

**Discussion of the ‘Preadviezen’:**

**Making Choices in Public and Private International  
Immunity Law’**

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‘Preadviezen’ by

Professor Aukje van Hoek

*Staatsimmunititeit in het Privaatrecht*

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## Discussion of the paper by Professor van Hoek:

### Staatsimmunititeit in het Privaatrecht

Professor *Aukje van Hoek* is the first to present her ‘preadvies’ titled: ‘Staatsimmunititeit in het privaatrecht’. The ‘preadvies’ deals with the combination of private law and public international law and she examines six fairly recent court cases with the purpose of analysing how their outcomes relate to the 2004 *United Nations Convention on Jurisdictional Immunities of States and their Property*. Which, if any, effects can be expected after the ratification of this Convention, for example for the Netherlands, which is still considering ratification?

The paper of Prof. van Hoek considers five areas of interest that follow from the cases. The first is the question of the ‘sources of immunity law’ and the effect of the 2004 Convention on the determination of rules of customary international law. The European Court of Human Rights, in the case of *Cudak v. Lithuania*, uses the 2004 Convention to find rules of customary international law on immunities. However, Prof. van Hoek questions whether the European Court has used the Convention in a correct manner in determining that Lithuania was bound to the rules laid down in Article 11 of the Convention. She puts forward that the Court goes beyond the established means of determining the existence of customary international law, which is traditionally based on the existence of ‘consistent state practice’.

A second aspect concerned is the question whether a ‘territorial nexus’ is to be part of the question of immunities. Prof. van Hoek argues on the basis of two Chilean cases that a territorial nexus may affect the decision on granting immunity, and that this follows naturally from the need to balance the interests of a particular state to deal with the matter in its own courts and the right of private persons to effectively have access to a court.

A third aspect focuses on immunities in labour conflicts at embassies and consulates. Even when no immunity is granted with regard to the labour disputes of certain categories of staff, other aspects of diplomatic immunity may make effective protection of these workers difficult. In the case of unfair dismissals, for example, diplomatic immunity of other workers involved in a labour conflict may make it difficult to obtain evidence as to the reasons of the dismissal, which in turn can make it impossible for the court to grant fair compensation.

A fourth aspect concerned entails the obligation for courts to test immunity *ex officio* under the 2004 Convention. In the Netherlands ratification of the 2004 Convention would entail a need for a change of legislation and practice, as at present courts do not test immunity *ex officio*.

The last aspect discussed deals with immunity from execution. Public goods are excluded from being subject to seizure in terms of execution under the 2004 Convention, which means that it can be difficult to obtain execution for private parties. In the Netherlands a challenge is presented by the fact that attached private and public state bank accounts cannot be partially frozen, for example to ensure payment of overdue salaries. In this respect the current proposal for a European Account Preservation Order, not yet included in the paper, may be an incentive to create new solutions.

Prof. *de Waart* compliments the authors of all papers for giving much food for thought from their widely divergent angles of private law, international crimes and international organisations. All in all there is a growing awareness that sovereignty is not a privilege anymore, but a responsibility. The key question has become whether the classic Latin maxim *par in parem non habet imperium* still holds true as the basis of immunity law. The maxim seems outdated especially in light of criminal law and the view of the present world as a global village.

In her paper van Hoek argues that granting immunity is not anymore, if ever, a matter of strict definition between *acta jure imperii* and *acta jure gestionis*, but of balancing of all relevant interests. He fully agrees. However, in its judgment of 24 September 2010 *re Llanos Oil v. Columbia*, the Supreme Court states that privileges and immunities apply regardless whether in a concrete case the efficient functioning of the diplomatic mission is at stake. In doing so the Supreme Court let pass, as it were, the opinion of the Hague Court of Appeal that the opposite view would imply that a court had to investigate each time whether an attachment would erase an impediment to the functioning of the diplomatic mission or not. The question is whether van Hoek's challenging and important second proposition also relates to the immunity of embassies, and if so, whether the above judgment will not prevent to take into account the legitimate role of territorial leads in the interpretation of immunity in particular cases in the Netherlands?

*Van Hoek* first of all agrees with *de Waart* that the granting of immunity is indeed a balancing test and he quite rightly points out that there is not much balancing in the *Llanos Oil* case. Immunity from execution is much more absolute than immunity from jurisdiction. But also when the rules on execution were to be developed as a balancing test the territorial nexus would be of importance. There seems no problem of fairness in a situation where one Columbian company is suing another Columbian company. However, when it is a Dutch employee suing a foreign embassy then there is a much stronger need for different rules.

*Dr. Koppe* asks van Hoek to what extent courts in the Netherlands, as organs of the state, have obligations under international law, irrespective of Dutch law, to test *ex officio* the compatibility of immunity? He points in this respect for example to the remarks of Germany in proceedings of Italy, in which immunity was not recognised.

*Van Hoek* responds that even though it is generally accepted that States violate their duties under international law when their courts assume jurisdiction in contravention of the rules of immunity, this does not in itself create an obligation for the courts to test questions of immunity *ex officio*. It only becomes a duty through the 2004 UN Convention. It is a matter of national law how you deal with the matter, and as such the Netherlands uses the '*Gerechtsdeurwaarderswet*' to stop subpoena's against foreign states and provides for local remedies in case immunities were not granted *ex officio*.

*Prof. Pontier* notes that in van Hoek's paper there is a very easy territorial nexus to be argued with regard to civil claims, taking into account the grounds for jurisdiction as found in Article 5.4 of the Brussels I Regulation. Criminal courts which are seized of civil suits in criminal cases could be competent to hear these claims. Following that line of argument could there be jurisdiction as to civil claims if criminal proceedings are already brought before local courts?

*Van Hoek* responds that a distinction should be made between state immunity and immunity of individuals (state officials and/or diplomatic staff). As liability under criminal law attaches to individuals, so does the jurisdiction under Article 5.4 of the Brussels I Regulation. This topic is outside the scope of her contribution.

*Prof. Lammers* inquires whether he understands correctly whether *van Hoek* argues that there is no customary rule of international law as yet that requires courts to test immunity questions *ex officio*? He points out that Article 6 of the 2004 Convention is very much a reflection of general international law and also accepted as such by the UN General Assembly. There is also Article 15 of the 1972 European Convention, which of course only applies between states. However, in *Azeta* the court recognised that these rules could also be considered more or less as customary international law. As such *Lammers* refers to Article 15, which includes the obligation to look into the question of state immunity if the state does not appear. Lastly, he applauds the proposal that Dutch law includes a provision that courts are required to examine immunity *ex officio*.

*Van Hoek* replies to *Lammers* that a distinction should be made with regard to the issue that a State may attract liability when a court does not examine state immunity *ex officio* and the existence of a separate rule that requires a court to examine *ex officio*. *Van Hoek* stands to be corrected, but to her knowledge a separate customary rule requiring *ex officio* examination by courts as such does not exist. None of the relevant treaties is applicable (yet), and no Dutch court has found such a rule of customary law to exist.

## **Discussion of the paper by Professor Brus:**

### **No Functional Immunity of State Officials for International Crimes: A Principled Choice with Pragmatic Restrictions**

Professor *Marcel Brus* began his presentation by explaining briefly the core questions in his contribution: What legal arguments can be used to support the claim that state officials accused of committing international crimes do not have immunity before foreign courts? How does this fit into general international law? Some argue for example that *ius cogens* crimes impose obligations that take precedence over state immunity and would allow states to prosecute perpetrators who would otherwise be protected by state immunity. Others argue that international crimes cannot be regarded as official acts of a state and therefore state immunity would not apply. However, none of the arguments put forward in literature and case law provide a convincing explanation as to why state officials accused of international crimes are not entitled to personal immunity.

*Brus* suggested that a distinction can be made between ‘international community law’—concerned with the protection of the interests of the international community (for example through international criminal law and the principle of universal jurisdiction) and traditional interstate law — concerned with interstate relationships (e.g., state immunity, diplomatic immunity). The rationale for state immunity lies in the principle of sovereignty and equality of all states. In order to avoid indirect responsibility of states, state officials enjoy functional immunity under traditional international law. This creates a conflict with new concepts related to the community aspect of international criminal law under which states have accepted that certain crimes are contrary to international law and must be punished, either in international criminal tribunals or in domestic courts.

International criminal law is created to invoke the individual criminal responsibility for international crimes. It concerns the actions of individuals, not of the state. It is unrelated to functional immunity that can be invoked in situations that individuals act on behalf of the state and therefore the immunity of these officials in fact protects the interests of the state. International criminal law creates direct international responsibilities for all individuals, whether or not acting as state officials. If looked at in this way, a denial of immunity for officials of a state who are accused of committing international crimes, is not about creating a (new) exception to the otherwise applicable (functional or personal) immunity rules, but about its non-applicability to international crimes. This is a principled choice. This does not mean that state immunity, including immunity of state officials, cannot continue to have a role in international law, but it can only play that role within the context for which that rule was created, namely the protection of the state against judicial scrutiny by the domestic courts of another state. On this basis a differentiation can be made between the continued existence of personal or full immunity (of heads of state, heads of government and ministers of foreign affairs) and the denial of functional immunity of state officials in case of international crimes. On the basis of this reasoning and linked to the need to allow the operation of international diplomacy, it is furthermore argued that full immunity is still needed when state officials engage in an official mission to another state. This immunity would protect the interest of the state in conducting its international relations and is not intended to protect the individual who has allegedly committed an international crime.

*Professor de Waart* is of the opinion that challenging message of the paper is that for international crimes functional immunity does not exist at all (p.63), because international criminal law has come into existence in order to pursue interests of international community and not of individual states (p.70). He argues that from the point of view of international community law, the underlying deductive logic should also apply to the immunity of heads of state and government and ministers of foreign affairs (p.61/62). The question is whether the shielding of a personal immunity holder from the exercise of the jurisdiction by another state is a matter of interstate law or of community law? If so, is it a principled choice or a policy-oriented one?

*Brus* replies that community international law and interstate immunity law represent different choices. Community law does not supersede the existing immunity of states, including the personal immunity of the highest holders of representative positions of the state. Under community law new responsibilities have been created, namely individual criminal

responsibilities that express the intention of the community to end the impunity for international crimes. Prosecution of state officials for international crimes is not an attempt to hold a state indirectly responsible for an act through its officials. The responsibility of the state and the responsibility of the officials have to be separated. However, the personal immunity of the high officials continues to exist as this is not intended to shield the individuals from prosecution, but to allow the state its representation abroad. Therefore, also diplomats and special or official missions continue to be protected by immunity, until the community decides that this rule needs to be abolished or changed. Maintaining these forms of immunity has an objective that is not undermined by the criminalisation in international law of certain behaviours. Hence, the high official will lose his or her immunity as soon as s/he leaves office. We see here new and old rules side by side, or community law side by side with traditional interstate law.

Professor *van Boven* is of the opinion that the arguments provided to support proposition 3 (about *ius cogens*) are not convincing (see p. 58 of the paper). If *ius cogens* does not also concern the obligation to prosecute, wouldn't it lose its imperative (normative) character and wouldn't it frustrate a state interested to investigate and prosecute the *ius cogens* crime if they are to face the argument that *ius cogens* does not apply to the obligation to prosecute?

*Van Boven* also criticises proposition 5 in that it is not a victim-oriented approach (see also p. 58-59). *Van Boven* notes that in relation to the *Bouzari* case the UN Committee Against Torture urged Canada to reconsider its obligation under Article 14 of the Convention Against Torture; it considered that the obligation therein is not limited to a territory or citizen of a state party, but applies to all victims of torture. He also cites the UN 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. This also shows that there is a development of international community law to provide a right to a remedy for victims of international crimes.

*Brus* responds to *van Boven* that he is pleased with the comment on proposition 5. He notes that *van Boven's* argument is based on the general acceptance that individual responsibility is part and parcel of international law. However, there is limited acceptance of civil responsibility in civil cases before foreign courts invoking universal jurisdiction. He is aware of the comment of the UN Committee, but it is difficult to draw general conclusions from this regarding the applicability of universal jurisdiction to civil claims for international crimes: in this respect the law is still in its infancy. With regards to proposition 3, the *ius cogens* norm concerns the prohibition of a particular act (e.g. torture), but this is different from the obligation to prosecute under universal jurisdiction: there is no evidence that obligation to prosecute under the universality principle is a *ius cogens* norm.

Professor *Pontier* asks whether proposition 5 of *Brus* has the effect of weakening proposition 2 in the paper by Professor *van Hoek*.

*Brus* responds is that the two propositions do not contradict each other. Proposition 5 is much more specific than proposition 2 by *van Hoek*. *Brus's* proposition is limited to a remedy for international crimes, whereas *van Hoek* more generally refers to the need to balance the

immunity of the state with the right of the victims of a violation to an effective remedy. In so far as the precise nature of the act of the state is concerned, Brus is of the opinion that in international law the setting aside of (functional) immunity in civil claims for international crimes has not yet convincingly emerged. It remains an argument *de lege ferenda*.

*Dr. Ribbelink* asks Brus whether the distinction between the two norms mentioned is relevant, i.e. does the concept of international community law add anything new or is it just a layer of another rule? How important is it for the immunity of international organisations? With regard to paper 3 by Dekker and Ryngaert, Ribbelink wants to know whether there exists something as community law, and, if so, what its relevance would be for the topic of functional immunity?

*Brus* replies that it may take more time to see the distinction between the two dynamics clearly in practice. The rationale for the development of international community law is the inadequacy of the traditional law to deal with new interests and situations. International environmental law (e.g. the precautionary principle), the idea of responsibility to protect, the responsibility of international community for the well-being of individuals, and international criminal law all concern the safeguarding of interests of the international community, whereas the traditional international law rules are based on the sovereignty of states which also includes non-intervention in the domestic affairs of the state. It is more than just another layer as it offers a fundamentally different starting point for the use of the relevant principles and rules of international law. It requires the finding of a new balance in international law. The underlying norms and values play a relevant role in finding this balance. International organisations form a relevant aspect of this new balance. Their roles and responsibilities is changing and has to be regarded in the light of either providing a functional platform for interstate cooperation, or the mechanism through which (also) international community objectives are being realised. Although in practice the difference may be seen to be only small, for the further development of international law it is essential to make this distinction.

Professor *Lammers* asks whether the starting point shouldn't be that officials who take actions in the exercise of state functions enjoy immunity, relying particularly on the maxim *par in parem* as accepted (in its restricted sense) in state practice. He is surprised to see that both in *Rainbow Warrior* and in Italian cases the courts rejected immunity; these cases seem to imply that there is no immunity for crimes committed on behalf of state, as there is no state practice that suggests that there should be immunity in such cases.

*Brus* responds that the cases referred to are not related to international crimes or to individual criminal or civil responsibility of officials of the state. They are remarkable cases, but cannot be regarded as a basis for the claim that state officials do not enjoy functional immunity for international crimes. There are other cases referred to in his paper that provide a contrary view. The limited state practice is insufficient to be used as a basis to claim that there is state practice and *opinio iuris* and therefore a (new) rule of customary law. The restriction of functional immunity of state officials for international crimes has therefore to be founded on another basis. This was attempted in this paper.

## **Discussion of the paper by Professor Dekker and Professor Ryngaert:**

### **Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals**

In the first part of the presentation *Professor Ige Dekker* introduced the topic of immunity of international organisations. He started with the observation that in international legal life the role of international organisations has become more prominent. The importance of the topic at hand is thus the direct result of the importance attached to international organisations and their extended scope of activity. With the expansion of the scope of activities of international organisations, the likelihood increases that rights of individuals are impaired. In most situations a remedy for these allegedly aggrieved individuals is however lacking. This is caused by that many international organisations lack any internal dispute settlement arrangements to deal with claims of individuals who claim the occurrence of a breach of their rights. For these individuals the only option is to resort to domestic courts. In practice, however, individuals have been unable to obtain any redress from domestic courts, as many claims were denied on the ground that international organisations are immune from suit in national legal systems on the basis of their constituent treaties.

Traditionally, the immunity of international organisations has been rationalised by drawing an analogy with state immunity, albeit under the heading of the *functional* immunity of international organisations, as laid down in, e.g., article 105 of the UN-Charter. The rationale behind granting functional immunity to international organisations is to enable them to function without domestic interference. How far the actual scope of this immunity for international organisations reaches is still unclear. The analogy with the immunity of states is at least confusing, because the legal set-up of international organisations differs fundamentally with that of states. A crucial aspect of the concept of international organisations is that they for the fulfilment of their goals and task are dependent on the activities of states and state-organs, including domestic courts. From that perspective, an interesting trend is visible in case law in which a general re-evaluation occurs of the immunity of international organisations. These cases show that there is lesser reluctance on the part of at least some, mainly western-European domestic courts to accept certain limitations on the functional immunity of international organisations if there are no alternatives available for individuals to seek redress. Professor Ryngaert will discuss in more depth these national cases.

*Professor Ryngaert* focused in his part of the presentation on State practice from the Netherlands and Belgium, and especially how domestic courts in these two States have applied functional immunity in case law. He dealt with three different legal issues. First, the legal basis for immunity of international organisations; secondly, the question what is functional immunity; and



third, the right to a remedy for individuals. In a case from 1985 the Hoge Raad of the Netherlands argued that there is a basis in international customary law establishing functional immunity of international organisations. It has, however, been widely assumed that there must be a conventional basis in which the functional immunity of international organisations is grounded. With regard to the second question of what functional immunity is, the general definition is that international organisations have immunity for those activities which are necessary for fulfilling the purposes of the individual international organisation. The rationale lying behind the granting of functional immunity is that if it would not have been granted the mission of the international organisation will be jeopardised. Case law shows that courts are not always willing to grant immunity to international organisations on the broad ground of compromising the mission of an international organisation. In another case involving the European Patent Organisation, which dealt with the catering facilities of this organisation immunity was denied. The third leg is the right to a remedy for individuals who claim violations of their rights. Due to the fact that immunity to international organisations is often granted, plaintiffs are consequently just as often left in the cold. The European Court of Human Rights has been more reluctant to grant immunity to international organisations and is only willing to do so if there are reasonable alternatives of dispute settlement that can receive the claims of individuals. In the *Srebrenica* case, the Court came to the conclusion that article 6 of the European Convention on Human Rights was not violated because there was a reasonable alternative for the plaintiff to obtain redress. This is because Dutch and Bosnian Courts would be open to receive the claim. The line of enquiry of the European Court of Human Rights has been to qualitatively assess the internal disputed settlement mechanism of the international organisation and then judge it in the light of the standard of article 6 of the European Convention on Human Rights. In addition, the court has paid attention to the autonomy of the organisation.

*Professor de Waart* observes that Professors Dekker and Ryngaert put strong emphasis on the functional immunity of international organisations. In this respect, de Waart wants to know why the functional immunity of international organisations can only be restricted by the doctrine of functional necessity. He wonders why the immunity of international organisations cannot or should not be restricted by either the distinction between *acta jure imperii* and *acta jure gestionis*, or by making a distinction between public acts and private acts.

*Ryngaert* answers to de Waart that the applicability of the distinction between *acta jure gestionis* and *acta jure imperii* is limited as international organisations are not States and thus have limited powers in contradistinction to a State. As a consequence, it is difficult to conceptualise this distinction with regard to international organisations. The right of a remedy proves much more useful in this respect. *Dekker* adds to de Waart that caution should be exercised in transferring the notion of sovereignty that applies to States to international organisations. This is because it will not only pose a number of problems which will be difficult to solve but, more importantly, will not contribute to a better understanding of the law of international organisations. As stated in the report, international organisations do have a fundamentally different legal character than States, and, in particular, their legal system includes the national legal orders of the member States. So, a remedy for individuals before domestic courts fits within the legal concept of international organisations.

*Dr. Koppe* asks whether there is an obligation under public international law to test *ex officio* whether Article 6 of the European Convention on Human Rights is complied with?

*Ryngaert* agrees with *Koppe* that there arguably exists an *ex officio* obligation under article 6 of the Convention.

Professor *Wellens* draws attention to the manner in which proposition 4 of this advisory report is formulated. In his view we need to take a step back and read this proposition in a different way, and, additionally, ask ourselves the question whether it should be formulated differently. In *Wellens'* view this proposition neglects to take full account of the obligations of international organisations under international law, i.e. under section 29 of the Vienna Convention to provide for alternative mechanisms. In the interest of administering justice a waiver should, occasionally, be handed. Even if no waiver can be given, international organisations are still bound by obligations that require providing alternative mechanisms of settlement.

*Ryngaert* replies that he does not necessarily agree with the suggestion of *Wellens* that the words 'may provide for' in proposition 4 should be replaced by 'should supply such mechanism'. This is because international organisations retain the choice to either supply such a mechanism or refrain from doing so. If an international organisation does not provide an adequate internal dispute settlement mechanism it has to undergo the consequences it entails. In view of this, there is no necessity to change the wording.

*Dr. de Hoogh* notes that the tension between access to court and the fair trial standard have been described well in the advisory report. In his view there is however an element missing in the report: what would happen if the functional immunity of an international organisation is violated? Would an international organisation in this situation be able to institute a claim for redress against the State that has awarded the damages? In view of the possibility that a denial of immunity of an international organisation could violate this immunity, how is to be dealt with a conflict of obligations of human rights, for instance of article 6 European Convention on Human Rights, with other obligations?

In his response to the *de Hoogh*, *Ryngaert* stresses that immunity of international organisations is not absolute. There will inevitably be conflicts between different rules of international law. In the view of the European Court of Human Rights any limitations on the functional immunity of international organisations must have a legitimate aim, must be proportional, and interpreted in conformity with human rights standards. But yes, a violation of an immunity of an international organisation could amount to liability of the State that awarded damages for a breach of an individual's rights. *Dekker* adds that he does not hold the view that international organisations should not, in principle, have immunity from domestic jurisdiction. One has to find an adequate balance between the different interests involved. In that respect it would be advisable to perceive the immunity of international organisations as constituting an exception to a general rule.

Professor *Blokker* remarks concern page 88 of the advisory report. He observes that, on the one hand, we have the rules of immunity of international organisations, and on the other, there are private citizens who have their rights infringed and are without remedy. Essentially the options

to solve the conflict between immunity of international organisations and to provide a remedy for aggrieved individuals are two-tired, being either international or national solutions. On page 89 of the advisory report it is stated that the solutions provided at the national level by domestic courts are more interesting. There is, however, an inherent problem by focusing on what is done nationally to solve this issue, which is that it is a solution which is only adopted by one Member State but members of international organisations are many. Blokker's very general question is: if we meet in 50 years would the realistic solution to the problem have been international or national?

In response to the question posed by Blokker what the solution would be 50 years from now, *Ryngaert* and *Dekker* find themselves in agreement. They both are of the opinion that any solutions provided by national courts are temporary. These solutions do however exert pressure on international organisations to address any faults or flaws in their internal dispute settlement mechanism.

*Dr. Ribbelink* wants to know whether there exists something as community law, and, if so, what the relevance would be for the topic of functional immunity.

In response to him, *Ryngaert* notes that both the concept of community law and the right to a remedy are inherent in the law of international organisations, which makes it difficult to answer the raised question. *Dekker* observes that the question whether the characterisation of the law of international organisations as international community law is, in general, helpful, but needs a separate discussion. It is however beyond any doubt that the characterisation of the law of international organisation as international community law will as such not solve the tension between the immunity of international organisations and the respect for basic human rights.

*Zandvliet* disputes the relevance of speaking of the principle of autonomy of international organisations. In their advisory report on the immunity of international organisations, *Dekker* and *Ryngaert* refer to the autonomy of international organisations as the underlying rationale or *raison d'être* for the functional immunity typically accorded to an international organisations in a host state agreement. The article, unfortunately, does not elaborate on the reasons why we speak of this autonomy. *Zandvliet* offers four reasons why we value the autonomy of international organisations.

First, international organisations typically operate in a variety of legal systems and traditions. For example, the United Nations cannot know the ins and outs of procurement law in all States where it maintains operations. Instead, the United Nations relies on its own dispute mechanisms to deal with disputes with vendors who were unsuccessful in a UN procurement action. Its functional immunity is designed to shield the United Nations from the procurement laws and regulations of a particular State.

Second, there is the dirty public secret that international organisations frequently operate in States where the rule of law is weak or non-existent. For example, referring to the denial of immunity accorded to the European Patent Organisation (EPO) by courts in the Netherlands in EPO's procurement dispute with its caterer, how would we feel if an Afghan, Syrian or

Equatorial Guinean courts were to consider UN procurement cases? Zandvliet poses the question whether the judgements by national courts would be met with a similar degree of approval?

Third, the governing bodies of international organisations are designed to take the leading role with respect to the organisation's functioning and not the domestic courts of just one State.

Lastly, much of international law is based on the idea "what is good for the goose is good for the gander." International organisations must expect a similar interaction with the hosting State or where it has its operations, regardless of exactly which State is implicated. Leaving aside the situation where the international organisation's act in question is *ultra vires*, deviating from the absolute approach to functional immunity of international organisations can be quite a dangerous and unwelcome development.

Hence, Zandvliet welcomes the call of Professor Blokker for international solutions to address some of the accountability gaps which may arise in terms of the actions of an international organisation. However, she strongly believes that calls to curtail the functional immunity concept in favour of judicial control by domestic courts should not be embraced lightly.

*Ryngaert* replies to Zandvliet that the rationale for having autonomy of international organisations is to offer them protection from undue interference of domestic courts. In order to not surprise national courts, constituent treaties contain detailed provisions specifying functional immunity of international organisations. Although article 6 of the European Convention on Human Rights is locally applied, it does constitute a universal norm. *Dekker's* response to Zandvliet is that practice shows that domestic courts are not unduly interfering with the work of international organisations or actively restrict their immunity. They show, in general, a nearly absolute respect for the immunity of international organisations. Both the authors of the advisory report do not evaluate the new trend in the case law of some domestic courts in Europe as signs to the contrary. One can discern a shift away from protecting the autonomy of international organisations to the protection of individuals but that is something totally different from an unduly interference with the work of an international organisation.

*Judge Orie* points out that bringing the host State before the European Court of Human Rights to stand trial because they allowed international organisations to operate on their territory is a possibility that has never been explicitly ruled out by this Court. He wants to know what the views of the authors of the advisory report are on this point.

*Ryngaert* believes the question put forward by Orie whether host States could be sued for allowing international organisations to be active on their territory is an interesting one. In the *Gasparini* case from 2009, the plaintiff decided to not wait until the Supreme Court rendered judgment and to then go to the ECHR but opted to file a claim with national courts. Nonetheless, this is a very interesting development.

Professor *Lammers* finds himself, for the greater part, in agreement with what the two authors argue in their advisory report, except with the emphasis that is laid on using national solutions to solve the problem at hand. In his view, international organisations have to internally develop an

efficient dispute settlement mechanism. If international organisations neglect to do this a penalty should be imposed on them by national courts.

*Dekker* points out that he largely agrees with the view of Lammers that, in general, accepting remedies before domestic courts is the second best option to tackle the problem. But one should also realise that in some instances a remedy before a domestic court is probably the best and most efficient way to deal with conflict between an international organisation and private parties. It will all depend on the circumstances of the individual case. In cases dealing with the issue of goods, immunity of international organisations should not be upheld by domestic courts.

*Dr. Henquet* sympathises with the idea to develop an international mechanism to offer a remedy for individuals who have had their individual rights breached by international organisations. He asks Professors *Dekker* and *Ryngaert* to elaborate a bit more on their views on the *Srebrenica* case, because if he extrapolates their line of reasoning to this case, in which private citizens did not have a remedy, he assumes that they are of the conviction the decision was wrong. In *Henquet's* view, the Court was however right to uphold the immunity of the UN because the circumstances surrounding the case were of a special nature.

*Ryngaert* continues by noting to *Henquet* that he agrees with *Henquet's* statement that the judgment rendered in the *Srebrenica* case is very interesting. He believes the Court correctly applied the necessity test in this case. What the Court arguably did in its reasoning was to apply a distinction between political sensitive cases and less sensitive cases, such as employment cases.

*Dr. Brölmann* wishes to elaborate further on the observation made by *de Waart* on the distinction between *acts de jure imperii* and *de jure gestionis* in relation to international organisations. She doubts whether the outright dismissal of the authors of the advisory report of this distinction is correct. Although it would be unfruitful to try and transpose doctrinal distinctions based on 'sovereignty' and '*par in parem non habet imperium*' to international organisations, room should be retained in the doctrine for developing a more external point of view on functional immunity of international organisations. The remarkable fact is that in present-day international practice the 'functional' immunity of international organisations works out as being more absolute than the 'sovereign' immunity of states. In fact, for the purpose of legal protection of individuals the advisory report focuses very much on the means of redress internal to the organisation (see propositions 3-5). This is in *Brölmann's* view linked to the coming of age of international organisations, in the sense that within the international legal order their acts are also categorised on the basis of 'outside' criteria – be it on different doctrinal foundations than states. Thus, in some cases international organisations allow for a remedy for third (private) parties. *Brölmann* wants to know whether the time is ripe for an objectivised categorisation of acts of international organisations in general international law so that specific acts would *eo ipso* not entail immunity?

In response to *Brölmann*, *Dekker* notes that, although an interesting topic in itself, the question was simply not researched by the authors of the advisory report. That there is a need to further develop the theoretical underpinnings of the functional necessity doctrine cannot be questioned. However, account must be taken of the fact that there is already quite a vast body of literature

dealing with this issue, for instance the work that was done by the International Law Commission and by David Singer.

*Rousso* observes that article 6 of the European Convention on Human Rights only applies to member States and not to international organisations. Hence, the obligations flowing from article 6 apply only to member States and not international organisations. Even if national courts grant individuals any redress, judgments of the European Court of Human Rights cannot be executed. In his view, the application of the norm contained in article 6 of the Convention to international organisations constitutes a prime example of bad policy. The better practice would be to put the responsibility where it belongs, namely on the member State.

In response to *Rousso*, *Ryngaert* remarks that it is indeed the responsibility of member States to act in accordance with article 6 of the European Convention on Human Rights as the Court lacks jurisdiction over international organisations. Therefore, agreements with international organisations should be negotiated codifying the jurisprudence of the court on article 6 of the European Convention. We should not strive for equal protection, but equivalent protection.

*Barnhoorn* was surprised to read proposition 1 of the advisory report concerning the legal basis of immunities of international organisations. When he researched the topic himself some thirty years ago in a comment on the decision of the District Court of the Hague in the *Spaans* case it was widely held in case law, State practice and literature that there is a customary rule of international law granting immunities from jurisdiction and enforcement to international organisations if a specific treaty with the host state is absent (see decision of 8 June 1983, 'Praktijkvelden' 1983 No 2022, electronically available). *Barnhoorn* criticises the conclusion drawn by the authors of the advisory report on that there is no longer a customary rule of international law attributing immunity to international organisations. In his view, a mere four cases are insufficient neither to uphold proposition one of the advisory report nor to show its correctness. This conclusion is in sharp contrast with, *inter alia*, the opinion of Henquet, whose study is largely based on the decision of the Dutch Supreme Court in the *Spaans* case (NILR (2010) p. 278). Moreover, the position of the Dutch government was, and still seems to be, that functional immunity is indeed a rule of international customary law. In this regard, *Barnhoorn* refers to a letter of the Dutch government to the Iran- US Claims Tribunal in 1983, which states that the principles in the draft Headquarters Agreement for the Tribunal 'are derived directly from the generally accepted principles of international law'. Also the Minister of Foreign Affairs of the Netherlands stated the same in 1982 in Parliament. This practice of the Netherlands is also shown with respect to the immunity of the Permanent Court of Arbitration, which only recently, in 1999, received its Headquarters Agreement (Trb. 1999 No. 68 in force in 2000). Since its establishment in 1899 the immunity of the Permanent Court of Arbitration has been based on customary law. *Barnhoorn's* question is what has changed since that time, and is the Dutch government wrong in accepting this functional immunity as a rule of international customary law?

In addition, *Barnhoorn* wants to correct the advisory report on one point. On page 91, the authors discuss the issue of the constitutional validity of the Headquarters Agreement of the Iran-US Claims of 1990. Like the Hague District Court the authors wrongly assume this agreement was

subject to Parliamentary approval. As is mentioned in the ‘Tractatenblad’ of 1990, in this case, and on the basis of the ‘Machtigingswet’, Parliament provided its approval in a very general way. This rule is currently laid down in art. 7 (a) of the Act on Approval and Promulgation of Treaties of 1994.

*Ryngaert* replies that from their study of relevant state practice, it transpires that recently no domestic court has derived the immunity of an international organisation from customary international law; the international organisation's immunity always found its legal basis in a treaty. Moreover, some courts have held explicitly that immunities of international organisations cannot be based on customary international law or general principles. (*EUI v. Piette*, Italian Yearbook of International Law (1999), p. 156; ILDC 297 (IT 2005), H4 (refusing to uphold a general customary international law rule of *par in parem non habet imperium/jurisdictionem*, as exists in the law of State immunity); *CEDAO v. BCCI*, 13 January 1993, Court of Appeals of Paris, 120 JDI 353 (1993)). The 1985 *Spaans* case - which grounded the immunity of an international organisation in customary law - is really an outlier.

It is true, however, that the political branches at times cite the customary character of international organisation immunities. This has not only happened in the Netherlands, but also in Belgium (see, e.g., press release of the Council of Ministers of the Belgian Ministers of 27 January 2010 regarding Eurocontrol, stating that privileges and immunities are accorded to international organisations under customary international law and that it is not necessary for Eurocontrol to enter into bilateral seat agreements with host States (available at <http://www.presscenter.org/en/node/51257>, retrieved in July 2012). The exact implications of such statements are unclear. Possibly, in states where courts have not unambiguously held that the immunity of international organisations cannot be based on customary law or general principles, such as the Netherlands, they open a window of opportunity for international organisations to rely on customary law before domestic courts in the absence of an applicable treaty. That said, such immunity should always be compatible with the right of access to a judge.

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