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## The Netherlands

*Rosanne van Alebeek and André Nollkaemper*

### I. Introduction

In this chapter we review the case-law of the courts of the Netherlands on the privileges and immunities of international organizations and their officials.<sup>1</sup> Its main aim is to identify whether and to what extent the courts in this case-law have engaged in transnational judicial dialogue: that is, as framed in the introduction to this volume, whether they have engaged in

examining the arguments raised and relied upon in ‘foreign’ decisions and employing or rejecting them in their own reasoning in various ways. By ‘transnational judicial dialogues’ or ‘conversations’ it is suggested to understand the willingness of domestic courts to look beyond their own jurisdiction and to take into account decisions rendered by other national [courts] or by international courts or tribunals.<sup>2</sup>

In order to assess the extent to which Dutch courts have engaged in judicial dialogue, it is first necessary to outline in general terms the Dutch case-law on immunities of international organizations and their officials. Our focus on references to foreign or international decisions implies that we do not discuss cases on those aspects of the law of immunities where no references to foreign cases or evidence of silent dialogue can be found at all. In particular, we do not discuss cases on the inviolability of property in the execution phase.

We will first, in section II, sketch the context of the case-law of the Dutch courts on matters of immunity. In section III we discuss the principal tenets of the case-law on immunities of international organizations, and in section IV we examine the cases involving a dialogue with (or, rather, references to) foreign and international decisions. In section V we will draw brief conclusions.

## II. The context of Dutch immunity decisions

### 1. International organizations in the Netherlands

The Netherlands is host to thirty-three international organizations.<sup>3</sup> The immunity of these organizations and their officials from Dutch jurisdiction is

<sup>1</sup> Since international law is considered to be an integral part of the Dutch legal order (cf section II.2), the national legal personality of international organizations is not an issue in Dutch jurisprudence. The courts simply note that they ‘derive . . . [their] legal personality from international law’: *Spaans v Iran-US Claims Tribunal*, Supreme Court, 20 December 1985, *NJ* 1986/438; ILDC 1759 (NL 1985), para 3.1.

<sup>2</sup> A Reinisch, ‘Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations—An Introduction’, in this volume.

<sup>3</sup> T Henquet, ‘International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts’ (2010) 57 *NILR* 267, 268; *Tweede Kamer der Staten-Generaal, Vergaderjaar* (Lower House of the States General, Session Year) 2007–2008, 30178 no 4; *Interdepartementaal*

mostly<sup>4</sup> regulated in headquarters agreements and supplemental and additional agreements.<sup>5</sup> These often elaborate on the immunity provisions found in the constituent treaty or a multilateral immunity treaty, such as the 1946 Convention on the Privileges and Immunities of the United Nations (UN) (1946 General Convention).<sup>6</sup> The various treaties formulate immunity provisions in different terms. For example, the Headquarters Agreement with the Organisation for the Prohibition of Chemical Weapons (OPCW) provides that the organization shall '[w]ithin the scope of its official activities . . . enjoy immunity from any form of legal process',<sup>7</sup> while the Headquarters Agreement with the International Criminal Court (ICC) provides first, in general

*Beleidsonderzoek: Beleidskader Werving en Opvang Internationale Organisaties* (Interministerial Policy Review: Policy Framework on Attracting and Hosting International Organisations) 3.

<sup>4</sup> In exceptional cases regard must be had to the related multilateral treaty. For example, the immunity of the European Patent Organisation (EPO) and its officials is regulated under the Protocol on Privileges and Immunities of the European Patent Organisation (1973), OJ EPO 2001, Special edition no 4, 55 (EPO Protocol on Privileges and Immunities), as is the immunity of experts performing functions on behalf of, or carrying out missions for, the Organisation. The Headquarters Agreement further regulates the immunity of EPO officials (Agreement between the Kingdom of the Netherlands and the European Patent Organisation concerning the Branch of the European Patent Office at the Hague, including Separate Agreement, (2006) Treaty Series 2006-155 ). The immunity of Eurocontrol is regulated by its constitutive treaty 'EUROCONTROL' International Convention relating to co-operation for the Safety of Air Navigation (1960) 523 UNTS 117, while the immunity of Eurocontrol officials has been elaborated in a Headquarters Agreement (Agreement between the Kingdom of the Netherlands and EUROCONTROL concerning the privileges and immunities of the staff of EUROCONTROL and their family members (2007) 2418 UNTS 231). The immunity of Europol officials has been elaborated in a Headquarters Agreement (Exchange of Notes constituting an Agreement between the Kingdom of the Netherlands and Europol concerning privileges and immunities of the staff of Europol and their family members (2007) Treaty Series 2008-21). The immunity of Europol and its officials is also regulated under the Protocol on the Privileges and Immunities of Europol, the members of its organs, the deputy directors and the employees of Europol (2002) OJ C 312/2.

<sup>5</sup> Headquarters agreements are sometimes concluded in the form of an exchange of notes: see, eg, Exchange of Letters recording an Agreement relating to privileges and immunities of members of the International Court of Justice, the Registrar, the officials of the Registry, accessors, the agents and counsel of the parties and of witnesses and experts (1946) 8 UNTS 114; Exchange of Letters between the Government of the Kingdom of the Netherlands and the President of the Iran-United States Claims Tribunal concerning the granting of privileges and immunities to the Tribunal (1990) 2366 UNTS 445 (The Netherlands Iran-US Claims Tribunal Exchange Letters). For a general overview of Headquarters Agreements in the Netherlands see N M Blokker, 'Headquarters Agreements', in P J van Krieken and D McKay (eds), *The Hague: Legal Capital of the World* (TMC Asser Press 2005) 61–110.

<sup>6</sup> Convention on the Privileges and Immunities of the United Nations (1946) 1 UNTS 15; this is, for example, the basis of the Headquarters Agreement with the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (1994) (ICTY Headquarters Agreement). See also the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (1947) 33 UNTS 261 (Special Convention), which is the basis of the Headquarters Agreement with the Organisation for the Prohibition of Chemical Weapons (OPCW), the Agreement between the OPCW and the Kingdom of the Netherlands concerning the Headquarters of the OPCW (1997) 2311 UNTS 91 (OPCW Headquarters Agreement); the Statute of the International Criminal Court (ICC Statute) is the basis of the Headquarters Agreement with the ICC, the Headquarters Agreement between the International Criminal Court and the host State (2007) 2517 UNTS 173 (ICC Headquarters Agreement). Cf for the relation between the host state agreements, the constituent agreements and customary international law, section III.1.

<sup>7</sup> OPCW Headquarters Agreement (n 6) article 4 (with two exceptions: (a) civil action by a third party for damages arising out of an accident caused by a vehicle belonging to or operated on behalf of the OPCW where these damages are not recoverable from insurance; and (b) civil action relating to death or personal injury caused by an act or omission of the OPCW or officials of the OPCW in the Kingdom of the Netherlands).

terms, in article 5, that '[t]he Court shall enjoy, in the territory of the host State, such privileges, immunities and facilities as are necessary for the fulfillment of its purposes',<sup>8</sup> and specifies in article 11 that this immunity is absolute.<sup>9</sup> An exceptional provision was included in the former Headquarters Agreement with the International Nickel Study Group, which provided that the organization would 'enjoy the same immunity from legal process as foreign States'.<sup>10</sup>

Headquarters agreements concluded by the Netherlands often provide for an exception to immunity in case of civil actions for damages caused by a vehicle belonging to or operated on behalf of the organization, where those damages are not recoverable from insurance,<sup>11</sup> or for civil actions for death or personal injury caused by the organization or its officials in the Netherlands,<sup>12</sup> but not all agreements include these exceptions.<sup>13</sup>

The scope of the immunity of officials working for international organizations in these treaties is also not uniform. Until recently, most headquarters agreements concluded by the Netherlands only granted diplomatic status to the head of the organization. Some organizations, however—for example, the International Court of Justice (ICJ), the International Tribunal for the Former Yugoslavia (ICTY), and the OPCW—had arranged for diplomatic privileges and immunities for a broader category of their officials.<sup>14</sup> This difference in the immunity granted to high-ranking officials of the various organizations based in the Netherlands led to complaints. In response, the Dutch government, in 2005, decided

to accord *uniform equal treatment to employees of all international organisations* based in the Netherlands. Top-ranking personnel of international organisations are to be placed on an equal footing with diplomatic staff of equivalent rank at foreign embassies and all other personnel on an equal footing with the administrative and technical staff of such embassies. They will enjoy the same immunities and fiscal or other privileges as embassy personnel of equivalent rank. The result will be a satisfactory and internationally competitive regime that is easy to implement and applicable to all international organisations.<sup>15</sup>

<sup>8</sup> ICC Headquarters Agreement (n 6) article 5.

<sup>9</sup> ICC Headquarters Agreement, article 11.1 provides: 'The Court, 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 Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.' Cf also the ICTY Headquarters Agreement (n 6).

<sup>10</sup> Agreement between the Kingdom of the Netherlands and the International Nickel Study Group concerning the Headquarters of the Group (1991) 2304 UNTS 69, article 5. No longer in force since 31 December 2005, cf NM Blokker (n 5) 67.

<sup>11</sup> Cf OPCW Headquarters Agreement (n 6) article 4(1)(a).

<sup>12</sup> Cf OPCW Headquarters Agreement (n 6), article 4(1)(b).

<sup>13</sup> Cf ICC Headquarters Agreement (n 6).

<sup>14</sup> Blokker remarked in this regard that 'the principle of the formal equality of States—which is the reason that there is only one regime of rules for diplomatic relations between States—does not have a sister principle of the formal equality of international organizations': see N M Blokker (n 5) 72. Interestingly, the Headquarters Agreement with the OPCW provides: 'If and to the extent that the Government shall, in the future, enter into an agreement with any intergovernmental organisation containing terms or conditions more favourable to that organisation than comparable terms or conditions in this Agreement, the Government shall extend such more favourable terms or conditions to the OPCW or to any person entitled to privileges and immunities under this Agreement' (additional provision 4(a) of the 'Separate Arrangement' between the OPCW and the Netherlands).

<sup>15</sup> Dutch Government position paper on the Interministerial Policy Review (IBO) of the Policy Framework for Attracting and Hosting International Organisations, 3 (emphasis in original).

This policy has been implemented through the exchange of notes with various international organizations. It has been pointed out that

these notes do not necessarily eliminate all differences in the treatment of staff members in the Netherlands. This is because these notes stipulate that they 'shall not detract from any existing arrangements in the Headquarters Agreement or other bilateral or multilateral agreements'. Thus, insofar as provisions in preexisting treaties . . . grant more rights to staff members of [an] organisation, such provisions will continue to remain in force. The provisions in the exchange of notes will only have effect to the extent that the pre-existing treaties grant fewer rights, or are silent.<sup>16</sup>

In practice, however, employees of international organizations based in the Netherlands now have a largely uniform position as far as privileges and immunities are concerned, and the main bone of contention has been removed.

## 2. International law in the Dutch legal order

Like all other treaties, treaties on immunities of international organizations that as a matter of international law are binding on the Netherlands are automatically incorporated, and thus have the force of law in the domestic legal order. Their validity in the national legal order is not dependent on any further implementing legislation. This principle is not expressly formulated in the Dutch Constitution, but is based on unwritten constitutional law.<sup>17</sup> Also, customary international law on immunities of international organizations<sup>18</sup> is part of the Dutch legal order, without need for transformation.

Under article 93 of the Constitution, the power of courts to give effect to international law is limited to provisions that are 'binding on everyone'.<sup>19</sup> Courts can apply provisions of international law if they are formulated sufficiently precisely,<sup>20</sup> but individuals can only invoke these provisions if they are the addressees of the norm.<sup>21</sup> This provision has not been considered as a barrier to the application of agreements on immunities of international organizations: it is the international organization that invokes the provision and which is the addressee of the right.<sup>22</sup> It follows that such agreements can be considered to be 'directly applicable' or 'self-executing' in the legal order of the Netherlands.<sup>23</sup> Moreover, article 94 of the Constitution provides that '[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions'.

<sup>16</sup> T Henquet (n 3) 272.

<sup>17</sup> L F M Besselink and RA Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht: een 'neo-monistische' benadering* (Kluwer 2009); A Nollkaemper, 'The Netherlands', chapter 9 in D Sloss and D Jinks (eds), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2009).

<sup>18</sup> Cf section III.1.

<sup>19</sup> Article 93 of the Dutch Constitution provides: 'Provisions of treaties and of resolutions by international institutions that are binding on all persons by virtue of their contents shall become binding after they have been published.'

<sup>20</sup> Supreme Court, 30 May 1986, *NJ* 1986, 688, para 3.2.

<sup>21</sup> Supreme Court, 29 November 2002, *NJ* 2003, 35, para 3.5, referring to para 30 of the Opinion of the Advocate-General.

<sup>22</sup> Indeed, the District Court of The Hague stated that the question of whether private persons can rely on an immunities agreement is not relevant, since the Court would have to apply it *ex officio*; see LJN: BN0537, *Rechtbank's-Gravenhage*, 301199/HA ZA 07-3983, para 3.5, and further section II.3.

<sup>23</sup> P H F Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff 1994) 144: 'the great majority of treaty provisions concerning organizational immunities can be considered as self-executing'. See also T Henquet (n 3) 271.

However, the actual basis upon which Dutch courts give effect to immunities of international organizations is somewhat unclear. Article 13a of the General Provisions Act<sup>24</sup> limits the jurisdiction of the courts where exceptions apply that are recognized in international law. This provision was introduced with a view to ensuring that courts uphold the immunity of states under customary international law. The justification for this provision seems to be twofold. On the one hand, at the time of its introduction it was much less established than now that all rules of international law, including customary international law, are part of the national legal order. On the other hand, since customary international law normally does not prevail over conflicting national law of the Netherlands, article 13a ensures that courts can exercise jurisdiction, even when other rules of national law would suggest otherwise.<sup>25</sup> It might also be argued that article 13a suggests that the lack of jurisdiction is not dependent on what the parties claim—its bar to jurisdiction has to be recognized by the court even when the parties do not rely on the rule of international law in question. However, as we will note in section II.3, that interpretation has not been accepted by the Supreme Court.

It is a reasonable interpretation that this provision now also extends to customary law principles that protect the immunity of international organizations (which have been recognized to exist by the Supreme Court).<sup>26</sup> It is less clear whether this provision also forms the basis for the application of treaty-based immunities. While some lower courts have suggested this,<sup>27</sup> the Supreme Court in the *Mothers of Srebrenica* case seemed to distinguish customary law from treaty law in this respect.<sup>28</sup>

To the extent that such treaties indeed limit a right that might otherwise flow from Dutch law, such as the right of access to court under article 17 of the Constitution, there is no option other than to base the domestic, and trumping, effect either on article 13a of the General Provisions Act (even though that was clearly written with a view to customary international law) or on article 94 of the Constitution. It should be added that this potential doctrinal controversy has not led to any problem in the case-law.

Special provisions apply to taxation. Article 39 of the General Taxation Law empowers the Minister of Finance to grant an exemption from taxation where this is required by international law. Like article 13a of the General Provisions Act, this 'rule of reference' allows the Minister to grant priority to customary law (and treaties, where their application would not be based on article 94 of the Constitution) over the general taxation provisions.

### 3. The role of organizations, the host state, and the court in advancing arguments on immunities

In most cases (potentially) involving the immunity of international organizations, such organizations have participated in proceedings and have themselves invoked immunity. However, this does not always happen; three scenarios can be distinguished here.

<sup>24</sup> The General Provisions Act (1829) Government Gazette No 10.

<sup>25</sup> For instance, article 17 of the Dutch Constitution provides: 'No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.'

<sup>26</sup> Cf section III.1.

<sup>27</sup> Eg, LJN: BN0537, Rechtbank's-Gravenhage, 301199/HA ZA 07-3983.

<sup>28</sup> *Stichting Mothers of Srebrenica*, Supreme Court, 13 April 2012, LJN: BW1999 (in Dutch only). In paragraph 4.2 the immunity of states and that of international organizations is distinguished both in regard to their basis and scope. The immunity of states, the Court considered, 'is derived, as article 13a General Provisions Act relates, from the law of nations (par in parem non habet imperium)'. Arguably, the Supreme Court did thus not regard article 13a as relevant in the context of international organizations' immunity.

First, an organization may choose not to appear, but may refer to its immunity in doing so. This happened, for instance, in the procedure by Milosevic against the ICTY,<sup>29</sup> in which the Tribunal informed the Court that it would not take part in the proceedings, referring to its immunity. In this case, the Court duly considered (and upheld) the immunity of the ICTY.<sup>30</sup>

Second, the State of the Netherlands may intervene in the proceedings and advance the argument of the organization. This is what happened in the case of *Mothers of Srebrenica et al v The State of the Netherlands and the United Nations*.<sup>31</sup> In the first instance, the state submitted to the District Court a letter from the UN to the Netherlands Permanent Representative in New York, pointing out the immunity of the UN and stating that the UN would not waive its immunity. The District Court then declared that it lacked jurisdiction in regard to the claim against the UN. On appeal, the Court of Appeal allowed the state to intervene on the side of the UN (which did not appear), whereupon the state advanced the arguments supporting the immunity of the UN. The state had argued in this regard that under international law, it had an interest of its own in (invoking) this immunity.<sup>32</sup>

In this context it is also relevant that under section 3a of the Bailiffs Act, the Minister of Justice can notify the bailiff that a particular act (such as serving the writ of summons on an organization, or seizing property under a warrant of execution) would violate the obligations of the Netherlands under international law. This reflects the interest of the state in protecting the immunity of international organizations from the courts of the Netherlands. In the case at hand, the bailiff had failed to notify the Minister by virtue of article 3a subsection 1 of the Bailiffs Act. The District Court noted that the omission to apply article 3a of the Bailiffs Act 'does not anticipate a Court's decision about its jurisdiction, nor negatively affects [*sic*] the right of the State as a party in the action to submit its view on it to the Court'.<sup>33</sup>

Third, the question has arisen as to whether a court should consider the immunities of international organizations *ex officio*. Some lower courts have answered this question in the affirmative, apparently basing their decisions on the language of article 13a of the General Provisions Act.<sup>34</sup> However, this is not the approach taken by the Supreme Court. In 1995, it had stated in a procedure against Morocco that if a Dutch court in principle has jurisdiction (apparently meaning jurisdiction as a matter of private international law), it should adjudicate the matter; also if the defendant is a sovereign state, unless the defendant has timely invoked its immunity. There would be no need for an *ex officio* inquiry into the question of whether an invocation of immunity would be justified.<sup>35</sup> In a later case, the Supreme Court added that even though a court is not required to enquire into the immunity of a foreign state, it is competent to do so.<sup>36</sup> In

<sup>29</sup> *Slobodan Milosevic v ICTY*, District Court of The Hague, 26 February 2002, LJN AD9602, Vonnis in kort geding.

<sup>30</sup> *Slobodan Milosevic v ICTY* (n 29).

<sup>31</sup> *Stichting Mothers of Srebrenica*, Court of First Instance, 10 July 2008, LJN: BD6796, 295247/HA ZA 07-2973 Judgment in the incidental proceedings; Court of Appeal, 30 March 2010, LJN: BL8979; Supreme Court, 13 April 2012, LJN: BW1999 (in Dutch only).

<sup>32</sup> *Stichting Mothers of Srebrenica*, Court of First Instance, 10 July 2008, LJN: BD6796, 295247/HA ZA 07-2973 Judgment in the incidental proceedings, para 3.3.

<sup>33</sup> *Stichting Mothers of Srebrenica* (n 32) para 5.3.

<sup>34</sup> Cf LJN: BN0537, *Rechtbank's-Gravenhage*, 301199/HA ZA 07-3983, para 3.5.

<sup>35</sup> *Trappenberg-arrest*, HR 25 November 1994, NJ 1995/650, with annotations of Th M de Boer, para 3.3.3.

<sup>36</sup> Supreme Court, 26 March 2010, LJN: BK9154. Note that also in cases on immunity of individuals (accused of international crimes), courts are not required to consider the immunity

the *Mothers of Srebrenica* case, the Supreme Court stated that it saw no reason why this would be different in the case of international organizations.<sup>37</sup>

#### 4. Transnational judicial dialogue in the Dutch courts

Dutch courts tend not to waste words. While commentators take care to point out that Dutch judicial decisions ‘are neither as brief and laconic as the decisions of the French Cour de Cassation, nor as lengthy and discursive as the decisions of the German Bundesgerichtshof’,<sup>38</sup> and stress that over the years the Supreme Court has come to use more elaborate reasoning than in the past,<sup>39</sup> the influence of the French legal tradition is unmistakable.<sup>40</sup> This general brevity of reasoning may partly explain the fact that in Dutch case-law ‘comparative considerations . . . are rare’.<sup>41</sup> This is not to say that Dutch courts do not partake in the global trend of transnational judicial dialogue.<sup>42</sup> Advocates-General, who advise the Supreme Court, refer in their opinions to international and foreign case-law more often than the Supreme Court itself.<sup>43</sup> However, in their opinions, references to foreign case-law are also ‘relatively scarce’.<sup>44</sup> Because of this, ‘it is difficult to assess the impact of comparative law on the decisions taken’.<sup>45</sup>

of defendants on their own initiative, if the defendant has not raised such immunity. See Opinion of the Advocate-General in Supreme Court, 8 July 2008, LJN: BC7418, para 10.2.

<sup>37</sup> *Stichting Mothers of Srebrenica* (n 28) para 2.6.

<sup>38</sup> A S Hartkamp, ‘Comparative Law Before the Dutch Courts’, in G Canivet, M Andenas, and D Fairgrieve (eds), *Comparative Law before the Courts* (The British Institute of International and Comparative Law 2004) 229, 229. In similar terms, Loth places the Dutch Supreme Court ‘in between’ the French Cour de Cassation and the United States Supreme Court: M A Loth, ‘Courts in a Quest for Legitimacy: A Comparative Approach’, in N Huls, M Adams, and J Bomhof, *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (TMC Asser Press 2009) 267, 277–8.

<sup>39</sup> W J M Davids, ‘Judicial Reasoning and Legitimacy of the Dutch Supreme Court’, in N Huls, M Adams, and J Bomhof, *The Legitimacy of Highest Courts’ Rulings, Judicial Deliberations and Beyond* (TMC Asser Press 2009) 223, 224; E Mak, ‘Why do Dutch and UK Judges Cite Foreign Law?’ (2011) 70 *Cambridge Law Journal* 420, 431.

<sup>40</sup> Cf also W J M Davids (n 39) 223.

<sup>41</sup> A S Hartkamp (n 38) 229. As Mak points out in an article on the use of foreign law in the Dutch courts, ‘[t]he working methods and style of reasoning of the analysed courts influence the citation of foreign law in their judgments’: E Mak (n 39) 423. She also states that ‘as a rule, no citations of foreign law are included in the reasoning of judgments’, E Mak (n 39) 431. Cf also A Reinisch, ‘The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity’, in A Reinisch and U Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven 2007) 298, for the relevance of this fact in the context of our inquiry.

<sup>42</sup> R C Black and L Epstein, ‘(Re-)Setting the Scholarly Agenda on Transjudicial Communication’ (2007) 32 *Law & Social Inquiry* 789; R J Krotoszynski Jr, ‘I’d Like to Teach the World to Sing (In Perfect Harmony): International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue’ (2006) 104 *Michigan Law Review* 1321; P M Moremen, ‘National Court Decisions as State Practice: A Transnational Judicial Dialogue?’ (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 259; A Slaughter, ‘Human Rights International Law Symposium: A Typology of Transjudicial Communication’ (1994) 29 *University of Richmond Law Review* 99; A Slaughter, ‘Judicial Globalization’ (2000) 40 *Virginia Journal of International Law* 1103; M A Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005) 93 *Georgetown Law Journal* 487.

<sup>43</sup> M de S-O-Ë Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004).

<sup>44</sup> E Mak (n 39) 440.

<sup>45</sup> E Mak (n 39) 440.



According to one Advocate-General, ‘the Dutch Supreme Court is quite willing to consider comparative law . . . However, the number of cases where this inspiration is openly admitted in the judgments is small.’<sup>46</sup> From recent interviews conducted with a number of Dutch Supreme Court Judges and Advocates-General, it transpired that ‘comparative law at least plays a role in the phase of discovery before the judgment is written’,<sup>47</sup> and that regard was being had especially to French and German case-law, and sometimes to English or US cases.<sup>48</sup> In these interviews, most judges ‘expressed the fear that the discussion of foreign judgments in their decisions would give rise to criticism as concerns the legal systems to which reference is made: why look at one system, but not at another? References to foreign judgments would thus risk weakening the authority of Supreme Court judgments.’<sup>49</sup> Similar research has not been undertaken in respect of lower court judges, and systematic data in this respect is thus lacking.

The dialogue between Dutch courts and international courts is of an altogether different nature. Leaving aside judgments against the Netherlands (which can be applied directly by the courts if their substance allows for this, but which are not properly part of the phenomenon of dialogue), Dutch courts have frequently referred to decisions of international courts and tribunals—particularly the European Court of Human Rights (ECtHR), but also the European Court of Justice (ECJ) and the International Court of Justice (ICJ). Later we will give several examples of decisions on immunities of international organizations that indeed refer to such international decisions.

While, formally, ECtHR decisions and judgments are only binding on the defendant state,<sup>50</sup> the Dutch Supreme Court has explained that decisions and judgments of the ECtHR are deemed to be binding to the extent that they are directly based on the substantive provisions of the European Convention on Human Rights (ECHR) to which they relate.<sup>51</sup> In that respect, the binding nature of ECtHR jurisprudence is based on the ECHR itself, and is binding and directly applicable within the Dutch legal order in the same way as the ECHR.<sup>52</sup>

The status of ECJ jurisprudence within the Dutch legal order is strangely enough less straightforward, but can probably be explained in terms of European Union (EU) law itself. While a preliminary ruling of the ECJ given under (now) article 267 of the Treaty on the Functioning of the European Union (TFEU) is directly addressed only to the national court which brought the matter before the Court, in Case 66/80 the ECJ held that a preliminary ruling declaring an act of an institution to be void ‘is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give’.<sup>53</sup> There are strong arguments in favour of extending this *erga omnes* effect to preliminary rulings in which EU law is interpreted, particularly in view of the emphasis that the Court in the aforementioned judgment placed on the aim of (now) article 267—to ensure that Community law is applied uniformly by national courts.<sup>54</sup> Of course, this does not help to explain the practice of Dutch courts, as discussed shortly, to refer to ECJ jurisprudence in cases in which EU law is not directly relevant.<sup>55</sup>

<sup>46</sup> A S Hartkamp (n 38) 232–3.

<sup>47</sup> E Mak (n 39) 440.

<sup>48</sup> E Mak (n 39) 439.

<sup>49</sup> E Mak (n 39) 445.

<sup>50</sup> Article 46.1 ECHR.

<sup>51</sup> Cf, eg, Supreme Court, 10 November 1989, *NJ* 1990, 628.

<sup>52</sup> See the discussion in <<http://repository.ubn.ru.nl/bitstream/2066/74383/1/74383.pdf>> accessed January 2013, 49–50.

<sup>53</sup> Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato*, ECR [1981] 1191, para 13.

<sup>54</sup> *International Chemical Corporation* (n 53) para 11. Cf for an overview of arguments in support of this position, K Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625, 1642.

<sup>55</sup> See section IV.2.

In respect of jurisprudence coming from other international courts, such as the ICJ, it is less clear how the courts perceive their status. It seems safe to say that the incorporation theory is limited to the ECtHR, which has been given a mandate to interpret one specific treaty. The reference to and reliance on judgments of the ICJ should most probably be explained by the persuasive authority of these judgments and their role as 'subsidiary means for the determination of rules of law'.<sup>56</sup>

### III. Principal tenets of Dutch case-law on immunities of international organizations

#### 1. Sources of international organizations' immunity

The immunity of international organizations may derive from different sources of international law. Immunity provisions are found in the constituent instruments of international organizations,<sup>57</sup> in multilateral treaties concluded separately from the constituent treaty,<sup>58</sup> and in bilateral headquarters agreements (or other bilateral treaties<sup>59</sup>) between the organization and the host state. Whether, in the absence of a treaty, customary international law requires states to grant immunity to international organizations has been subject to some controversy. Some commentators write that '[i]t is difficult to argue that all international organizations are to enjoy privileges and immunities by virtue of a rule of customary international law',<sup>60</sup> while others observe that '[a]ccording to . . . the majority view, international organizations enjoy absolute immunity from legal proceedings even if no express treaty provision is applicable'.<sup>61</sup>

The Dutch Supreme Court has firmly positioned itself in the latter camp. In 1985, it considered the immunity of the Iran-US Claims Tribunal, with which the Netherlands had not yet concluded a headquarters agreement at the time. The Supreme Court held in *Spaans v Iran-US Claims Tribunal* that

[i]t must be assumed that even in cases where there is no treaty [in which privileges and immunities are conferred upon international organizations] it follows from unwritten international law that an international organization is entitled to the privilege of immunity from

<sup>56</sup> Article 38(1)(d) ICJ Statute.

<sup>57</sup> Cf article 105 Charter of the United Nations (1945) 1 UNTS XVI; article 48 Rome Statute of the International Criminal Court (1998) 2187 UNTS 90.

<sup>58</sup> Cf UN Privileges and Immunities Convention (n 6), UN Convention Specialized Agencies (n 6), EPO Privileges and Immunities Protocol (n 4), Agreement on the Privileges and Immunities of the International Criminal Court (2002) 2271 UNTS 3.

<sup>59</sup> In addition to the Headquarters Agreements, immunity may be agreed in an exchange of letters constituting a treaty, cf (n 5).

<sup>60</sup> P Sands and P Klein, *Bowett's Law of International Institutions* (5th edn, Sweet & Maxwell 2009) 15–39. Cf also I F Dekker and C Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals', in *Making Choices in Public and Private International Immunity Law, Preadviezen, Mededelingen van de Nederlandse Vereniging voor International Recht—no 138* (TMC Asser Press 2011) 83, 90: 'domestic courts generally do not recognize the immunities of international organisations in the absence of an applicable treaty' (emphasis in original).

<sup>61</sup> A Reinisch, *International Organizations before National Courts* (CUP 2000) 146. Cf, in support of the customary nature of the rule, also A Reinisch (n 41) 297; D Akande, 'International Organizations', in M D Evans (ed), *International Law* (3rd edn, OUP 2010) 272; C F Amerasinghe, *Principles of the Institutional Law of International Organisations* (CUP 2005) 346; I Scobbie, 'International Organizations and International Relations', in R J Dupuy, *Manuel sur les Organisations Internationales/A Handbook on International Organizations* (2nd edn, Martinus Nijhoff 1998) 839.

jurisdiction on the same footing as generally provided for in the treaties referred to above, in any event in the State in whose territory the organization 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 performance of the tasks entrusted to the organization in question.<sup>62</sup>

It thus held that the Tribunal enjoyed immunity even though a treaty provision to that effect was lacking at the time. This position has been confirmed in Dutch case-law ever since.<sup>63</sup> As we will discuss later, the Supreme Court's holding on the scope of the international organizations immunity rule under customary international law has also influenced the jurisprudence in cases where a treaty was applicable.

A consequence of the multiplicity of sources is that in any particular case, rules stemming from multiple sources may be applicable.<sup>64</sup> As to the relation between those sources, three situations can be distinguished. The first is the relationship between a headquarters agreement and the multilateral treaty governing the organization. Only exceptionally does a headquarters agreement specify that it prevails in case of conflict with a multilateral treaty.<sup>65</sup> According to the Office of Legal Affairs of the UN Secretariat, this would conform to a general principle: a headquarters agreement prevails since it is '*lex specialis*' and 'negotiated later'.<sup>66</sup> Exceptionally, one headquarters agreement provides otherwise: the Headquarters Agreement between the Netherlands and Europol states that

[i]n case of conflict between this Agreement and the [Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol] setting out the rules to be applied in all Member States, on privileges and immunities necessary for the performance of their tasks, of Europol, the members of its Organs and the Deputy Directors and the employees of Europol, the Protocol shall prevail.<sup>67</sup>

The second situation is the relation between the constituent treaty and the multilateral immunity treaty, such as that between the UN Charter and the 1946 General Convention. In the case of *Mothers of Srebrenica et al v The State of the Netherlands and the United Nations*,<sup>68</sup> the plaintiffs had argued that the immunity of the UN should be assessed on the basis of article 105 of the UN Charter,<sup>69</sup> rather than of article II § 2 of the 1946 General Convention.<sup>70</sup> While in doctrine the argument has indeed been

<sup>62</sup> *Spaans v Iran-US Claims Tribunal* (n 1). At the time of the proceedings the Headquarters Agreement had yet to be concluded between the Netherlands and the Iran-US Claims Tribunal.

<sup>63</sup> Cf, eg, *Greenpeace Nederland v Euratom*, Judgment on Appeal in Cassation, 13 November 2007, LJN: BA9173; ILDC 838 (NL 2007). Cf, for an earlier decision, *Eckhardt v European Organization for the Safety of Air Navigation*, District Court of Maastricht, 12 January 1984, 94 ILR 331, 337–8.

<sup>64</sup> Cf, eg, A S Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (1st edn, Springer 1995) 35–66; T Henquet (n 3) 273–4.

<sup>65</sup> H G Schermers and N M Blokker, *International Institutional Law* (5th edn, Martinus Nijhoff 2011) 260.

<sup>66</sup> *United Nations Juridical Yearbook* 1987, 212.

<sup>67</sup> Article II Europol Headquarters Agreement (n 4).

<sup>68</sup> *Stichting Mothers of Srebrenica* (n 31).

<sup>69</sup> Article 105(1) UN Charter provides: '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.'

<sup>70</sup> Article II § 2 General Convention provides (n 6): '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. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

advanced that the 1946 General Convention provides more far-reaching immunity than article 105 of the UN Charter,<sup>71</sup> the Court of Appeal dismissed the argument, stating that

it is evident . . . that the Convention and therefore also article II § 2 of the Convention implement . . . article 105, subsection 3 of the Charter, in the sense that article II § 2 of the Convention further substantiates which immunities are necessary for obtaining the objectives of the UN. There is no indication that article II § 2 of the Convention goes beyond the scope allowed by article 105 of the Charter in this respect.<sup>72</sup>

The Supreme Court implicitly confirmed this, by stating that article II § 2 of the Convention details article 105 of the Charter.<sup>73</sup> It will be argued in section III.2.a that this interpretation is correct. Since a harmonious interpretation of the two provisions was possible, the decision does not, however, reveal how Dutch courts would deal with conflicting provisions.

The third situation concerns the relationship between customary law and treaty provisions. Interestingly, Dutch courts do not always have regard to the exact definition of the scope of the immunity in the applicable treaty; instead, they focus on the customary functional immunity norm formulated by the Supreme Court (discussed in section II.2.a). In an employment-related case against the European Patent Organisation (EPO), the Court of Appeal did specify the content of the applicable immunity provisions in the European Patent Convention and the Protocol on Privileges and Immunities of the European Patent Organisation. Article 3.1 of the Protocol provides as follows: 'Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution',<sup>74</sup> and article 3.4 specifies that '[t]he 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'.<sup>75</sup> Without further explanation, however, the Court of Appeal moved to assess the immunity of the EPO against the customary law standard formulated by the Supreme Court in the *Spaans* and *Euratom* cases. The Court inquired whether the dispute was 'immediately connected to tasks entrusted to the organisation', instead of asking whether the employment relation at issue was 'strictly necessary for its administrative and technical operations', as would be expected on the basis of the applicable treaty law.<sup>76</sup> The Supreme Court,

<sup>71</sup> Cf, eg, T Henquet (n 3) 278; I F Dekker and C Rynjaert (n 60) 97.

<sup>72</sup> *Stichting Mothers of Srebrenica*, Appeal Court of The Hague, 30 March 2010, LJN: BL8979, para 4.4 (in Dutch); English version available at TMC Asser Institute: Centre for International and European Law, 'Mothers of Srebrenica v. The Netherlands & the UN': <[http://www.asser.nl/default.aspx?site\\_id=36&level1=15248&level2=&level3=&textid=39956](http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956)> accessed 24 May 2012.

<sup>73</sup> *Stichting Mothers of Srebrenica* (n 28).

<sup>74</sup> Except

- (a) to the extent that the Organisation 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 Organisation, or in respect of a motor traffic offence involving such a vehicle;
- (c) in respect of the enforcement of an arbitration award made under article 23.

<sup>75</sup> EPO Protocol on Privileges and Immunities (n 4).

<sup>76</sup> In a more recent case against the EPO, the Court of Appeal of The Hague explicitly relied on the restrictive definition of the scope of immunity in the Protocol: *European Patent Office v Stichting Restaurant De La Tour*, Court of Appeal of The Hague, 21 June 2011, LJN: BR0188. Cf section III.2.a.

in that same case, did not even discuss the content of the applicable treaty provisions, simply applying its own functional immunity standard instead.<sup>77</sup>

Similarly, in an employment dispute between the Iran-US Claims Tribunal and a former employee, the Sub-District Court of The Hague<sup>78</sup> recognized that the immunity claim was controlled by the Exchange of Letters between the Government of the Netherlands and the Tribunal, which provides that the latter enjoys immunity 'within the scope of the performance of its tasks.'<sup>79</sup> When assessing whether the employment dispute was covered by the Tribunal's immunity, the Court however considered that the tasks performed by the former employee were necessary for the fulfilment of the tasks of the Tribunal, and that the question of compensation for her dismissal was 'immediately connected' to these tasks.<sup>80</sup> It will be explained in section III.2.a that the difference in formulation of the two standards is arguably not negligible.

The decision of the Sub-District Court of The Hague in *Pichon-Duverger v PCA* illustrates that the application of custom over treaty law may in fact lead to a different outcome.<sup>81</sup> A former employee of the Permanent Court of Arbitration (PCA) had been dismissed and challenged this decision. The PCA invoked its immunity under article 3 of the PCA Headquarters Agreement, which provided for absolute immunity.<sup>82</sup> The District Court rejected the PCA's immunity defence. The principal ground for the rejection concerned the right of access to court, discussed further in section III.3; however, the Court further supported its decision by arguing that a labour dispute, being a purely private law matter, did not affect the functioning of the organization in any way. The Court thus engaged in an independent—and not very convincing<sup>83</sup>—assessment of the customary functionality test, even though the wording of the Headquarters Agreement leaves no doubt as to the absolute scope of the PCA's immunity from Dutch jurisdiction.

## 2. Scope of international organization immunity

### a) *The jurisdictional immunity of international organizations*

When formulated in terms of a rule of customary international law, it is generally agreed that international organizations 'enjoy such immunities as are necessary for their effective functioning',<sup>84</sup> and this is also the formulation found in treaty provisions regulating the immunity of international organizations. In view of the vast differences between international organizations and between the countries in which they operate, what is 'necessary' may differ between international organizations, as is evidenced by

<sup>77</sup> *X v European Patent Organisation*, Supreme Court, 23 October 2009, LJN: BI9632; ILDC 1464 (NL 2009).

<sup>78</sup> District Court of The Hague, 24 August 2011, LJN: BT2066 (in Dutch only).

<sup>79</sup> Article 3, The Netherlands Iran-US Claims Tribunal Exchange Letters (n 5).

<sup>80</sup> District Court of The Hague (n 78), para 4.2.

<sup>81</sup> *Pichon-Duverger v PCA*, District Court of The Hague (sub-district section), judgment in the incidental proceedings, 27 June 2002, cause list no 262987/02-3417 (not published, on file with the authors).

<sup>82</sup> Agreement concerning the Headquarters of the Permanent Court of Arbitration (1999) 2304 UNTS 41068 (PCA Headquarters Agreement).

<sup>83</sup> It is generally agreed, also by the Dutch Supreme Court, that labour disputes are typically covered by international organizations immunity: cf section III.2.a.

<sup>84</sup> J Klabbers, *An Introduction to International Institutional Law* (2nd rev edn, CUP 2009) 132; R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 91.

treaty practice in which this formulation is sometimes followed by an immunity rule with an absolute scope, and sometimes by a rule with a more limited scope. Nevertheless, this 'functional necessity' rationale is often translated into a statement as to the uniform substantive scope of the rule. Akande, for example, writes that the principle of 'functional necessity' means that international organizations must be granted immunity 'in respect of acts done in the exercise of their functions'.<sup>85</sup> Since traditionally international organizations are considered never to act outside the scope of their functions, functional immunity in this sense may still be said to be (almost) absolute.<sup>86</sup>

A more restrictive approach features in the Dutch jurisprudence. The Dutch Supreme Court ruled in the *Spaans* case that international organizations enjoy immunity

in respect of all *disputes which are immediately connected with the performance of the tasks entrusted to the organization* in question. . . . Employment disputes which may arise 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.<sup>87</sup>

In the *Euratom* case, the Supreme Court again stressed that the functional immunity test requires it to assess 'whether or not the acts in question are immediately connected to the tasks entrusted to the organisation'.<sup>88</sup> The storage of nuclear waste on the premises of EURATOM in violation of Dutch criminal law was held to qualify squarely under this standard. While the limits of the 'immediately connected' standard have yet to be developed in case-law, it seems clear that not *all* acts performed by international organizations would qualify, and that the standard is therefore more restrictive than that granting immunity in respect of 'acts done in the exercise of their functions'.

A couple of lower court decisions indicate that these courts tend to interpret the standard restrictively. In *Pichon-Duverger v PCA*, the Court held in general terms that court procedures concerning labour disputes do not affect the functioning of international organizations, since they concern 'a purely private law matter'.<sup>89</sup> Also, in a labour dispute between the OPCW and a former security guard, the same Sub-District Court of The Hague was not convinced as to why the organization would be entitled to immunity in a case in which 'diplomatic . . . interests did not play a role'.<sup>90</sup> The

<sup>85</sup> Akande (n 61) 274; Bekker (n 23) 165.

<sup>86</sup> Akande (n 61); E Gaillard and I Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass' (2002) 51 *ICLQ* 1, 10: 'it might result in immunity being granted to international organisations in all circumstances, given that international organisations will always be deemed to act within the scope of their duties'. A Reinisch and U A Weber, 'In the Shadow of Waite and Kennedy—the Jurisdictional Immunity of International Organisations, 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, 63: 'Since international organisations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied. . . . The traditional view seems to be that functional immunity necessarily leads to absolute immunity.'

<sup>87</sup> *Spaans v Iran-US Claims Tribunal* (n 1) paras 3.3.4–3.3.5 (emphasis added). The Supreme Court did not repeat the reasoning of the local court and the district court of The Hague in this case, which had both relied on the distinction between *acta iure imperii* and *acta iure gestionis* as operative in the law of state immunity. Cf Local Court of The Hague, 8 June 1983 and District Court of The Hague, 9 July 1984, 94 *ILR* 321, 323–6.

<sup>88</sup> *Greenpeace Nederland v Euratom* (n 63).

<sup>89</sup> *Pichon-Duverger v PCA* (n 81).

<sup>90</sup> *Hendrik Resodikromo v OPCW*, District Court of The Hague (sub-district section), 7 November 2005, case list no 530605/05-21363 not published, on file with the authors. Execution of the judgment was however prevented; cf Court of Appeal of The Hague, 15 March 2007, LJN: BA2778, 06/1249 KG.

standard developed by the Supreme Court is not uncontroversial. As stated previously, the functional necessity rationale does not as such shed much light on the scope of the immunity of international organizations. In fact, the Netherlands is a party to the 1946 General Convention,<sup>91</sup> as well as to various headquarters agreements<sup>92</sup> in which the immunity necessary for effective functioning is formulated as an absolute immunity rule.

The *Srebrenica* case elucidates this point.<sup>93</sup> The case concerned a claim of surviving relatives of men and boys who were victims of the massacre that took place in Srebrenica in 1995. The enclave was under the protection of Dutch UN peacekeepers, but they could not prevent the massacre of approximately 7,000 Bosniaks. A claim was instituted against the United Nations and the Netherlands for failure to prevent genocide. The UN invoked its immunity under article II § 2 of the 1946 General Convention, which provided that '[t]he 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'.<sup>94</sup> The plaintiffs argued that the immunity of the UN had to be assessed on the basis of article 105(1) of the UN Charter—which provided that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'—rather than on the basis of the 1946 General Convention. The Court of Appeal responded by denying that there is a difference between the standards in the two provisions:

It would be of no avail . . . anyway if the invocation of the UN's immunity was tested strictly on the basis of article 105 of the Charter, for the question that needs to be addressed is not whether the invocation of immunity in the particular case at hand is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution in general. The Court of Appeal answers the latter question without doubt affirmatively.<sup>95</sup>

The Supreme Court confirmed that the UN indeed enjoyed the most extensive immunity and could not be sued in the courts of any of its member states.<sup>96</sup> In other words, some international organizations, just like diplomats,<sup>97</sup> may require an almost absolute immunity from the jurisdiction of the host state in order to guarantee their independent functioning within the borders of a territorial state, and the functional necessity rationale can therefore not be juxtaposed with an absolute approach to international organizations' immunity.<sup>98</sup>

Apart from being under-inclusive in regard to some organizations, the standard may also be over-inclusive in regard to others, as illustrated by the 2011 *European Patent*

<sup>91</sup> General Convention (n 6).

<sup>92</sup> Cf, eg, ICC Headquarters Agreement (n 6), articles 5 and 11.

<sup>93</sup> *Stichting Mothers of Srebrenica* (nn 28, 31, and 72).

<sup>94</sup> General Convention (n 6), article II § 2.

<sup>95</sup> *Stichting Mothers of Srebrenica v Netherlands* (n 72), para 4.5.

<sup>96</sup> *Stichting Mothers of Srebrenica* (n 28).

<sup>97</sup> Cf article 31 Vienna Convention on Diplomatic Relations, adopted 18 April 1961, entered into force 24 April 1964, 500 UNTS 95; but also the absolute immunity of heads of state and government and ministers of foreign affairs, which the ICJ squarely based on a functional necessity rationale: cf *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 14 February 2002, ICJ Rep 2002, 3, para 53.

<sup>98</sup> Cf for such juxtaposing Henquet (n 3) 277–8: 'not all international organisations enjoy functional immunity; some are accorded absolute immunity'.

*Office v Stichting Restaurant De La Tour* case.<sup>99</sup> As we saw earlier, the Protocol on Privileges and Immunities of the European Patent Organisation provides that the EPO enjoys immunity within the scope of activities that 'are strictly necessary for its administrative and technical operation'.<sup>100</sup> The dispute concerned the EPO's rejection of the bid of Stichting Restaurant de la Tour to tender for catering services. The Court pointed out that the EPO's task is limited to 'the grant of European patents', and that catering services are not 'strictly necessary' for the fulfilment of the EPO's task.<sup>101</sup> A commentator on the case noted that the denial of immunity 'is correct since the functional needs of the organisation are plainly not at issue, that is, the EPO decision-making process in respect of European patents is unaffected'.<sup>102</sup> A more nuanced view would be that the decision can be explained by the restrictive immunity provision in the Protocol. It is unclear whether the disputed acts would equally not qualify under the arguably broader category of acts 'immediately connected to the performance of the tasks of an organization'.<sup>103</sup>

Apparently, states agreed that the immunity necessary to protect the effective functioning of the UN was absolute, and that the immunity necessary to protect the effective functioning of the EPO was quite limited in scope. It is argued here that the substantively uniform functional immunity standard formulated by the Dutch Supreme Court deserves to be reconsidered as evidently one and the same functional necessity rationale that has led to substantially different immunity rules in various treaties.

*b) The jurisdictional immunity of international organizations' officials (and experts and witnesses)*

As already explained, the Netherlands grants high-level officials of the organizations on its territory extensive immunity, analogous to the immunity of diplomatic agents.<sup>104</sup> In addition, lower-ranking officials usually enjoy immunity for their official acts, and in the headquarters agreements with the ICTY,<sup>105</sup> the International Criminal Tribunal for Rwanda,<sup>106</sup> the Iran-US Claims Tribunal,<sup>107</sup> and the ICC,<sup>108</sup> immunity provisions have been included to secure the independent exercise of the functions of experts and witnesses.

<sup>99</sup> *European Patent Office v Stichting Restaurant De La Tour* (n 76).

<sup>100</sup> Cf text at (n 75).

<sup>101</sup> Cf, for the reliance on article 6 ECHR in this case, text at (n 127).

<sup>102</sup> Henquet (n 3) 294 (comment on district court judgment in this case).

<sup>103</sup> It was explained earlier that in an employment dispute case between the EPO and a former employee, the Court of Appeal and the Supreme Court applied this standard, notwithstanding the more restrictive language of the EPO Protocol. Since employment disputes no doubt qualify under the immunity provision of the Protocol as well, the organization was not granted more immunity than it enjoyed under the directly applicable legal regime.

<sup>104</sup> See section II.1.

<sup>105</sup> Cf ICTY Headquarters Agreement (n 6) article 28.3: 'Witnesses and experts referred to in paragraph 1 above shall not be subjected by the host country to any measure which may affect the free and independent exercise of their functions for the Tribunal.'

<sup>106</sup> Notawisseling houdende een verdrag tussen het Koninkrijk der Nederlanden en het International Tribunaal voor Rwanda betreffende privileges en immuniteiten van het personeel van het International Criminal Tribunal for Rwanda en hun gezinsleden, 1 January 2006.

<sup>107</sup> Headquarters Agreement between the Kingdom of the Netherlands and the Iran-US Claims Tribunal (1988) Treaty Series 1988-25; The Netherlands Iran-US Claims Tribunal Exchange Letters (n 5).

<sup>108</sup> ICC Headquarters Agreement (n 6).



The immunity of international organizations officials has generated only a handful of court cases in which the immunity provisions in the headquarters agreement are duly applied by the courts.<sup>109</sup> Most cases relating to international organizations officials are tax cases, since the rather generally formulated rules in treaties and headquarters agreements do not always provide clear-cut answers to disputes arising within the complex reality of taxation law. We will not enter the equally complex considerations of the Dutch courts in the many relevant cases in this field. While initially the Supreme Court adopted a rather absolute approach, the general trend in recent cases is the restrictive interpretation of treaty provisions providing for exemption of taxation law with, as a guiding principle, the rationale of taxation exemptions: namely, the effective and independent functioning of the organization.<sup>110</sup> In section IV.2, some of these cases will be discussed in more detail, as examples of judicial dialogue.

### 3. The right of access to court and international organization immunity

The *Waite and Kennedy* doctrine has been received cautiously by the Dutch courts.<sup>111</sup> Without too much ado, it was concluded in one case that the Administrative Tribunal

<sup>109</sup> *X v Y*, Hague Court of Appeal, 20 November 1969 (1970) *NYIL*, 210; diplomatic immunity of employee of International Patents Institute stands in the way of a maintenance-order; *A v B*, District Court of The Hague, 23 June 2010, LJN: BN0537; immunity of witnesses at Iran-US Claims Tribunal in respect of statements made in tribunal; *AAPAP v E L van S*, District Court of The Hague, 16 April 1980 (1989) *20 NYIL*, 301–5, para 8: ‘eviction order qualified under article 31(1)(a) of the VCDR and immunity defence was hence rejected’.

<sup>110</sup> Process in footnotes: *Van V v Commissioner of Internal Revenue*, The Hague Court of Appeal (tax section), 9 December 1969 (1971) *NYIL*, 226–31; *JGK v Commissioner of Internal Revenue*, Supreme Court, 7 January 1970 (1971) *NYIL*, 231–2; *X v Commissioner of Internal Revenue*, The Hague Court of Appeal, 30 December 1971 (1974) *NYIL*, 297–9; *State Secretary of Finance v Van V*, Supreme Court, 7 June 1972 (1973) *NYIL*, 397f; *X v Commissioner of Internal Revenue*, The Hague Court of Appeal, 11 September 1972, BNB 1973/128 (1974) *NYIL*, 299–300; *X v Commissioner of International Revenue*, The Hague Court of Appeal, 11 September 1972, BNB 1973/206 (1974) *NYIL*, 300–1; *X v Commissioner of Internal Revenue*, Court of Appeal of Leeuwarden, 11 December 1972 (1974) *NYIL*, 301–3; *X v Commissioner of Internal Revenue*, Supreme Court, 20 April 1977 (1977) *NYIL*, 275; *X v Commissioner of Internal Revenue*, Supreme Court, 4 June 1980 (1981) *NYIL*, 307–9; Supreme Court, 27 April 1988, BNB 1988/182, no 24 806; Supreme Court, 21 December 1994, BNB 1995/145, no 29 814; Supreme Court, 15 December 1999, BNB 2000/58, no 35 038; Supreme Court, 29 September 2002, LJN AE0466; Court of Appeal, 28 August 2004, LJN BH5891; Court of Appeal, 15 September 2004, LJN AR 2996; District Court of Leeuwarden, 29 April 2005, V-N 2005/37.3, no 03/0601; Supreme Court, 16 January 2009, LJN BF7264; The Hague Court of Appeal, 2 March 2010, LJN BM 1096; The Hague Court of Appeal, 21 July 2010, LJN BN5781; Supreme Court, 4 February 2011, LJN BP2997; Supreme Court, 4 February 2011, LJN BN3539; District Court of The Hague, 18 January 2012, AWB 11/3126, LJN: BV1667.

<sup>111</sup> When the Supreme Court ruled in the *Spaans* case that employment disputes are covered by international organizations’ immunity, it added to that conclusion that generally international organizations provide for a special procedure for the resolution of disputes relating to employment relations, and it pointed out also that the Tribunal provided for such a procedure. It is unclear from the judgment what the relevance of this observation was, but it could be argued that it at least implicitly addressed the tension between immunity rules and access to court rights, as was of course squarely addressed fourteen years later by the ECtHR in *Waite and Kennedy*. Cf the ILDC commentator to the case, C Brölmann (n 1) A4. Cf also *Eckhardt v European Organization for the Safety of Air Navigation*, District Court of Maastricht, 12 January 1984, 94 ILR 331, 338. The Court (in passing) considered the Administrative Tribunal of the ILO to be sufficiently accessible, thereby implicitly recognizing the relevance of this fact. Interestingly, Mr Spaans in fact brought his case to Strasbourg, arguing that the grant of immunity to the Tribunal violated his right of access to court under article 6 ECHR. The European Commission of Human Rights declared the application inadmissible, arguing that ‘[b]ecause of the immunity enjoyed by the Tribunal, the administrative decisions of the Tribunal are not acts which occur within the jurisdiction of the Netherlands within the meaning of article 1... of the Convention and thus do

of the International Labour Organization (ILO) provided ‘an effective legal process’<sup>112</sup>—without mentioning the origin of this requirement in the jurisprudence of the ECtHR. In a case against the EPO, the Supreme Court confirmed the position of the Court of Appeal in this case, according to which the fact that in practice the Tribunal does not allow for oral hearings does not mean that the Tribunal ‘does not offer protection equivalent to article 6’, in the absence of proof that the Tribunal rejects motivated requests in cases where an oral hearing is called for.<sup>113</sup> Neither the Court of Appeal nor the Supreme Court referred to the ECtHR jurisprudence when discussing the ‘reasonable alternative means’ requirement central to this part of the judgment. However, the opinion of the Advocate-General acknowledges the origin of the doctrine in an extensive discussion of the *Waite and Kennedy* judgment.<sup>114</sup>

In the *Srebrenica* case, the Court of Appeal applied the *Waite and Kennedy* doctrine explicitly, but with a disconcerting twist.<sup>115</sup> The Court rejected the argument that the doctrine did not apply to the United Nations because this organization was established before the entering into force of the ECHR,<sup>116</sup> or because article 103 of the UN Charter prevails over obligations under the ECHR,<sup>117</sup> but dismissed the reliance on article 6 of the ECHR since it was not established that the claimants did not ‘have access whatsoever to a court of law with regard to what happened in Srebrenica’.<sup>118</sup> First, the Court said, they could have sued the individual perpetrators of the genocide, and second, they could sue the Dutch state.<sup>119</sup>

Arguably, the *Waite and Kennedy* case leaves some room for reference to remedies available against persons or entities other than the organization itself. After the conclusion that the European Space Agency Appeals Board qualified as a reasonable

not engage the responsibility of the Netherlands under the Convention’. *Spaans v the Netherlands*, App No 12516/86 (European Commission of Human Rights, 12 December 1988).

<sup>112</sup> *HB, EP and KS v International Service for National Agricultural Research (ISNAR)*, District Court of The Hague, 13 February 2002 (2004) 35 *NYIL* 453, 457.

<sup>113</sup> *X v European Patent Organisation*, Supreme Court, 23 October 2009, LJN: B19632; ILDC 1464 (NL 2009), para 3.5 (no translation yet available); cf also District Court of The Hague (sub-district section), 24 August 2011, LJN: BT2066, where the Court considered that it had been stated insufficiently to decide whether the procedure provided by the Iran-US Claims Tribunal meets the requirement of article 6. In another case, the Court did not mention the *Waite and Kennedy* doctrine as such, nor the reasonable alternative means test, but did refer, in an *obiter dictum*, to the remedy open to the complainant in the ICTY: *Slobodan Milošević v International Criminal Tribunal for the former Yugoslavia*, District Court of The Hague, judgment in interim injunction proceedings, 26 February 2002, KG 02/105, LJN AD9602, para 5.2.

<sup>114</sup> Opinion of the Advocate-General in *X v European Patent Organisation* (n 113) para 12–14.

<sup>115</sup> *Stichting Mothers of Srebrenica* (n 72).

<sup>116</sup> *Stichting Mothers of Srebrenica* (n 72) para 5.4. This had been the decisive argument of the Court of First Instance, dismissing the reliance on the *Waite and Kennedy* doctrine: *Stichting Mothers of Srebrenica* (n 32) para 5.24. While the Court of First Instance did not in any way refer to the decision of the UK High Court of Justice that was issued four months earlier, in which the same reasoning was applied in regards to UNESCO, this may be an example of silent judicial dialogue. Cf *Entico v UNESCO* [2008] EWHC 531 (Comm) High Court of Justice, 18 March 2008, para 27.

<sup>117</sup> *Stichting Mothers of Srebrenica* (n 72) para 5.5.

<sup>118</sup> *Stichting Mothers of Srebrenica* (n 72) para 5.13.

<sup>119</sup> The reference to the possibility to sue the Netherlands is interesting. Did the Court mean to lift a corner of the veil as to its position on the attribution of the acts of Dutchbat to the state? This question has not yet been answered by the Dutch courts. While in distinct proceedings concerning the responsibility of the Netherlands for the death of a couple of local employees of the Dutchbat base camp who fell victim to the genocide after having been forced to leave the camp, where the Court of Appeal has recently found in favour of the victims, it is far from certain whether the legal reasoning on attribution applies *mutatis mutandis* in the case of the Mothers. *Nuhanović v Netherlands*, Court of Appeal, 5 July 2011, LJN:BR5388; ILDC 1742 (NL 2011) (overturning the Netherlands, District Court of The Hague, 10 September 2008, LJN: BF0182 and LJN BF0181).

alternative means, the ECtHR took care to add that temporary workers such as Mr Waite and Mr Kennedy could seek redress from the firms that employed them and hired them out to the international organizations with ‘reasonable prospects of success’.<sup>120</sup> It does not seem, however, that this *quasi obiter* statement could bear the weight of the judgment in itself, and the decisive reliance of the Court of Appeal in the *Srebrenica* case on the remedies against others than the organization cannot but astonish. In its 2012 judgment in the case, the Supreme Court did not follow the reasoning of the Court of Appeal on this point, but dismissed the access to court argument in an equally disconcerting vein.<sup>121</sup> The Court started by saying that there was no reason to assume that the ECtHR meant to include the UN when it referred to ‘international organisations’ in the *Waite and Kennedy* and *Beer and Regan* judgments: in any case, the Court reasoned, not as far as it concerned acts of this organization in the context of Chapter VII of the UN Charter.<sup>122</sup> The Court then underlined the special position of the UN, referring to the *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* cases of the ECtHR.<sup>123</sup> It quoted extensively from the case, and referred among others to paragraph 27 of the decision, in which the ECtHR observed that ‘[t]he ICJ considers article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement’; and paragraph 149, in which the ECtHR considered that

[s]ince operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.

On the basis of these considerations the Supreme Court concluded that the Court of Appeal had erred in applying the *Waite and Kennedy* doctrine to the UN, since the immunity of the UN prevailed over conflicting ECHR rules on the basis of article 103 of the UN Charter.<sup>124</sup> Interestingly, the Supreme Court concluded by paraphrasing paragraph 101 of the *Jurisdictional Immunities of the State* case,<sup>125</sup> in which the ICJ had held that it could not ‘find [a] 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’. While the Court acknowledged that the judgment concerned state immunity, and not the immunity of the UN, it held that this difference did not justify a different assessment of the relation between the immunity of the UN and the right of access to court than the ICJ decided in regard to the immunity of states.<sup>126</sup>

In two cases, ‘access to court considerations’ did play a role in the rejection of the immunity defence, although they cannot be cited as straightforward applications of

<sup>120</sup> *Waite and Kennedy v Germany*, App No 26083/94 (ECtHR, 18 February 1999), para 70.

<sup>121</sup> *Stichting Mothers of Srebrenica* (n 28).

<sup>122</sup> *Stichting Mothers of Srebrenica* (n 28) para 4.3.3.

<sup>123</sup> *Stichting Mothers of Srebrenica* (n 28) para 4.3.3.

<sup>124</sup> *Stichting Mothers of Srebrenica* (n 28) paras 4.3.5 and 4.3.6.

<sup>125</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Judgment, 3 February 2012.

<sup>126</sup> *Stichting Mothers of Srebrenica* (n 28) para 4.3.14.

the *Waite and Kennedy* doctrine, and the relevant ECtHR jurisprudence was not explicitly acknowledged. In the abovementioned case of *Pichon-Duverger v PCA*, where a dispute over a dismissal between the PCA and a (former) employee was brought before the Dutch courts, the Court noted that the Headquarters Agreement provided for absolute immunity but at the same time imposed an obligation on the PCA to 'make provisions for appropriate methods of settlement of . . . disputes arising out of contracts'.<sup>127</sup> Now, as the PCA had not foreseen such a procedure, the Court found that the grant of immunity to the PCA would mean that the applicant had no remedy, which would not be in accordance with the purpose of the parties to the Agreement. The Court concluded that the grant of immunity would be a violation of article 6 of the ECHR.

The role of article 6 in a dispute between the EPO and a company whose bid to tender for catering services was rejected by the organization is ambiguous.<sup>128</sup> While the article 6 argument only comes into play when a court establishes the *prima facie* applicability of the immunity rule, the Court of Appeal argued that since the disputed acts did not qualify under the applicable immunity provision, a denial of access to court would not be proportionate and would violate article 6. While the ECtHR did indeed consider the grant of immunity (to states) beyond the requirements of international law to violate the right of access to court,<sup>129</sup> this line of reasoning arguably serves no purpose in a procedure before a domestic court. By engaging the argument the Court of Appeal intimated, most likely inadvertently, that granting immunity beyond the requirements of international law would be possible if it were not for the obligations under article 6 of the ECHR.

In conclusion, two observations are warranted. First, the fact that Dutch courts have referred to the requirements of article 6 ECHR in the assessment of the adequacy of the alternative remedy is interesting in view of the controversy as to the meaning of the 'reasonable alternative means' test. The Dutch courts seem to be of the opinion that the ECtHR meant to impose an obligation to provide an alternative remedy equivalent to article 6 standards.<sup>130</sup> Second, Dutch courts proceed from the assumption that international organizations' immunity will *not be applied* when no alternative remedy is available.<sup>131</sup> The Court of Appeal in the *Srebrenica* case even observed that '[t]he European Court of Human Rights . . . has ruled in a number of judgments . . . that the immunity from prosecution under international law must be set aside under certain circumstances for the right of access to a court of law guaranteed by article 6 ECHR'.<sup>132</sup> This is notable, since on its face, the *Waite and Kennedy* doctrine is limited to the finding that the grant of immunity in the absence of reasonable alternative means

<sup>127</sup> *Pichon-Duverger v PCA* (n 81); article 16.1(a) PCA Headquarters Agreement (n 82).

<sup>128</sup> *European Patent Office v Stichting Restaurant De La Tour* (n 76) para 14.

<sup>129</sup> Cf, eg, *Cudak v Lithuania*, App No 15869/02 (ECtHR, 23 March 2010); *Guadagnino v Italy and France*, App No 2555/03 (ECtHR, 18 January 2011); *Sabeh El Leil v France*, App No 34869/05 (ECtHR, 29 June 2011).

<sup>130</sup> The decision *AL v Italy*, App No 41387/98 (ECtHR, 11 May 2000) seems to support this position ('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'). Cf, for a different opinion, N Angelet and A Weerts, 'Challenges to Immunities on the Basis of the Right to a Fair Trial', in K Papanikolaou and M Hiskaki (eds), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008) 33–49.

<sup>131</sup> Cf also the Opinion of the Advocate-General in the *Srebrenica* case (n 28) 2.17: 'In general the presence of reasonable alternative means is a condition for the application of immunity from jurisdiction.'

<sup>132</sup> *Stichting Mothers of Srebrenica* (n 72) para 5.2.

violates Article 6 of the ECHR. The doctrine leaves the state with two clashing obligations under international law.<sup>133</sup>

## IV. Conspicuous absence of judicial dialogue

### 1. Reference to foreign case-law

We have found only two cases in which a Dutch court expressly referred to another national court when deciding a question related to international organizations' immunity; the proverbial exceptions that prove the rule. The first reference can be found in a 1969 decision of the Court of Appeal of The Hague.<sup>134</sup> The case concerned the question of taxation of the income of a UN official. The Tax Commissioner relied on a judgment issued by a Swiss court in 1958 to support his argument that the so-called progressive taxation reservation is generally recognized. The Court of Appeal noted that the Swiss decision seemed to be based to a great extent on a principle of Swiss national law.<sup>135</sup> The Court of Appeal noted that

[i]t is remarkable that, in making this consideration, the Swiss judge interprets provisions of supra-national law with the help of what he declares to be a general principle of Swiss law

and concluded that

[s]ince the Court is not called upon to judge the correctness of a decision of a Swiss court, it will, therefore, suffice to state that the decision made under Swiss law gives no grounds for reviewing the conclusion at which the Court has already arrived.

The second reference followed forty years later. In 2009, the Supreme Court was called upon to decide the question of whether the pension of a former registrar of the ICJ was free from Dutch taxation, in the sense of article 32.8 of the ICJ Statute.<sup>136</sup> In support of its decision that the normal meaning of the terms 'salaries, allowances, and compensation' of article 32.8 does not cover pensions, the Supreme Court referred to a 1997 judgment of the French Conseil d'Etat dealing with the exact same question.<sup>137</sup>

In addition, in a handful of Opinions of the Advocate-General in Supreme Court cases, we found limited reference to foreign case-law. In *Spaans*, for example, the Advocate-General broadly referred to support in foreign case-law for the immunity of international organizations in employment disputes, referring to secondary literature rather than to specific foreign judgments.<sup>138</sup> The Advocate-General in this case does specifically mention one US case in a different context.<sup>139</sup> When discussing the

<sup>133</sup> Cf also R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', in E de Wet and J Vidmar (eds), *Hierarchy in International Law. The Place of Human Rights* (OUP 2012) 71, 109–10, for the possibility of satisfying the requirements of article 6 through the payment of damages to the individual by the host state.

<sup>134</sup> *Van V v Commissioner of Internal Revenue* (n 110) 226–31.

<sup>135</sup> This Court has the impression that that decision was, to a great extent, supported by the following consideration: 'C'est une principe admis d'une façon générale et constante en Suisse que l'Etat qui n'a le droit d'imposer qu'une partie du revenu ou de la fortune d'un contribuable a néanmoins le pouvoir de fixer le taux de l'impôt en tenant compte des éléments imposable qui échappent à sa souveraineté.'

<sup>136</sup> Supreme Court, 16 January 2009, LJN: BF7264 (n 110).

<sup>137</sup> Supreme Court, 16 January 2009, LJN: BF7264 (n 110) para 3.2.3, referring to Conseil d'Etat, 6 June 1997, no 148683 (1997) Recueil Lebon, 206, Supreme Court of Appeal, *M Aquarone v France*, 6 June 1997, ILDC 1809 (FR 1997).

<sup>138</sup> *Spaans v Iran-US Claims Tribunal* (n 1).

<sup>139</sup> *Broadbent v OAS*, 628 F.2d 27 (DCC 1980) (1984) *AJIL* 223.

occasional alleged lack of objectivity of national courts vis-à-vis international organizations, the Advocate-General referred to the US case in which this rationale was acknowledged, before moving on to dismiss the argument. In the *Euratom* case, the Advocate-General refers to two foreign national court decisions. He recalled that the Dutch Supreme Court considered the immunity of international organizations to be a rule of customary international law and then rather bluntly stated that '[t]he Swiss *Bundesgericht* equally acknowledges the immunity of international organisations.'<sup>140</sup> The word 'equally' here is ambiguous, since the Swiss *Bundesgericht* in the 1992 judgment that the Advocate-General discussed in quite some detail did *not* acknowledge the customary status of international organization immunity.<sup>141</sup> Moreover, the case is an example of absolute international organization immunity.<sup>142</sup> Oddly, the Advocate-General concluded his discussion of the case with the statement that 'international organisations normally enjoy an absolute and complete immunity',<sup>143</sup> but then moved on to state that international organizations have functional immunity for acts performed in the exercise of official functions, without explaining how this conclusion relates to the extensively discussed Swiss example that pointed in the direction of a broader immunity rule.<sup>144</sup> The second reference is hidden in a footnote. The Advocate-General qualified his conclusion that judges predominantly proceed from functional international organizations' immunity with a reference to a case decided by the Belgian Court of Cassation in which the rule is denied the status of customary international law.<sup>145</sup> Finally, in a 2011 taxation case concerning the spouse of a NATO official,<sup>146</sup> the Advocate-General in his conclusion engaged in a detailed analysis of the ECJ jurisprudence on the analogous position of EU officials,<sup>147</sup> as well as of Dutch jurisprudence concerning UN and NATO officials. In the course of the latter analysis, sandwiched between a long list of Dutch cases and without any explanation of the function of the one reference to a foreign case, reference was made to a judgment of the Belgian Court of Cassation.<sup>148</sup> The Advocate-General noted that the Belgian court applied the reasoning of the ECJ (without an explicit mention) to a NATO official.

## 2. Reference to international case-law

The list of cases where Dutch courts have referred to international decisions is slightly longer. These essentially involve (implicit) references to case-law of the ECtHR and the ECJ. An exceptional reference to another international tribunal was found in the 2009 judgment of the Supreme Court concerning the taxation of the pension of a former registrar of the ICJ, discussed earlier.<sup>149</sup> The Court found support for its position that

<sup>140</sup> Opinion of the Advocate-General in the *Euratom* case (n 63) para 26, referring to *Bundesgericht* 21 December 1992, BGE 118 Ib 562, 564f (confirmed by *Bundesgericht* 2 July 2004, BGE 130 I 312, 321–3).

<sup>141</sup> Opinion of the Advocate-General in the *Euratom* case (n 63) para 26.

<sup>142</sup> 'Les organisations internationales bénéficient d'une immunité absolue et complète, ne comportant aucune restriction.' See also T Neumann and A Peters, 'Switzerland', in this volume.

<sup>143</sup> Cf (n 139) and the opinion of the Advocate-General in the *Euratom* case (n 63).

<sup>144</sup> Opinion of the Advocate-General in the *Euratom* case (n 63) para 31.

<sup>145</sup> *League of Arab States v TM*, Appeal judgment, 12 March 2001, App No S.99.0103.F; ILDC 42 (BE 2001).

<sup>146</sup> Supreme Court, 4 February 2011, LJN: BN3539 (n 110).

<sup>147</sup> See section IV.2.

<sup>148</sup> Reference to Appeal judgment, 26 September 2002, App No F.00.0083.F/1, para 5.6, <[http://www.cassonline.be/easycms/rechtspraak\\_juridat](http://www.cassonline.be/easycms/rechtspraak_juridat)>.

<sup>149</sup> Supreme Court, 16 January 2009, LJN: BF7264 (n 110).

the normal meaning of the terms ‘salaries, allowances, and compensation’ of article 32.8 of the ICJ Statute does not cover pensions in a judgment of an arbitration tribunal established to settle a dispute between France and UNESCO in which it was held that the tax exemption for ‘*traitements et émoluments*’ in the Headquarters Agreement between France and UNESCO did not apply to pensions of former employees of the organization.<sup>150</sup> Occasionally, reference to ICJ jurisprudence can be found. The Court of First Instance in the *Srebrenica* case noted that the ICJ, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,<sup>151</sup> discussed the obligations of states under the Genocide Convention,<sup>152</sup> and did not mention any obligation of states to enforce the Convention through civil proceedings.<sup>153</sup> The Court also pointed out that the ICJ held in its Advisory Opinion in *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*<sup>154</sup> that alleged tortious activity of the UN shall not be dealt with by national courts but should be settled in accordance with the appropriate modes of settlement provided for in article VIII, § 29 of the General Convention.<sup>155</sup> In the 2012 judgment of the Supreme Court in the *Srebrenica* case, substantial reference was made to the 2012 ICJ judgment in *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)*.<sup>156</sup> The ICJ judgment could be relied upon to answer the question of whether an exception to international organization immunity exists in the situation of cases concerning particularly grave crimes, or *ius cogens* violations, negatively.<sup>157</sup> Particularly striking is the explicit reiteration of the position of the ICJ that it could not ‘find [a] 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’.<sup>158</sup> In a first critical reaction to the ICJ judgment, Bianchi noted that this paragraph might jeopardize the ‘doctrine of equivalent protection’.<sup>159</sup> While the Supreme Court did not attach decisive importance to the ICJ ruling, it considered paragraph 101 pertinent to the question at issue, and consciously or not, with this explicit reference the Supreme Court could be seen to call into question the *Waite and Kennedy* doctrine. It thus took surprisingly little time for Bianchi’s fear to materialize. The finding that the differences between state immunity and international organization immunity do not warrant a different approach to the access to court argument is not uncontroversial. It has been pointed out that the fact that states, unlike international organizations, *ipso facto* have a judicial system in place, explains the relevance of the

<sup>150</sup> Supreme Court, 16 January 2009, LJN: BF7264 (n 110), Reports of International Arbitral Awards Volume XXV, 14 January 2003, referred to in para 3.3.3.

<sup>151</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Rep 2007, 43.

<sup>152</sup> *Stichting Mothers of Srebrenica* (n 32).

<sup>153</sup> *Stichting Mothers of Srebrenica* (n 32) para 5.19.

<sup>154</sup> *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Rep 1999, 62.

<sup>155</sup> *Stichting Mothers of Srebrenica* (n 32) para 5.15.

<sup>156</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Judgment, 3 February 2012. *Stichting Mothers of Srebrenica* (n 28) para 4.3.10.

<sup>157</sup> The Supreme Court also relied on the judgment of the ECtHR in *Al-Adsani v United Kingdom*, App No 35763/97 (ECtHR, 21 November 2001) in this context: cf *Stichting Mothers of Srebrenica* (n 28) para 4.3.8–9.

<sup>158</sup> *Jurisdictional Immunities of the State* (n 156) para 101; *Stichting Mothers of Srebrenica* (n 28) para 4.3.13.

<sup>159</sup> A Bianchi, On certainty, <<http://www.ejiltalk.org/on-certainty/#more-4504>> accessed 26 January 2013.

'reasonable alternative means' doctrine in the context of international organization immunity, and not state immunity.<sup>160</sup>

Section III.3 made clear that the *Waite and Kennedy* doctrine of the ECtHR has landed in Dutch court practice, although the *Mothers of Srebrenica* case has excluded the United Nations from its scope. While the Strasbourg origin of the doctrine is not always expressly acknowledged, reference to the *Waite and Kennedy* judgment in international organization immunity cases is not uncommon. In other cases, courts have regard to the question of alternative remedies without explicitly mentioning the doctrine. The Supreme Court's reliance on the *Behrami and Saramati* cases to argue that the immunity of the UN prevails over clashing ECHR norms is surprising.<sup>161</sup> While the *Behrami and Saramati* cases indeed included some ominous passages, the ECtHR did not, in so many words, say that article 103 took precedence over the ECHR and, in fact, skilfully steered around that very issue in the more recent *Al-Jedda v UK* judgment.<sup>162</sup>

Interestingly, formulating its definition of functional immunity as being limited to 'acts immediately connected to the exercise of the functions' in the *Euratom* case, the Supreme Court relied on a judgment issued by the ECJ in 1968.<sup>163</sup> In the *Sayag v Leduc* judgment, the ECJ considered that the immunity of officials of the Communities under the Protocol on the Privileges and Immunities of the European Communities 'depends on the nature of the activity by virtue of which immunity is claimed'. Immunity only applies to acts 'performed in an official capacity, that is to say, within the framework of the task entrusted to the community'.<sup>164</sup> The ECJ considered that

[i]n excluding jurisdiction of the national courts of member states . . . the [provisions on immunity of officials] are intended to ensure that the official activity of the community and of its servants is shielded from any examination in the light of any criteria based on the domestic law of member states, so that such activity may be carried out in full freedom in accordance with the task entrusted to the community.<sup>165</sup>

The reference to this case in the *Euratom* case is not obvious. First, the *Sayag* case concerned the immunity of officials of the organization, rather than immunity of the organization itself. The said Protocol does not in fact deal with the scope of the immunity of the Communities as such, and from the *Sayag v Leduc* case it can arguably not be inferred that the Community itself would only be shielded from jurisdiction in respect of its official acts. According to the Advocate-General in this case the considerations of the ECJ 'clearly' applied equally to the Community, since it would be illogical to accord immunity to the officials, and to the buildings of an organization, but not to the organization itself.<sup>166</sup> However, this reasoning does not acknowledge the possibility that the 'privileges and immunities . . . necessary for the performance of their tasks' that article 28 of the Treaty<sup>167</sup> accords to the Communities are *wider* than that. In

<sup>160</sup> Cf, eg, A Reinisch and U A Weber (n 86) 85–6. Commenting on the *Al-Adsani* case and the difference with international organization immunity cases, they note the relevance of 'the fact that in state immunity cases there is always a natural alternative forum in the defendant state'.

<sup>161</sup> Cf *Stichting Mothers of Srebrenica* (n 28).

<sup>162</sup> *Al-Jedda v United Kingdom*, App No 27021/08 (ECtHR, 7 July 2011).

<sup>163</sup> C-5/68, *Sayag v Leduc* [1968] ECR; referred to in *Greenpeace Nederland v Euratom* (n 63) para 6.2.

<sup>164</sup> *Sayag v Leduc* (n 163) 401.

<sup>165</sup> *Sayag v Leduc* (n 163) 402.

<sup>166</sup> Opinion of the Advocate-General in the *Euratom* case (n 63) para 23.

<sup>167</sup> Treaty Establishing a Single Council and a Single Commission of the European Communities and Annexed Documents, signed at Brussels, 8 April 1965 <<http://aei.pitt.edu/5202/>>.



comparison, the 1946 General Convention provides for absolute immunity of the organization, while the immunity of almost all officials is limited to 'official acts'. The Advocate-General in addition refers in a footnote to the *Zwartveld* judgment of the ECJ,<sup>168</sup> which in fact would have provided more solid support for the Supreme Court judgment. In this case the ECJ observed more generally that the privileges and immunities of the Communities had 'a functional, and therefore relative' character, although it did not in this context state that immunity was limited to a particular category of acts.<sup>169</sup> Secondly, while the reliance on EU law in the context of Euratom is logical,<sup>170</sup> in view of the *sui generis* nature of the EU it may be argued that no general inferences should be drawn from immunity provisions in EU law. In the *Zwartveld* case, for example, the ECJ emphatically underlined the special nature of EU law and of the EU as an institution. It noted that 'relations between the Member States and the Community institutions are governed... by a principle of sincere cooperation'.<sup>171</sup> Because of that, the ECJ ruled that the Commission was obliged to 'give its active assistance to... national proceedings, by producing documents to the national court and authorizing its officials to give evidence in the national proceedings'.<sup>172</sup> Unless the Commission produced 'imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities',<sup>173</sup> the Commission had to produce the documents requested by the Dutch courts and authorize its officials to give evidence before the courts, even though the documents and the testimonies concerned the official activities of the Communities. In other words, the 'relative' immunity of the EC/EU may at least to some extent be explained by organization-specific factors.

ECJ judgments have been referred to extensively by both courts and Advocates-General in the many taxation cases that have come before the Dutch courts. This is done firstly in cases concerning taxation of EC/EU officials. The ECJ has been regularly asked to interpret article 13 of the Protocol on the Privileges and Immunities of the European Communities through the preliminary reference procedure, and Dutch courts follow the ECJ's interpretation diligently, in accordance with their obligations under EU law.<sup>174</sup> After the ECJ clarified in *Van der Zwalmen and Massart* that the income of an EC official could under some circumstances be taken into account when taxing his or her spouse, especially when the spouse applied for an income-dependent benefit,<sup>175</sup> the Supreme Court followed the ECJ explicitly when a similar question came before it.<sup>176</sup> The Opinion of the Advocate-General recognized that the ECJ judgment forced the Supreme Court to deviate from its earlier line of jurisprudence,<sup>177</sup> and the Supreme Court itself also acknowledged this change of course in later jurisprudence.<sup>178</sup>

<sup>168</sup> C-2/88 *JJ Zwartveld and Others* [1990] ECR I-4405; referred to in footnote 18 of the Opinion of the Advocate-General in the *Euratom* case (n 63).

<sup>169</sup> *Zwartveld* (n 168) para 20.

<sup>170</sup> Article 191 Euratom Treaty (1957) refers to the 1965 Protocol.

<sup>171</sup> *Zwartveld* (n 168) para 17.

<sup>172</sup> *Zwartveld* (n 168) para 22.

<sup>173</sup> *Zwartveld* (n 168) para 25.

<sup>174</sup> Article 267a of the TFEU gives the ECJ jurisdiction to issue preliminary rulings on the interpretation of EU law, and these rulings bind national courts of EU states.

<sup>175</sup> Case C-229/98, *Van der Zwalmen and Massart v Belgian State* [1999] ECR I-7113.

<sup>176</sup> Supreme Court, 29 September 2002, LJN: AE0466 (n 110) para 3.5.

<sup>177</sup> Supreme Court, 29 September 2002, LJN: AE0466 (n 110) para 6.1.

<sup>178</sup> Supreme Court, 4 February 2011, LJN: BN3539 (n 110) para 3.5.5.

More pertinently, the ECJ judgments in tax cases have moreover influenced the interpretation of the scope of privileges and immunities of officials of other organizations. When the Court of Appeal of The Hague referred to a judgment of the ECJ<sup>179</sup> in a tax case concerning a UN official, it admitted that

the answer to the present problem is not necessarily the same in relation to the European Communities as in relation to the United Nations and also that the Court of Justice of the European Communities has not given a decision, nor indeed could it have done so, on the interpretation of the Convention on the Privileges and Immunities of the United Nations.<sup>180</sup>

‘Nevertheless,’ the Court reasoned, ‘the great similarity of the relevant provisions of that Convention and those of the Protocols of the European Communities is remarkable.’ In a 2011 judgment, the Supreme Court interpreted the tax exemption of article 19 of the Treaty of Ottawa,<sup>181</sup> applicable to NATO officials, along the lines of the principles applied in cases concerning EU officials and derived from ECJ jurisprudence. According to the Supreme Court, the text of article 19 largely corresponds to the text of article 13 of the EC Protocol. Since the purpose of both exemptions is also similar, there was, according to the Supreme Court, no reason for a different interpretation.<sup>182</sup> In a similar vein, the Supreme Court aligned the position of an EPO official to that of EU officials.<sup>183</sup> The *Van der Zwalmen* judgment of the ECJ has hence been used to interpret the scope of tax exemptions in other, similarly worded treaties. Also here one can wonder whether the *sui generis* nature of the EU allows for such cross-referencing to ECJ jurisprudence in cases concerning officials of different organizations.<sup>184</sup>

## V. Concluding observations

The finding that there are surprisingly few references to foreign national case-law in Dutch international organization immunity cases gives rise to the chicken and egg question: does the Netherlands take quite an isolated position on both the sources of the international organization immunity rule as well as on its scope because its courts do not take cognizance of foreign case-law? Or do the Dutch courts not *refer* to foreign case-law that they have taken cognizance of because it does not support their position? In any case, if, as Reinisch has argued ‘[t]he rather high convergence of outcomes in cases before national courts addressing similar international law issues is a clear

<sup>179</sup> C-6/60, *Jean E Humblet v the Kingdom of Belgium* [1960] ECR 559.

<sup>180</sup> *Van V v Commissioner of Internal Revenue* (n 110).

<sup>181</sup> Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, Ottawa, 20 September 1951, 200 UNTS 3.

<sup>182</sup> Supreme Court, 4 February 2011, LJN: BN3539 (n 110) para 3.5.5. The Advocate-General in this case had noted that the Supreme Court, in a 1999 case (15 December 1999) concerning a NATO official, had not followed the approach of the ECJ in *Van der Zwalmen* and wrote that this means that either the Supreme Court interprets the exemption of NATO officials more absolutely than that of EU officials, or that the Supreme Court had not yet noted the 1999 *Van der Zwalmen* judgment; paras 7.5–7.6. The latter explanation thus seems to have been the correct one.

<sup>183</sup> Supreme Court, 4 February 2011, LJN: BP2997 (n 110) para 3.5.6; cf also the decision of the Secretary of State of Finance, 23 September 2004, no IFZ2004/764M, BNB 2005/12, in which it is noted that the character of the exemption in the various agreements is the same, and that thus the Supreme Court judgment of 2002 has the same consequences for all officials of all organizations in the Netherlands. The decision has been criticized: cf V-N 2004/54.6; V-N 2009/15.30; I J J Burgers cs, *Weguijs in het Internationaal en Europees Belastingrecht* (Sdu 2009) 196.

<sup>184</sup> Cf the Opinion of the Advocate-General in Supreme Court, 4 February 2011, LJN: BN3539, para 6.3, in which some authority is cited for making a distinction between EU and NATO officials for tax purposes.

indication of the existence of a trans-judicial dialogue',<sup>185</sup> the divergence of Dutch international organization immunity practice could conversely be seen to be a clear indication of the absence of such dialogue.

A few tentative comments can be made on the practices outlined earlier.

The international organization immunity practice in Dutch courts provides very little support for the trend that has been identified in recent literature, pointing to the emergence of informal networks of domestic courts worldwide, interacting with and engaging each other.<sup>186</sup> Likewise, it does not provide any support for the thesis formulated by Benvenisti that courts would resort to dialogue to strengthen their position vis-à-vis the executive.<sup>187</sup> Given the fact that executives may pursue policies through international organizations and thus escape from constraints that would apply domestically, the 'Benvenisti thesis' might suggest that courts would, through dialogue, limit the unassailable powers of international organizations and thereby the transnational exercise of powers by the executive. The case-law of the Netherlands provides no evidence for this proposition.

Of course, we cannot exclude that in preparing decisions, judges and, more likely, their assistants consider foreign case-law in their preparations. Such practices, which might be exposed through empirical research, would be of interest for identifying the impact of particular jurisdictions on Dutch case-law and more generally for a better understanding of the Dutch judicial practice in matters of international law. But such practices in themselves would not qualify as dialogue—it would only expose a one-way flow of arguments and interpretations that at best in a very indirect way would find their way back to the 'sender'.

The practice that does exist seems to be limited to what might be considered the 'usual suspects'—Belgium, France, Switzerland, and the United States. Cases from, for instance, Greece, Russia, Japan, and many other jurisdictions exist and surely may have been relevant, but apparently were not considered. One may speculate that the courts simply found it too cumbersome to gain access to or properly understand in their context cases from such jurisdictions, taking into account language barriers.

The lack of a more systematic consideration of foreign case-law is particularly remarkable in view of the arguably 'non-voluntary character' of the comparative law approach in the determination of the various aspects of the legal position of international organizations before national courts. The use of comparative law to identify rules of customary international law has in this respect been distinguished from other instances of reference to foreign case-law.<sup>188</sup> Since Dutch courts regard international organization immunity as a rule of customary international law, and regularly underline the customary rule in the cases before them, scrutiny of and reference to foreign case-law seems to be called for—not just an option. In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, the ICJ emphasized that a survey of domestic court practice was indispensable for the identification of the scope of the rule of state

<sup>185</sup> A Reinisch (n 41) 308–9.

<sup>186</sup> M A Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Legal Norms' (2005) 93 *Georgetown Law Journal* 487, 490.

<sup>187</sup> E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *AJIL* 241.

<sup>188</sup> Cf, eg, U Drobnig, 'The Use of Comparative Law by Courts', in U Drobnig and S van Erp (eds), *The Use of Comparative Law by Courts* (Kluwer Law International 1999) 3, 6, who distinguishes between 'voluntary' and 'necessary' recourses to foreign law, qualifying the recourse to foreign case-law to identify international custom under the latter category.

immunity: 'State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune . . .'<sup>189</sup>

Also, when the courts are asked to apply a treaty provision, consultation of jurisprudence of foreign national courts interpreting the same multilateral treaty, or similar bilateral treaties, seems called for. This has been recognized in relation to those treaties that expressly include the obligation to ensure uniform application through interpretation,<sup>190</sup> but arguably applies more generally. While it is admittedly difficult to construe such an obligation in terms of the international law on treaty interpretation, unless sufficient jurisprudence is available so as to speak of 'subsequent practice in the application of the treaty which establishes the agreement of the parties' in the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties,<sup>191</sup> such an obligation is increasingly phrased in terms of a general principle. In this vein, Lord Hope observed that '[th]e general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states';<sup>192</sup> in the context of the interpretation of the ECHR by national courts, a judge of the ECtHR has argued that 'courts should try to harmonize the interpretation of the same legal notions' in order to secure the coherence of the law and therewith the legitimacy of legal systems;<sup>193</sup> and the former ICJ Judge Simma has in more general terms referred to the 'increasing responsibility on the part of [domestic] courts to maintain [international] law's coherence and integrity'.<sup>194</sup>

A comparative international law approach is, of course, fraught with difficulties. As one commentator aptly noted, '[w]hether dealing with treaty interpretation or customary international law, surveys of national court decisions are likely to turn up insufficient evidence to ever truly be quasi-determinative.'<sup>195</sup> Dutch international organization immunity decisions do warrant an additional cautionary remark in this regard. It is noteworthy that in one of the cases where the Advocate-General expressly referred to a foreign judgment, he got it wrong. In the *Euratom* case the Advocate-General referred to a 1992 Swiss judgment of the Bundesgericht, to support his conclusion that international organizations have customary functional immunity for acts performed in the exercise of official functions, while the Swiss case does not in fact provide any support for an immunity rule outside the context of treaties to which

<sup>189</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Judgment, 3 February 2012, para 55.

<sup>190</sup> Cf S van Erp, 'The Use of Comparative Law Method by the Judiciary—Dutch National Report', in U Drobnič and S van Erp (eds), *The Use of Comparative Law by Courts* (Kluwer Law International 1999) 235, 237. Cf, eg, the UN Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3, art 7(1): 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

<sup>191</sup> Vienna Convention on the Law of Treaties (1980) 1155 UNTS 331; Cf, eg, A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57, 84: 'decisions by domestic courts of States that are parties to the treaty provide evidence of how those States understand their obligations and, where sufficient uniformity is evident, might demonstrate a subsequent agreement as to interpretation.' Cf also p 86.

<sup>192</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet Ugarte (Amnesty International and ors intervening)* [2000] 1 AC 147, 244 (per Lord Hope).

<sup>193</sup> W Thomassen, 'Judicial Legitimacy in an Internationalized World', in N Huls, M Adams, and J Bomhof, *The Legitimacy of Highest Courts' Rulings, Judicial Deliberations and Beyond* (TMC Asser Press 2009) 399, 404.

<sup>194</sup> B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *EJIL* 265, 290.

<sup>195</sup> A Roberts (n 191). Cf p 83 more generally for an overview of the 'methodological difficulties' inherent in 'comparative international law'.

Switzerland is a party, and certainly does not provide any support for an immunity limited to a certain category of acts of international organizations only. If the Swiss case-law is so difficult to understand and interpret correctly, one can sense the wisdom of not citing Greek, Japanese, or Russian cases. As expressed by judges in the interviews we have cited, partial consideration of relevant foreign practice indeed undermines the authority of Supreme Court judgments.

Also, the relatively numerous cases in which courts have referred to decisions of the ECJ and the ECtHR reveal the pitfalls of transnational judicial dialogue. The citation of case-law of the ECJ on matters of privileges and immunities of officials to support immunities of the organization, as well as the reliance on ECJ case-law to support a particular immunity principle of other organizations, notwithstanding the distinct nature of the EU that was recognized by the ECJ itself, suggest that in the hands of Dutch courts, international decisions may take on a life of their own, deviating from the original meaning, yet clothed with the appearance of original authority.

Even more problematic is the interpretation of and reliance on *Behrami* in support of the principle that the UN Charter prevails over the ECHR, and on *Germany v Italy* in support of the principle that the lack of alternative remedies does not constitute a valid ground for setting aside international organizations' immunity.

All of this suggests that while in theory reliance on and dialogue with other courts (foreign and international) can help courts arrive at interpretations and understandings of international principles, particularly when these are common across jurisdictions, such as principles on privileges and immunities of international organizations, and may even be indispensable when assessing the scope of a possible customary rule in this regard, there is nothing inherently or necessarily beneficial in such dialogue. It all depends on the quality of interpretation and on the purposes for which they are used. Under a benevolent interpretation, the Dutch case-law reflects shortcomings in interpretation and understanding of foreign and international case-law, but it could also be seen to demonstrate how citing foreign and international case-law can be (ab)used to provide a decision with false authority.