 'the effect' of Article 103 of the UN Charter. The issue in *Al-Jedda* was whether the claimant's internment in a facility run by British forces in Iraq conformed to Article 5 of the ECHR.[1424] The UK argued that

> 'Article 5 of the Convention was displaced by the legal regime established by United Nations Security Council Resolution 1546 by reason of the operation of Articles 25 and 103 of the United Nations Charter, to the extent that Article 5 was not compatible with that legal regime.'[1425]

However, the ECtHR found that

> 'neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.'[1426]

As a result, in the absence of a normative conflict in *Al-Jedda*, Article 103 of the UN Charter did not apply in that case. Conversely, such a conflict does arise in the present case, that is, between the obligations to accord jurisdictional immunity and grant access to court. The operation of Article 103 of

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diversification and expansion of international law', 'it seems sound to join the prevailing opinion that Article 103 should be read extensively - so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations.' UN Doc. A/CN.4/L.682 (2006), para. 345 (emphasis added). See, likewise, Higgins *et al* (2017), para. 12.31 ('There is emerging consensus that the priority that Article 103 gives to the UN Charter over "international agreements" is also applicable to rules of customary international law.').

[1422] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 144.

[1423] Ibid., para. 145 (emphasis added).

[1424] *Al-Jedda v. the United Kingdom* [GC], Judgment of 7 July 2011, [2011] ECHR (IV) (*Al-Jedda*), para. 59.

[1425] Ibid., para. 91. Similarly, ibid., para. 100 ('they argue that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. They contend that, as a result of the operation of Article 103 of the United Nations Charter . . . the obligations under the Security Council Resolution prevailed over those under the Convention.').

[1426] Ibid., para. 109.

the UN Charter remains to be explored further in resolving that conflict.[1427] That, however, would fall outside the scope of the present study.

#### 4.3.3.3.2 The choice between jurisdictional immunity and access to court

*Al-Jedda* illustrates the statement made by Koskenniemi, in his capacity as chairman of the ILC Study Group on 'fragmentation of international law: difficulties arising from the diversification and expansion of international law': 'In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well.'[1428]

In a similar vein, as the ECtHR has repeatedly stated,

> 'the Convention forms part of international law. It must consequently determine State responsibility in conformity and harmony with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty.'[1429]

As explained by Koskenniemi:

> 'Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators. This results precisely from the "clustered" nature in which legal rules and principles appear. But it may also be rationalized in terms of a *political* obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.'[1430]

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[1427] In resolving the conflict, there are no further priority rules at play. In particular, neither obligation has the status of *jus cogens*. Cf. Irmscher, at 471 ('while it is generally recognized that certain human rights guarantees have attained the status of jus cogens norms in view of their recognition as such, this is not the case with the right of access to court'). Furthermore, considered from the perspective of the Netherlands as forum state, the competing treaty obligations at issue are at the same level in the hierarchy of norms. Each applies by virtue of Art. 93 of the Constitution, which provides: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' Of note, Art. 17 (*jus de non evocando*) of the Dutch Constitution provides: 'No one can be prevented against his will from being heard by the courts to which he is entitled to apply under the law.' <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021. This right may be taken to correspond to Art. 6 of the ECHR. However, while it is amongst the fundamental rights listed in the Constitution, this right does not operate so as to outrank the UN's right to immunity from jurisdiction. In this respect, according to Art. 120 of the Constitution, 'the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.' (emphasis added.)

[1428] A/CN.4/L.682, 13 April 2006, para. 37 (emphasis added).

[1429] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 144 (emphasis added). See also A/CN.4/L.682, 13 April 2006, para 164 ('the European Convention on Human Rights is not, and has not been conceived as a self-contained regime in the sense that recourse to general law would have been prevented. On the contrary, the Court makes constant use of general international law with the presumption that the Convention rights should be read in harmony with that general law and without an *a priori* assumption that Convention rights would be overriding.')

[1430] UN Doc. A/CN.4/L.682 (2006), para. 35 (italics in original, underlining added).

The proportionality test under *Waite and Kennedy* reflects the foregoing insofar as it reconciles the right of access to court with the jurisdictional immunity of the international organisation through 'reasonable alternative means'. In aiming to harmonise conflicting obligations, the test is reflective of the broader international legal framework and it is solution-oriented. Furthermore, the harmonious and systemic approach in international law also militates in favour of interpreting Article 6 of the ECHR in conformity with Section 29 of the General Convention, discussed above.

That being so, according to Koskenniemi, 'although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: "it may resolve apparent conflicts; it cannot resolve genuine conflicts".' [1431]

Similarly, as concluded by Pauwelyn,

> 'the interplay of norms in international law is no longer of academic interest only. In today's interdependent world, where states must co-operate in pursuit of common objectives and do so under the auspices of an ever increasing number of distinct international organisations, the potential for conflicts between norms is very real indeed. In the absence of a centralised international law-maker, the multitude of law-makers and other actors, be they domestic or international, at work on the international scene fuel the risk of conflict of norms arising.'[1432]

In the case in point, absent reasonable alternative means, there is genuine conflict between the obligation to confer jurisdictional immunity and the obligation to grant access to court. The issue is how to resolve that conflict (leaving aside Article 103 of the UN Charter). The ECtHR as a specialised human rights court has limited leeway—as seen, absent alternative remedies, it can only conclude that the forum state breached Article 6 of the ECHR. Conversely, domestic courts are faced with a choice as to which obligation to prioritise.

Importantly, *Waite and Kennedy* does *not* dictate that in the absence of reasonable alternative means, the right of access to court necessarily prevails. All the case stands for is that the forum state incurs liability under the ECHR where its courts uphold the immunity from jurisdiction of an international organisation in the absence of such means. It does not resolve the normative conflict as such.

In the words of the ILC Study Group, the relationship between immunity and access to court qualifies as one

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[1431] Ibid., para. 42.
[1432] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 487.

> 'of conflict. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the [VCLT].'[1433]

It is those 'basic rules' that guide the discussion that follows. Even if these rules may not lead to an unequivocal legal outcome,[1434] they provide arguments to prioritise the jurisdictional immunity of international organisations. However, as will be seen, the lower Dutch courts not infrequently hold the opposite.

*Legal and policy considerations in favour of immunity from jurisdiction*

- Lex posterior: arbitrary results

Article 30 of the VCLT concerns the application of successive treaties relating to the same subject matter and reflects the principle *lex posterior derogat legi priori* ('when two rules apply to the same matter, the later in time prevails'[1435]). The *lex posterior* principle may be said to apply insofar as the ECHR (in light of Article 6) and the General Convention (in light of Section 2) relate to the 'same subject matter' in terms of Article 30(1) of the VCLT:[1436] access (or not) to court.

More specifically, the current situation would be governed by Article 30(4) of the VCLT:

> 'When the parties to the later treaty do not include all the parties to the earlier one:
> (*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

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[1433] UN Doc. A/CN.4/L.702 (2006), para. 14(2) (emphasis added). As Irmscher put it: 'There is either access to court or immunity, *tertium non datur'.* Irmscher (2014), at 464. More specifically, according to Irmscher: 'it is the forum State that is bound by the two conflicting rules of international law. There is a clear conflict between the duty to respect the immunity of the international organization and the duty to provide access to court when it comes to the determination of civil rights, as compliance with one would necessarily mean non-compliance with the other. The first obligation is owed towards the other Member States of the international organization and/or to the organization. The second obligation, in turn, is owed primarily to the other contracting parties of the human rights treaty, but likewise to the actual beneficiaries of the human rights guarantees, i.e. the natural and legal persons falling under the scope of application of the respective treaty.' Ibid., at 474 (fns. omitted). Cf. Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), paras. 3.4 and 3.10, according to which the mere fact that alternative recourse was absent did not mean that the immunity from jurisdiction must be set aside. Rather, a choice must be made between the obligation to grant access to court and uphold the immunity from jurisdiction (in the case in point, according to the Court of Appeal, the former outbalanced the latter).

[1434] Cf. Irmscher (2014), at 474-475 ('The application of the normal conflict rules does not yield any reliable results in the present case that would generally be applicable . . . the *lex specialis* rule does not provide any meaningful results. Nor can the principle of *lex posterior derogat legi priori* provide a solution'. [fn. omitted]).

[1435] A. Aust, *Modern Treaty Law and Practice* (2013), at 221.

[1436] According to Art. 30(1) of the VCLT: 'Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.'.

> (*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.'[1437]

The General Convention was adopted on 13 February 1946. Having been adopted on 4 November 1950, the ECHR qualifies as the 'later treaty'.[1438]

The ECHR has 47 states parties,[1439] 46 of which (Andorra being the exception)[1440] are also amongst the 162 states parties to the General Convention (i.e., 116 states parties to the General Convention are not states parties to the ECHR). From the perspective of the Netherlands (as the forum state, being a state party to both treaties), the application of Article 30(4) of the VCLT would have the following results:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 45 states that are parties to both treaties, the obligations under the ECHR (as the 'later treaty') would prevail;[1441]
- Under Article 30(4)(b) of the VCLT, as between the Netherlands and Andorra, being a state party to the ECHR but not the General Convention, the ECHR would apply. Conversely, under the same provision, as between the Netherlands and the 116 states parties to the General Convention that are not states parties to the ECHR, the General Convention would apply.

As a result, the Netherlands would be bound by the ECHR (access to court) towards 46 states and by the General Convention (immunity) towards 116 states.

The problem Irmscher identified with respect to the application of the *lex posterior* principle is that it would

> 'lead to completely arbitrary results, when applied by the courts of a single State. With respect to an organization which that State has joined before entering into human rights obligations, human rights would prevail, whereas with regard to all organizations which that State joined later, immunity would be ruling.'[1442]

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[1437] According to Art. 30(3) of the VCLT: 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'.

[1438] The date of adoption of the treaty is the relevant date for purposes of Art. 30 of the VCLT. See Aust (2013), at 204. But see E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions', (1988) 59 *British Yearbook of International Law* 75, at 110 ('It appears that Article 30 is based on suppositions that are too simple as regards the time factor in multilateral treaty-making processes.').

[1439] <coe.int/en/web/portal/47-members-states> accessed 21 December 2021.

[1440] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed on 21 December 2021.

[1441] That is, under Art. 30(4)(a) in conjunction with Art. 30(3) of the VCLT, 'the earlier treaty', being the General Convention, 'applies only to the extent that its provisions are compatible with those of the later treaty', being the ECHR. The immunity under Section 2 of the General Convention is not compatible with the right of access to court under Art. 6(1) of the ECHR.

[1442] Irmscher (2014), at 466.

The application of the *lex posterior* rule may lead to arbitrary results insofar as the timing of the adoption of the General Convention and the ECHR may to an extent be a coincidence. If the General Convention had been the 'later treaty', the result would have been rather different. That is:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 45 states that are parties to both the ECHR and the General Convention (as the 'later treaty'), the obligations under the General Convention would prevail;
- Under Article 30(4)(b) of the VCLT, the Netherlands' competing obligations would remain unchanged. That is, as between it and those 116 states parties to the General Convention that are not states parties to the ECHR, the General Convention would apply. Conversely, under the same provision, as between the Netherlands and Andorra, being a state party to the ECHR but not the General Convention, the ECHR would apply.

As a result, the Netherlands would be bound by the ECHR (access to court) towards only one state (Andorra) and by the General Convention (immunity) towards 161 states.

The 'arbitrariness' in connection with timing may be further illustrated by the case of NATO. By way of background, as explained by Olson:

> 'The legal structure of NATO's immunities is quite complex. NATO's founding document, the 1949 North Atlantic Treaty, is a rather trim political agreement establishing a military alliance. The North Atlantic Treaty is decidedly not, however, a constituent instrument . . .
> With respect specifically to NATO immunities, their essential elements are found in the 1951 Ottawa Agreement, for the civilian side, and for the military headquarters in the 1952 Paris Protocol to the NATO Status of Forces Agreement.'[1443]

Whilst the North Atlantic Treaty does not contain a provision on the privileges and immunities of NATO akin to Article 105 of the UN Charter, Article V of the Ottawa Agreement does contain a provision similar to Section 2 of the General Convention.[1444] The Ottawa Agreement was adopted on 20 September 1951, such that in terms of Article 30(4) of the VCLT it is the 'later treaty' compared to the ECHR (adopted on 4 November 1950). On the understanding that all 30 NATO member states are states parties

[1443] Olson (2015), at 163 (fns. omitted). The reference is to the Ottawa Agreement and the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, 200 UNTS 340 ('Paris Protocol'). In *Supreme*, the Court of Appeal held that neither the Ottawa Agreement nor the Paris Protocol confer jurisdictional immunity on the defendants. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), paras. 6.6.3 and 6.6.6.

[1444] Art. V of the Ottawa Agreement provides: 'The Organisation, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organisation, may expressly authorise the waiver of this immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or detention of property.'.

to the Ottawa Agreement, 28 of these (including the Netherlands) are also states parties to the ECHR (which has 47 states parties in total), the other two states being the United States and Canada.

The application of the *lex posterior* test under Article 30(4) of the VCLT would lead to the following results:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 27 states that are parties to both the ECHR and the Ottawa Agreement, the Ottawa Agreement (being the 'later treaty') would apply;
- Under Article 30(4)(b) of the VCLT, as between the Netherlands, and the USA and Canada, being states parties to the Ottawa Agreement but not the ECHR, the Ottawa Agreement would apply. Conversely, under the same provision, as between the Netherlands and those 19 states parties to the ECHR that are not states parties to the Ottawa Agreement, the ECHR would apply.

In sum, the Netherlands would be bound by the ECHR (access to court) towards 19 states and by the Ottawa Agreement (immunity) towards 29 states.

However, here as well the timing of the adoption of the Ottawa Agreement and the ECHR may to an extent have been a coincidence. The North Atlantic Treaty and the Ottawa Agreement are closely related in that they together form NATO's basic legal framework (together with the Paris Protocol to the NATO Status of Forces Agreement). The North Atlantic Treaty was adopted just before the adoption of the ECHR, while the Ottawa agreement was adopted shortly thereafter. The Ottawa Agreement might just as well have been adopted before the ECHR, with rather different results. That is:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 27 states that are parties to both the ECHR and the Ottawa agreement, the ECHR (being the 'later treaty') would apply;
- Under Article 30(4)(b) of the VCLT, as between the Netherlands and those 19 states parties to the ECHR that are not states parties to the Ottawa Agreement, the ECHR would apply. Conversely, under the same provision, as between the Netherlands and the USA and Canada, being states parties to the Ottawa Agreement but not the ECHR, the Ottawa Agreement would apply.

In sum, the Netherlands would be bound by the ECHR (access to court) towards 46 states and by the Ottawa Agreement (immunity) towards only 2 states.

In conclusion, the *lex posterior* test under Article 30(4) of the VCLT arguably is of little assistance in the present case to resolve the normative conflict between the obligations to, on the one hand, accord jurisdictional immunity and, on the other, grant access to court. Under that test, the dates of adoption of

the relevant treaties would determine the resolution of that conflict. However, those dates are particularly close to one another and the sequence of the adoption of the treaties in point may be rather a coincidence. What instead seems to be significant in terms of the interrelationship between these treaties is that their adoption formed part of a process of intense international law making following the Second World War. This calls for an enquiry into the intention of the states, the significance of which is underscored by the ILC study group: 'The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose.'[1445]

- The intention of the states parties

Like the UN Charter, the ECHR was adopted in the aftermath of the Second World War.[1446] The former embodied the international community's policy objective to buttress international cooperation through the UN. The latter embodied the policy objective to protect human rights at the regional level as part of a global process in furtherance of the UN Charter and the Universal Declaration of Human Rights. These policy objectives and, in consequence, these treaties are complementary.

More specifically, the UN Charter, as seen,[1447] can be viewed as the UN's constitution. Its preamble recalls the determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'.[1448] The promotion of respect for human rights and fundamental freedoms is one of the purposes of the United Nations.[1449] A significant milestone in this respect is the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948.[1450] That instrument is the linking pin with the ECHR, as the latter's preamble reflects:

> 'Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;
> Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared'.[1451]

The adoption of the ECHR, and subsequently the ICCPR, followed the UNGA's adoption of the General Convention in furtherance of Article 105 of the UN Charter. There is no evidence to suggest that in guaranteeing the right of access to court under Article 6(1) of the ECHR, and subsequently Article 14(1)

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[1445] UN Doc. A/CN.4/L.702 (2006), para. 14(27) (emphasis added).
[1446] P. van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2006), at 3.
[1447] See subsubsection 2.3.2.1 of this study.
[1448] UN Charter, preamble, para. 2.
[1449] Art. 1(3) of the UN Charter ('To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. [emphasis added]).
[1450] UN Doc. A/RES/217A(III) (1948).
[1451] Preamble to ECHR, paras. 2-3.

of the ICCPR, states intended to undercut the UN by reneging on their commitment under the General Convention to protect its independence through jurisdictional immunity. It seems in fact unlikely that states had such an intention.[1452]

Similar reasoning applies in the case of NATO. Its member states are unlikely to have intended that the general right of access to court under Article 6 of the ECHR would take priority over the immunity which they specifically and contemporaneously bestowed on NATO under Article V of the Ottawa Agreement,[1453] building on the North Atlantic Treaty.[1454]

The General Convention and the Ottawa Agreement, irrespective of their precise dates of adoption in relation to the ECHR, appear to express the intention of the states to shield the UN and NATO, respectively, from the jurisdiction of national courts.

- Lex specialis

The aforementioned intention of states may be given appropriate expression through the *lex specialis derogat legi generali* principle.[1455] Though the principle, which is not codified in the VCLT, is not free from controversy,[1456] according to the aforementioned ILC study group, it

> 'is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.'[1457]

In terms of the principle's rationale, the ILC working group explained:

> 'That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be

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[1452] In this connection, the preamble to the UN Charter expressed the determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. UN Charter, Preamble, para. 3 (emphasis added).
[1453] The operation of the *lex posterior* principle, as seen, in fact supports this proposition.
[1454] Olson argued along similar lines: 'The North Atlantic Treaty, European Convention on Human Rights and Ottawa Agreement were developed essentially simultaneously, and by a largely identical group of states. The North Atlantic Treaty entered into force in 1949, fourteen months before signature of the ECHR. The Convention and Ottawa Agreement were signed within less than a year of each other, and entered into force less than nine months apart. Nine of the Convention's original twelve signatories were also original signatories of Ottawa. Eight of the ten original European allies ratified Ottawa before they ratified the Convention. It was in this context that each ally undertook a binding and unconditional commitment to every other ally—including the non-European ones—that its courts would not interfere with the workings of the Alliance. In the context of an organization whose very purpose is to affirm and maintain political solidarity, such an undertaking cannot easily be disregarded.' Olson (2015), at 170-171.
[1455] Cf. Irmscher (2014), at 466 ('The concept of, and rules implementing, immunities may constitute lex specialis with respect to the forum State's obligation concerning access to court.').
[1456] Ibid. ('The principle of *lex specialis* is, however, heavily disputed in public international law'). Pauwelyn argued that the *lex specialis* principle gives way to that of *lex posterior*. Pauwelyn (2003), at 409.
[1457] UN Doc. A/CN.4/L.702 (2006), para. 14(5).

> applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.'[1458]

However, Irmscher questions the relevance of the *lex specialis* principle in the case in point, stating that

> 'it is not a straightforward exercise to identify the more special provision of two different sets of rules pertaining to completely different legal areas and with opposing legal consequences. Identifying the *lex specialis* will bound to be a value judgment rather than a compelling legal reasoning.'[1459]

To the contrary, it is submitted that there are in fact good arguments that Section 2 of the General Convention is *lex specialis* in relation to Article 6 of the ECHR, in the sense that the former operates as a 'modification, overruling or a setting aside'[1460] in relation to the latter. Whereas Article 6 of the ECHR creates a general entitlement of access to the courts, Section 2 of the General Convention provides a specific exception exclusively with respect to the UN. Indeed, as Irmscher himself stated:

> 'What can be said . . . is that, when looking at the substance of the obligations, while the right of access to court is one that principally obliges the State for the benefit of an unlimited number of potential claimants, immunities are expressly granted in individual cases for the benefit of individual international organizations, where this has been expressly agreed upon by the (forum) State.'[1461]

Complications arise in applying the *lex specialis* principle where the states parties to the competing treaties are not identical. In this respect, the ILC Study Group stated the following:

> 'The hard case is the one where a State (A) has undertaken conflicting obligations in regard to two (or more) different States (B and C) and the question arises which of the obligations shall prevail. Here the *lex specialis* appears largely irrelevant. Each bilateral (treaty) relationship is governed by *pacta sunt servanda* with effect towards third parties excluded. Such conflict remains unregulated by article 30 of the VCLT. The State that is party to the conflicting instruments is in practice called upon to choose which treaty it will perform and which it will breach, with the consequence of State responsibility for the latter.'[1462]

However, in the case in point, 46 out of 47 ECHR states parties are also parties to the General Convention. Andorra is the only state that is a party to the former treaty but not to the latter one, though it is bound to respect the UN's immunity under Article 105 of the UN Charter. There seem to be good arguments that the obligation under Section 2 of the General Convention prevails amongst the ECHR states parties—as between those states and the other states parties to the General Convention—on the basis that that obligation is *lex specialis* in relation to Article 6(1) of the ECHR. This arguably

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[1458] Ibid., para. 14(7) (emphasis added). The operation of the *lex specialis* principle is precluded where one of the obligations has *jus cogens* status. Ibid., para. 14(10). However, that is not the case here. See Irmscher (2014), at 475.
[1459] Irmscher (2014), at 466-467.
[1460] UN Doc. A/CN.4/L.682 (2006), para. 88.
[1461] Irmscher (2014), at 467 (emphasis added).
[1462] UN Doc. A/CN.4/L.682 (2006), para. 115 (fn. omitted, emphasis added).

corresponds to the intention of the ECHR states parties, that is, to create a general right of access to court, except in the case of the UN.

- Article 31(3)(c) of the VCLT and the different legal natures of the competing norms

The general rule of interpretation contained in Article 31(3)(c) of the Vienna Convention points in the same direction.[1463] It provides that 'there shall be taken into account . . . any relevant rules of international law applicable in the relations between the parties'. As the ILC Study Group explained:

> 'Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty'.[1464]

Applied to the current case, according to Irmscher:

> 'the underlying principle of this rule may be said to be that general rules of a multilateral character may have to be taken into account when interpreting a certain provision. Thus, when interpreting and applying the right of access to court, regard must be had to other obligations of the forum State as a matter of treaty law, including immunities granted in accordance with public international law. The Human Rights Committee, in its General Comment no. 32, has expressly recognized that "exceptions from jurisdiction deriving from international law such, for example, as immunities" can constitute a legitimate limitation of the right of access to a court under Article 14, CCPR — a clear indication that immunities under international law constitute the context for the interpretation of the right of access to court.'[1465]

Indeed, in terms of the legal nature of the rights at issue, whereas the right to immunity is absolute, the right of access to justice is not. As Irmscher put it:

> 'Whereas the right of access to court is by no means absolute and would depend on the details, limitations and conditions of the domestic legal order, immunity has been regulated in an unqualified automatic manner. It is essentially self-executing and applies automatically, it is not a mere consideration by virtue of which a court would be given the discretion to refuse the adjudication of a certain dispute.'[1466]

Therefore, the interpretation of the right of access to court in light of the jurisdictional immunity of international organisations militates in favour of the latter taking priority over the former.

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[1463] According to the ILC Study Group: 'When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31-33 having to do with the interpretation of treaties.' UN Doc. A/CN.4/L.702 (2006), para. 14(3) (emphasis added). Art. 31(3)(c) is also cited by the ECtHR in interpreting the ECHR, taking 'into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty'. See, e.g., *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01), para. 122.

[1464] UN Doc. A/CN.4/L.702 (2006), para. 14(21).

[1465] Irmscher (2014), at 468 (fn. omitted, emphasis added).

[1466] Ibid., (emphasis added).

- Consequences of prioritising one right over the other

As to the consequences of the courts of a state party to the General Convention denying the immunity of the UN, under the ASR—specifically, Articles 1, 2, 4[1467] and 12—the forum state would incur international responsibility for the internationally wrongful act of breaching the obligation under Section 2 of the General Convention.[1468] At the very least,[1469] it would incur that responsibility towards the 116 states parties to the General Convention that are not parties to the ECHR. Similarly, in the case of NATO, by denying its jurisdictional immunity, the forum state would commit an internationally wrongful act, at least towards the USA and Canada, for breaching the obligation under Article V of the Ottawa Agreement.

As a result, amongst others, under Article 30 of the ASR, the forum state would be under an obligation to cease doing so, that is, to ensure respect for the jurisdictional immunity of the international organisation. Insofar as domestic courts are independent, the executive branch may be limited to making representations in favour of the immunity. And, it arguably would be required to preclude the execution of judgments rendered in contravention of the immunity.[1470]

The forum state would moreover be under an obligation to make full 'reparation' under Article 31 of the ASR. The damage resulting from a denial of immunity is the impairment of the independence of the international organisation. As seen in subsection 4.2.1, such impairment may take various forms. It is difficult to conceive how such damage could be repaired. That is why it is important to respect the jurisdictional immunity of international organisations in the first place. According to Irmscher,

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[1467] Art. 4 of the ASR provides: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' (emphasis added).

[1468] As submitted in subsubsection 3.2.2.2, there is insufficient support for the argument that the forum state is entitled to suspend the UN's jurisdictional immunity under the General Convention on the basis that the UN's failure to implement its obligation under Section 29 of the treaty amounts to a 'material breach' thereof. Similarly unconvincing, it is submitted, is the argument that the forum state could deny the UN's immunity as a countermeasure against the UN for the latter's failure to implement Section 29 of the General Convention. But see Irmscher (2014), at 476-478.

[1469] The state might incur such responsibility also towards the states that are parties to both the ECHR and the General Convention, on the view that the latter prevails as per the reasoning above.

[1470] As seen, under Art. 3(a) of the Bailiff's act, the Minister of Justice may instruct a bailiff to not serve a judgment on an international organisation, where doing so would be in violation of the state's obligations under international law obligations. Such an instruction was given, for example, following Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*). See also Court of Appeal The Hague (summary proceedings) 15 March 2007, ECLI:NL:GHSGR:2007:BA2778 (*OPCW*), upholding the instruction issued by the Minister of Justice under Art. 3(a) of the Bailiff's act. This followed District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo* v. *OPCW*), dismissing the OPCW's immunity from jurisdiction and awarding the claim on the merits.

> 'if the right of access to court would prevail, the concept of immunities would be completely disregarded and thus become obsolete, since the purpose of immunity from jurisdiction is exactly to exclude any substantive examination of the case by the court.'[1471]

Indeed, in practice international organisations jealously guard their immunity from jurisdiction. Where an international organisation is sued before a domestic court, it will typically engage with the forum state, through its foreign ministry, to insist on the immunity being respected.[1472] In addition, legal proceedings between the international organisation and the forum state cannot be excluded; a dispute settlement clause may well be in place.[1473]

Yet, Irmscher suggests that the consequences of denying the immunity are less weighty than the consequences of denying access to court.[1474] According to Irmscher:

> 'Accepting the obligation to respect an organization's immunities would mean non-observance of the human rights obligation of the forum State. Depending on the available mechanisms, a State could face proceedings before the competent treaty body which could independently confirm a violation of the treaty, and potentially order the State party to pay compensation and/or to remedy the situation, at least with respect to the future. Thus, there is potential for a judgment or a comparable legal pronouncement, possibly with high publicity. Furthermore, the State may be obliged to remedy the situation or to pay compensation.'[1475]

However, in none of the nine cases identified in this study did the ECtHR rule against the forum state, although this was because reasonable alternative means were deemed to be available, whereas Article 103 of the UN Charter was at issue in *Mothers of Srebrenica*. If it came to an award against the forum state for upholding the jurisdictional immunity of an international organisation, this might be the cost of protecting the independence of the organisation.[1476] Any reputational damage could be offset by the state demonstrating its commitment to the right of access to court,[1477] or seeking to ensure the accountability of the international organisation, in other ways. For example, as a member state of the international organisation, the state could argue for the improved implementation of Section 29 of the General Convention (or equivalent provision). Alternatively, it could pursue an advisory opinion from the ICJ

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[1471] Irmscher (2014), at 469.
[1472] But see Irmscher (2014), at 475-476 ('political irritations will normally be limited, if they will surface at all.')
[1473] For example, headquarters agreements concluded with the Netherlands typically provide for arbitration where a dispute cannot be settled amicably. See, e.g., Art. 44 of the IRMCT Headquarters Agreement. But see Irmscher (2014), at 475-476 ('the unlikelihood of an international organization to start legal proceedings against one of its Member States').
[1474] Irmscher (2014), at 476 ('even though the two obligations of the forum State are of equal value, the consequences of not respecting them would be essentially different. Arguably, and based on factual considerations only, the consequences of disrespecting immunities would weigh much less from the perspective of the forum State, given the character and possible vulnerability of the international organization.').
[1475] Irmscher (2014), at 475.
[1476] Financial awards ordered by the ECtHR are generally not such as to be prohibitive for states. See, e.g., the award for compensation and expenses in *Osman v. the United Kingdom* [GC], Judgment of 28 October 1998, [1998] ECHR (VIII) (*Osman*).
[1477] Cf. ibid., at 469 ('even if immunities are respected by the court, the right of access to court would still have a broad scope of application.').

under Section 30 of the General Convention for breach of Section 29 (or equivalent provisions), or exercise diplomatic protection for claimants that are its nationals. An alternative approach to avoid exposure through an adverse judgment would be for the forum state to concede responsibility towards the claimant and offer compensation.

- Context

In balancing the obligation to accord immunity against the obligation to grant access to court, context is relevant. To begin with, one cannot lose sight of the wide divergence amongst international organisations, the sources of their immunity and the different types of third-party claims against them. Thus, for example, the UN's absolute immunity under the General Convention was at issue in *Mothers of Srebrenica*, which concerned the UN's alleged failure of the UN in the face of genocide in connection with a Chapter VII operation. NATO's SHAPE and JFCB are invoking functional immunity under customary international law in the *Supreme* case, concerning a contractual dispute. The IUSCT, seated in the Netherlands, has relied on its functional immunity under its headquarters agreement in various employment disputes (*Spaans v. IUSCT* having been previously decided under general international law). And, the EPO, partly seated in the Netherlands, has relied on its functional immunity under multilateral agreements in a variety of disputes. All these cases essentially raise the same conflict between immunity and access to court, but the different circumstances of each warrants careful consideration in addressing that conflict.

The membership of an international organisation forms a contextual element of particular significance. This is illustrated by the case of NATO. As seen, the adequacy of its alternative remedies in staff cases has come before the ECtHR in *Gasparini* and, concerning NATO's jurisdictional immunity, in *Chapman*. The issue in both cases was whether under the *Waite and Kennedy-Bosphorus* test, NATO's Appeals Board and its procedures conformed to the essence of Article 6 of the ECHR. Whilst the ECtHR found in *Gasparini* that the test was met, it dismissed the applicant's challenge in *Chapman* as the applicant had not availed himself of the Appeals Board. This notwithstanding, the point is that the Court scrutinised the adequacy of NATO's alternative remedies. In this respect, Olson, a former NATO legal adviser, stated that 'NATO has some very real concerns relating to the jurisprudence of the European Court of Human Rights, and struggles to make sense of it.'[1478] He continued to comment:

> 'NATO is *not* a "European" body, despite the fact that 26 of its 28 member states are European. Rather, in its very conception—its own constitution, one might say—it is a trans-Atlantic body in which the North American element is as fundamental as the European. It cannot be doubted that the North American allies would immediately reject the proposition that NATO is part of the European public order in the sense that 'European constitutional instruments' could directly dictate or constrain its internal workings. And insofar as the implication is that rulings of the Court might, by purporting

[1478] Olson (2015), at 169.

> to apply ECHR standards directly to the Organization's internal regulations or enforcement mechanisms, effectively impose Convention norms on NATO bodies outside Europe . . . —that, too, would raise serious questions . . . The degree of state action required seems to have shrunk dramatically, however, to the point that, in its 2009 ruling in *Gasparini* the Court apparently abandoned even the pretence of requiring some state action as a precondition to holding an ECHR party accountable for actions of NATO. Rather, in that case it took it on itself to judge the quality of NATO's internal appeals tribunal on the basis that allegations of its insufficiency raised the possibility of a "structural lacuna" in the Organization, for which it considered ECHR Parties still directly accountable almost a half-century after the original transfer of sovereign powers to NATO.'[1479]

Did the ECtHR, as Olson put it, 'effectively impose Convention norms on NATO bodies' or, as he suggested in a footnote with reference to ICJ case law, infringe the 'basic principle that a court may not exercise jurisdiction over a state without that state's consent'?[1480] Arguably, the Court did not do so. As Olson himself recognised, it is 'ECHR Parties' who are being held to account in light of their obligations under the ECHR in connection with international organisations. The ECtHR may have no choice but to rule that a state party breaches Article 6 of the ECHR where its courts uphold immunity whilst alternative remedies do not meet the *Waite and Kennedy-Bosphorus* test. That is a consequence of those states being parties to the ECHR, whilst simultaneously being NATO member states. However, the ECtHR's ruling does not, as such, interfere with NATO and, contrary to Olson's concern, ECHR norms are not being imposed on it.

Nonetheless, there could be indirect such interference if a NATO member state would set aside NATO's jurisdictional immunity in anticipation of an ECtHR ruling. To prioritise the obligation to grant access to court over the obligation to accord immunity would be questionable in view of NATO's membership and purpose. Two of the Ottawa Agreement's states parties—the United States and Canada—are not parties to the ECHR. Having been founded, at least in part, to respond to the threat posed by the Soviet Union,[1481] NATO 'is a trans-Atlantic body in which the North American element is as fundamental as the European.'[1482] That 'North American element', made up of the USA and Canada, is not subject to the ECHR. At the same time, the ECHR's 47 states parties do include the Russian Federation and other former Soviet states. To ignore NATO's jurisdictional immunity on account of the ECHR is fundamentally problematic: it would expose NATO to interference in the name of ECHR states parties, including those that, at least in part, gave cause for NATO's establishment.

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[1479] Ibid., at 170 (fn. omitted; italics in original, underlining added).
[1480] Ibid., at 170, fn. 22. Along similar lines, see Lock (2010), at 540 ('The USA and Canada are not bound by the Convention, but the alleged procedural deficit in the staff rules of NATO would be attributable to them also. If the Court had found a violation of the Convention, it would thus have held these countries indirectly responsible for the violation of a human rights treaty to which they are not parties.').
[1481] <nato.int/cps/us/natohq/declassified_139339.htm> accessed 21 December 2021.
[1482] Olson (2015), at 170.

This context is relevant to resolve the conflict between jurisdictional immunity and access to court in the pending case of *Supreme*. Even if in that case alternative remedies are deemed to be absent, and notwithstanding that the respondents' immunity arises under general international law (as opposed to a treaty), the foregoing may provide good arguments for the immunity to prevail.[1483]

Similar reflections arise with respect to the IUSCT, though a very different type of international organisation compared to NATO. Seated in the Netherlands, its only member states are the USA and Iran. Under Article 3 of the IUSCT's headquarters agreement with the Netherlands, concluded in 1990, the IUSCT enjoys functional immunity. As seen, a real question arises as to whether the IUSCT's alternative recourse in staff cases (that is, the tribunal's own arbitrators) meets the requirement of independence under Article 6 of the ECHR. If that requirement is not met, and where the immunity of the IUSCT is upheld, the ECtHR would find the Netherlands in breach of Article 6 of the ECHR.

However, that does not mean that the Dutch courts must prioritise the obligation to grant the claimants access to court over the obligation to accord the IUSCT immunity from jurisdiction. To the contrary, as in the case of NATO, the circumstances of the IUSCT may provide good arguments for prioritising its immunity. To begin with, its sole states parties are the USA and Iran, on which the ECHR has no bearing. Established in 1981, the Tribunal was part of a negotiated solution for a highly volatile situation, the Iran hostage crisis. The Netherlands was prepared to host the tribunal, perhaps in light of its constitutional commitment to 'promote the development of the international legal order.'[1484] Whilst that commitment equally includes promoting and encouraging respect for human rights (which includes the right of access to court), it may be that in the circumstances, the Netherlands' intention was first and foremost to offer protection to the IUSCT to enable it to carry out its sensitive mandate in full independence. Having to that end agreed to confer immunity from jurisdiction on the IUSCT,[1485] the Netherlands may have to accept the consequences of being simultaneously bound by the ECHR. That is, the potential for an adverse ruling of the ECtHR does not justify breaching the obligation under the headquarters agreement to accord jurisdictional immunity to the IUSCT.

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[1483] The District Court stated that it would balance the conflicting rights to, on the one hand, access to court and, on the other, functional immunity. District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.25 ('De rechtbank zal daarom onderzoeken of de functionele immuniteit dient te wijken voor artikel 6 EVRM. Hierbij moet worden beoordeeld of het belang van het respecteren van de functionele immuniteit van AJFCH en SHAPE zwaarder weegt dan het belang van Supreme bij "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".'). However, in reality the Court applied the proportionality test under *Wait and Kennedy* and, having concluded that there were no reasonable alternative means, it prioritised the rights under Art. 6 of the ECHR. Ibid., paras. 4.36-4.41.

[1484] Art. 90 of the Constitution of the Netherlands, <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021.

[1485] Of note, the IUSCT Headquarters Agreement does not include a provision akin to Section 29 of the General Convention, requiring the IUSCT to make 'provision for the settlement of disputes of a private law character'.

The ECtHR has shown that it is itself not oblivious to the realities surrounding the simultaneous application of different treaties. For example, in *Behrami and Saramati,* it held:

> 'The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.
> . . . The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN.'[1486]

This passage was the lead-in to a reference to Article 103 of the UN Charter. Though it does not contain a legal argument, the quoted passage took into account an important reality to back up the ECtHR's deference to the UN Charter in declaring the applications in *Behrami and Saramati* inadmissible. For national courts, which as courts of general jurisdiction enjoy broader discretion in making policy choices than the ECtHR, the 'reality check' in *Behrami and Saramati* is instructive in addressing the conflict between immunity and right of access to court.

- Interim conclusions

*Waite and Kennedy* does *not* dictate to domestic courts that the obligation to grant access to court must prevail. The implication of this precedent is merely that where the courts of a forum state uphold the immunity from jurisdiction of an international organisation, in the absence of reasonable alternative means, the forum state will in most cases (*Mothers of Srebrenica* being the exception) breach Article 6 of the ECHR. The ECtHR, as a specialised human rights court, may have no choice but to make a finding to that effect. Conversely, domestic courts, as courts of general jurisdiction, will have to balance the forum state's obligation to grant access to court against its obligation to respect the international organisation's immunity from jurisdiction.

In conducting this balancing exercise, there are good arguments that militate in favour of prioritising the immunity. Notably, whilst the *lex posterior* principle arguably leads to 'arbitrary results', the *lex specialis* principle may reflect the intention of states to create a general entitlement of access to the court, except as agreed otherwise with respect to international organisations. Furthermore, the right of access to court is not absolute, which in light of Article 31(3)(c) of the VCLT militates in favour of prioritising the obligations to accord immunity. Moreover, while the consequences of denying the immunity arguably outweigh those of denying access to court, contextual considerations, notably the

[1486] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01), paras. 146-147.

member states of the international organisation, may point in the same direction. The examples concerning NATO and the IUSCT illustrate the realities at play.

By seeking to vindicate the right of access to court in alternative ways, the forum state may provide comfort to its courts in upholding the jurisdictional immunity of international organisations. Ultimately, it is for international organisations and their member states to provide access to justice through alternative remedies. This would reconcile the conflicting international obligations concerning jurisdictional immunity and access to justice, in furtherance of the systemic approach referred to by Koskenniemi. And, it would ensure compliance by international organisations with their international law obligations to provide for alternative remedies.

*The 'Waite and Kennedy approach' in domestic case law*

Notwithstanding the arguments developed in the foregoing, in choosing between the conflicting obligations to accord immunity from jurisdiction and grant access to court, the lower Dutch courts not infrequently prioritise the latter over the former. The approach followed is essentially along the lines of *Waite and Kennedy*:[1487] the jurisdictional immunity is to give way where Article 6 of the ECHR would be breached in the absence of alternative remedies. It has not come to immunity being denied by the Dutch courts in final instance. This is because alternative remedies were each time deemed to be available (*Mothers of Srebrenica* being the exception). Indeed, litigation concerning the jurisdictional immunity of international organisations largely concerns the question of whether adequate alternative remedies are available. The lower Dutch courts are less inclined to conclude that they are.

Thus, for example, the District Court of Limburg in its 2017 judgment in *Supreme* set aside the immunity of the respondents on the basis that the available remedies were below par.[1488] On similar grounds, the District Court The Hague has on several occasions denied the jurisdictional immunity of international

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[1487] Cf. Reinisch (2016, 'Immunity'), para. 33 ('In the Court's view, the proportionality of the grant of immunity depended upon the availability of 'reasonable alternative means' to protect their rights'. [emphasis added]). Cf. Irmscher, at 473 ('The European Court of Human Rights has recognized that immunities may constitute a proportionate limitation of the right of access to court, provided there exists an alternative remedy for the claimant.' [emphasis added]).

[1488] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (Supreme) ('4.33 . . . Het ontbreken van een geschilbeslechtingsmechanisme in de BOA's Herat en Kandahar . . . maakt de claim van een ontoelaatbare schending van het recht op een fair trial dan ook gerechtvaardigd, tenzij moet worden geoordeeld dat de alternatieven die Supreme ter beschikking staan, voldoen aan de standaard in het Waite en Kennedy-arrest: er moet sprake zijn van "reasonable means to protect effectively the rights" . . . 4.41. Gelet op het voorgaande komt de rechtbank tot het oordeel dat het beroep op de functionele immuniteit van AJFCH en SHAPE in dit geval afstuit op het in artikel 6 van het EVRM gewaarborgde recht op een fair trial. De rechtbank acht zich daarom bevoegd kennis te nemen van de vorderingen.' [emphasis added]). On appeal, the immunity was upheld on the basis, amongst others, that alternative remedies were deemed to be available. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.3. ('Het hof vermag niet in te zien waarom een dergelijke vrijwillig aangegane nadere afspraak, gezien de ter zake in het Nederlands recht getroffen wettelijke regelingen, geen 'redelijk alternatief' zou vormen.').

organisations. Thus, in its 2014 judgment in *EPO unions,* the Court rejected the EPO´s immunity from jurisdiction on the basis that the claimants could not avail themselves of alternative remedies.[1489] In 2012, in *IUSCT non-extension*, the Court denied the IUSCT's immunity from jurisdiction as the claimant had not been informed of alternative remedies.[1490] And, in 2002, the Court denied the PCA immunity from jurisdiction in *Pichon v. PCA* on the basis that the PCA had not implemented the obligation under Article 16 of the PCA Headquarters Agreement to 'make provisions for appropriate methods of settlement of: (a) disputes arising out of contracts and disputes of a private law character to which the PCA is party'.[1491]

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[1489] District Court The Hague (summary proceedings) 14 January 2014, ECLI:NL:RBDHA:2014:420 *(EPO unions)*, para. 3.6 ('In het kader van de beoordeling van de proportionaliteit is voorts van belang of aan de VEOB en SUEPO alternatieve rechtsmiddelen ter beschikking staan die hun recht op toegang tot de rechter effectief beschermen. Naar het oordeel van de voorzieningenrechter is dat niet het geval . . . Een en ander leidt ertoe dat het beroep van de Octrooiorganisatie op immuniteit van jurisdictie wordt verworpen.' [emphasis added]). Conversely, whilst the Court of Appeal rejected the immunity, it stated that this was *not* because of the mere absence of alternative recourse. See Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), paras. 3.4, 3.10.

[1490] District Court The Hague 13 February 2012 (IUSCT non-extension), as paraphrased in Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (IUSCT non-extension), para. 1.4 ('In verband met zijn bevoegdheid overweegt de kantonrechter dat het Tribunaal als internationale organisatie functionele immuniteit geniet en dat, nu [eiseres] in haar functie van secretaresse bijdroeg aan de vervulling van de taken van het Tribunaal en de door haar aan het Tribunaal verweten gedragingen met de vervulling van die taken onmiddellijk verband houden, de Nederlandse rechter geen rechtsmacht toekomt, tenzij [eiseres] daardoor de toegang tot een onafhankelijke en onpartijdige rechterlijke instantie wordt onthouden. Omdat van de zijde van het Tribunaal verzuimd is [eiseres] te wijzen op de mogelijkheid van een interne rechtsgang of de zaak door te verwijzen naar de Tribunal Judges, is naar het oordeel van de kantonrechter voor [eiseres] niet een procedure mogelijk gemaakt, die gelijkwaardig is aan artikel 6 EVRM, en acht de kantonrechter zich bevoegd van het geschil tussen [eiseres] en het Tribunaal kennis te nemen.' [emphasis added]). See also Court of Appeal The Hague (summary proceedings) 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour),* para. 12 ('Weliswaar is het in artikel 6 EVRM gewaarborgde recht op toegang tot een onafhankelijk en onpartijdig gerecht niet absoluut en kan dit recht aan beperkingen worden onderworpen, maar die beperkingen dienen proportioneel te zijn ten opzichte van het nagestreefde doel en zij mogen niet zover gaan dat daardoor het wezen van het recht op rechterlijke toegang wordt aangetast, bijvoorbeeld indien de belanghebbende geen redelijk alternatief voor het effectief inroepen van zijn rechten onder het EVRM ter beschikking staat.' [emphasis added]).

[1491] District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*), at 2 ('Blijkens artikel 16 lid 1 sub a van de zetelovereenkomst dient de PCA regels op te stellen voor de wijze van beslechting van geschillen die kunnen ontstaan op grond van contracten en conflicten van civielrechtelijke aard waarbij de PCA partij is. Niet is gebleken dat aan deze bepaling uitvoering is gegeven. Dit betekent dat Pichon geen enkele rechtsgang heeft. Dat is niet de bedoeling geweest van de contracterende partijen bij de zetelovereenkomst.'). While the Court referred to Art. 6 of the ECHR, it primarily relied on the purported intention of the parties to the PCA Headquarters Agreement, suggesting a linkage between the entitlement to jurisdictional immunity and the availability of alternative recourse.

Furthermore, several judgments suggest that the jurisdictional immunity would have been dismissed but for the availability of alternative remedies. These include the Hague Court of Appeal judgments in *IUSCT non-extension*,[1492] *IUSCT abolition,*[1493] and *EPO disability*.[1494]

As to the Dutch Supreme Court, as seen, in *Mothers of Srebrenica* it did not consider the absence of reasonable alternative means to be of consequence for the UN's immunity. However, the case is atypical, notably as Article 103 of the UN Charter was at play. In *Spaans v. IUSCT*, back in 1985, the Supreme Court held that it could 'disregard' the question of whether 'exceptions may be made' to the jurisdictional immunity of the IUSCT.[1495] This was because, in that case, the Supreme Court deemed that alternative remedies were available. However, as lower courts continue to fuel the notion that immunity depends on adequate alternative remedies, the Supreme Court may have to confront that question.

The approach in the said case law of the lower Dutch courts is also seen abroad. As explained by Blokker and Schrijver, with reference to several European jurisdictions,

> 'national courts have often accepted immunity claims by international organizations, sometimes criticizing the absence of any remedies or referring to the availability of alternative remedies. But occasionally, national courts have rejected such claims, in the absence of alternative remedies.'[1496]

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[1492] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.5 ('Het hof is daarom van oordeel dat het door het Tribunaal gedane beroep op zijn immuniteit van jurisdictie slechts gehonoreerd kan worden als voor [geïntimeerde] voorzien was in een alternatieve rechtsgang voor de beslechting van het door haar opgeworpen geschil waarvan zij gebruik kon maken'. [underlining added]).

[1493] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 15 ('Uit de eerdergenoemde beslissing van het EHRM in de zaak Waite en Kennedy/Duitsland blijkt dat een alternatieve rechtsgang beschikbaar moet zijn' [underlining added].).

[1494] Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.' [emphasis added). See also District Court The Hague 28 November 2001 (*ISNAR*), para. 5.10, cited in District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*) ('every person is entitled, under international law too, to an effective legal process in cases such as the present one. If it should therefore transpire that the legal process in accordance with the Staff Regulations is not effective in this specific case, the Dutch courts would have a function after all.' [emphasis added]).

[1495] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4. In upholding the IUSCT's immunity, the District Court The Hague in the same matter held that the absence of legal recourse for IUSCT staff members would *not* have rendered the Dutch courts competent. See Sub-District Court The Hague 9 July 1984, *NJ* 1986/438, para. 8.

[1496] Blokker and Schrijver (2015), at 353 (fns. omitted, emphasis added). See also, ibid., at 345, arguing that the answer to criticism over the absence of recourse is 'to reduce as much as possible any 'accountability gaps': for example, by waiving the immunity whenever necessary and possible or by providing for alternative remedies for private law disputes. If international organizations do not take this requirement seriously, courts may increasingly reject immunity claims by international organizations and, more generally, international organizations may lose support in public opinion.'). Likewise, Schrijver (2015), at 331, arguing 'an uncomfortable and unsatisfactory situation has evolved as a consequence of the lack of adequate procedures for instituting legal proceedings against the United Nations. This is being expressed by increasing dissatisfaction and also in several court rulings at

According to Reinisch, 'The *Waite and Kennedy* test linking immunity to the availability of "reasonable alternative means" of redress has been also espoused by a number of national courts'.[1497] It may be that '[i]n spite of this growing acceptance of the *Waite and Kennedy* approach, it is too early to say whether national courts will generally follow it'.[1498] One thing seems clear, however: without adequate alternative remedies, jurisdictional immunity is not to be taken for granted.

### 4.4 Reducing 'accountability gaps': a role for national courts?

In following the *Waite and Kennedy* approach—that is, in the absence of alternative remedies, access to court takes priority over jurisdictional immunity—domestic courts seek to avoid gaps in the accountability of international organisations.[1499] From this perspective,[1500] Reinisch has proposed a role for national courts. Whether disputes can be adjudicated by domestic courts would be determined on the basis of a balancing exercise involving the following considerations:

> '(a) whether [national courts] are suited to perform this task; and (b) whether such exercise of jurisdiction will disproportionally hinder the independent functioning of international organizations. Clearly, both aspects will always require nuanced answers; they will come as matters of degree and not as black-and-white, yes-or-no responses. Thus, each element in itself, and subsequently both elements combined, will require a balancing exercise.'[1501]

As to the potential for interference in the functioning of the international organisation, Reinisch proposed the identification of 'criteria to assess different degrees of political interference'.[1502] In this

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national level and at European level, which are weakening respect for the immunity of the United Nations.' See likewise Daugirdas and Schuricht (2021), at 55-56 ('as international organizations' lawyers have themselves recognized, international organizations immunity is vulnerable when injured individuals lack access to alternative dispute settlement mechanisms.').

[1497] Reinisch (2016, 'Immunity'), para. 35.

[1498] Ibid., para. 41. Reinisch concludes: 'Art. II Section 2 has become one of the central provisions of the General Convention. Immunity from legal process has always been considered a crucial tool to guarantee the independent functioning of international organizations. While an outright exemption from the jurisdiction of national courts has become problematic, in particular, in situations where no alternative dispute settlement mechanisms have been made available, judicial practice tends to recognize the UN's 'immunity from every form of legal process' as enshrined in Art. II Section 2 General Convention.' Reinisch (2016, 'Immunity'), para. 108.

[1499] Blokker and Schrijver (2015), at 345.

[1500] Reinisch (2015), at 322 ('While national courts can hardly be considered to be generally unsuited to adjudicate cases involving international organizations, it may well be that they are often not in the best position to do so. Where other dispute settlement options are available to potential claimants and where these appear better suited to decide complex issues of international organizations law, domestic courts should abstain from filling any accountability gap by upholding jurisdiction. Instead, they should defer to other, probably international dispute settlement institutions.') Similarly, I. Dekker and C. Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals', in A.A.H. van Hoek and Nederlandse Vereniging voor Internationaal Recht, *Making Choices in Public and Private International Immunity Law* (2011), 83 at 108 ('Domestic courts should only grant international organisations immunity if the latter offer reasonably available alternative dispute-settlement mechanisms (cf., the caselaw of the European Court of Human rights)'.

[1501] Reinisch (2015), at 319.

[1502] Ibid., at 322.

respect, one

> 'element to be taken into account is the actual internal operation of international organizations through the exercise of jurisdiction of national courts . . . Again this will be a question of degree that will increase with the extent to which a national court will have to address issues of the internal law of an international organization.'[1503]

As to who carries out the balancing exercise, Reinisch considered this 'could be found in the form of international courts or tribunals performing the balancing exercise and deciding whether or not domestic courts should adjudicate or grant immunity.'[1504] Specifically, he envisaged a '"preliminary ruling" in which an international court or tribunal would merely decide the incidental procedural issue of whether an international organization enjoys immunity or not'.[1505] Reinisch proposed that this role be performed by the ICJ.[1506] To this end, he envisaged the making of

> 'explicit provision for the introduction of the suggested limited preliminary ruling system in the applicable immunities instruments, such as multilateral privileges and immunities treaties or headquarters agreements. This would clearly require the political will on the part of states and international organizations to do so. But given the increasing importance of immunity issues from a 'rule of law' and accountability perspective, such an enlarged role of the ICJ would appear feasible.'[1507]

It is submitted that, in reality, these proposals are likely to be challenging. For one, the legal framework governing international organisations is a patchwork of instruments. Practical challenges would arise as each such instrument would have to be renegotiated. International organisations in the Netherlands are moreover unlikely to agree to any changes to their immunity protection. This is because they currently enjoy a large measure of protection, with Dutch courts broadly interpreting the scope of jurisdictional immunity, even where the immunity is cast in functional terms. Moreover, no matter how authoritative the ICJ is, as the principal judicial organ of the UN, organisations that do not form part of the UN system may prefer to keep matters in their own hands.

Perhaps most fundamentally,[1508] it is difficult to see how the proposal would address the fundamental reason why international organisations require jurisdictional immunity, as discussed in subsection 4.2.1 of this study, that is, to avoid interference in their independent and efficient functioning. It may be

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[1503] Ibid., at 323.
[1504] Ibid., at 325. In the case of adjudication, presumably the international organization would be expected to waive its immunity. See Reinisch (2015), at 324.
[1505] Ibid., at 326.
[1506] Ibid.
[1507] Ibid., 327-328.
[1508] It is also not clear from the proposal how the intended 'preliminary ruling' would concern the relationship between the international organisation's immunity and the claimant's right of access to court. A finding by the ICJ to the effect that the international organisation is entitled to immunity would in any event not preclude a claimant from suing the host state before the ECtHR for breach of Art. 6 of the ECHR.

possible to avert certain risks through preliminary rulings.[1509] But to safeguard properly against domestic interference would require closer oversight over the domestic proceedings. The ICJ would have to familiarise itself with the dispute and effectively police the proceedings. That is an unlikely role for the Court.

It is submitted that efforts to improve the accountability of international organisations would be more usefully directed to developing alternative remedies proper.[1510] As explained by Blokker and Schrijver, the answer to criticism that individuals who suffer from the activities of international organizations cannot bring claims

> 'is not to question the existing regime of immunity rules of international organizations. . . . [T]he regime of immunities rules is and continues to be a key part of the law of international organizations, essential for their independent functioning, generally accepted and respected in practice. Instead, the answer is to fully implement this regime and to reduce as much as possible any 'accountability gaps': for example, by waiving the immunity whenever necessary and possible or by providing for alternative remedies for private law disputes. If international organizations do not take this requirement seriously, courts may increasingly reject immunity claims by international organizations and, more generally, international organizations may lose support in public opinion.'[1511]

Alternative remedies, thus, serve to protect the independence and effectiveness of international organisations by preserving their jurisdictional immunities, and protecting their legitimacy.[1512]

Leaving aside the impact on international organisations if national courts were to adjudicate third-party disputes, such adjudication would unlikely serve the interests of third-parties. This is because international organisations will resist complying with domestic judgments, ultimately by relying on their immunity from *execution*. The result, therefore, would be no different than if the domestic court had

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[1509] For example, the ICJ could conceivably designate a national court that is best placed to adjudicate a case to avoid the risk of diverging national court rulings, which is one of the problems identified by McKinnon Wood. See Schermers and Blokker (2018), para. 1611.

[1510] Cf. Reinisch (2015), at 328 ('A more pragmatic short-term response for international organizations trying to avoid situations in which national courts may be tempted to "close the accountability gap" by denying immunity to international organizations would be increasing efforts to eliminate "accountability gaps" in the first place. This could be achieved by international organizations developing functioning alternative means of redress that make the balancing exercise described above superfluous.'); Johansen (2020), at 300 ('The main advantages of pursuing reform at the international level are clear: International organisation retain their independence, while the accountability toward individual victims is ensured – provided that sufficient accountability mechanisms are established.').

[1511] Cf. Blokker and Schrijver (2015), at 345. See also Johansen (2020), at 298 ('I stand with those opposing radical changes to the current regime international organisation IO immunities'; De Brabandere (2010), at 119 ('The answer to the question of how to improve the rights of individuals who cannot bring a claim against an international organization needs . . . to be found, not in an inconsistent exception to international organization immunity, but rather in the creation of effective alternative dispute settlement mechanisms.').

[1512] Cf. Blokker and Schrijver (2015), at 343 ('It is considered to be less acceptable today if individuals suffer from the activities of international organizations and do not have adequate remedies or cannot bring claims against these organizations with some chance of success. Parallel to this, the role played by international organizations has become much more prominent than in previous decades. Their number and activities have multiplied, and as a result it is less exceptional that 'things may go wrong' and that individuals consequently suffer from their operations.').

upheld the international organisation's immunity from jurisdiction—the claimant would be left empty-handed.

In sum, national courts are not well placed to adjudicate third-party disputes against international organisations. The rationale for the jurisdictional immunity of these organisations continues to apply; however, to bolster the immunity (and the legitimacy of international organisations), alternative remedies are indispensable. It is through such remedies that 'accountability gaps' are to be reduced.[1513] National courts incentivise the development of such remedies through the *Waite and Kennedy* approach.[1514]

### 4.5 Conclusions

As seen in chapter 3 of this study, Section 29 of the General Convention was conceived as the counterpart to the UN's jurisdictional immunity. The premise underlying that idea remains valid insofar as, due to their ever-increasing responsibilities, international organisations more than ever need protection against domestic interference through jurisdictional immunity.

It is not to be taken for granted, however, that jurisdictional immunity effectively shields international organisations from third-party claims before domestic courts. The problem does *not* lie with the legal regime governing the immunity as such. In the Netherlands, the domestic jurisdiction central to this chapter, the immunity of international organisations is firmly rooted in the legal order. There is a broad variety of sources providing for such immunity, including, according to the Dutch Supreme Court in *Spaans v. IUSCT*, general international law. And, the jurisdictional immunity is recognised in the case law of the Dutch courts, as well as the ECtHR.

Rather, the key challenge to the effectiveness of immunity from jurisdiction arises out of the conflict between the obligation to respect the immunity and the obligation to grant access to court under Article 6(1) of the ECHR. To be sure, that conflict is not insurmountable. To begin with, it needs to be considered closely whether the obligation to grant access to justice under Article 6 of the ECHR applies. If it does not, then there is no conflict to resolve. The question as to the application of Article 6 of the ECHR turns on whether the dispute concerns the 'determination of . . . civil rights'. In the case of the UN, that arguably is to be determined in accordance with Section 29 of the General Convention, the core provision governing the organisation's third-party liability. As discussed in chapter 3 of this study, there are good arguments that the *Mothers of Srebrenica* dispute is outside the scope of that provision

[1513] Cf. Irmscher (2014), at 487 ('Alternative legal remedies are meant to fill this perceived accountability gap').
[1514] Cf. Reinisch (2015), at 319 ('The exercise of jurisdiction by national courts should not be an end in itself, but rather the means to achieve an end: that is, the development of adequate alternative dispute settlement mechanisms within international organizations in order to ensure their accountability.').

for lack of a 'private law character'. The implication would be that, contrary to the ECtHR's conclusion in *Mothers of Srebrenica*, Article 6 of the ECHR would not apply.

And even where Article 6 of the ECHR *does* apply, the obligation to grant access to court can be reconciled with the obligation to accord jurisdictional immunity through 'reasonable alternative means'. The Dutch Supreme Court recognised this early on in its judgment in *Spaans v. IUSCT* and it is central to the ECtHR's decision in *Waite and Kennedy*. According to subsequent ECtHR case law – developed on the basis of another line of cases in the context of international organisations – 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 Supreme Court and the ECtHR ruled in favour of the jurisdictional immunity of international organisations in each of the nine respective cases before them, as identified in this study. Alternative remedies were available in each of these cases, except one: *Mothers of Srebrenica*. Whilst the various courts in that case nonetheless concluded in favour of the UN's immunity, their reasoning is widely divergent. The ECtHR's decision is particularly ambiguous. It seems to confound the question of whether the entitlement to jurisdictional immunity is conditional on the availability of alternative recourse (which it arguably is not) with the question of whether jurisdictional immunity leads to a violation of the right of access to court. Absent reasonable alternative means, the answer to the latter question, in principle, is yes. The question then arises as to which obligation to prioritise: to uphold jurisdictional immunity or grant access to justice?

In the case of the UN, whilst not clearly articulated in the various *Mothers of Srebrenica* opinions, Article 103 of the UN Charter may operate so as to prioritise the obligation to uphold immunity from jurisdiction over the obligation to grant access to justice. But, even absent Article 103 of the UN Charter, there are good arguments for domestic courts to prioritise the obligation to uphold immunity from jurisdiction over the obligation to grant access to court.

Notwithstanding the foregoing, it is not to be taken for granted that the lower Dutch courts will uphold the jurisdictional immunity of international organisations. The relevant case law, like that in other jurisdictions, follows the ECtHR's approach in *Waite and Kennedy*. That is, in the absence of alternative remedies, access to court takes priority over jurisdictional immunity.

But domestic courts are not well placed to fill 'accountability gaps' concerning international organisations. A lose-lose situation arises: domestic adjudication impairs the independent functioning of international organisations. And, as international organisations decline to comply with domestic judgments and enjoy immunity from *execution*, third-party claimants are denied justice after all.

To ensure that international organisations are protected through jurisdictional immunity and that third-party claimants receive justice, the solution is to reconcile the conflicting obligations concerning immunity and access to court. Consonant with *Waite and Kennedy*, this involves the development of alternative remedies.

According to Jenks, writing in 1961:

> 'International immunities are apt to be regarded either as one of the housekeeping problem [sic] of international organisations or as an insidious encroachment on the rule of law, the liberty of the subject, and the equality of man. They are neither.'[1515]

In view of the complexities discussed in this chapter, the jurisdictional immunity of international organisations is anything but a 'housekeeping problem'. The immunity is as fundamental as ever to protect the independence of international organisations. But, immunity requires counterbalancing by alternative remedies to avoid 'accountability gaps'. Without such remedies, immunity *does* encroach on the rule of law, thereby undermining the legitimacy of international organisations. And, importantly, courts may attempt to close accountability gaps by rejecting immunity. This underscores the significance of the proper implementation of Section 29 of the General Convention.

[1515] C. Wilfred Jenks, International Immunities (1961), at xiii, continuing: 'In the present stage of development of world organisation they are an essential device for the purpose of bridling unilateral and sometimes irresponsible control by particular governments of the activities of international organisations. These organisations have been created by agreement amongst governments to discharge important and in some cases vital responsibilities on behalf of the world community as a whole with freedom, with independence, and with impartiality.'.

# 5 TOWARDS A 'COMPLETE REMEDY SYSTEM' FOR THIRD-PARTIES UNDER SECTION 29 OF THE GENERAL CONVENTION

## 5.1 Introduction

In addressing the first research question of this study, chapter 3 of this study has interpreted Section 29(a) of the General Convention, and appraised the UN's implementation thereof. It has done so in light of the international organisations law framework concerning third-party remedies. Notably, for 'modes of settlement' Section 29(a) of the General Convention to qualify as 'appropriate', they arguably must comply with (the essence of) Article 14 of the ICCPR; they must not be unduly burdensome, particularly for private claimants; and, they must not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction. The implementation of Section 29(a) of the General Convention has moreover been assessed against the broader backdrop of the rule of law.

The conclusion reached in chapter 3 was that the implementation of Section 29(a) of the General Convention gives rise to a number of problems. To recall briefly, these are:

1. Only disputes of a 'private law character' under Section 29(a) qualify for dispute settlement. Arguably the main challenge with the current implementation of Section 29 is that the UN itself determines the character of third-party disputes, exposing itself to criticism that it violates the maxim that no one may be judge in their own case (*nemo iudex in causa sua*);
2. With respect to standing claims commissions for peacekeeping operations, two problems have been identified. First, the legal framework of these commissions, which have never been established, is problematic in several respects. Second, 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; and
3. Arbitration under the UNCITRAL Arbitration Rules is not necessarily an 'appropriate' mode of settlement, as two problems arise. First, arbitration under those rules is potentially burdensome, particularly for private claimants. Second, more fundamentally, arbitration, including under the UNCITRAL Arbitration Rules, is subject to the supervision of national courts. That contrasts with the need to protect the independence of international organisations by avoiding the interference of national courts.

These problems indicate the need for a structural revision of the implementation of Section 29(a) of the General Convention. That is further amplified by the apparent absence of a 'system'[1516] amongst the various modes of settlement used to implement that provision.

A systematic revision of the implementation of Section 29(a) of the General Convention is necessary to ensure that that provision truly operates as the 'counterpart' to the UN's jurisdictional immunity, as it was originally conceived.[1517] Chapter 4 concluded that such a revision is warranted: the case for immunity is strong, but without alternative remedies courts may reject the immunity. And, immunity without such remedies contravenes the rule of law, thereby undermining the legitimacy of international organisations. It is therefore inevitable to counterbalance jurisdictional immunity through the further development of alternative remedies,[1518] notwithstanding the perceived reluctance of international organisations to do so.[1519] As signalled above (section 1.1), there is an urgent need for international law to develop so as to bolster the enforcement of third-party rights against international organisations.

In addressing the second research question of this study, the present chapter aims to design the essential features of 'a complete remedy system' for private parties,[1520] counterbalancing jurisdictional immunity, in third-party disputes against the UN and other international organisations.

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[1516] Notwithstanding the reference by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel to a 'complete remedy system to private parties' in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 6.

[1517] As observed in connection with an early draft text that would culminate in the General Convention. See International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 219.

[1518] Cf. Daugirdas and Schuricht (2021), at 81; Johansen (2020), at 300; Schrijver (2015), at 335; Blokker and Schrijver (2015), at 356 ('Schrijver believes that in the case of the United Nations there is an urgent need to develop alternative remedies, with a view both to respect the by now well established right of citizens of access to courts and remedies and to guarantee the independence and discretionary freedom of the United Nations by securing continued respect for its immunity'); De Brabandere (2010), at 119. An alternative approach to the accountability of international organisations (not being the disregarding of their jurisdictional immunity, as discussed in chapter 4) would be to hold the *member states* of the international organisation responsible. However, as explained by Schrijver, amongst other objections: 'Such an approach would run counter to the idea behind the United Nations being a separate international legal person, the existence of which is aimed at maintaining or restoring international peace and security.' Schrijver (2015), at 336. On this alternative approach, see generally Barros (2019), as well as Hirsch (1995), chapters four and five. For an exploration of various alternative approaches to the accountability of international organisations, see Issue 1: Special issue: Forum: The Accountability of International Organizations, (2019) 16 *International Organizations Law Review* 1.

[1519] Klein (2016), at 1045 ('international organisations have not proven keen to even consider the creation of such mechanisms and display a considerable degree of resistance toward such evolutions.'). Daugirdas observes that the current list of alternative accountability mechanisms is 'rather short'. Daugirdas (2019), at 12 (referring to, amongst others, the 'World Bank Inspection Panel and similar mechanisms at other international financial institutions.' Ibid., fn. 2).

[1520] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para.

Building on the experience to date with the implementation of Section 29 of the General Convention, in developing solutions to the problems recalled above, this chapter proposes a combined and integrated approach. With the overall aim of facilitating the fair, efficient and transparent resolution of third-party disputes under Section 29(a) of the General Convention, the chapter proposes the establishment of a comprehensive dispute settlement mechanism: the Mechanism for the Settlement of Disputes of a Private Law Character ('Mechanism)'.[1521] Operating under the auspices of the Permanent Court of Arbitration, the Mechanism would be established by the UNGA in a resolution, and complemented by a new UN Convention: the 'United Nations Convention on the Settlement of Disputes of a Private Law Character (Convention)'. The Mechanism would facilitate alternative dispute resolution ('ADR') and, where amicable settlement fails, two-tiered arbitration (though not involving a full appeal instance).

In sum, as detailed in this chapter, the Mechanism's contentious limb would provide for arbitration in first instance before ad hoc tribunals and standing claims commissions. Disputes over the legal character of third-party disputes would be decided in preliminary proceedings. Arbitrations would be governed by the PCA Arbitration Rules 2012, modified as necessary, and amended to provide for expedited proceedings based on proposals developed by the UNSG. Further, there would be a standing Appellate Tribunal, which would be competent to dispose of appeals concerning (i) the legal character of third-party disputes and (ii) the interpretation and application of the UN Liability Rules by claims commissions, and (iii) review first instance awards on limited annulment grounds. That last function is central to the creation of a system of internationalised and 'self-contained' arbitration. Under that system, states and national courts are obliged to not interfere with arbitration under the Mechanism. Modelled after the ICSID Convention, the Convention would create obligations to that effect for its states parties.

This chapter is divided into two main parts. The first part (section 5.2) discusses the solutions proposed for each of the three problems recalled above. The second part (section 5.3) discusses the combined approach to these solutions through the Mechanism.

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6, under the heading 'The remedy régime envisaged by the Convention and implemented by the United Nations'. In this respect, Rashkow notes that 'the Organization has consistently maintained over the years that its immunity is not a shield from responsibility to respond to credible claims of a private law character and that the Organization is obligated to make a dispute resolution modality available for such claims under Section 29 of the General Convention. See, e.g., United Nations Juridical Yearbook (1980), at 227–242.' Rashkow (2015), at 84, fn. 22.

[1521] The word 'mechanism' is intended to reflect both the contentious dispute settlement limb (essentially entailing two-tier arbitration) and the amicable settlement limb.

## 5.2 Proposed solutions

In proposing solutions for the abovementioned problems regarding the implementation of Section 29(a) of the General Convention, this section concerns the legal character of third-party disputes (subsection 5.2.1.), standing claims commission (subsection 5.2.2) and arbitration (subsection 5.2.3).

### 5.2.1 The legal character of third-party disputes

To recall, subsection 3.4.2 of this study interpreted the phrase 'private law character' in Section 29(a) of the General Convention. Complex and illusive, the phrase is prone to lead to differences in interpretation and application. This was brought to the fore particularly in the case studies conducted in this study. Notably, as seen, the dispute arising out of the Haiti cholera epidemic caused considerable controversy over the UN's determination that the dispute lacked a 'private law character'.

In reality, as seen in subsubsection 3.4.1.3 of this study, there currently are no viable alternatives to the UN (Secretariat) unilaterally determining the character of third-party disputes. To request the ICJ for an advisory opinion on the legal character of such disputes under Section 30 of the General Convention, whilst theoretically possible, would be rife with legal and political hurdles. Indeed, from a claimant's perspective, that process amounts to an 'illusory' remedy.[1522] Nor is it structurally feasible for the current dispute settlement modes under Section 29 to determine the legal character of a third-party dispute. This is because the very existence of these modes is often contingent on the determination of a dispute having a private law character. This is illustrated by the dispute concerning the Haiti cholera epidemic, as well as that concerning the Kosovo lead poisoning: the UN declined to establish a (standing) claims commission on the basis that the dispute lacked a private law character. On the same basis, more generally, the current formulation of the dispute settlement clause in SOFAs (discussed below) allows the UN to prevent the establishment of standing claims commissions for third-party claims in connection with peacekeeping operations.

It ought not to be left to UN Secretariat to decide unilaterally on the applicability of Section 29 of the General Convention, by determining, amidst political and financial pressures, the character of third-party disputes. The UN's views are indispensable to be able to reach an informed decision on the character of a third-party dispute—but that decision ought not to be its own. As submitted in subsubsection 3.4.1.3 of this study, this practice, whereby the UN effectively controls its own

[1522] Cf. *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67: 'It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.'.

accountability, is particularly at odds with core notions of the rule of law and justice, and the UN's undertaking to comply with such notions.

The solution proposed is to establish an external body to determine the character of third-party disputes. That body would be the Mechanism. More specifically, where the UN (Secretariat) takes the position that a third-party dispute brought against it lacks a 'private law character' under Section 29 of the General Convention, it would raise a preliminary objection to the (subject-matter) jurisdiction of the tribunal or claims commission. The tribunal or commission would rule on the objection as a preliminary question, which ruling could be appealed to the Appellate Tribunal.[1523] The ruling on the legal character of the dispute would take the form of an award that is binding on the UN and the private party.

#### 5.2.2 (Standing) claims commissions

##### 5.2.2.1 A revised legal framework for standing claims commissions

To recall, as discussed in paragraph 3.4.3.1.3 of this study, the main problems with respect to the legal framework of standing claims commissions are the following:

(i) Paragraphs 54 and 55 of the MINUSTAH SOFA, which, as seen, is representative of modern-day SOFAs, convert the exemption from liability in the case of 'operational necessity' under UNGA resolution 52/247 (1998) into a limitation of the subject-matter jurisdiction of the commission;
(ii) The extent of the commission's leeway to determine its own procedures contrasts with arbitration rules generally, in which prescriptions concerning independence, impartiality, fairness, equality, and so forth, are common. Furthermore, the quorum requirement for the standing claims commission is overly broad and risks undermining the integrity of the commission's proceedings; and
(iii) The provision concerning the commission's establishment is incomplete, as it does not provide for a default appointment procedure for commission members other than the chairperson.

As a preliminary observation, it is submitted that there are good reasons to maintain the current set-up envisaged by the UN, that is, to establish a standing claims commission for each peacekeeping operation, as opposed to a single claims commission for all such operations jointly.[1524] Operation-specific

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[1523] This 'gatekeeping process' would be a variation on the function of the former European Commission on Human Rights in determining the admissibility of cases before the ECtHR. The Commission was abolished with the entry into force of Protocol 11 to the ECHR in 1998.
[1524] Cf. Schrijver (2015), at 339 ('a standing claims commission, as envisaged in the provisions of the Model SOFA (1990), should be set up for each peace support operation. This commission should be permanent for the duration of the peace operation and should consist of at least three members: one to be appointed by the United Nations, one by the government of the state in which the mission is taking place, and a chairperson to be chosen jointly by

commissions may offer better access to third-party claimants, including in the case of hearings. Such commissions would also be better placed to familiarise themselves with the particular circumstances of the operation. From the perspective of host states, their ability to appoint a member to the commission may provide comfort that its interests, and possibly those of its nationals,[1525] are duly taken into account.

In addressing the problems sub (i) through (iii) above, it is proposed to reorganise Paragraphs 54 and 55 of the MINUSTAH SOFA by consolidating them into a single third-party dispute settlement clause in the SOFA. That provision would have a substantive and procedural component.

The substantive component of the third-party dispute settlement clause would simply provide that the settlement of third-party disputes shall be in accordance with UNGA resolution 52/247 (1998). Thus, 'operational necessity' would apply as an exemption from liability, as opposed to a limitation of the subject-matter jurisdiction of the commission (as is currently the case). Furthermore, the application of UNGA resolution 52/247 (1998) would include the temporal and financial compensation limitations thereunder. That would address the problem sub (i) above.

The procedural component of the third-party dispute settlement clause would set forth the sequencing of proceedings before the claims review board (including a reasonable time-frame for such proceedings) and the standing claims commission. That component would furthermore clarify the procedures governing the establishment and functioning of the claims commission. The problems sub (ii) and (iii) above would be addressed by declaring applicable the PCA Arbitration Rules 2012 (as modified, see below).

More specifically, the proposal is to integrate standing claims commissions into the Mechanism as first instance tribunals. As to the problem sub (ii) above, the lacuna in terms of procedural rules would be filled by the PCA Arbitration Rules 2012 (as modified).[1526] As a result, the current provisions in

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these two members; or, if they fail to reach agreement on the chairperson, with the assistance of an independent authority (for example, the President of the General Assembly or the President of the International Court of Justice). This procedure would result in the establishment of an independent and standing body that can consider damage claims related to international peace missions.' [emphasis added]). But see Zwanenburg (2004), at 305 ('A real standing or central claims commission should be established that can receive claims against all peace support operations'); see idem Advisory Committee on Public International Law, 'Advies Inzake Aansprakelijkheid Tijdens Vredesoperaties' (No. 13, 2002), para. 5.4.5.

[1525] But see Schmalenbach (2016), para. 56 ('the host State (and thus its representative on the panel) does not necessarily advocate the interests of the complainant.').

[1526] See, e.g., Art. 17(1) of the PCA Arbitration Rules ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'). The provision is identical to Art. 17(1) of the UNCITRAL Rules.

Paragraph 55 of the MINUSTAH SOFA specifically mandating the claims commission to determine its own procedures, and providing rules on quorum and decision-making, could be removed.

The composition of standing claims commissions would differ from the default first instance arrangement under the Mechanism. Under that arrangement, in principle, there would be a separate tribunal for each third-party dispute, with a sole arbitrator appointed by the parties. Conversely, in the case of peacekeeping operations, as seen, there would be one claims commission per operation, competent to deal with *all* third-party disputes related to the operation. One member of the claims commission would be appointed by the host state and the other by the UNSG, in continuation of the arrangement currently envisaged by the UN. For the predicate 'standing' to apply, claims commissions would be established upon the commencement of the operation. The SOFA would provide fixed time-periods for each of the UNSG and the Government of the host state to appoint their respective members.[1527] Similar to 'regular' first instance arbitration tribunals under the Mechanism, under Article 9(1) of the PCA Arbitration Rules 2012, the proposal is for the commission's chairperson to be appointed by the two members already appointed (not by the UNSG and the Government of the host State, as currently envisaged by the UN).[1528]

As to the problem sub (iii) above, the proposal is to amend the default appointment procedure in the arbitration clause in the SOFA so that it extends beyond the chairperson and includes *all* members of the commission.[1529] In line with Article 6 of the PCA Arbitration Rules 2012, the appointing authority would be the PCA Secretary-General.

#### 5.2.2.2 The consistent interpretation and application of the UN Liability Rules

To recall, as discussed in subsubsection 3.4.3.2 of this study, the UN Liability Rules, which are intended to be applied by claims commissions, give rise to important questions. These questions concern, amongst others, the legal basis for the adoption of these rules, their legal nature and their scope of application. To resolve these questions authoritatively and allow the UN Liability Rules to mature into a third-party liability regime proper, these rules are in need of consistent interpretation and application. That is needed

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[1527] In the absence of a SOFA, the appointment could be done under the default appointment procedure involving the PCA Secretary-General (see below).
[1528] Cf. Schrijver (2015), at 339 ('This commission should be permanent for the duration of the peace operation and should consist of at least three members: one to be appointed by the United Nations, one by the government of the state in which the mission is taking place, and a chairperson to be chosen jointly by these two members'. [emphasis added]). The proposal would also correspond to the UN-Netherlands dispute settlement clause in Art. 44(2) of the IRMCT Headquarters Agreement: 'Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal'. If party-appointed arbitrators can be trusted jointly to appoint a chairperson in disputes between the UN and a state, there is no compelling reason why that would be different in the case of third-party disputes.
[1529] Cf. Art. 44(2) of the IRMCT Headquarters Agreement.

to foster legal certainty, as required by the rule of law. Standing claims commissions could not achieve this in isolation.

The proposed solution is to extend the jurisdiction of the Appellate Tribunal so as to include errors in the interpretation and application of the UN Liability Rules under UNGA resolution 52/247 (1998).[1530] To be clear, this is not to re-introduce the appellate tribunal abolished as per the proposal in the 1997 Report.[1531] The reason for that proposal was that the appeal foresaw 'a very similar procedure and composition to that of the standing claims commission, and may in fact be seen as a duplication of the proceedings in the standing claims commission.'[1532]

The proposed Appellate Tribunal's jurisdiction would be significantly more limited: it would extend specifically to alleged errors in the interpretation and application of the UN Liability Rules by claims commissions. The proceedings before the Appellate Tribunal, following claims commission proceedings, would therefore not amount to a full reconsideration of the dispute.

### 5.2.3 Arbitration

#### 5.2.3.1 Appropriate arbitration rules for third-party disputes

To recall, as seen in paragraph 3.4.3.1.3 of this study, the UNCITRAL Arbitration Rules are not necessarily appropriate for settling third-party disputes against the UN. This is because the arbitral tribunal's establishment and the arbitral procedures may be overly burdensome, notably by being time-consuming, resource-intensive and costly.

In acknowledging this, as seen, the UNSG, at the initiative of the UNGA,[1533] has made proposals concerning the settlement of contractual disputes with consultants and individual contractors. These proposals are set forth in the Expedited Arbitration Concept Paper and the Expedited Arbitration Implementation Proposal.[1534] As the following overview aims to illustrate (paragraph 5.2.3.1.1), these proposals provide a suitable basis for developing arbitration rules for settling third-party disputes generally (paragraph 5.2.3.1.2).

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[1530] Cf. The expanded jurisdiction of the Appellate Tribunal under Art. 8.28 of CETA ('(a) errors in the application or interpretation of applicable law'). In the same sense, see Schrijver (2015), at 337 ('Within the United Nations, a 'Central Claims Commission' could be set up as a coordinating body for the claims commissions of individual peace operations. In the future, it could perhaps evolve into an appeal body.').
[1531] 1997 Report, para. 10, fn. 2.
[1532] Ibid.
[1533] UN Doc. A/RES/62/228 (2008), para. 66; UN Doc. A/RES/65/251 (2011), para. 55.
[1534] UN Doc. A/66/275 (2011), Annex II, and UN Doc. A/RES/67/265 (2012), Annex IV, respectively.

5.2.3.1.1 The UNSG's 'Expedited Rules' for arbitration of disputes with consultants and individual contractors

The Expedited Arbitration Concept Paper sets forth, in significant detail, the essential features of the proposed arbitration procedures:

> '• A two-stage process, consisting of an informal dispute resolution phase and an expedited arbitral proceeding in case the informal dispute resolution phase fails
> • Non-waivable time limits for filing arbitration claims
> • Sole arbitrator
> • Arbitrator to be chosen from a roster of arbitrators agreed upon by the Organization and the individual contractors/consultants (see para. 7 (d) below)
> • Limitation of arbitrator's fees
> • Elimination of an appointing authority, but exercise of certain functions of an appointing authority (e.g., selecting/appointing the arbitrator, deciding on a party's challenge to an arbitrator) by a neutral entity – The neutral entity could be an international dispute settlement institution (in which case both the Organization and the claimants would have to bear their respective share of the institution's administrative fees)
> • Transmittal of arbitration notices and other communications by electronic means, whenever feasible
> • Use of standard templates for the parties' submissions
> • Simplification and limitation of the number of pleadings and other submissions
> • Restrictions on the amendment of pleadings and submissions
> • Testimony of witnesses to be by written affidavit, unless the arbitrator decides that the testimony of a witness should be given orally (e.g., to enable the opposing party to cross-examine the witness)
> • Conferences and consultations among the arbitrator and parties on preliminary administrative and other matters to be by teleconference or videoconference
> • Exceptionally, a party may request a hearing to cross-examine a witness, or the arbitrator may order a hearing if necessary to resolve a substantial issue of fact or law; such hearings normally to be by teleconference or videoconference, to be restricted in scope, and not to exceed two days
> • In most cases, arbitrator's award to be based on the parties' written pleadings and submissions (documents-only process)
> • Arbitrator to issue the award within a specified time frame, e.g., 30 days
> • Any compensation awarded to be limited to economic loss and subject to a cap
> • Depending on the number of arbitrations that will be initiated against the Organization under the proposed simplified arbitration procedures, additional resources may be required to defend the Organization and minimize its legal liability.'[1535]

According to the Expedited Arbitration Concept Paper, the foregoing would be reflected in a 'new set of rules, called the Rules for Expedited Arbitration Procedures under United Nations Consultancy Contracts (hereinafter the "Expedited Rules")'.[1536] The Expedited Rules 'would be prepared, using the UNCITRAL Arbitration Rules as a framework. The Expedited Rules would be based on the provisions of the UNCITRAL Arbitration Rules, modified as necessary to incorporate the expedited procedures discussed herein.'[1537]

[1535] UN Doc. A/66/275 (2011), Annex II, para. 5.
[1536] Ibid., para. 6 (emphasis added).
[1537] Ibid. (emphasis added).

The Expedited Arbitration Implementation Proposal sets forth proposals regarding the implementation of a mechanism for expedited arbitration procedures, together with the related cost implications. The implementation of the mechanism would involve a model dispute settlement clause.[1538] Furthermore,

> 'a core element of the expedited arbitration procedures would be the neutral entity. The core functions of the neutral entity would be: (a) to vet arbitrators proposed for inclusion in the list of arbitrators; (b) to promulgate and maintain the list of arbitrators; (c) to appoint the arbitrators for arbitration cases under the expedited rules; (d) to consider and resolve challenges to arbitrators by parties to arbitration cases; and (e) to hold, manage and, as appropriate, disburse the deposits towards the arbitrator's fee and expenses to be paid by parties to an arbitration case. While the functions of the neutral entity would not include the full array of services typically provided by arbitral institutions, additional administrative functions for the neutral entity may also be considered.'[1539]

The neutral entity would be selected in accordance with the procurement rules.[1540] The entity's running costs would be borne by the UN, but any additional costs related to a particular arbitration would be shared between the UN and the claimant.[1541]

The UN would draw up an initial list of arbitrators, who would be vetted by the neutral entity. Arbitrators who are found to meet the requirements would be included on a list promulgated by the entity.[1542] For each arbitration, the neutral entity would appoint a single arbitrator from the list of arbitrators. This would be the arbitrator agreed upon by the parties. Absent such agreement, this would be the arbitrator ranked highest by the parties out of three arbitrators proposed by the neutral entity.[1543]

Fees and costs of the arbitrators would be split equally between the parties.[1544] The arbitrator's fee would be fixed and depend on the amount in dispute.[1545] That is,

> 'the amount of an arbitrator's compensation for a case would be fixed in amount, either as a fixed fee (where the case proceeds beyond the closure of the proceedings and commencement of the award period), or a percentage of the fixed fee (where the case is settled or otherwise terminated before that point but after the respondent has submitted its response to the claimant's request for arbitration).'[1546]

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[1538] UN Doc. A/RES/67/265 (2012), Annex IV, para. 5-7.
[1539] Ibid., para. 8.
[1540] Ibid., para. 9.
[1541] Ibid., para. 10.
[1542] Ibid., para. 12. As to the requirements for inclusion on the list, 'an arbitrator would be required to have knowledge of commercial law and experience in international arbitration cases, including cases under the UNCITRAL Arbitration Rules; be familiar with the United Nations or other international organizations and the issues and functions particular to such an organization; be competent in at least English, French or Spanish; and be of good character. To the extent possible, there should be geographical diversity among the individuals on the list of arbitrators.' Ibid., para. 13.
[1543] Ibid., para. 16.
[1544] Ibid., para. 17.
[1545] Ibid., para. 18.
[1546] Ibid., para. 33.

The UN Office of Legal Affairs would prepare pleading templates.[1547] A case would be initiated by a claimant submitting a request for arbitration and statement of claim to the UN, together with an initial deposit of the arbitrator's fee.[1548]

#### 5.2.3.1.2 Arbitration rules for third-party disputes: developing the UNSG's Expedited Rules based on the PCA Arbitration Rules 2012

The UNSG's proposals contain valuable elements for an arbitration process for third-party disputes generally, that is, beyond contractual disputes with consultants and individual contractors.[1549] In this respect, as to the amount in dispute, the UNSG's proposals 'do not presuppose a financial limitation'.[1550]

The UNSG's proposal is to develop the Expedited Rules on the basis of the UNCITRAL Arbitration Rules. That is understandable: a product of the UN, the UNCITRAL Arbitration Rules are the default, if not exclusive, set of arbitration rules used by the UN for the settlement of (third-party) disputes against it. This notwithstanding, the UNCITRAL Arbitration Rules are particularly appropriate for the settlement of commercial disputes.[1551]

In contrast, the PCA Arbitration Rules 2012,[1552] while based on the UNCITRAL Arbitration Rules, specifically cater for the requirements of disputes 'involving at least one State, State-controlled entity, or intergovernmental organization'.[1553] As to the changes made to the UNCITRAL Arbitration Rules,[1554] these were made in order to, amongst others,

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[1547] Ibid., para. 24.
[1548] Ibid., para. 25.
[1549] This would correspond to a broader trend in arbitration to facilitate expedited proceedings. For example, Art. 8.23(5) of CETA provides: 'The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.' Art. 30 of the Rules of Arbitration of the International Chamber of Commerce and Appendix VI offer an 'expedited procedure providing for a streamlined arbitration with reduced scales of fees'. See <iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions> accessed 21 December 2021. Art. 5 of the 2016 Arbitration Rules of the Singapore International Arbitration Centre provides for an expedited procedure. See <siac.org.sg/our-rules/rules/siac-rules-2016> accessed 21 December 2021. The Arbitration Institute of the Stockholm Chamber of Commerce has developed the Expedited Arbitration Rules 2017. See <sccinstitute.com/our-services/expedited-arbitration> accessed 21 December 2021.
[1550] UN Doc. A/66/275 (2011), Annex II, para. 2.
[1551] The United Nations Commission on International Trade Law (UNCITRAL) which 'shall have for its object the promotion of the progressive harmonization and unification of the law of international trade'. See UN Doc. A/RES/2205(XXI) (1966), Section I (emphasis added). See also UN Doc. A/RES/68/109 (2013).
[1552] See generally B.W. Daly, E. Goriatcheva and H.A. Meighen, *A Guide to the PCA Arbitration Rules* (2014).
[1553] PCA Arbitration Rules (2012), Introduction, at 4.
[1554] The 2012 PCA Rules are furthermore based 'on four sets of PCA procedural rules from the 1990s'. See Daly, Goriatcheva and Meighen (2014), para. 1.02. These include the 1996 Optional Rules for Arbitration between International Organizations and Private Parties ('PCA International Organization/Private Party Rules'). Ibid., paras. 1.09-1.10. According to Daly, Goriatcheva and Meighen, 'it was . . . felt that the PCA's procedural offerings could be simplified by consolidating the party-specific PCA rules of the 1990s into a single set of rules that could apply to all the combinations of parties involved in PCA-administered proceedings.' Ibid., para. 1.12.

> '(i) Reflect the public international law elements that may arise in disputes involving a State, State controlled entity, and/or intergovernmental organization;
>
> (ii) Indicate the role of the Secretary-General and the International Bureau of the PCA'.[1555]

As to the PCA Arbitration Rules 2012 reflecting public international law elements (sub (i) above), an example is Article 35(1):

> 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall: . . .
>
> (c) In cases involving intergovernmental organizations and private parties, have regard both to the rules of the organization concerned and to the law applicable to the agreement or relationship out of or in relation to which the dispute arises, and, where appropriate, to the general principles governing the law of intergovernmental organizations and to the rules of general international law. In such cases, the arbitral tribunal shall decide in accordance with the terms of the agreement and shall take into account relevant trade usages.'[1556]

This closely corresponds to the law that would be applied by the Mechanism (discussed below).

As to the role of the PCA Secretary-General and the PCA International Bureau (sub (ii) above), as explained by Daly, Goriatcheva and Meighen,

> 'the Rules also provide for the role of the PCA International Bureau and the PCA Secretary-General. Unlike the 2010 UNCITRAL Rules, which do not specify an administrative institution, the 2012 PCA Rules provide for the administration of arbitral proceedings by the PCA. Pursuant to Article 1(3) of the Rules, the PCA International Bureau acts as registry and secretariat, while the PCA Secretary-General is the appointing authority pursuant to Article 6.'[1557]

The roles of the International Bureau and the PCA Secretary-General correspond to their proposed roles in connection with the Mechanism.

Overall, the PCA Arbitration Rules 2012 appear to be particularly suitable for present purposes compared to the UNCITRAL Arbitration Rules. A further argument in favour of the former is that the latter are a product of the UN, which may be taken to contrast with the requirements of impartiality and independence in settling third-party disputes against the UN.

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[1555] PCA Arbitration Rules (2012), Introduction, at 4. A third set of changes to the 2010 UNCITRAL Arbitration Rules is made in order to: 'Emphasize flexibility and party autonomy'.

[1556] According to Daly, Goriatcheva and Meighen: 'Adapted from the applicable law provisions of the 1990s PCA Rules and Art. 35 of the 2010 UNCITRAL Rules, Art. 35 of the 2012 PCA Rules is a unique provision, tailored to the specificities of disputes between the different combinations of parties—states, state-controlled entities, intergovernmental organizations, and private parties—that are expected to have recourse to the Rules.' Daly, Goriatcheva and Meighen (2014), para. 6.21 (fns. omitted). Regarding cases involving intergovernmental organizations and private parties, the reference is to Art. 33 of the PCA International Organization/Private Party Rules.

[1557] Daly, Goriatcheva and Meighen (2014), para 2.07.

Therefore, in addition to proposing to extend the scope of application of the Expedited Rules to third-party disputes in general, the proposal is to base those rules on the PCA Arbitration Rules 2012. This would still meet the UN's policy objective to base the Expedited Rules on the UNCITRAL Arbitration Rules, as the PCA Arbitration Rules 2012 are based on the latter.

That being said, the PCA Arbitration Rules 2012 would require modification, for one, to reflect the self-contained and internationalised nature of the arbitration under the Mechanism.[1558] This would involve the deletion of Article 1(2), according to which:

> 'Agreement by a State, State-controlled entity, or intergovernmental organization to arbitrate under these Rules with a party that is not a State, State-controlled entity, or intergovernmental organization constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.'

Dispute settlement under the Mechanism would not detract from the jurisdictional immunity of international organisations; rather, the Mechanism would counter the immunity by providing adequate alternative recourse.

Concretely, the PCA Arbitration Rules 2012, modified as indicated above, would be taken as the basis for developing arbitration rules for the settlement of third-party disputes against the UN. This would involve the integration of the aforementioned elements of the UNSG's Expedited Rules (with further elements to reflect state of the art innovations in arbitration, as discussed below).

#### 5.2.3.2 Neutral arbitration of third-party disputes: denationalised and self-contained arbitration

To recall, as discussed in subsubsection 3.4.3.1 of this study, because of its perceived neutrality, arbitration is the preferred mode for the settlement of third-party disputes, as an alternative to domestic litigation. However, rather than excluding national courts, arbitration, as a matter of course, is subject to court supervision. The role of national courts is to ensure the effectiveness and fairness of arbitration. The problem is that, in doing so, courts could potentially abuse their supervisory powers. They could do so in a variety of ways, for example, by annulling awards to the extent they are favourable to international organisations, or by frustrating the arbitration (by issuing anti-arbitral injunctions or revoking the authority of a tribunal), potentially pushing cases to the national courts. The supervisory role of national courts may therefore expose international organisations to interference by those courts.

Hence, international organisations may reserve their jurisdictional immunity in connection with arbitration, and they may decline to agree to a place of arbitration. However, as seen in paragraph

[1558] Art. 1(1) of the 2012 PCA Arbitration Rules reflects the potential for modification of these rules.

3.4.3.1.3 of this study, the uncertainty as to whether the jurisdictional immunity will in fact apply in a given case before a national court is unsatisfactory to both claimants and the international organisation.

The proposed solution is to design an arbitration system that adequately safeguards fairness and effectiveness, but excludes national court involvement. As discussed in paragraph 3.4.3.1.3 of this study, whilst it is exceptional for arbitration to be 'de-nationalised', this is in fact a key feature of arbitration under the ICSID Convention.[1559] As seen, that convention provides for 'internationalised' arbitration as part of a 'self-contained' system, that is, one that is disconnected from domestic jurisdictions. The rationale underlying the ICSID Convention is therefore the same as the objective of the UN, and international organisations generally, that is, to keep out of court in connection with arbitration.

Delaume explained the mechanics of the ICSID Convention in creating a 'self-contained' arbitration regime:

> 'Within the framework of the Convention and of the Regulations and Rules adopted for its implementation, ICSID arbitration constitutes a self-contained machinery functioning in total independence from domestic legal systems. The autonomous character of ICSID arbitration is clearly stated in Article 44 of the Convention, according to which:
>
> > Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question;
>
> and in Article 26 of the Convention, which provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."'[1560]

According to Schreuer: 'Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention.'[1561] Furthermore, as explained by Schreuer:

> 'The principle of noninterference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts. This is evidenced by the provisions on the constitution of the tribunal (Arts. 37–40), on proceedings in the absence of a party (Art. 45(2)), on autonomous arbitration rules (Art. 44), on applicable law (Art. 42(1)), and on provisional measures (Art. 47). It is only in the context of enforcement that domestic courts may

[1559] The International Centre for the Settlement of Investment Disputes was created under the ICSID Convention to facilitate the settlement of investment disputes through conciliation and arbitration. ICSID does not itself arbitrate such disputes—that is done by ad hoc tribunals constituted for each dispute. Schreuer (2013), para. 1.
[1560] Delaume (1983), at 784 (emphasis added).
[1561] Schreuer (2009), at 351, para. 1.

> enter the picture (Arts. 54–55). In addition, the arbitration process is also insulated from inter-State claims, by the exclusion of diplomatic protection (Art. 27).'[1562]

Said 'principle of noninterference', which is operationalised through various provisions of the ICSID Convention, boils down to the obligation of states and national courts to defer entirely to ICSID arbitration. The supervisory function normally performed by national courts is instead assumed by ICSID machinery. This includes the review of awards, the ultimate form of supervision over an arbitration. As explained by Blackaby et al., with respect to Article 52 of the ICSID Convention:

> 'If the application is for annulment of the award, then ICSID constitutes an ad hoc committee of three members to determine the application. If the award is annulled, in whole or in part, either party may ask for the dispute to be submitted to a new tribunal, which hears the dispute again and then delivers a new award'.[1563]

The proposed Convention would similarly operationalise the 'principle of noninterference' with respect to the Mechanism by imposing obligations on states similar to the ICSID Convention.

As Schreuer commented: 'ICSID has been a success, it is now the preferred forum for the settlement of investment disputes.'[1564] At the same time, however, years of experience with the ICSID Convention have also given rise to criticism. Thus, according to Schreuer:

> 'Support for investment arbitration in general and for ICSID in particular is not undivided. Some states have become weary of the possibility of being sued . . .
>
> . . . Some investors have become concerned about the complex nature, duration and cost of the procedure for the registration of requests for arbitration. In addition, the growing incidence of requests for annulment has raised concerns about the finality and cost of ICSID proceedings
>
> . . . Another concern is the consistency of the case law. Tribunals composed of different arbitrators are constituted for each case. Although most tribunals take careful note of earlier decisions, there are several areas in investment law that have developed divergent lines of authority.'[1565]

As explained by UNCTAD as to concerns concerning consistency:

> 'Existing review mechanisms, namely the ICSID annulment process or national-court review at the seat of arbitration (for non-ICSID cases), operate within narrow jurisdictional limits. It is noteworthy that an ICSID annulment committee may find itself unable to annul or correct an award, even after having identified "manifest errors of law". Furthermore, given that annulment committees – like arbitral tribunals – are created on an *ad hoc* basis for the purpose of a single dispute, they may also

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[1562] Ibid., at 351-352, para. 3 (emphasis provided). Furthermore, as explained by Schreuer: 'It is beyond doubt that the exclusive remedy rule of Art. 26 also operates against domestic courts.' Ibid., at 386, para. 132, citing G.R. Delaume, 'ICSID Arbitration in Practice', (1984) 2 *International Tax & Business Lawyer* 58, at 68 ('If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject.').
[1563] Blackaby et al. (2015), para. 10.14 (fn. omitted).
[1564] Schreuer (2013), para. 74.
[1565] Ibid., paras. 71-73 (emphasis added).

> arrive (and have arrived) at inconsistent conclusions, thus further undermining predictability of international investment law.'[1566]

Such concerns have resulted in a long-running debate about whether an appeal tribunal ought to be established for investor-state disputes.[1567]

Concerns over consistency, as well as other concerns,[1568] were echoed during the EU's negotiation of the 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ('CETA').[1569] Such concerns provided an impetus for the establishment of a new 'investment court system' ('ICS') in Chapter 8, Section F, of CETA. As explained by the European Parliamentary Research Service, the ICS

> 'departs substantially from the arbitration model. The ICS is made up of a tribunal and appellate body. As opposed to the arbitration framework, parties to the dispute will not be able to choose their tribunal members. These will instead be selected on a rotational basis from a group of judges, appointed for a specified period of time by the CETA Joint Committee. The ICS was inspired by the World Trade Organization Appellate Body, both for the selection and remuneration of judges . . . Because of the low number of cases and to contain the cost of establishing an ICS, CETA uses the [ICSID] as an administrative secretariat, charged with providing organisational and logistical assistance for the ICS proceedings.'[1570]

Under Article 8.27 of CETA, the Tribunal has 15 members (Paragraph 2), who are appointed by the CETA Joint Committee (composed of representatives of the EU and Canada[1571]) for a five-year term,

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[1566] UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (IIA Issues Note, 2013), at 3-4 (fn. omitted). See also J.P. Charris Benedetti, 'The Proposed Investment Court System: Does it Really Solve the Problems?', (2019) *Revista Derecho Del Estado* 83, at 91 ('The problem of inconsistency derives from tribunals rendering contradictory decisions in cases involving similar sets of facts, parties and applicable [International Investment Agreements].').

[1567] UNCTAD (2013), at 8 ('An appeals facility implies a standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals. It has been proposed as a means to improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals and enhance the predictability of the law'); A.J. van den Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions', (2019) 34 *ICSID Review* 156.

[1568] Other criticism concerns, amongst others, questions over the impartiality of arbitrators due to their involvement in investor-state arbitration in various capacities, and the lack of transparency due to confidentiality of the arbitral proceedings. European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), para. 2.3.

[1569] [2017] OJ L11/23. Provisionally entered into force on 21 September 2017, excluding, amongst others, Section F, 'Resolution of investment disputes between investors and states'. See Notice concerning the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L238/9.

[1570] European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), at 1 (emphasis added). See also Reinisch (2016, 'Investment Court System for CETA'), at 764 ('Members of these tribunals are selected in a manner markedly different from that applying in traditional [investor-State arbitration] and clearly intended to minimize investor influence . . . a truly novel feature lies in the case-allocation mechanism similar to that found in some domestic judicial systems: the three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified 'random and unpredictable' rotation system. This is clearly contrary to the traditional ISA approach where the disputing parties are free to select 'their' arbitrators, partly subject to the condition that they should not be nationals of disputing parties.' [fns. omitted]).

[1571] Art. 26.1(1) of CETA.

renewable once (Paragraph 5). Cases are heard by divisions of three members (Paragraph 6), appointed by the President of the Tribunal on a rotation basis, and ensuring the 'random and unpredictable' composition of the division (Paragraph 7).

As to the ICS Appellate Tribunal, under Article 8.28 of CETA, its members are to be appointed by the CETA Joint Committee (Paragraph 3).[1572] Appeals are heard by divisions consisting of three randomly appointed Members (Paragraph 5). The Appellate Tribunal's powers (Paragraph 2) extend beyond those of ICSID annulment panels. That is, the Appellate Tribunal

> 'may uphold, modify or reverse the Tribunal's award based on:
> (a) errors in the application or interpretation of applicable law;
> (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
> (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).'

ICS's institutional design indeed represents a significant departure from arbitration practice in general (which raises questions as to the application of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),[1573] discussed below).

Whilst investment arbitration may raise particular concerns regarding the consistency of awards,[1574] there too is a need for consistency in the settlement of third-party disputes against the UN. This militates in favour of a standing Appellate Tribunal, as opposed to *ad hoc* annulment panels under the ICSID Convention. Moreover, specifically to ensure the consistent interpretation and application of the UN Liability Rules, it is proposed to expand the jurisdiction of the Appellate Tribunal to include appeals against awards alleging errors in the interpretation and application of those rules. This is inspired by the expanded competence of the ICS Appellate Tribunal under Article 8.28(2)(a), cited above.

A further argument for curtailing the parties' leeway in selecting arbitrators is that, as discussed in paragraph 3.4.3.1.3 of this study, the establishment of arbitral tribunals can be overly burdensome, to the point of discouraging private parties from resorting to arbitration. From that perspective, too, there is merit in creating a standing Appellate Tribunal and confining the choice of first instance arbitrators to the Panel of Arbitrators. Such streamlining and simplifying of the arbitral process arguably enhances its 'appropriateness' in terms of Section 29 of the General Convention.

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[1572] By decision of 29 January 2021, the CETA Joint Committee determined that the Appellate Tribunal will, in principle, have six members (Art. 2(1)), which number may be increased by multiples of three (Art. 2(2)). See <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/122a87d2-a6da-482c-b295-8a76f8d8aa29/details> accessed 21 December 2021.
[1573] 330 UNTS 3.
[1574] For example, the complex corporate structures of claimants may invite parallel proceedings under various legal instruments.

## 5.3 The Mechanism for the Settlement of Disputes of a Private Law Character

In developing and implementing the solutions to the problems discussed above, as said, the aim is to adopt a combined and integrated approach for the implementation of Section 29(a) of the General Convention. This has given rise to the proposed Mechanism.

To recall, the proposed solutions would be combined into the Mechanism as follows:

- Where the UN contests the 'private law character' of a third-party dispute, at the request of the third-party claimant, the dispute's character would be determined in preliminary proceedings. The first instance decision may be appealed to the Appellate Tribunal;
- Problems concerning the legal framework of standing claims commissions, including regarding their establishment, would be resolved by amending the dispute settlement clause in SOFAs. This would include integrating such commissions (composed of three members) into the Mechanism, alongside arbitral tribunals (composed, in principle, of a sole arbitrator). To ensure the clarification and development of the UN Liability Rules by standing claims commissions, the Appellate Tribunal would be competent to dispose of appeals concerning the interpretation and application of those rules;
- The contentious dispute resolution process would be based on the PCA Arbitration Rules 2012, modified as necessary. Based in turn on the UNCITRAL Arbitration Rules, those rules cater for the specific requirements of disputes involving private parties and international organisations. To ensure the appropriateness and (cost-)effectiveness of the proceedings, the UNSG's Expedited Rules would be developed on the basis of, and integrated into, the PCA Arbitration Rules 2012; and
- The self-contained nature of the contentious dispute resolution process, aimed at avoiding interference by national courts, would involve states being obliged to defer entirely to the Mechanism for the settlement of third-party disputes. Obligations to that effect would result from the Convention, modelled after the ICSID Convention.

The foregoing are proposed solutions to problems regarding the settlement of third-party disputes through contentious proceedings. As a mandatory preliminary step, however, the Mechanism would provide for amicable settlement proceedings. That is in line with the UN's current practice to attempt to settle third party disputes; the Mechanism would continue that practice through a controlled process.

This section is structured in three main parts. First, it discusses the Mechanism's amicable and contentious disputes settlement prongs (subsection 5.3.1). As to the latter, it briefly recalls earlier proposals for the establishment of tribunals in connection with Section 29 of the General Convention. Then follows a discussion about the competence of the Appellate Tribunal, the composition of the

Mechanism's first level tribunals and the Appellate Tribunal, the applicable law and procedure, and the nature of the contentious proceedings. Next follows a discussion of the PCA and its suitability to administer the Mechanism. Second, the section discusses the Mechanism's establishment pursuant to an UNGA resolution, complemented by the Convention to operationalise the Mechanism's self-contained arbitration regime. It also discusses the main financial aspects of the Mechanism (subsection 5.3.2). Third, the section discusses the potential of making the Mechanism available to other international organisations (subsection 5.3.3).

### 5.3.1 Amicable and contentious dispute resolution under the auspices of the PCA

#### 5.3.1.1 Amicable dispute resolution

To recall, as discussed in paragraph 3.4.3.1.3 of this study, in line with general international practice, third-party disputes with the UN are routinely the subject of negotiations or consultations. And, settlements are regularly reached.[1575] However, due to the absence of a structured settlement process, such settlements are not necessarily in the best interest of the parties.

The Mechanism would provide for a circumscribed amicable settlement phase prior to adversarial proceedings. This would be in line with the 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels'.[1576] Having recognised, as seen, 'that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs',[1577] the declaration stated: 'We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone . . . should enjoy full and equal access to these justice mechanisms.'[1578]

Indeed, as will be seen, ADR is reflected in the UN's practice for the settlement of staff disputes and contractual disputes. That practice, and other international practice and emerging trends in different dispute settlement contexts, provide useful input in designing a structured amicable settlement phase.

As will be seen, a brief overview of such practice and trends suggests the following elements for the design of an amicable settlement regime for present purposes: first, the amicable settlement phase should be limited in time; second, ADR should be available, on a voluntary basis.

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[1575] Rashkow (2015), at 79. See also, e.g., 1995 Report, para. 7: 'The overwhelming majority of commercial agreements that have been entered into by the United Nations have been performed without the occurrence of any serious difficulty and, when problems have arisen, they have been resolved through direct negotiations in most instances. The United Nations has, therefore, had recourse to arbitral proceedings in only a limited number of cases to date.'.
[1576] UN Doc. A/RES/67/1 (2012).
[1577] Ibid., para. 2.
[1578] Ibid., para. 15 (emphasis added).

5.3.1.1.1 A brief overview of international practice and trends

Amicable settlement seems to be gaining prominence in the field of investment disputes between private parties and states under bilateral investment treaties ('BITs'). According to a 2012 OECD working paper:

> 'Almost 90% of the treaties with ISDS provisions require that the investor respect a cooling-off period before bringing a claim. Often, an investor must respect this waiting period regardless of whether it brings the dispute to domestic courts or before an international arbitral tribunal . . . Most treaties require or suggest that the disputes be subjected to non-confrontational settlement procedures during this period
>
> *Preliminary non-confrontational dispute settlement procedures*
>
> . . . Mandatory preliminary procedures have now become almost the norm among the treaties that provide for dispute settlement through international arbitration: 81% of the treaties that provide for [investor-state dispute settlement] through international arbitration require such procedures, while another 8% of the treaties suggest that parties should use them . . . Parties are often, but not always, under the obligation to use these procedures to try to settle the dispute during cooling-off periods.
>
> Over 30 different designations of these preliminary procedures have been found in the treaties, plus some very rare descriptions that occur only once in the sample. A large, but slightly declining majority of them require parties in dispute to attempt to settle the dispute "amicably". Many treaties, and an increasing share in the total, are more specific and order that settlement through "negotiations" or "consultations" be attempted. Other methods of settlement such as conciliation and mediation are also mentioned in treaties, albeit very rarely.'[1579]

The situation is similar under CETA. According to Article 8.19(1): 'A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted'. Under Article 8.22(1)(b) of CETA, a claim may only be submitted if, among other things, 'the investor . . . allows at least 180 days to elapse from the submission of the request for consultations'.

There seems, therefore, to be an emerging norm in the settlement of investment disputes to the effect that such disputes may be submitted to arbitration only upon the expiry of a certain time-period, up to six months.[1580] Negotiations or consultations are to be attempted during that period.[1581] The aim is to

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[1579] J. Pohl, K. Mashino and A. Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (OECD Working Papers on International Investment, 2012/02) <dx.doi.org/10.1787/5k8xb71nf628-en> accessed 21 December 2021, at 17-18 (emphasis added).

[1580] Ibid., at 17 ('Most often, it is set to 6 months, but many treaties set a shorter period of 3, 4 or 5 months. Other periods, such as 7, 12, and 18 months, occur occasionally.' [fns. omitted]).

[1581] An example of a mandatory, time-limited, amicable settlement period in a different context is Art. 44 of the IRMCT Headquarters Agreement: '1. All differences arising out of the interpretation or application of this Agreement or supplementary arrangements or agreements between the Parties shall be settled by consultation, negotiation or other agreed mode of settlement. 2. If the difference is not settled in accordance with paragraph 1 of this Article within three months following a written request by one of the Parties to the difference, it shall, at the request of either Party, be referred to a Tribunal of three arbitrators.' (emphasis added).

avoid, where possible, expensive, resource-intensive and time-consuming arbitration, whilst amicable settlement may also better preserve a business relationship.

Whereas, as seen, according to the 2012 OECD working paper, BITs 'very rarely' mention conciliation and mediation as amicable settlement techniques, a more recent study concluded that there is nonetheless an emerging trend to include those techniques in BITs:

> 'The recent reforms of treaties signed by States, either in the form of an investment chapter of an FTA or as stand-alone BITs, show that mediation/conciliation is slowly getting attention and traction in treaty language. The UNCTAD Report for 2019 identifies a number of treaties signed in 2018, which do exactly that. A review of these provisions show [*sic*] that the most advanced text is probably the agreement between the EU and Vietnam (not yet in force), which includes a full Annex on mediation.'[1582]

Similarly, according to Article 8.20(1) of CETA: 'The disputing parties may at any time agree to have recourse to mediation.' To this end, rules for mediation may be adopted by the Committee Services and Investment pursuant to Article 8.44(3)(c) of CETA.

Mediation and conciliation are ADR techniques that involve the intervention of a third person in an amicable settlement process.[1583] In general terms, 'international conciliation' has been defined by the Institut de droit international as:

> 'a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.'[1584]

Pursuant to Article 6(1)(c) of the ICSID Convention, and in furtherance of Chapter III of the ICISD Convention, in 1967, the ICSID Administrative Council adopted 'rules of procedure for conciliation'

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[1582] C. Kessedjian et al., 'Mediation in Future Investor-State Dispute Settlement Academic Forum on ISDS' (Academic Forum on ISDS, Concept Paper 2020/16, 2020), at 3 (fns. omitted). See likewise A. Ubilava, 'Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation' (*Kluwer Mediation Blog*, 2020) <mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation/> accessed 21 December 2021 ('Unlike the older bilateral investment treaties (BITs) and even some newer investment chapters in Free Trade Agreements (FTAs), the newest generation of such international investment agreements (IIAs) often have express references to mediation and conciliation.' [hyperlink removed]).

[1583] See generally Collier and Lowe (1999), at 27-31.

[1584] Institut de droit international, 'International Conciliation' (Session of Salzburg, 1961), Article 1. See also the description of conciliation by J.-P. Cot, *International Conciliation* (1972), 9, cited in Collier and Lowe (1999), at 29 ('intervention in the settlement of an international dispute by a body having no political authority of its own, but enjoying the confidence of the parties to the dispute, with the task of investigating every aspect of the dispute and of proposing a solution which is not binding on the parties.').

('ICSID Conciliation Rules') for the settlement of investment disputes.[1585] There is only a limited number of reported conciliation cases under the ICSID Conciliation Rules.[1586]

In 1980, UNCITRAL followed suit with the adoption of conciliation rules in the broader context of international commercial relations ('UNCITRAL Conciliation Rules').[1587] In 1996, the PCA, with the approval of its Administrative Council, established Optional Conciliation Rules ('PCA Optional Conciliation Rules'). The PCA Conciliation Rules are particularly relevant for present purposes insofar as they 'are intended for use in conciliating disputes in which one or more of the parties is a State, a State entity or enterprise, or an international organization.'[1588] Just as the PCA Arbitration Rules 2012 are based on the UNCITRAL Arbitration Rules, the PCA Optional Conciliation Rules are based on the UNCITRAL Conciliation Rules. Changes reflect, amongst others, 'the availability of the Secretary-General of the Permanent Court of Arbitration to assist in appointing conciliators and of the International Bureau to furnish administrative support (art. 4, para. 3 and art. 8).'[1589]

Moreover, the PCA Optional Conciliation Rules provide for an 'integrated system'. That is, as explained in the introduction to those rules:

> 'A significant feature of the PCA Optional Conciliation Rules is that they are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration under the various PCA Optional Arbitration Rules. This is useful because if a dispute is not resolved

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[1585] The ICSID website describes conciliation as 'a cooperative, non-adversarial dispute resolution process. The goal of the Conciliation Commission is to clarify the issues in dispute between the parties and to endeavor to bring about agreement on mutually acceptable terms. To that end, a Conciliation Commission may request relevant documents, hear witnesses, make site visits and issue recommendations to assist the parties in reaching mutually acceptable terms to resolve their dispute. Parties to conciliation proceedings are expected to cooperate in good faith with the Commission and seriously consider its recommendations.' <icsid.worldbank.org/services/mediation-conciliation/conciliation/overview> accessed 21 December 2021. The ICSID website provides the following background information regarding the ICSID Conciliation Rules: 'The original Conciliation Rules were adopted on September 25, 1967 and were effective as of January 1, 1968. These were published with non-binding explanatory notes. The Conciliation Rules have subsequently been amended three times. The first amendment was approved and took immediate effect on September 26, 1984. The second amendment was approved on September 29, 2002 and was effective on January 1, 2003. The current Conciliation Rules were approved by written vote of the Administrative Council in 2006 and were effective from April 10, 2006.' <icsid.worldbank.org/services/mediation-conciliation/conciliation/overview> accessed 21 December 2021, (hyperlinks omitted).

[1586] Kessedjian (2020), at 9.

[1587] Conciliation Rules of the United Nations Committee on International Trade Law, adopted on 23 July 1980, recommended by the UNGA in resolution 35/52 (1980) for use regarding disputes arising in the context of international commercial relations. According to the UNCITRAL website, the 'Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.' <uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed 21 December 2021.

[1588] PCA Optional Conciliation Rules, Introduction, at 151.

[1589] Ibid.

> by conciliation, parties may wish to move promptly to final and binding arbitration. Therefore, these Rules provide several important safeguards that apply in the event that arbitration, or recourse to judicial means, follows an unsuccessful conciliation.'[1590]

Insofar as there is a conceptual difference between 'mediation' and 'conciliation',[1591] this concerns the task of the third person, that of a conciliator being to 'make an impartial elucidation of the facts and to put forward proposals for a settlement'.[1592] However, as explained in the introduction to the PCA Optional Conciliation Rules:

> 'In modern international practice, the word 'mediation' is sometimes used to designate a process that is very similar to the procedures for 'conciliation' described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words 'conciliation' to 'mediation' and 'conciliator' to 'mediator.'[1593]

As part of a broader international trend in favour of ADR, the distinction between mediation and conciliation indeed seems to be fading. Thus, for example, the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation, whose scope of application is limited to 'commercial disputes',[1594] broadly defines 'mediation' as

> 'a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.'[1595]

A similarly broad definition of 'mediation' is set forth in the 2008 EU Directive on 'Certain Aspects of Mediation in Civil and Commercial Matters' ('EU Mediation Directive'),[1596] concerning the settlement of cross-border disputes.

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[1590] Ibid., at 153.
[1591] Art. 33 of the UN Charter suggests they are distinct techniques: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.´ (emphasis added).
[1592] Collier and Lowe (1999), at 29.
[1593] PCA Optional Conciliation Rules, Introduction, at 152.
[1594] 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc. A/RES/73/198 (2018), Annex, (not yet in force) ('Singapore Convention on Mediation'), Art. 1(1).
[1595] Art. 2(3) of the Singapore Convention on Mediation. See Ubilava (2020) ('This Singapore Convention on Mediation does not differentiate between mediation and conciliation or any other dispute resolution mechanism resulting in settlements, as long as the procedure that resulted in such settlement agreements complies with the definition of Article 2(3)').
[1596] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] OJ L136/3. According to its Art. 3(a), '"Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.'.

Of note, the foregoing instruments require third-party intervention—whether called 'mediation' or 'conciliation'—to be 'impartial', with several adding the requirement of 'independence'.[1597]

As to the resolution of staff disputes at the UN, 'staff members are strongly encouraged to make every effort to resolve the dispute informally'.[1598] To this end, the UN facilitates various forms of third-party involvement in support of such efforts through the Integrated Office of the United Nations Ombudsperson and Mediation Services.[1599] According to the UN:

> 'Ombudsmen and mediators can be a key resource to assist staff members who are seeking guidance as to where to take their concerns and how to take their grievances forward, or are weighing the implications of raising their concerns. Informal resolution services are available before, during, or in place of a formal complaint, while providing an alternative to litigation with opportunities to transform potentially volatile situations into ones of mutual understanding.'[1600]

As reported by the UNSG in 2008: 'Non-staff personnel, including consultants, individual contractors and individuals under service contracts, may . . . seek the services of the Office of the Ombudsman, which, in a number of instances, has assisted the parties in reaching mutually acceptable solutions.'[1601]

Furthermore, Article 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services) (rev. April 2012):

> 'AMICABLE SETTLEMENT: The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law ("UNCITRAL"), or according to such other procedure as may be agreed between the Parties in writing.'

Of note, as the UN website explains with respect to staff disputes: 'Mediation is a voluntary process and so gaining agreement by both parties to participate in the mediation process is vital, as mediation cannot take place if one party declines to take part.'[1602] Similarly, as explained in the Introduction to the PCA Optional Rules for Conciliation: 'A primary principle that is expressed throughout these Rules is that

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[1597] See, e.g., Art. 7(1) of the UNCITRAL Conciliation Rules and the PCA Optional Conciliation Rules ('The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute'. [emphasis added]); Art. 3(b) of the EU Mediation Directive ('Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way'. [emphasis added]); Art. 5(1)(f) of the Singapore Convention on Mediation ('The competent authority of the Party to the Convention where relief is sought under Art. 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: . . . There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.' [emphasis added]).
[1598] <un.org/en/internaljustice/overview/resolving-disputes-informally.shtml> accessed 21 December 2021.
[1599] Ibid.
[1600] Ibid.
[1601] UN Doc. A/62/748 (2008), para. 18.
[1602] <un.org/en/internaljustice/overview/resolving-disputes-informally.shtml> accessed 21 December 2021.

initiating and continuing conciliation is entirely voluntary'.[1603] Likewise, with respect to investment disputes,

> 'the newest generation of such international investment agreements (IIAs) often have express references to mediation and conciliation. However, even when they do, almost all IIAs only make such third-party procedures voluntary; foreign investors and host states would have to agree later and separately to try mediation.'[1604]

Similarly, the definition of 'mediation' in Article 3(a) of the EU Mediation Directive' explicitly includes the 'voluntary basis' of the process.

To render ADR mandatory might cause tension with the right of 'access to justice', as enshrined in Article 14 of the ICCPR and Article 6 of the ECHR. In this light, Article 5(2) of the EU Mediation Directive provides (emphasis added):

> 'This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.'[1605]

Therefore, a balanced approach regarding ADR in relation to binding dispute settlement seems to be called for. This is reflected in the objective of the EU Mediation Directive, which pursuant to Article 1 of the directive is 'to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings' (emphasis provided).

#### 5.3.1.1.2 Elements of an ADR regime for third-party disputes against the UN

The following elements emerge from the foregoing for the design of an amicable third-party dispute settlement regime.

First, under the Mechanism, a claim by a private party against the UN would only be admissible in contentious proceedings upon the conclusion of an amicable settlement phase of limited duration. If

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[1603] PCA Optional Conciliation Rules, Introduction, at 152.
[1604] Ubilava (2020) (hyperlink removed), adding that 'it seems that only two treaties . . . both signed in 2019 – provide instead for mandatory conciliation as a pre-condition to arbitration. However, under both treaties, conciliation becomes mandatory only for the claimant investor, not for the respondent state.'.
[1605] According to a European Parliament report on the implementation of the EU Mediation Directive, 'although compulsory mediation would promote the use of mediation as an alternative to in-court-dispute resolution, such a development would be contrary to the voluntary nature of mediation and would affect the exercise of the right to an effective remedy before a court or tribunal as established in Art. 47 of the Charter.' European Parliament, 'Report on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive')' (2016/2066(INI, 2017) <europarl.europa.eu/doceo/document/A-8-2017-0238_EN.pdf> accessed 21 December 2021.

negotiations or consultations could continue without limitation, the right of access to justice under Article 14 of the ICCPR would be impaired.

Second, in line with an overall international trend in favour of ADR, third-party assistance—whether called 'mediation' or 'conciliation'—should be available during the amicable settlement phase. To be clear, this would include the settlement phases following proceedings before the claims review board (for claims arising out of peacekeeping operations) and the Tort Claims Board (for claims arising at UN headquarters district).[1606] The PCA Optional Conciliation Rules would provide a particularly suitable basis for developing ADR rules for present purposes.

Third, ADR is to be impartial and independent. In this respect, an ADR service internal to the UN may be appropriate for the informal settlement of staff disputes insofar as an employment relationship is an 'internal affair' (much like the UNDT and the UNAT are internal to the UN). However, when it comes to third-party claims against the UN, internal UN mediators may not satisfy the requirements of impartiality and independence. Like the Panel of Arbitrators (discussed elsewhere in this chapter), a panel of mediators could be established and administered by the PCA. This would mirror the approach regarding arbitration and conciliation under the ICSID Convention.

However, that is not to say that an *internal* review of a third-party claim would not be warranted prior to dispute settlement (that is, first, ADR and, where necessary, contentious proceedings). Such internal review is already partially institutionalised at the UN, namely, through claims review boards and the Tort Claims Board. Consideration could be given to making such initial internal consideration of third-party claims part of general practice with respect to third-party claims.[1607] That might assist the organisation in adopting a considered position regarding a claim, including during settlement discussions, and a request for mediation by a claimant.

#### 5.3.1.2 Contentious proceedings: first instance tribunals and the standing Appellate Tribunal

##### 5.3.1.2.1 Earlier proposals and precedent

The proposed Mechanism, including two levels of tribunals, results from the combination of solutions to the problems in the implementation of Section 29 of the General Convention. However, the proposed establishment of a tribunal for the settlement of third-party disputes against the UN in fact pre-dates the

[1606] Subject to the Tort Claims Board's continued existence.
[1607] Schrijver has suggested 'an Ombudsperson with purely advisory authority'. Schrijver (2015), at 338. Consideration could be given to including such an ombudsperson at these initial stages of the dispute settlement process. See Boon and Mégret (2019), at 6 (referring to 'old calls for the ombudsman position to have an external dimension'). See generally Johansen (2020), para. 3.2.3. ('Ombudspersons').

adoption of the General Convention. Back in 1943, in pressing 'for the early consideration of some of the administrative aspects of the creation of adequate world institutions,'[1608] Jenks argued:

> 'In the postwar world there should be a single World Administrative Tribunal which should exercise jurisdiction over [complaints alleging the nonobservance of the conditions of appointments of officials]. It should also be competent in cases in which some official act performed on behalf of an international institution is alleged to violate a private right; in cases in which international institutions are involved in legal relationships governed by municipal law, such as disputes relating to real estate, building contracts, printing contracts, and such matters; and in any cases involving the private affairs of officials in respect of which an international should be thought preferable to a national jurisdiction. Such a tribunal should have jurisdiction over all existing and future international institutions and their staffs.'[1609]

The 'single World Administrative Tribunal' envisaged by Jenks would have a general jurisdiction, extending beyond staff disputes, to which all international organisations would be subject.

Jenks' proposal was largely reflected in Article 18(2) of the ILO's 'suggested text of proposed resolution' in 1945:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
>
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
>
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
>
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[1610]

However, as the proposed Article 18(2) evolved into Section 29 of the General Convention, the reference to a 'tribunal' was replaced by the broad formula of 'appropriate modes of settlement'. And, contrary to Article 18(2), staff disputes are not mentioned in Section 29 of the General Convention.

As to the exclusion of staff disputes from Section 29, notwithstanding the multitude of administrative tribunals, Jenks' proposal that several organisations would be subject to the jurisdiction of a single

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[1608] Jenks (1943), at 93.
[1609] Ibid., at 104 (emphasis added). The citation continues as follows: 'In the interest of a proper integration of the world judicial institutions of the future, the World Administrative Tribunal should have an organic relationship with the Permanent Court of International Justice. The Court might well be made responsible for the appointment of the members of the Tribunal and be competent to decide cases involving points of principle likely to have a far-reaching influence on the status and development of world institutions which are referred to it by the Tribunal.'.
[1610] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223 (emphasis added). The scope of this provision seems to be less broad than that of the jurisdiction of the 'single World Administrative Tribunal' proposed by Jenks, which would extend to violations of 'a private right' and 'cases in which international institutions are involved in legal relationships governed by municipal law'.

tribunal has to an extent become reality: the ILOAT's jurisdiction has been recognised by, currently, 58 international organisations,[1611] whilst the jurisdiction of the UNDT and UNAT, respectively, extends to several organisations beyond the UN Secretariat, Funds and Programmes.[1612]

As to the formula 'appropriate modes of settlement' under Section 29, writing in 1961, Jenks noted that it had been adopted in relation to several other international organisations;[1613] these include the Specialized Agencies,[1614] NATO,[1615] OAS,[1616] and ICAO.[1617] Jenks commented:

> 'As yet effect has been given to the obligation to provide for "appropriate modes of settlement" by a combination of settlement by negotiation with arbitration clauses rather than by arrangements with any firm institutional content. The principal exception is that the Statute of the Administrative Tribunal of the ILO was amended in 1946 to give the tribunal jurisdiction in respect of "disputes arising out of contracts to which the International labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution". A substantial number of contracts conferring such jurisdiction have been concluded but as of 1960 this extended jurisdiction has not been exercised. One of the difficulties of the matter is that a third party is apt to regard the Administrative Tribunal of an international organisation as a body subject to its influence rather than an impartial court. While the experience of the matter in which the Administrative Tribunals of international organisations have operated in respect of matters arising between such organisations and their staffs appears to show that such fears are unjustified, they are understandable. The whole matter is still in an early stage of development and the provision of firm institutional arrangements for dealing with such cases would appear to be primarily a matter of time.'[1618]

The ILOAT's 'extended jurisdiction' over contractual disputes, which arises under Article II(4) of the ILOAT Statute,[1619] has remained of little practical relevance. Jenks may have correctly surmised that this is because of the perceived lack of impartiality of internal tribunals in the settlement of contractual disputes with third-parties.[1620] That would militate in favour of an *external* tribunal, along the lines of

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[1611] <ilo.org/tribunal/lang--en/index.htm> accessed 21 December 2021.
[1612] For the ILOAT, see <ilo.org/tribunal/membership/lang—en/index.htm> accessed 21 December 2021. For the UNDT and the UNAT, see <un.org/en/internaljustice/overview/who-can-use-the-system.shtml> accessed 21 December 2021.
[1613] Jenks (1961), at 44.
[1614] Art. 31 of the Specialized Agencies Convention.
[1615] Art. 24 of the Ottawa Agreement.
[1616] Art. 12 of the OAS Agreement on Privileges and Immunities.
[1617] Art. 33 of the ICAO Headquarters Agreement. See also section 1.2 of this study.
[1618] Jenks (1961), at 44 (fn. omitted, emphasis added). Cf. Blatt (2007), at 104 ('Bereits vor Unterzeichnung der VN-Charta und des ÜVIVN wurde die Errichtung eines World Administrative Tribunals vorgeschlagen, das mit einer umfassenden Zuständigkeit zur Behandlung aller denkbaren Klagen Privater gegen sämtliche Internationale Organisationen ausgestattet sein sollte, und noch Anfang der 1960er Jahre schien die Bildung einer entsprechenden Gerichtsbarkeit innerhalb der jeweiligen Institutionen nur eine Frage der Zeit'. [fn. omitted]).
[1619] That is, 'disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution'.
[1620] For the same reason, it might be problematic to expand the jurisdiction of the UN's administrative tribunals, as suggested by Schrijver (2015), at 338 ('It might be possible in the long term to expand the jurisdiction of the new United Nations Appeals Tribunal, so that it functions as a specialised court for claims of an administrative and civil law character against the United Nations.'). It is noted that the UNGA has suggested to explore such an expansion as an option for the settlement of contractual disputes with non-staff personnel. UN Doc. A/RES/64/233 (2010), para. 9 under (d). The UNSG, however, expressed the concern that this 'at this stage would be detrimental

the Mechanism, as proposed in this study. In this respect, as seen, Jenks considered the 'provision of firm institutional arrangements' to be 'primarily a matter of time'. Indeed, the matter has remained alive; for example, Schrijver recommended

> 'the establishment of standing claims commissions for international peace operations, the appointment of an Ombudsperson and, in the long term, the establishment of a 'Central Claims Commission' or a separate tribunal that could deal with claims against the United Nations and its functionaries for acts committed by or on behalf of the organization.'[1621]

In furtherance of such recommendations,[1622] the next paragraph discusses in further detail the first instance tribunals and Appellate Tribunal, which together make up the contentious limb of the proposed Mechanism.

#### 5.3.1.2.2 Two-tiered arbitration

To recall, the proposal is for first instance tribunals to be established in the event of 'disputes arising out of contracts or other disputes of a private law character' that cannot be resolved amicably. These tribunals would, in principle, be composed of a single arbitrator, selected by the parties from a panel of arbitrators, or appointed by the Secretary-General of the PCA, as default appointment authority. As to standing claims commissions, they would differ from 'regular' first instance tribunals notably in that they would be composed of three members and be established at the outset of each peacekeeping operation. Furthermore, there would be a standing Appellate Tribunal whose members (possibly including the Mechanism's President) would be appointed by the UNGA.

After discussing the Appellate Tribunal's competence, the present paragraph addresses the composition of the first instance tribunals and the Appellate Tribunal. It then turns to discuss the applicable law and procedure.

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to the new system. In particular, the terms and conditions applicable to staff members and the principles of administrative law, which underpin the Staff Regulations and Staff Rules and the administrative framework of the United Nations, do not apply to non-staff personnel.' UN Doc. A/65/373 (2010), paras. 179 and 182.

[1621] Schrijver (2015), at 341 (emphasis added). See also the proposal by Ferstman for 'a two-tiered system: allowing local claims review boards to decide on a wider array of claims up to a certain financial threshold and established [*sic*] a centralised, independent claims mechanism to deal with more complex or costly claims.' Ferstman (2019), at 67.

[1622] See also the conclusions reached by Johansen (2020), at 301 ('There is no single recipe for how [reform at the international level] could be carried out, and I certainly do not purport to have a comprehensive reform plan. That said, it seems necessary to have at least some court-like mechanism that can issue binding decisions – it is in particular that which is lacking. This could be achieved by establishing internal courts, for example modelled after the international administrative tribunals that deal with disputes between IOs and their staff.' [emphasis added]).

*The competence of the Appellate Tribunal*

Under the Mechanism's contentious limb, there would be no full reconsideration of the dispute on appeal. Rather, in balancing fairness and efficiency, the scope of the Appellate Tribunal's basic competence would be limited to reviewing first instance awards on limited grounds. That competence would be expanded specifically so as to include appeals against first instance decisions concerning the legal character of disputes. That would be warranted by the complexity of such decisions, as well as their significance for both the UN and private parties. The Appellate Tribunal's competence would furthermore be expanded so as to include appeals concerning the interpretation and application of the UN Liability Rules (and possibly 'general principles of law, including international law' in contractual disputes, see below). That would foster the, much-needed, consistent development of the law in this area.

As an alternative to the Appellate Tribunal's aforementioned expanded competence, or possibly in combination with such competence, consideration could be given to the Appellate Tribunal giving 'preliminary rulings' to first instance tribunals and claims commissions. The proceedings relating to such rulings could be modelled after the practice of the European Court of Justice.[1623]

*Composition of first instance tribunals and the Appellate Tribunal*

As to the composition of first instance tribunals, the selection of arbitrators would involve two steps, along the lines of the UNSG's Expedited Arbitration Rules and Articles 12-16 of the ICSID Convention. First, the UNGA would establish a Panel of Arbitrators. In selecting arbitrators for the panel, input could be sought from the Office of Legal Affairs of the UN Secretariat.[1624] The Mechanism's statute would set forth the requirements for arbitrators. To this end, the UNSG's Expedited Arbitration Implementation Proposal provides a useful starting point. It states that

> 'an arbitrator would be required to have knowledge of commercial law and experience in international arbitration cases, including cases under the UNCITRAL Arbitration Rules; be familiar with the United Nations or other international organizations and the issues and functions particular to such an organization; be competent in at least English, French or Spanish; and be of good character. To the extent possible, there should be geographical diversity among the individuals on the list of arbitrators.'[1625]

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[1623] Art. 267 of the Treaty on the Functioning of the European Union, [2012] OJ C326/47.
[1624] In identifying candidates, consideration could be given to members of the Permanent Court of Arbitration. However, that is subject to whether those members meet the requirements for present purposes. It is moreover noted that the members of the Court are appointed by the PCA's 122 Contracting Parties <pca-cpa.org/en/about/introduction/contracting-parties/> accessed 21 December 2021, whereas the UN's membership is currently made up of 193 states <un.org/en/about-us> accessed 21 December 2021.
[1625] UN Doc. A/RES/67/265 (2012), Annex IV, para. 13.

Before being placed on the Panel of Arbitrators, candidates would be vetted by the PCA.[1626]

The second step in the establishment of a tribunal would be taken once a dispute has arisen and amicable settlement has failed. The parties—that is, the UN and the private claimant—would have the opportunity to agree on an arbitrator from the Panel of Arbitrators. Failing such an agreement, the PCA Secretary-General would proceed with the appointment of the tribunal through the list procedure as foreseen in the Expedited Rules (see above). Contrary to Article 40 of the ICSID convention, and so as not to undermine the UNGA's role in establishing the Panel of Arbitrators, it may be preferable to not allow arbitrators to be selected outside the Panel of Arbitrators (except for members of standing claims tribunals appointed by host states).[1627]

It may be necessary to allow for expanding the composition of the tribunal from one to three members where this is warranted, for example, by the complexities of the case, the number of claimants, or the amount in dispute. In this respect, consideration could be given to designing a system along the lines of Article 10(9) of the UNDT Statute, according to which

> 'the President of the United Nations Appeals Tribunal may, within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case.'

Moving to the Appellate Tribunal, contrary to first instance tribunals and claims commissions, it would be a standing tribunal. Its members would meet the requirements stipulated in the proposed UNGA resolution, with additional requirements to ensure seniority and expertise.[1628] The number of members of the Appellate Tribunal would remain to be determined. It is proposed that this be an uneven number, which is common in arbitration so as to avoid a tied result.[1629] To provide context, the UNAT and ILOAT are each composed of seven judges,[1630] and the WTO Appellate Body has the same number of

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[1626] In the case of the UNDT and the UNAT, the 'Internal Justice Council' is involved in the search for suitable candidates. UN Doc. A/RES/62/228 (2008), para. 37(a). Consideration could be given to expanding the mandate of the Council (and amending its name accordingly) so as to include the search for arbitrators, possibly in consultation with the PCA.

[1627] The UNGA would be able to amend the Panel of Arbitrators.

[1628] The members of the Appellate Tribunal, like those of standing claims commissions, would require the necessary expertise to be able to rule on questions concerning the interpretation and application of the UN Liability Rules.

[1629] As seen, on 29 January 2021, the CETA Joint Committee decided, pursuant to Art. 8.28.7 of the CETA, that the Appellate Tribunal, in principle, will have six members (Art. 2(1)), which number may be increased by multiples of three (Art. 2(2)). Divisions of the Appellate Tribunal constituted to hear a case will be composed of three members (Art. 2(5)). See <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/122a87d2-a6da-482c-b295-8a76f8d8aa29/details> accessed 21 December 2021.

[1630] Art. 3(1) of the UNAT Statute and Art. III(1) of the ILOAT Statute. Furthermore, under Art. 4(1) UNDT Statute, the UNDT is composed of three full-time judges and six half-time judges.

members.[1631] Inter-state arbitration tribunals are typically composed of five arbitrators,[1632] whereas dispute settlement clauses between international organisations and states often provide for three arbitrators.[1633]

The Appellate Tribunal could possibly be divided into divisions. This may be appropriate, as a rule, in disposing of requests for review of first instance awards. Conversely, and notwithstanding the need for efficiency, it may be that appeals concerning the legal character of disputes are best decided *en banc*, in view of the complexity and significance of the matters at issue. Furthermore, to ensure the consistent development of the UN Liability Rules, appeals concerning the interpretation and application of these rules equally may best be disposed of in the same way.[1634]

*Applicable law and procedure*

As to the substantive law governing third-party disputes against the UN, as discussed in subsubsection 3.4.1.2 of this study, it varies depending on the dispute in point. Much has been said about the UN Liability Rules, governing third-party disputes arising out of peacekeeping operations. These rules would, in first instance, be applied by standing claims commissions. Furthermore, to ensure the consistent clarification and development of these rules, the Appellate Tribunal would be competent to hear and decide appeals alleging error in the interpretation and application of the UN Liability Rules.

As to contractual disputes, as seen, as explained by the UNSG, the UN's

> 'practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.'[1635]

The 'terms of the contract' would include General Terms and Conditions of Contract which may be annexed to, and form an integral part of, the contract.[1636] As to 'general principles of law, including international law', the contents of this source of law may be ambiguous and prone to divergent

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[1631] <wto.org/english/thewto_e/glossary_e/appellate_body_e.htm> accessed 21 December 2021.
[1632] Daly, Goriatcheva and Meighen (2014), para. 4.26.
[1633] See, e.g., Art. 44(2) of the IRMCT Headquarters Agreement.
[1634] Cf. Art. 10(2) of the UNAT Statute ('Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.').
[1635] 1985 Supplement to the 1967 Study, at 155. Likewise, in the context of grievances by consultants and individual contractors, the UNSG stated in 2008: 'With respect to the law applicable to arbitral claims, the Organization reviews such claims in the light of the applicable contractual terms as well as general principles of international law. As an intergovernmental Organization with 192 Member States, the United Nations takes the view that its contracts and agreements should not be subject to the laws of any one jurisdiction, but should respect general principles of international law. Therefore, the General Conditions do not include a choice of law provision but stipulate that the "decisions of the arbitral tribunal shall be based on general principles of international commercial law".' UN Doc. A/62/748 (2008), para. 22.
[1636] <un.org/Depts/ptd/about-us/conditions-contract> accessed 21 December 2021.

interpretations by different tribunals. The question arises of whether the Appellate Tribunal would be sufficiently able to clarify any such ambiguity through the limited powers of review foreseen in the proposed arrangement. It may be that the same approach is in fact warranted as the one proposed with respect to the UN Liability Rules. That is, consideration could be given to expanding the Appellate Tribunal's competence to hearing and deciding appeals alleging error in the interpretation and application of 'general principles of law, including international law' in contractual disputes.

In terms of procedure, the first instance tribunals, including Standing Claims Commissions, would apply the PCA Arbitration Rules 2012, as amended, amongst others, by incorporating the UNSG's Expedited Rules. Further modifications could be made as necessary to ensure that the arbitration rules reflect state of the art innovations in relevant areas.[1637] One such area concerns 'transparency', one dimension of which is 'procedural transparency',[1638] which 'concerns the way international courts and tribunals apply and enforce international legal norms.'[1639] That has come to the fore particularly in the area of investor-state dispute settlement, as it directly involves public interests.[1640] In the area of investment arbitration, transparency generally boils down to the disclosure of information to third-parties and the participation of such parties in arbitral proceedings.[1641] The 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are a notable product of developments in that area.[1642] But, the debate concerning transparency is not limited to investment arbitration. Indeed, several arbitration organisations have 'initiated projects to foster greater transparency and overall confidence in the system and its outcomes.'[1643]

There are good arguments, it is submitted, for the UN's third-party dispute settlement regime to follow the transparency trend in arbitration. First, like investor-state disputes resolution, third-party claims against the UN are likely to involve public interests (if only because the UN is publicly funded). Second, but for the UN's immunity from jurisdiction, disputes against the UN would be heard by domestic courts in proceedings that are, in principle, public. If dispute resolution under Section 29 of the General

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[1637] Examples include 'consolidation' of proceedings, cf. Art. 22A of the LCIA Arbitration Rules <lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%201> accessed 21 December 2021; composite requests, cf. Art. 1.2 of the LCIA Arbitration Rules; 'mass claims processes', regarding which the PCA has particular expertise <pca-cpa.org/en/services/arbitration-services/mass-claims-processes/> accessed 21 December 2021.
[1638] G. Ruscalla, 'Transparency in International Arbitration: Any (concrete) Need to Codify the Standard?', (2015) 3 *Groningen Journal of International Law* 1, at 2.
[1639] Ibid., at 2.
[1640] Ibid., at 3. See also Art. 8.36 of CETA ('transparency of proceedings').
[1641] Ibid., at 2.
[1642] UN Doc. A/68/17 (2013), Annex I, adopted by decision of 11 July 2013. See also UN Doc. A/RES/68/109 (2013).
[1643] D. Schimmel et al., 'Transparency in Arbitration' (Practice Note, 2018) <foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx> accessed 21 December 2021, at 1.

Convention is to be truly a counterpart for the UN's immunity from jurisdiction, it should be no less transparent than court proceedings. Third, and perhaps most significantly of all, Article 14 of the ICCPR entitles claimants to a hearing (by a 'competent, independent and impartial tribunal established by law') that is not only fair, but also 'public'.

A further procedural issue arises in connection with the determination of the legal character of third-party disputes. Insofar as that determination involves the interpretation and application of Section 29 of the General Convention, it concerns the General Convention's states parties. It would be appropriate, therefore, to make allowance for those states, as well as possibly other interested parties, to make submissions in the proceedings.

*The nature of the proceedings: self-contained arbitration*

The Convention, as seen, is intended to provide for a 'self-contained' arbitration regime, which excludes national court involvement. That regime would be modelled after the core provisions of the ICSID Convention that operationalise the 'principle of non-interference', as referred to by Schreuer.[1644] These notably, but not exclusively, include the following, in relevant part:

> 'Article 26
> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'[1645]
>
> 'Article 44
> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'
>
> 'Article 52
> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;

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[1644] Schreuer (2009), at 351-352, para. 3.
[1645] According to Schreuer: 'Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention . . . The principle of noninterference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts. This is evidenced by the provisions on the constitution of the tribunal (Arts. 37–40), on proceedings in the absence of a party (Art. 45(2)), on autonomous arbitration rules (Art. 44), on applicable law (Art. 42(1)), and on provisional measures (Art. 47). It is only in the context of enforcement that domestic courts may enter the picture (Arts. 54–55). In addition, the arbitration process is also insulated from inter-State claims, by the exclusion of diplomatic protection (Art. 27).' Ibid., at 351-352, paras. 1 and 3. Furthermore, as explained by Schreuer: 'It is beyond doubt that the exclusive remedy rule of Art. 26 also operates against domestic courts.' Ibid., at 386, para. 132, citing Delaume (1984), at 68: 'If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject.'.

(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.'[1646]

'Article 53
(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'

'Article 54
(1) Each state party shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state'.

Similar provisions would be included in the proposed Convention, obliging its states parties to refrain from interfering in dispute settlement under the Mechanism.

Under the Convention, the term 'award' would be defined so as to include a final preliminary ruling regarding the character of a third-party dispute. As a result, where a first instance tribunal or, in the event of an appeal, the Appellate Tribunal rules that a dispute lacks a private law character, that ruling would be *res judicata* and must be recognised by national courts as precluding subsequent proceedings against the international organisation.

The exclusivity of the Mechanism under the Convention would be a legal basis, additional to jurisdictional immunity, for courts to decline to adjudicate cases against international organisations. Consequently, international organisations would enjoy stronger legal protection against domestic interference. This deference to a dispute settlement mechanism with exclusive competence[1647] resembles the situation regarding the settlement of non-contractual disputes with the EU. Under Article 268, in conjunction with Articles 274 and 340, of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the EU has exclusive jurisdiction in such disputes. In this respect, as explained by Wessel in the broader context of the immunities of the EU,

'the immunities of the European Union have never been given much attention in academic literature. One reason may be that, because of the extensive (and often exclusive) jurisdiction of the Court of Justice of the EU, issues can or must often be solved at that level. Whereas most international organizations lack a judicial forum for individuals to bring claims, the EU's well-developed legal

[1646] As a whole, the post-award remedies under the Convention are set forth in Arts. 49 to 52.
[1647] Cf. Art. 26 of the ICSID Convention, which provides in relevant part: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.' (emphasis added).

> order allows any natural or legal person, whatever his nationality or residence, to institute proceedings against a decision addressed to him or which is of direct and individual concern.'[1648]

Returning to the Convention, under its self-contained regime, it is of little relevance whether the first instance tribunals (including standing claims commissions) and the Appellate Tribunal, and the proceedings before them, qualify as arbitration or judicial adjudication.[1649] Conversely, the former qualification is essential to ensure the application of the New York Convention.

*The New York Convention as a backup legal framework*

With over 160 states parties, the New York Convention is 'one of the key instruments in international arbitration'.[1650] It applies, in principle,[1651] in UNCITRAL arbitrations against the UN in the current set-up. Pending the proposed Convention's entry into force and, subsequently, with respect to non-states parties, the New York Convention is to continue to apply as a backup legal framework for the Mechanism. In designing the Mechanism, care should be taken to ensure the requirements under the New York Convention are met.

The New York Convention's key provision is Article III, which provides in relevant part: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.'

Article V of the New York Convention allows states to refuse the recognition and enforcement of awards on limited grounds. There is accordingly a potential for interference by states, such that, for present

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[1648] R.A. Wessel, 'Immunities of the European Union', in N.M. Blokker and N. Schrijver (eds.), Immunity of International Organizations (2015), 137 at 159 (emphasis added). As explained by Wessel, furthermore: 'The situation that the Union is a party to a dispute taking place within one its Member States is foreseen by the treaty, and in fact a role of the national courts is not excluded. This absence of full jurisdictional immunity results in a special situation which is highly exceptional for international organizations. Art. 274 of TFEU provides: 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.' Ibid., 143.

[1649] Regarding '[w]hat constitutes an international court', see generally Johansen (2020), at 78ff.

[1650] <newyorkconvention.org> accessed 21 December 2021. Cf. Van den Berg (2019), at 1 (underscoring 'the importance of [the New York Convention and the ICSID Convention] for international arbitration. Each convention has more than 150 Contracting States, and both have been thoroughly tested in numerous court decisions interpreting and applying their provisions.' [fn. omitted]).

[1651] Art. I(3) allows a state, amongst others, to 'declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.' (emphasis added). Several states have made such a declaration, <newyorkconvention.org/countries> accessed 21 December 2021. The 'commercial reservation' would exclude several, but not all, third-party disputes with the UN.

purposes, the New York Convention is 'second best' to the ICSID Convention and the proposed Convention.

As explained by Blackaby et al., insofar as an award is recognised under the New York Convention,

> 'the purpose of recognition on its own is generally to act as a shield. Recognition is used to block any attempt to raise in fresh proceedings issues that have already been decided in the arbitration that gave rise to the award of which recognition is sought.'[1652]

More specifically:

> 'Recognition on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, it will seek to produce the award to the court, and will ask the court to recognise it as valid and binding upon the parties in respect of the issues with which it dealt. The award may have disposed of *all* of the issues raised in the new court proceedings and so put an end to those new proceedings as *res judicata*—that is, as matters in issue between the parties that in fact have already been decided. If the award does not dispose of all of the issues raised in the new proceedings, but only some of them, it will need to be recognised for the purposes of issue estoppel, so as to prevent those issues with which it does deal from being raised again.'[1653]

As a result, once a national court has recognised an arbitral award, it is precluded from hearing the matter on grounds of *res judicata*. This effectively offers international organisations protection against national court interference, in addition to their jurisdictional immunity.[1654]

Such protection also results from Article II of the New York Convention:

> '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration
>
> . . .
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

The recognition of an arbitration agreement by a national court therefore involves a court denying itself jurisdiction over the dispute against the international organisation.

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[1652] Blackaby et al. (2015), para. 11.23.
[1653] Ibid., para. 11.20 (emphasis in original, fn. omitted).
[1654] The enforcement of an award under the New York Convention does not preclude an international organisation from relying on its immunity from execution.

Turning to the design requirements of the Mechanism in order for the New York Convention to operate as a 'backup' legal framework, this turns largely, though not exclusively, on the method of composition of tribunals. Similar issues have arisen with respect to other (prospective) tribunals. These include the ICS under CETA,[1655] the IUSCT,[1656] the prospective 'International Tribunal for Investments (ITI)',[1657] and the prospective appeal mechanism for investor-state disputes.[1658]

As to the ICS, as seen, its arbitration panels are appointed by states parties, while its divisions are designated internally for each case. As Reinisch explained:

> 'The crucial legal issue is whether a third-party dispute settlement institution with permanent "tribunal members" is more a court or can still qualify as an arbitral tribunal. Usually, the distinctive element is exactly the permanency and the method of appointment: Judges are appointed for a certain period of time and for an undefined number of disputes, whereas arbitrators are appointed by the disputing parties for a specific dispute. Further, the lack of an appeals possibility and greater party autonomy in shaping the procedure are considered to be hallmarks of arbitration vis-à-vis adjudication through courts. Sometimes, additionally the "compulsory" jurisdiction of courts is contrasted with the "voluntary" acceptance of arbitration, though the ICJ with its requirement of a separate acceptance of the Court's jurisdiction demonstrates quite ably that this distinction is probably more valid in domestic legal systems.'[1659]

In discussing the ITI, which would be 'composed of tenured (or semi-tenured) members',[1660] Kaufmann-Kohler and Potestà detail the requirements under the New York Convention. Accordingly, a national court requested to recognise an ITI award,

> 'would in particular ask itself the following questions: (a) Is the decision an "award" under the NYC?; (b) Is there an "agreement in writing" under Articles II and V(1)(a) of the Convention?; (c) If there were one, would the presence of a built-in appeal pose any problems under the NYC?'[1661]

Regarding the first point referred to by Kaufmann-Kohler and Potestà in the foregoing citation, as explained by Reinisch with respect to the ICS, the

> 'issue will be whether national courts in New York Convention Contracting States, where recognition and enforcement may be sought in the future, will consider ICS awards as awards made by an arbitral

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[1655] See generally A. Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration', (2016) 19 *Journal of International Economic Law* 761, with reference to a draft of CETA dated 29 February 2016 (CETA was signed on 30 October 2016).
[1656] Ibid., at 767 (The IUSCT's judges are 'appointed by two states to decide an undetermined number of disputes also between nationals of one state and the other state.').
[1657] See generally G. Kaufmann-Kohler and M. Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (Geneva Center for International Dispute Settlement, 2016) <ssrn.com/abstract=3455511> accessed 21 December 2021.
[1658] See generally Van den Berg (2019).
[1659] Reinisch (2016, 'Investment Court System for CETA'), at 766 (fns. omitted).
[1660] Kaufmann-Kohler and Potestà (2016), para. 79.
[1661] Ibid., para. 145.

> body. The whole purpose of the New York Convention is the enforcement of arbitral awards as opposed to foreign judicial decisions.'[1662]

The matter turns on the interpretation of, in particular, Article I(2) of the New York Convention: 'The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'

In the case of the ICS, Reinisch concluded that 'it appears that the proper view should be that ICS remains predominantly a form of arbitration and that in spite of its name and some judicial features ICS tribunals will render arbitral awards.'[1663] In reaching that conclusion, Reinisch considered:

> 'The *travaux préparatoires* of the Convention indicate that even a permanent dispute settlement institution can be regarded as arbitration and that what was crucial was the '*voluntary* nature of arbitration, based on "will" or "agreement" of the parties, as opposed to any type of adjudication based on "compulsory", or "mandatory" jurisdiction, imposed on the parties "regardless of their will".'
>
> Thus, even where the parties may not be able to appoint 'their' arbitrators, they must still be able to freely consent to such dispute settlement. Otherwise, it would lose its character as arbitration.'[1664]

Similarly, as explained by Kaufmann-Kohler and Potestà with respect to awards rendered by the ITI,

> 'there would be good reason to qualify the ITI as a "permanent arbitral body" under the Convention, both under the "ordinary meaning" of Article I(2), and under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958. However, this does not seem of primary importance. What matters – as it clearly results also from the *travaux* – is the consensual basis of the adjudicator's jurisdiction, which would be clearly met for the ITI . . .
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> . . . That said, while not strictly needed, UNCITRAL may, after the adoption of the ITI Statute, consider issuing a "recommendation", similar to the one it made in connection with the interpretation of Article II(2) and Article VII(1) of the NYC. Such a recommendation would be aimed at clarifying that the ITI falls within the ambit of the NYC, as a "permanent arbitral body" under Article I(2) or otherwise. It would certainly provide comfort to domestic courts faced with the enforcement of ITI awards and would likely improve consistency in the interpretation by courts.'[1665]

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[1662] Reinisch (2016, 'Investment Court System for CETA'), at 783 (emphasis added).
[1663] Ibid., at 783. Indeed, according to Reinisch: 'While this risk certainly exists, it seems to the present author that the better arguments militate in favour of regarding ICS as a form of arbitration and the outcome of ICS dispute settlement as constituting enforceable awards.' Ibid., at 786.
[1664] Ibid., at 767. The fn. following this passage refers to Kaufmann-Kohler and Potestà (2016), para. 152.
[1665] Kaufmann-Kohler and Potestà (2016), paras. 154-155 (fn. omitted). The UNCITRAL recommendation referred to is the 'Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the [New York Convention], adopted by the [UNCITAL] on 7 July 2006 at its thirty-ninth session. See UN Doc. A/61/17, Annex II, (2006). The recommendation entails the following: 'Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards, 1. Recommends that Article II, paragraph 2, of the [New York Convention], be applied recognizing that the circumstances described therein are not exhaustive; 2. Recommends also that Article VII, paragraph 1, of the [New York Convention], should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.' The UNGA expressed its 'appreciation' to UNCITRAL regarding

Turning to the proposed Mechanism, the submission of a dispute to a first instance tribunal or the Appellate Tribunal arguably is no less consensual than its submission to an ad hoc UNCITRAL tribunal under the current set-up.[1666] Furthermore, the Mechanism would leave somewhat more leeway to the parties to compose first instance tribunals than the ICS or the ITI. That is, the Mechanism's first instance tribunals would, in principle, be appointed by the third-party claimant and the UN from the Panel of Arbitrators.

But then again, there would be no such leeway with respect to standing claims commissions, which would be established by the UNSG and the host state of a peacekeeping operation. Moreover, the Appellate Tribunal would be a standing tribunal whose members are appointed by the UNGA. Therefore, along the lines suggested by Kaufmann-Kohler and Potestà, it may be advisable to seek a recommendation by UNCITRAL—a subsidiary body of the UNGA—[1667] that the contentious limb of the Mechanism 'falls within the ambit of the NYC, as a "permanent arbitral body" under Article I(2) or otherwise'.[1668]

A separate issue arises with respect to the limitation of the scope of application of the New York Convention under Article I(1) (emphasis added) to

> 'arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

In the case of 'self-contained arbitration', such as under the ICSID Convention and the proposed Convention, there is no place of arbitration. In that connection, the question arises whether 'a-national' awards would fall within the scope of Article I(1) of the New York Convention or purposes of recognition. According to Kaufmann-Kohler and Potestà, that

> 'was heavily discussed in the past, but seems to have lost much of its appeal in more recent days. First, a number of courts have indeed applied the Convention to a-national awards . . . Further, it seems beyond dispute, and rightly so, that "delocalized" awards of at least one particular type, those made under the ICSID Convention, can be enforced under the NYC regime, if recognition/enforcement are sought in a non-ICSID Contracting State. The authors of this paper see no convincing reason why a de-localized ITI arbitration regime akin to the ICSID regime should be treated differently.'[1669]

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the recommendation and requested the Secretary-General 'to make all efforts to ensure that . . . the recommendation becomes 'generally known and available.' See UN Doc. A/RES/61/33 (2006), paras. 2 and 3.

[1666] Although it could be said that due to the jurisdictional immunity of international organisations, claimants in reality have little choice but to consent to arbitration.

[1667] UNCITRAL was established in A/RES/2205(XXI) (1966).

[1668] See likewise Kaufmann-Kohler and Potestà (2016), para. 155, with respect to the ITI. See likewise Reinisch (2016, 'Investment Court System for CETA'), at 768, with respect to the ICS under CETA.

[1669] Kaufmann-Kohler and Potestà (2016), para. 157 (fns. omitted).

The same may apply to a-national awards from the Mechanism's first instance tribunals and the Appellate Tribunal. As such awards would only become a-national upon entry into force of the Convention, the Mechanism's statute, as promulgated by the UNGA, could stipulate that until then, awards shall be deemed to be rendered in the Netherlands. Apart from being the host state of the PCA, the Netherlands has significant experience with international courts and tribunals generally, including the IUSCT. Moreover, having enacted a modern arbitration law, the Netherlands is generally a trusted arbitration venue.

The second point referred to by Kaufmann-Kohler and Potestà, as referred to above, concerns the term 'arbitration agreement' under Article II(2). According to that provision: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' In the case of arbitration of third-party disputes against the UN, the arbitration clause may be included in a contract (such as in the case of contractual disputes with consultants and individual contractors) or in a *compromis*.

But, an arbitration agreement between a third-party and the UN may also come into existence in other ways. First, in submitting a claim to a standing claims commission, the claimant would accept the UN's offer of arbitration expressed in the SOFA,[1670] thus entering into an arbitration agreement. The same applies when an investor enters into an arbitration agreement with a state of investment by submitting a claim to an investment tribunal under a BIT.

Second, where a private party holds the UN liable in tort but the UN denies the private law character of the claim, the controversy would be decided by the Mechanism. Here, too, an arbitration agreement would come into existence insofar as the submission of the claim entails the claimant's acceptance of the UN's standing offer of arbitration under the Mechanism's statute.[1671]

According to Kaufmann-Kohler and Potestà, writing with respect to the ITI:

> 'It is well-accepted that the consensual method based on arbitration without privity meets the writing requirement under the [New York Convention] . . .

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[1670] This would necessitate a further amendment of the SOFA, along the lines of the formulation commonly found in BITs. For example, according to Art. 9(2) of the Agreement on Promotion and Protection of Investments Between the Government of the Kingdom Of Bahrain and the Government of the Kingdom of The Netherlands, signed on 5 February 2007: 'If the dispute has not been settled within a period of three months from the date either party to the dispute requested amicable settlement, that Contracting Party irrevocably consents that the dispute may be submitted at the request of the national concerned to' arbitration (emphasis added). Similarly, Art. 8.25(1) of CETA provides: 'The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section.'.

[1671] Like the SOFA, the UNGA resolution would expressly state that the UN consents that the dispute may be submitted to the Mechanism.

> . . . This notwithstanding, the ITI Statute could expressly state that (i) consent achieved through the combination of the state's offer with the investor's submission of a claim to the dispute settlement mechanism "shall satisfy the requirements of Article II of the NYC for an 'agreement in writing"'.[1672]

As seen, the same could be provided with respect to the Mechanism.[1673]

The third, and final, point referred to by Kaufmann-Kohler and Potestà concerns the compatibility of an appeals facility with the New York Convention. According to Reinisch, as seen, 'the lack of an appeals possibility' is considered to be amongst the 'hallmarks of arbitration vis-à-vis adjudication through courts.'[1674] It is submitted that it is not likely that the design of the Mechanism's contentious limb, consisting of first instance tribunals *and* a standing Appellate Tribunal, would undermine the application of the New York Convention. To begin with, the Appellate Tribunal is not competent to reconsider the dispute in full. Rather, it has powers of review like ICSID annulments panels. The Appellate Tribunal's powers would only extend further in limited cases (regarding the character of third-party claims, and the interpretation and application of the UN Liability Rules). In any event, as explained by Kaufmann-Kohler and Potestà, 'as long as the overall process can be regarded as arbitration . . . no issue related to the presence of a built-in appeal would arise under the NYC.'[1675]

In sum, there appear to be good arguments that the arbitration under the Mechanism would be covered by the New York Convention, as a backup legal framework to the proposed Convention. That said, as Van den Berg concluded with respect to a potential future appeal mechanism for investor-state dispute settlement:

> 'The New York Convention raises a whole host of issues: definition of an arbitral award; what a permanent arbitral body is; whether an a-national award fall [*sic*] under the Convention; whether there is a residual application to ICSID awards; whether investment arbitration falls under the commercial reservation; whether the definition of an arbitration agreement in writing is fulfilled; when an award made at first instance is 'binding' under the Convention; and whether the grounds for refusal of enforcement can be waived. Appropriate and careful treaty design appears to be a challenge for the drafters. To draft legally suitable and workable solutions is a daunting task.'[1676]

Notwithstanding the differences between, on the one hand, the Mechanism and, on the other, the appeal mechanism discussed by Van den Berg, the importance of '[a]ppropriate and careful treaty design', as underscored by Van den Berg, is to be borne in mind in designing the Mechanism.

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[1672] Kaufmann-Kohler and Potestà (2016), paras. 159-160.
[1673] The matter could also be added to the interpretation requested of UNCITRAL. In this regard, UNCITRAL's aforementioned 2006 recommendation is helpful: 'Recommends that Article II, paragraph 2, of the [New York Convention], be applied recognizing that the circumstances described therein are not exhaustive' (emphasis added).
[1674] Reinisch (2016, 'Investment Court System for CETA'), at 766.
[1675] Kaufmann-Kohler and Potestà (2016), para. 164.
[1676] Van den Berg (2019), at 33 (fn. omitted).

#### 5.3.1.3 The Permanent Court of Arbitration

The Mechanism would need to be administered expertly and efficiently. The UN Secretary General's Expedited Rules Concept Paper favoured an outside institution administering the arbitration proceedings for contractual disputes with consultants and individual contractors. It did so for good reasons, that is, 'having an outside institution administer the arbitration would de-link the neutral entity from the Organization and eliminate any perception of partiality.'[1677] This reasoning would apply equally to the administration of proceedings, both amicable and contentious, as part of the Mechanism.

Of the various international dispute settlement institutions, the PCA's unique background and mandate would make it ideally suited to administer the Mechanism. As described by Daly, Goriatcheva and Meighen:

> 'Established in 1899 during the first Hague Peace Conference, the PCA is the world's oldest intergovernmental organization dedicated to facilitating the peaceful resolution of international disputes . . .
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> . . . Originally focused on arbitration and other forms of dispute resolution between states, the PCA now offers a broad range of services for the resolution of disputes involving various combinations of states, state-controlled entities, intergovernmental organizations, and private parties. These services include arbitration, conciliation, factfinding commissions, good offices, and mediation.'[1678]

In addition to 'regularly providing administrative services in support of parties and arbitrators conducting arbitral proceedings under the PCA's auspices',[1679] the PCA has significant experience with a broad variety of specialised international dispute settlement regimes. More specifically, it has acted as registry in all but one arbitration under Annex VII to the 1982 United Nations Convention on the Law of the Sea.[1680] The PCA also 'frequently provides administrative support in disputes between investors and States arising under the Energy Charter Treaty, conducted under the UNCITRAL Arbitration Rules'.[1681] Furthermore, there is a PCA Steering Committee on International Mass Claims Processes, which 'was established in response to the proliferation of mass claims systems in recent years'.[1682] Moreover, the PCA 'has been regularly included as the forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments concerning natural resources and the environment,

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[1677] UN Doc. A/66/275 (2011), Annex II, para. 26.
[1678] Daly, Goriatcheva and Meighen (2014), paras. 1.03-1.04 (fn. omitted).
[1679] Such services may involve 'serving as the official channel of communications and ensuring safe custody of documents. The PCA can also provide such services as financial administration, logistical and technical support for meetings and hearings, travel arrangements, and general secretarial and linguistic support. In addition, a staff member of the International Bureau may be appointed as registrar or administrative secretary for a case and carry out administrative tasks at the direction of the arbitral tribunal.' <pca-cpa.org/en/services/arbitration-services/case-administration> accessed 21 December 2021.
[1680] <pca-cpa.org/en/services/arbitration-services/unclos/> accessed 21 December 2021.
[1681] <pca-cpa.org/en/services/arbitration-services/> accessed 21 December 2021.
[1682] <pca-cpa.org/en/services/arbitration-services/mass-claims-processes/> accessed 21 December 2021. Regarding mass torts involving the UN, see generally Ferstman (2019).

and offers specialized rules for arbitration and conciliation of these disputes.'[1683] Lastly, the PCA's International Bureau acts as secretariat to the standing Arbitral Tribunal for the Bank for International Settlements.[1684]

In a video message on the PCA's website, UN Secretary-General Guterres underscored the importance of conciliation and arbitration, and recognised the PCA's significance and its strong ties to the UN.[1685] To administer the Mechanism for the settlement of third-party disputes against the UN would fit with the PCA's extensive experience in the settlement of international disputes.

The PCA's particular suitability for present purposes is underscored by its Optional Conciliation Rules and its Arbitration Rules 2012. As seen, these sets of rules provide a solid basis for the development of procedural rules for the settlement of third-party disputes against the UN in amicable, respectively, contentious proceedings. This is particularly so as both sets of rules are specifically intended for use in disputes in which one or more of the parties is a State (entity or enterprise), or an international organization.[1686] Moreover, as seen, the PCA Optional Conciliation Rules 'are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration'.[1687]

Furthermore, both sets of rules envisage an active role for the PCA Secretary-General and the PCA's International Bureau (as the PCA Secretariat is known), which the Secretary-General heads.[1688] In addition to assisting in appointing conciliators,[1689] the Secretary-General serves as appointing authority for arbitral tribunals.[1690] As for the International Bureau, it provides administrative assistance to conciliations,[1691] and acts as registry and secretariat in arbitrations.[1692]

The PCA's involvement with the Mechanism would moreover result in a large measure of legal protection for arbitrators and participants to the arbitral proceedings, there being no need to establish the Mechanism as an international organisation for that reason. According to Article 16 ('Exclusion of

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[1683] <pca-cpa.org/en/services/arbitration-services/> accessed 21 December 2021.
[1684] <pca-cpa.org/en/services/arbitration-services/bis/> accessed 21 December 2021.
[1685] <pca-cpa.org/en/home> accessed 12 December 2021 ('The Permanent Court of Arbitration has supported the efforts of tribunals around the world. But it has also fostered conciliation . . . In today's complex and volatile world, arbitration and conciliation are underutilised, yet they are indispensable. As a permanent observer of the United Nations General Assembly, the Court is ideally placed to promote the rule of law . . . I look forward to strengthening ties between our two organisations').
[1686] PCA Optional Conciliation Rules, Introduction, at 151; PCA Arbitration Rules 2012, Introduction, at 4.
[1687] PCA Optional Conciliation Rules, Introduction, at 153.
[1688] The PCA's organisational structure furthermore includes 'an Administrative Council that oversees its policies and budgets' and 'a panel of independent potential arbitrators known as the Members of the Court'. See <pca-cpa.org/en/about> accessed 21 December 2021 (hyperlinks removed).
[1689] Art. 4(3) of the PCA Optional Conciliation Rules.
[1690] Art. 6 of the PCA Arbitration Rules 2012.
[1691] Art. 8 of the PCA Optional Conciliation Rules.
[1692] Art. 1(3) PCA Arbitration Rules 2012.

liability') of the PCA Arbitration Rules 2012 (which would be retained in the proposed arbitration rules): 'The parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.'

The waiver of claims in this provision is unqualified. That is a change to Article 16 of the UNCITRAL Arbitration Rules, under which the waiver does not apply to 'intentional wrongdoing'.[1693]

The legal protection of arbitrators, and other participants to the proceedings, is further buttressed through the PCA Headquarters Agreement, between the PCA and the Netherlands,[1694] as its host state, and various 'Host Country Agreements' with states parties to the PCA's founding treaties.[1695] Under such agreements—in addition to the PCA, its Secretary-General and its staff—arbitrators and other participants in arbitral proceedings, including notably witnesses, enjoy a broad range of privileges and immunities.[1696]

The PCA's preparedness to undertake the administration of the Mechanism may depend on the approval of its Administrative Council. As to the UN, to be able to invite the PCA to administer the Mechanism, the UN would need to consider its procurement rules. The UNSG's Expedited Rules Concept Paper provided for a 'competitive procurement exercise' for the selection of an international dispute settlement institution to administer arbitral proceedings for disputes with consultants and individual contractors.[1697] If it came to such an exercise, the PCA can be expected to do particularly well in the technical evaluation.

However, a competitive procurement exercise may not in fact be required on two grounds. First, the UN's Financial Regulations and Rules may allow the UNSG to dispense with such an exercise. UN Financial Regulation 5.13 provides:[1698] 'Tenders for goods and services shall be invited by advertisement, except where the Secretary-General deems that, in the interests of the Organization, a departure from this regulation is desirable.'

Financial Rule 105.16(a) details this as follows:

> 'The Under-Secretary-General for Management may determine for a particular procurement action that using formal methods of solicitation is not in the best interest of the United Nations: (i) When there is no competitive marketplace for the requirement, such as where a monopoly exists, where

[1693] Daly, Goriatcheva and Meighen (2014), paras. 4.72-4.74.
[1694] See also Exchange of Notes constituting an Agreement supplementing the Agreement concerning the Headquarters of the Permanent Court of Arbitration, 6 June 2012. See Daly, Goriatcheva and Meighen (2014), paras. 4.76-4.78.
[1695] Ibid., para. 4.79.
[1696] Ibid., paras. 4.76-4.79.
[1697] UN Doc. A/66/275 (2011), Annex II, para. 26.
[1698] UN Doc. ST/SGB/2013/4 (2013).

> prices are fixed by legislation or government regulation or where the requirement involves a proprietary product or service'.[1699]

Arguably, due to the PCA's uniqueness there is no 'competitive marketplace'. As a result, it would not be 'in the best interest of the United Nations' to use formal methods of solicitation in the case in point. Second, in any event, having approved the UN's Financial Regulations, the UNGA would be empowered to override the procurement regime under the Financial Regulations and Rules.

Lastly, to engage the PCA for purposes of administering the Mechanism, the UN and PCA would conclude an agreement. The agreement would concern matters such as financial matters, reporting and dispute settlement (between the UN and the PCA).

#### 5.3.2 Establishment and legal framework of the Mechanism

Having clarified certain essential aspects of the Mechanism, this subsection discusses its establishment. That would involve a resolution by the UNGA, complemented by a Convention to establish the 'self-contained' arbitration regime. A further component of the Mechanism's establishment, as seen, would be the conclusion of the agreement between the UN and the PCA.[1700]

The overall objective of these arrangements would be comprehensively to 'make provisions for appropriate modes of settlement of . . . disputes arising out of contracts and other disputes of a private law character' in accordance with Section 29 of the General Convention. That provision dictates the scope of the UNGA resolution and the Convention. As a result, the Mechanism would not be competent to settle disputes that lack a private law character, that is, disputes regarding the UN's 'performance of constitutional functions'. That said, as seen, the Mechanism would have the power to rule on its own jurisdiction ('Kompetenz-Kompetenz'),[1701] including notably by determining the legal character of disputes before it.

##### 5.3.2.1 The UNGA resolution

The proposed UNGA resolution would be the continuation of the UNGA's involvement with the implementation of Section 29 of the General Convention. To recall, in the era starting with the 1995 Report, the UNGA, upon receiving the 1996 Report and 1997 Report, promulgated the UN Liability

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[1699] Ibid.

[1700] In addition, contracts concluded by the UN would include an arbitration clause referring to the mechanism, in lieu of the customary UNCITRAL arbitration clause. Furthermore, SOFAs would include an amended third-party dispute settlement clause, as discussed above.

[1701] Cf. Art. 23(1) of the PCA Arbitration Rules 2012 ('The arbitral tribunal shall have the power to rule on its own jurisdiction'); Art. 2(6) of the UNDT Statute and Art. 2(8) of the UNAT Statute ('In the event of a dispute as to whether the . . . Tribunal has competence under the present statute, the . . . Tribunal shall decide on the matter.').

Rules in resolution 52/247 (1998). In 2012, the UNGA initiated the dialogue with the UNSG about expedited arbitration of contractual disputes with consultants and individual contractors.

To establish the Mechanism through an UNGA resolution would underscore that it is the UN that gives effect to its obligation under Section 29(a) of the General Convention 'to make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character'. The Mechanism, as a whole, would qualify as a comprehensive 'mode of settlement' in terms of that provision.

The purposes of the proposed UNGA resolution would be to:

(i) establish the Mechanism by adopting its statute, included in an annex to the resolution. The UNGA used the same legislative technique with respect to the UNDT and the UNAT: in resolution 63/253 of 24 December 2008,[1702] the UNGA decided to adopt the tribunals' statutes set out in Annexes I and II, respectively.[1703] In that resolution, in addition to adopting the statutes, the UNGA set out the date as of which the tribunals became operational, approved the proposed conditions of service of the tribunals' judges, and decided on a review of the statutes at a later stage. The tribunal's statutes deal with such matters as competence, composition, administrative arrangements, rules of procedure, receivability, evidence and interim measures. Similar topics would be addressed in the proposed UNGA resolution and in the Mechanism's statute;

(ii) approve the engagement of the PCA and, as necessary, waive the procurement requirements (discussed above); and

(iii) adopt the proposed Convention and open it for accession by States.

The UNGA would adopt the proposed UNGA resolution on a report of the Sixth (Legal) Committee. That Committee's involvement is warranted by the legal complexities of the matters at issue. The UNGA followed the same routing in adopting the General Convention.[1704]

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[1702] Reissued for technical reasons and dated 17 March 2009. The resolution was adopted on a report from the Fifth Committee. See UN Doc. A/63/642 (2008). The UNGA had allocated the matter to both that committee and the Sixth Committee. Ibid., para. 1. However, here is no reference in UN Doc. A/63/642 (2008) to any involvement of the Sixth Committee.

[1703] UN Doc. A/RES/63/253 (2008), para. 26. Both statutes have subsequently been amended several times. For the UNDT Statute, see UN Doc. A/RES/69/203 (2014); UN Doc. A/RES/70/112 (2015); A/RES/71/266 (2016); and A/RES/73/276 (2018). For the UNAT Statute, see A/RES/66/237 (2011); A/RES/69/203 (2014); A/RES/70/112 (2015); and A/RES/71/266 (2016).

[1704] See, e.g., UN Doc. A/C.6/37 (1946). The draft convention that would become the General Convention was contained in document UN Doc. A/C.6/28 (1946). By contrast, UN Doc. A/RES/52/247 (1998), concerning the UN Liability Rules, emerged from the Fifth (Administrative and Budgetary) Committee, as did the statutes of the UNDT and UNAT.

#### 5.3.2.2 The Convention

To create a self-contained, de-nationalised, arbitration regime, the Convention would be a necessary complement to the UNGA resolution. In this respect, the UNGA lacks the power to impose obligations on states.[1705] These obligations would implement the principle of 'non-interference', explained by Schreuer.[1706] The relevant provisions would be based on the ICSID Convention, as listed above. Notably, these provisions would include the obligation to accept tribunal awards as binding, except as provided for in the Convention,[1707] and to recognise and enforce an award 'as if it were a final judgment of a court in that State'.[1708] A state would accept such obligations by becoming a party to the Convention.

Further, the proposed Convention would complement the General Convention. The former would not in any way detract from the latter,[1709] including in particular its Article II on privileges and immunities.[1710] In that connection, one might consider the alternative of amending the General Convention by incorporating therein the provisions of the proposed Convention. However, the General Convention's general nature would contrast with the specific contents of the proposed Convention. Furthermore, any efforts to amend the General Convention with respect to the implementation of Section 29 might give rise to a broader overhaul of the treaty.[1711] That would likely delay, and possibly complicate, the comprehensive implementation of Section 29 along the lines currently proposed. It would therefore not seem advisable to pursue an amendment of the General Convention by integrating therein the contents of the proposed Convention.

Another alternative would be to integrate the contents of the proposed Convention into a general convention regarding privileges and immunities. Insofar as Section 29 of the General Convention was conceived to be the counterpart to the UN's jurisdictional immunity, these topics could arguably be dealt with jointly in one treaty.

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[1705] Only the UNSC has binding powers over member states, under Chapter VII of the UN Charter. This requires there to be a threat to or breach of the peace, or an act of aggression. That is unlikely to be the case generally when it comes to the private law liability of the UN, However, in the case of a peace enforcement action, the UNSC might deem it appropriate to impose obligations on states with regard to tribunal awards, which would be binding on states under Art. 25 of the UN Charter.
[1706] Schreuer (2009), at 351-352, para. 3.
[1707] Cf. Art. 53 of the ICSID Convention.
[1708] Cf. Art. 54 of the ICSID Convention.
[1709] Though Section 36 of the General Convention contemplates the possible conclusion of 'supplementary agreements adjusting the provisions of' the General Convention.
[1710] Section 30 of the General Convention would also continue to apply. Under that provision, the ICJ could conceivably rule on the interpretation and application of Section 29. However, as discussed elsewhere in this study, it has never done so. In the result, though the ICJ potentially retains the final word, the risk of competing decisions with those of the Mechanism would be minimal.
[1711] Art. 35 of the General Convention contemplates the possibility of a 'revised General Convention'.

As seen in chapter 4 of this study, the proposal for a general convention on privileges and immunities for international organisations, in connection with the need for alternative recourse, goes back decades. To recall, in 1936, Åke Hammarskjöld concluded that a 'réglementation générique est dans l'air et que la tendance dominante y est favorable".'[1712] Hammarskjöld was concerned about the lack of access to justice occasioned by jurisdictional immunity: 'Il y a là sans doute une lacune; et une lacune qui—surtout combinée avec la tendance à confondre immunités diplomatiques et immunités internationales—a beaucoup entravé le développement de cette dernière institution.'[1713]

As seen, in 2006, Gaja, at the time a member of the ILC, produced a paper up in connection with the topic 'Jurisdictional immunity of international organizations' as part of the 'long-term programme of work since the forty-fourth session of the Commission (1992)'.[1714] According to the paper:[1715]

> 'The recent adoption through UNGA resolution 59/38 of the UN Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.'[1716]

As part of a general overview of the topic, and reminiscent of Hammarskjöld's 1936 article, Gaja's paper stated:

> 'Immunity of [international organizations] has to be studied in the context of remedies that are available for bringing claims against an organization, according to the rules of that organization or to arbitration agreements. There is a need to avoid the risk of a denial of justice.'[1717]

The paper further includes a number of headings. The first is entitled 'Major issues raised by the topic', one of which is: 'Protection of the rights of natural and legal persons in relation to jurisdictional immunities of international organizations. In particular, the role of alternative means of settling disputes.' The other headings in the paper are: 'Applicable treaties, general principles or relevant legislation or judicial decisions'; 'Existing doctrine'; and 'Advantages of preparing a draft convention'. Under that final heading, according to the paper:

> 'Given the number of instances in which treaties concerning immunities of international organizations do not apply and given also the general character of most treaty provisions, it would be in the interest of all concerned that the rules of international law governing immunities of international organizations should be more easily ascertainable. Due consideration should be made, where appropriate, to the need for progressive development. The increased importance of economic activities of international organizations, often in direct competition with the private sector, add urgency to the matter.

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[1712] Hammarskjöld (1936), at 194.
[1713] Ibid., at 186.
[1714] UN Doc. A/61/10 (2006), para. 260, sub (m).
[1715] Ibid., Annex B, 'Jurisdictional immunity of international organizations', at 455-458.
[1716] Ibid., para. 1.
[1717] Ibid., para. 7.

> Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the Convention on jurisdictional immunities of States and their property.'[1718]

To date, the topic 'Jurisdictional immunity of international organizations' has remained on the ILC's long-term programme of work.[1719]

Also included on the ILC's long-term programme of work is the topic 'Settlement of international disputes to which international organizations are parties',[1720] in regard to which, as seen, a paper was prepared by Sir Michael Wood.[1721] According to the paper, the settlement of third-party disputes against international organisations would be outside the scope of that topic.[1722] That said, Wood's paper does state:

> 'Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Council of Europe's Committee of Legal Advisers on Public international law (CAHDI) has on its agenda an item on "Settlement of disputes of a private character to which an international organisation is a party"'.[1723]

As to the CAHDI, during its 60th meeting (March 2021), the topic 'Settlement of disputes of a private character to which an International Organisation is a party' was included on the agenda as part of its ongoing activities, under the heading 'Immunities of states and international organisations'.[1724]

Clearly, then, the topic of immunity from jurisdiction of international organisations in conjunction with the settlement of private law disputes against international organisations, has attracted the attention of the ILC and the CADHI. The suggestion by Gaja in 2006 for a general convention on the jurisdictional immunity of international organisations—though dismissed by at least one author—[1725] may yet be considered.[1726]

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[1718] Ibid., para. 11.
[1719] <legal.un.org/ilc/status.shtml> accessed 21 December 2021.
[1720] Ibid. See generally Reinisch (2018).
[1721] UN Doc. A/71/10 (2016), Annex A, at 387-399.
[1722] 'The present paper focuses primarily on disputes that are international, in the sense that they arise from a relationship governed by international law. It does not cover disputes involving the staff of international organizations ("international administrative law"). Nor does it cover questions arising out of the immunity of international organizations. It would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered.' Ibid., para. 3.
[1723] Ibid., para. 3, fn. 7 (emphasis added).
[1724] <coe.int/en/web/cahdi/-/60th-meeting-strasbourg-24-25-march-2021?inheritRedirect=true> accessed 21 December 2021.
[1725] Webb (2015).
[1726] Cf. Reinisch (2016, 'Introduction'), para. 9 ('Suggestions to adopt a more generic convention on the privileges and immunities of international organizations in general have been discussed in the . . . ILC . . . between the 1960s and the 1990s, but not further pursued.' [fns. omitted]).

Meanwhile, and whilst subsequent integration into a comprehensive legal framework is conceivable, the proposed Convention might be pursued on its own. This would expedite the coming into being of a comprehensive arrangement for the implementation of Section 29 of the General Convention.

#### 5.3.2.3 Financial implications

Any involvement of states and the UNGA with the implementation of Section 29 to date seems to have been driven largely by financial concerns in connection with the UN's liability. This is evidenced by the UN Liability Rules having emerged out of the Fifth (Administrative and Budgetary) Committee. And, the discussions in recent years about expedited arbitration for contractual disputes with consultants and individual contractors focused significantly on cost implications.

Justice has a price. But, to provide for adequate recourse under Section 29 of the General Convention is to invest in the UN's independence, as such recourse protects against national court interference. And, it is to invest in enhancing the UN's legitimacy.[1727] Conversely, the absence of such recourse may cause reputational damage and decrease the organisation's legitimacy. This may in turn impair its effectiveness and thereby undermine the member states' investment in the organisation.[1728] From that perspective, it may be cost-effective to invest in alternative recourse. Reputational damage appears to have been at issue for the UN in proposing a $400 million response package for the Haiti cholera epidemic.[1729] However, in so doing the UN did not resolve the lingering legal controversy over its liability.[1730] Yet, leaving aside that little funding has reportedly been received,[1731] to offset reputational damage it seems indispensable to resolve such controversies by investing in alternative recourse.

The Mechanism would be designed and operated in such a way as to minimise expenses. Thus, through its broad experience in administering a variety of dispute settlement processes, the PCA would be able to render services efficiently. Furthermore, as per the proposal in the Expedited Arbitration Implementation Proposal, the arbitrator's fees would be fixed, depending on the amount in dispute in a

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[1727] Cf. Daugirdas and Schuricht (2021), at 81 ('Recognizing this [customary international law obligation on international organizations to provide effective remedies] is, of course, not costless. It may expose international organizations to increased pressures and demands for compensation, and it might allow international organizations to water down the content of their obligations. The authors of this chapter are not blind to these costs. But we believe that the risks and costs of the status quo are even greater.').
[1728] Daugirdas (2019), at 12 ('a bad reputation can impose significant costs').
[1729] <news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and> accessed 21 December 2021. See generally Daugirdas (2019), at 13-14. However, according to Daugirdas, 'the United Nations' response to cholera in Haiti showcases some important limitations and complications of reputation as a motivator and disciplinarian'. Ibid., at 15.
[1730] According to Daugirdas: 'The deficiencies and even pathologies of reputation as a motivator . . . highlights the urgency of developing additional formal accountability mechanisms to assure recourse to individuals harmed by the acts and omissions of international organizations.' Ibid., at 41.
[1731] <ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25851&LangID=E> accessed 21 December 2021.

case, and it would be shared amongst the parties.[1732] Moreover, Article 41 of the PCA Arbitration Rules 2012 goes beyond the UNCITRAL rules in providing 'a novel, mandatory review mechanism of the tribunal's fees and expenses.'[1733] That is, 'the PCA is tasked with monitoring compliance with the reasonableness standard of Article 41(1) through three distinct procedures, each applicable at a specific stage of the arbitral proceedings.'[1734]

Lastly, the UNGA resolution would provide for the sharing in the expenses of the Mechanism by other international organisations in the event they were to recognise the Mechanism's competence.[1735]

### 5.3.3 Other international organisations

The General Convention is closely mirrored in the 1947 Specialized Agencies Convention. And, as Jenks noted in 1962 (as discussed above), the formula in Section 29 of the General Convention was adopted with respect to several international organisations. That practice has since continued with respect to both headquarters agreements and multilateral treaties.[1736] This underscores the significance of the UN's practice under Section 29 of the General Convention for several other organisations.

By the same token, the proposed Mechanism could be made available to other international organisations. In this respect, as seen, the UNAT (as well as the UNDT) is available to several agencies and organisations beyond the UN Secretariat, Funds and Programmes, and the ILOAT is currently available to 58 organisations.

In the case of the UNAT, Article 2(10) of its Statute provides in relevant part:

> 'The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency . . . or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity.' (emphasis added)

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[1732] UN Doc. A/67/265 (2012), Annex IV, paras. 17-21.
[1733] Daly, Goriatcheva and Meighen (2014), para. 6.76. Art. 41(1) of the PCA Arbitration Rules 2012 provides: 'The costs referred to in article 40, paragraphs 2(a), (b) and (c) shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any experts appointed by the arbitral tribunal, and any other relevant circumstances of the case.'.
[1734] Daly, Goriatcheva and Meighen (2014), para. 6.82.
[1735] Cf. Art. 2(10) UNAT Statute.
[1736] See section 1.2 of this study.

Thus, the recognition of UNAT jurisdiction by an international organisation notably involves the conclusion of a 'special agreement' between it and the UNSG.

In the case of the ILOAT, the tribunal was originally part of the League of Nations but at the same time served the ILO, to which it was transferred in 1946.[1737] Soon thereafter, the ILOAT was made available to other organisations as well, as explained by the ILOAT itself:

> 'In 1949, at the thirty-second Session of the International Labour Conference, Article II of the Statute of the ILO Tribunal was amended to permit other international organizations approved by the Governing Body of the International Labour Office to recognize the jurisdiction of the Tribunal to consider complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations of those organizations . . . That same year, the World Health Organization accepted the Statute of the ILO Administrative Tribunal, prompting other specialized agencies of the UN system to do likewise.'[1738]

Article II(5) of the ILOAT Statute provides:

> 'The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body.'

The annex to the ILOAT Statute provides in relevant part:[1739]

> '1. To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its Statute, an international organization must either be intergovernmental in character, or fulfil the following conditions: (a) it shall be clearly international in character, having regard to its membership, structure and scope of activity; (b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and (c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.
>
> 2. The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions which, in cases affecting any one of these organizations, are applicable as follows'.

One of those provisions states with respect to Article IX(2) of the ILOAT Statute: 'Expenses occasioned by the sessions or hearings of the Tribunal shall be borne by the international organization against which the complaint is filed.'[1740]

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[1737] < ilo.org/tribunal/about-us/lang--en/index.htm> accessed 21 December 2021.
[1738] Ibid., accessed 12 December 2021 (hyperlink removed).
[1739] <ilo.org/tribunal/about-us/WCMS_249194/lang--en/index.htm#art2> accessed 21 December 2021.
[1740] Ibid.

The recognition of the ILOAT's jurisdiction therefore involves a (i) declaration addressed to the ILO Director-General, (ii) by a qualifying organisation, (iii) recognising, in accordance with that organisation's Constitution or internal administrative rules, the jurisdiction of the ILOAT and its Rules.

Along the same lines, the recognition of the Mechanism's competence could involve (i) a declaration addressed to the PCA Secretary-General, (ii) by an organisation that is subject to a provision akin to Section 29(a) of the General Convention,[1741] (iii) recognising, in accordance with the organisation's internal legal framework, the competence of the Mechanism in the implementation of said provision.

A potential complexity arises with respect to the nationality of the arbitrators on the Mechanism. The determination of an international organisation's third-party liability may involve sensitive issues, and any liability may be significant. For that reason, it may be problematic for third-party disputes against an international organisation to be resolved by arbitrators from non-member states.

To provide context, in the case of ILOAT it is in fact conceivable for a judge from a non-member state to decide a dispute against the organisation. Article III of the ILOAT statute merely provides that the tribunal 'shall consist of seven judges, who shall all be of different nationalities.' Over the years, ILOAT's (deputy) judges have come from a great variety of states,[1742] not all of which are necessarily members of the organisations that have recognised the ILOAT's jurisdiction. This appears not to have given rise to controversy, notwithstanding the sensitivities that may be at issue in cases before the ILOAT.

In the case of the ICS, the matter of nationality has been given particular consideration. Article 8.27(2) of CETA provides: 'Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada (1) and five shall be nationals of third countries.'

Furthermore, according to Article 8.27(6) of CETA:

> 'The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.'

Similarly, in designing the Mechanism's statute, particularly as regards the Appellate Tribunal which would be a standing body,[1743] careful consideration ought to be given to the issue of the nationality of

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[1741] The essential elements of such an obligation arguably are to (i) make provision(s) for appropriate modes of settlement, of (ii) disputes of a private (law) character.
[1742] D. Petrović (ed.), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law* (2017), at 203-204.
[1743] First instance tribunals are proposed to be composed of a single arbitrator and the proposed Panel of Arbitrators may provide a sufficiently broad choice of arbitrators of various nationalities.

arbitrators. In particular, the Mechanism's competence to determine the nature of third-party disputes would involve delicate issues concerning the 'constitutional functions' of an international organisation.

A solution might be found in the direction of allowing a joining international organisation a degree of leeway regarding the composition of the Appellate Tribunal in cases against it.[1744] The aim would be to strike a balance between, on the one hand, the (political) reality concerning the nationality of arbitrators and, on the other, the need for consistency in decision-making by the Appellate Tribunal concerning Section 29 of the General Convention. A potential solution could be to allow an international organisation to appoint ad hoc arbitrators to add to, or partially replace, the bench. Concretely, in lodging a declaration with the PCA Secretary-General, recognising the Mechanism's competence, an international organisation would put forward such arbitrators (or reserve the right to do so), subject to vetting by the PCA.

The proposed Convention would apply to Mechanism proceedings and awards as such, that is, without regard to the particular respondent international organisation. However, it may be that (for political reasons) a state is not in a position to recognise Mechanism proceedings in relation to a particular organisation. To that end, the Convention could be drafted so as to allow states to opt out.[1745] The PCA Secretary-General would inform the treaty depository of each international organisation that has accepted the Mechanism's competence. Upon being informed by the depository of such newly joined organisation, states parties could then opt out of the Convention for purposes of that specific organisation.

Finally, as with the ILOAT and UNAT (discussed above), in accepting the Mechanism's competence, each international organisation would accept to participate in the administrative arrangements for the functioning of the Mechanism and pay its share in the Mechanism's expenses.

### 5.4 Conclusions

This chapter built on the problems identified in chapter 3 of this study with the current implementation of Section 29 of the General Convention. Those problems arise in light of the international organisations law framework governing third party remedies discussed in chapter 2, within which Section 29(a) of the General Convention is embedded, and against the broader backdrop of the rule of law.

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[1744] As well as possibly to add arbitrators to the Panel of Arbitrators.
[1745] Thus, contrary to the Specialized Agencies Convention, whose schedules contain specific provisions regarding individual agencies, the Convention would apply unreservedly to proceedings concerning all international organisations, except where states would opt out from their obligations under the Convention with respect to specific international organisations.

Notably, the UN's unilateral determination of the legal character of third-party claims contrasts with the principle *nemo iudex in causa sua*. Furthermore, to qualify as 'appropriate', modes of settlement under Section 29 of the General Convention must conform to the essence of Article 14(1) of the ICCPR. Moreover, such modes must shield the UN from domestic interference and they must not be unduly burdensome. Current modes of settlement are problematic: the envisaged settlement of claims arising out of peacekeeping operations lacks independence and impartiality; the UN Liability Rules are in need of development to enhance legal certainty; and, arbitration under the UNCITRAL Arbitration Rules is overly burdensome and does not adequately protect the UN from domestic interference.

These widely divergent problems indicate the need for a structural revision of the current implementation of Section 29(a) of the General Convention such that that provision counterbalances the jurisdictional immunity of the UN. As discussed in chapter 4 of this study, the absence of alternative remedies leads to 'accountability gaps', which undermine the legitimacy of international organisations and, in consequence, their effectiveness. And, courts may attempt to close such gaps by rejecting the jurisdictional immunity of international organisations, though that immunity is warranted more than ever to protect such organisations against interference.

To resolve these problems, an integrated approach to the proper implementation of Section 29(a) of the General Convention is called for. The Mechanism developed in this chapter would embody such an approach. It aims for Section 29(a) truly to operate as the 'counterpart' to the UN's jurisdictional immunity, by providing, in the words of the UN Legal Counsel in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* a 'complete remedy system to private parties'.

The Mechanism would build on UN practice. Thus, it would expand and institutionalise the practice regarding the amicable settlement of disputes, coupled with ADR. As to contentious dispute settlement, arbitration would remain the central technique, bolstered by a 'self-contained' regime. The arbitration rules applied by the Mechanism would be based on proposals produced by the UNSG at the initiative of the UNGA. The Mechanism would integrate the standing claims commissions currently foreseen for the settlement of third-party disputes in connection with peacekeeping operations. In so doing, the problems regarding their legal framework and establishment would be addressed. The Mechanism's Appellate Tribunal would facilitate the consistent interpretation and application of the UN Liability Rules. An important novelty would be the determination of the legal character of third-party disputes: it would be for the Mechanism to make that determination, following adversarial proceedings.

The Mechanism would be established by the UNGA, as a single comprehensive mode of settlement in implementation of the UN's obligation under Section 29(a) of the General Convention. The UNGA resolution would contain the Mechanism's statute. The UNGA would select the Mechanism's

conciliators and arbitrators. And, it would approve the Convention that operationalises the 'self-contained' arbitration regime. The UNGA would also approve the UN's engagement with the PCA for the administration of the Mechanism. That engagement would further the historic ties between the two organisations. The PCA would be able to deliver efficient and state-of-the-art dispute settlement services. Administered at arm's length, the Mechanism would be independent and impartial from the UN.

As a dispute settlement body, the Mechanism would not be foreign to the UN. Indeed, the UN has ample experience with a broad variety of courts, tribunals and other such bodies. In addition to the ICJ, as the UN's 'principal judicial organ', these include: a two-tiered system for the adjudication of staff disputes (the UNDT and UNAT); a variety of international criminal courts and tribunals; [1746] the UN Compensation Commission; and the International Tribunal for the Law of the Sea.[1747]

Decades ago, Jenks conceived that the UN would itself submit to such a body for the settlement of its third-party disputes. In so doing, the UN would live up to the expectation that it is committed to the rule of law in the area of third-party dispute settlement, having demonstrated its commitment to the rule of law in other contexts. That would not only strengthen the UN's immunity from jurisdiction, but also bolster its legitimacy and, thereby, its effectiveness. By making the Mechanism available to other international organisations, the UN would moreover lead the way concretely.

[1746] For example, the IRMCT.
[1747] Established by the 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396.

# 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.

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[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]

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[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.').

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## SAMENVATTING (DUTCH SUMMARY)

### De aansprakelijkheid van internationale organisaties jegens derden: naar een 'volledig stelsel van rechtsbescherming' als tegenwicht tegen immuniteit van jurisdictie

Sinds de oprichting van de VN neemt het belang van internationale organisaties in internationale kwesties gestaag toe door de toenemende mate waarin staten bevoegdheden aan hen overdragen. Bij het uitoefenen van hun functies raken internationale organisaties steeds vaker aan de belangen van private partijen. Dit onderstreept de noodzaak van een goed begrip van de verantwoordelijkheid (*accountability*) van dergelijke organisaties en hun aansprakelijkheid in juridische zin in het bijzonder.

Dit proefschrift gaat over de aansprakelijkheid van internationale organisaties jegens privaatrechtelijke rechtspersonen en natuurlijke personen (uitgezonderd het personeel van de organisatie). Centraal hierbij staat paragraaf 29(a) van het Verdrag nopens de voorrechten en immuniteiten van de Verenigde Naties uit 1946 ('Verdrag nopens de voorrechten en immuniteiten van de VN', respectievelijk, 'Paragraaf 29' en 'Paragraaf 29(a)'). Ingevolge Paragraaf 29(a) is de VN gehouden om 'regelingen [te] treffen voor passende wijzen van beslechting van . . . geschillen . . . van privaatrechtelijke aard, waarbij de Verenigde Naties partij zijn'. Soortgelijke verdragsbepalingen zijn van toepassing op een groot aantal andere internationale organisaties.

Uit de relevante travaux préparatoires volgt dat Paragraaf 29 was bedoeld om tegenwicht te bieden tegen de immuniteit van jurisdictie die de VN geniet ingevolge hetzelfde verdrag. Het doel van dergelijke immuniteit, die ingevolge vergelijkbare verdragsbepalingen eveneens van toepassing is op een groot aantal andere internationale organisaties, is te voorkomen dat nationale rechtspraak interfereert met het onafhankelijk functioneren van de organisatie en daarmee haar effectiviteit.

Het belang van de immuniteit van jurisdictie van internationale organisaties blijft onverminderd groot. Die immuniteit komt echter onder druk te staan bij gebreke van een alternatieve rechtsgang. In dat geval is het namelijk niet vanzelfsprekend dat indien een internationale organisatie wordt gedaagd voor de nationale rechter, deze laatste de immuniteit van de organisatie zal erkennen. Dit omdat er sprake is van een vacuüm in de rechtsbescherming. En waar de rechter de immuniteit wel erkent, zodat een nationale procedure geen doorgang kan vinden, staat het gebrek aan een alternatieve rechtsgang op gespannen voet met de rechtsstaat (*rule of law*). Het concept van de rechtsstaat staat volgens de VN-secretaris-generaal centraal bij het vervullen van de missie van de organisatie. Schending hiervan door de VN zelf ondermijnt haar legitimiteit en daarmee haar effectiviteit.

Een en ander wordt geïllustreerd door drie, in de literatuur veel besproken, gevallen waarin de VN door derde partijen aansprakelijk is gesteld voor vermeend onrechtmatig handelen of nalaten: de genocide in

Srebrenica in 1995 die de VN niet bij machte was te voorkomen; de vergiftiging, door grondvervuiling, van bewoners van kampen voor binnenlandse ontheemden in Kosovo ten tijde van het VN-bestuur; en de cholera-epidemie in Haïti die veroorzaakt zou zijn door VN-blauwhelmen. Deze gevallen, die in dit onderzoek als casestudy's worden behandeld, hebben gemeen dat de VN geen uitvoering gaf aan Paragraaf 29(a). In de casussen inzake Srebrenica en Haïti werd de immuniteit van jurisdictie van de VN voor de Nederlandse c.q. Amerikaanse rechter betwist. Die immuniteit bleef in beide gevallen weliswaar in stand, maar de casus inzake Haïti in het bijzonder illustreert hoe de legitimiteit van de VN schade opliep door het ontbreken van een rechtsgang.

Volgens een rapport van de VN-secretaris-generaal uit 1995 gaf de organisatie uitvoering aan Paragraaf 29. Dit middels een 'volledig stelsel van rechtsbescherming voor private partijen', zo betoogde de juridisch adviseur van de VN in 1998 voor het Internationaal Gerechtshof in de adviesprocedure inzake de immuniteit van jurisdictie van een speciale rapporteur (Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62).

Tegen deze achtergrond rijzen de volgende onderzoeksvragen:

(i) Hoe dient Paragraaf 29(a) te worden geïnterpreteerd, en diens implementatie door de VN te worden beoordeeld, in het licht van het juridisch kader inzake de rechtsbescherming van derde partijen tegen internationale organisaties, en tegen de achtergrond van de rechtsstaat?

(ii) Voortbouwend op het antwoord op de eerste onderzoeksvraag, hoe dient een 'volledig stelsel van rechtsbescherming voor private partijen' te worden vormgegeven dat tegenwicht biedt tegen immuniteit van jurisdictie inzake geschillen tussen de VN, alsook andere internationale organisaties, en derde partijen?

De structuur van het proefschrift is als volgt. Na de inleiding (hoofdstuk 1) volgt een uiteenzetting van het juridisch kader inzake de rechtsbescherming van derde partijen tegen internationale organisaties (hoofdstuk 2). Het uitgangspunt voor een goed begrip van Paragraaf 29(a) is de immuniteit van jurisdictie van de VN ingevolge paragraaf 2 van het Verdrag nopens de voorrechten en immuniteiten van de VN. De uiteindelijke rechtsbasis van die immuniteit is artikel 105(1) van het VN-Handvest. De privileges en immuniteiten ingevolge die bepaling gaan hand in hand met de rechtspersoonlijkheid van de VN binnen de nationale rechtsorde ingevolge artikel 104 van het VN-Handvest. De implicatie van die rechtspersoonlijkheid is in beginsel dat de VN deel uitmaakt van de nationale rechtsorde. De privileges en immuniteiten belemmeren echter de uitoefening van jurisdictie door de nationale rechter, zoals gezegd ter bescherming van het onafhankelijk functioneren van de organisatie.

Het is dus het internationaal recht dat juridische barrières, bestaande uit privileges en immuniteiten, opwerpt tegen het beoordelen door de nationale rechter van de rechtmatigheid van de activiteiten van

internationale organisaties. Daarmee rijst de vraag welke rechtsbescherming het internationaal recht biedt aan derden inzake geschillen met dergelijke organisaties. Geconcludeerd wordt dat het Internationaal verdrag inzake burgerrechten en politieke rechten uit 1966 ('BUPO-verdrag') verplichtingen van constitutionele aard schept voor de VN. Artikel 2(3) van het BUPO-verdrag vereist dat de VN procedurele rechtsbescherming biedt tegen mensenrechtenschendingen door de organisatie. Wat betreft de beslechting van civielrechtelijke geschillen met de organisatie gelden de zwaardere procedurele vereisten ingevolge artikel 14(1) van het BUPO-verdrag: 'eerlijke en openbare behandeling door een bevoegde, onafhankelijke en onpartijdige bij de wet ingestelde rechterlijke instantie'.

Volgend op dit juridisch kader komt de eerste onderzoeksvraag uitvoerig aan bod (hoofdstuk 3). De analyse begint met beschouwingen over de binding van de VN aan Paragraaf 29. Dan volgt een overzicht van de huidige VN-praktijk ter zake, aan de hand van beschikbare informatie. Vervolgens worden de termen 'privaatrechtelijke aard' en 'passende wijzen van beslechting' onderzocht. Geconcludeerd wordt dat de huidige implementatie van Paragraaf 29(a) problematisch is. Ten eerste is het in de praktijk de VN zelf die beslist of die bepaling van toepassing is. Dat valt moeilijk te rijmen met de rechtsstaat. Ten tweede rijzen er om verschillende redenen problemen met betrekking tot claimcommissies (*standing claims commissions*) bij vredesoperaties. Veelzeggend is dat dergelijke commissies op papier bestaan, maar in werkelijkheid nooit zijn opgericht. Ten derde is de arbitragepraktijk van de VN problematisch: arbitrage onder de door de VN gebruikte UNCITRAL-regels behelst een veelomvattend proces dat weinig toegankelijk is voor met name kleinere partijen. Bovendien speelt de nationale rechter een toezichthoudende rol bij arbitrage, waardoor het risico bestaat dat de immuniteit van jurisdictie van de organisatie wordt ondermijnd. In het licht van deze problemen wordt geconcludeerd dat de implementatie van Paragraaf 29(a) structureel dient te worden herzien. Dat is nodig opdat deze bepaling een tegenwicht biedt tegen de immuniteit van jurisdictie van de internationale organisatie.

Een herziening van de implementatie van paragraaf 29(a) is echter slechts aan de orde voor zover de immuniteit van jurisdictie in de praktijk effectief is om internationale organisaties te weren tegen de nationale rechter. Het belang en de effectiviteit van immuniteit van jurisdictie worden daarom eerst nader onderzocht (hoofdstuk 4). Dat gebeurt aan de hand van een casestudy van de immuniteit van jurisdictie van internationale organisaties in Nederland en in de jurisprudentie van het Europese Hof voor de Rechten van de Mens ('EHRM') (waaronder de bekende zaken *Waite and Kennedy* en *Mothers of Srebrenica*). Nederland is een bij uitstek geschikte jurisdictie voor een dergelijk onderzoek alleen al vanwege het groot aantal aldaar gevestigde internationale organisaties.

Het belang van immuniteit van jurisdictie wordt duidelijk onderkend in de Nederlandse en Straatsburgse jurisprudentie: in de uitspraken van de Hoge Raad en het EHRM prevaleert die immuniteit stelselmatig. De centrale vraag is hoe de immuniteit te verenigen met het recht op toegang tot de rechter ingevolge artikel 6(1) van het Europees Verdrag voor de Rechten van de Mens ('EVRM') (dat correspondeert met

artikel 14(1) van het BUPO-verdrag). Volgens het EHRM kan dit middels redelijke alternatieve middelen (*reasonable alternative means*), waaronder bijvoorbeeld arbitrage.

Zonder dergelijke middelen conflicteert de verplichting van de forumstaat om de immuniteit van de organisatie te erkennen met de verplichting van die staat om aan eisers toegang tot de rechter te verschaffen. In het geval van de VN kan dat conflict worden opgelost in het voordeel van de immuniteit op grond van de voorrangsregel in artikel 103 van het VN-Handvest. Ten aanzien van andere internationale organisaties geldt een dergelijke voorrangsregel niet, al bestaan er vanuit de optiek van de organisatie goede argumenten waarom de immuniteit dient te prevaleren. Echter, de jurisprudentie van de lagere rechter in Nederland, alsook elders, suggereert niet zelden het tegenovergestelde: zonder alternatieve rechtsgang geen immuniteit. En indien het beroep op immuniteit wel wordt gehonoreerd, ondermijnt de afwezigheid van een dergelijke rechtsgang zoals gezegd de legitimiteit van de organisatie. Geconcludeerd wordt dan ook dat immuniteit van jurisdictie zonder een alternatieve rechtsgang, voor zover vereist door het internationaal recht, niet houdbaar is.

Tegen deze achtergrond komt de tweede onderzoeksvraag aan bod (hoofdstuk 5). De uitgangspunten zijn de eerder geïdentificeerde problemen ter zake van de huidige implementatie van Paragraaf 29(a). Bij het vormgeven van een 'volledig stelsel van rechtsbescherming' is het doel om, voortbouwend op de huidige praktijk van de VN, te voorzien in de eerlijke, efficiënte en transparante beslechting van geschillen met derden. In navolging van eerdere auteurs wordt een voorstel gedaan voor een alomvattend geschillenbeslechtingsmechanisme: het mechanisme voor de beslechting van geschillen van privaatrechtelijke aard ('Mechanisme'). Het Mechanisme voorziet in alternatieve geschillenbeslechting en, voor zover nodig, arbitrage. De voorgestelde arbitrageprocedure, die voorziet in een tweede instantie met beperkte jurisdictie, is toegankelijk en efficiënt. Het Mechanisme opereert onder auspiciën van het Permanent Hof van Arbitrage, dat ruime ervaring heeft met het soort geschillen in kwestie. Het Mechanisme wordt opgericht ingevolge een resolutie van de Algemene Vergadering van de VN, maar staat open voor andere internationale organisaties.

Naast het Mechanisme behelst het voorstel een nieuwe VN-conventie: de Conventie inzake de beslechting van geschillen van privaatrechtelijke aard. Deze conventie voorziet in gedenationaliseerde arbitrage, dat wil zeggen zonder toezichthoudende rol van de nationale rechter, langs de lijnen van het Verdrag inzake de beslechting van geschillen met betrekking tot investeringen tussen Staten en onderdanen van andere Staten uit 1965.

Het laatste hoofdstuk (hoofdstuk 6) bevat een overzicht van de bevindingen en sluit af met een aantal concluderende observaties.

In de kern beoogt het onderzoek bij te dragen aan het waarborgen van de effectiviteit van internationale organisaties. Wat betreft de aansprakelijkheid van dergelijke organisaties jegens derde partijen is het nodig om de immuniteit van jurisdictie van eerstgenoemden te versterken. Tegelijkertijd dient hun legitimiteit te worden vergroot middels een systematische en rechtsstaatconforme regeling ter implementatie van verdragsbepalingen als Paragraaf 29(a). De analyse en voorstellen in dit proefschrift doen daarvoor een voorzet.

**CURRICULUM VITAE**

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