

# SETTLEMENT OF DISPUTES OF A PRIVATE CHARACTER TO WHICH AN INTERNATIONAL ORGANISATION IS A PARTY

## Introduction

1. The aim of this paper is to facilitate a discussion of the settlement of disputes of a private law character to which an international organization is a party. The settlement of third-party claims for personal injury or death and for property loss or damage arising from the conduct of United Nations (UN) peace operations is used for illustrative purposes.
2. International organizations generally enjoy immunity from the civil jurisdiction of domestic courts. The enjoyment of immunity from the jurisdiction of domestic courts is designed to ensure the independent functioning of international organizations.
3. The immunity of international organizations in many cases prevents individuals who have suffered harm from conduct of an international organization from bringing a successful claim before a domestic court.
4. The immunity of international organizations in such cases has been increasingly challenged before judicial organs in recent years. Such challenges have frequently been based on an alleged incompatibility of upholding immunity with the right of access to a court.
5. A number of domestic courts have considered such challenges in recent years. The legal reasoning employed by these domestic courts and the outcome of the cases have varied. One element that was considered relevant in a number of cases was whether there was an alternative remedy provided to the plaintiff by the international organization.
6. At the international level, the European Court of Human Rights (ECtHR) in particular has had occasion to consider the relationship between the right of access to a court on the one hand and the immunity of international organizations on the other<sup>1</sup>. In all these cases the ECtHR concluded that upholding the immunity of an international organization was not in violation of the right to access to court. To arrive at this conclusion, it inquired into the question whether the immunity pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. As part of this inquiry, the ECtHR has considered it a "material factor" whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. The wording of the ECtHR decisions suggests that in different factual circumstances than obtained in the abovementioned cases, it cannot be excluded that the Court would find that upholding immunity would violate Article 6 ECHR.
7. The immunity of international organizations has not only been increasingly criticized before the courts. Concern has also been expressed in the legal literature as well as in public opinion in various States, in particular concerning those situations where it is perceived that claimants are left without any (effective) remedy.

## Alternative remedies

8. International organizations often provide an alternative remedy in case of disputes of a private law character to which the organization is a party. In the case of the UN, this is explicitly provided for in the Convention on the Privileges and Immunities of the United Nations (CPIUN). Section 29 of this convention states:

The United Nations shall make provisions for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

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<sup>1</sup> See e.g. *Beer and Regan v. Germany*, [1999] ECHR 6; *Waite and Kennedy v. Germany*, [1999] ECHR 13; *Chapman v. Belgium*, [2013] ECHR 094; *Stichting Mothers of Srebrenica and others v. the Netherlands*, [2013] ECHR 194.

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

9. Commercial contracts concluded by international organizations generally provide for a dispute settlement procedure. With respect to claims arising from employment disputes, many international organizations provide for an internal mechanism where such claims can be heard.

10. An alternative remedy appears most important however in case of claims arising from the operational activities of international organizations. This is particularly the case when the operational activities undertaken by the organization constitute military operations. Also in respect of such activities there are examples of international organizations making provision for settling claims of a private law nature. The best-known example is probably the settlement of claims by the United Nations arising from peace operations established by the organization. Such claims have also been the focus of public and legal attention recently, *inter alia* as a consequence of the cholera epidemic in Haiti<sup>2</sup>. It is therefore instructive to focus on this example.

### **Dispute settlement procedures in UN peace operations**

11. The principal legal document concerning a UN peace operation is the Status of Forces Agreement (SOFA) that is normally concluded between the United Nations and the Host State of the operation. The text of specific SOFAs is based on a model SOFA that was submitted by the UN Secretary-General to the General Assembly in 1990<sup>3</sup>. The model SOFA as well as specific SOFAs based on the model provide for immunity of the UN peace operation from the jurisdiction of the Host State. They also contain a provision on the settlement of disputes or claims of a private law character to which the UN peace operation is a party and over which the courts of the Host State do not have jurisdiction because of any provision of the SOFA<sup>4</sup>. The article provides for the settlement of such claims by a standing claims commission to be established for that purpose. It envisages a commission composed of three members. One member shall be appointed by the Secretary-General of the UN, one member by the Government of the Host State, and a chairman jointly by the Secretary-General and the Government. The awards of the commission shall be final and binding.

12. In practice, such standing claims commissions have never been established. Instead, claims for personal injury or death and for property loss or damage have been handled by 'local claims review boards' created in UN operations. These boards are composed entirely of personnel of the operation. They examine, approve or recommend settlement of third-party claims for personal injury or death and for property loss or damage that are attributable to acts performed in connection with official duties by civilian or military members of the mission<sup>5</sup>.

13. The fact that the local claims review boards are composed entirely of personnel of the operation and do not include representation from the Host State, has been criticized for lack of impartiality. This has been recognized by the Organization itself<sup>6</sup>.

14. Elements of the standards used by the local claims review boards in examining claims have been described by the UN Secretary General. These include:

a. Claims for property loss and damage caused by UN forces in the ordinary operation of the force are subject to the exception of "operational necessity", that is, where damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate. The definition of 'operational necessity' used by the UN makes this a potentially broad category.

b. Temporal and financial limitations have been imposed concerning third-party claims against the UN. These concern the timeframe within which a claim must be submitted, the types of compensable injury or loss, and the amount payable. The limitation on the liability

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<sup>2</sup> In October 2013, lawyers for Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN.

<sup>3</sup> Model Status-of-Forces Agreement for Peace-keeping Operations, UN Doc. A/45/594 of 9 October 1990.

<sup>4</sup> *Id.*, Art. 51.

<sup>5</sup> UN Doc. A/51/389 of 20 September 1996, pp. 8-9.

<sup>6</sup> UN Doc. A/51/903 of 21 May 1997, p. 4.

of the Organization as a means of allocating the risks of peacekeeping operations between the UN and host States is premised on the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for damage arising from such an operation. It may be asked how realistic this premise is in certain host States, and whether it is fair that individuals who have been harmed bear the consequences.

c. The UN rejects claims that “would necessarily include a review of political and policy matters.” This was the reason recently given by the UN for considering a claim relating to the cholera epidemic in Haiti as not receivable pursuant to Section 29 CPIUN.

15. These elements tend to restrict the possibility that a claim arising from the conduct of a UN peace operation will be successful.

### **Differences between international organizations**

16. There are many international organizations, and no two are the same. There are for example important differences between the scope of immunity from the civil jurisdiction of States that organizations enjoy. There are also differences between the alternative claims settlement procedures offered by different organizations.

17. A common element however does appear to be the limited possibilities for settlement of disputes of a private character to which an international organization is a party. Such a perceived lack of accountability may be detrimental to the reputation of an international organization. This may be exacerbated where there is a perceived disconnect between the importance an international organization attaches to accountability for other actors on the one hand, and its internal policies and practices on the other hand. This attracts the criticism that an organization does not ‘practice what it preaches’.

18. There is also the risk that perceived shortcomings in the settlement of disputes of private character to which an international organization is a party, may lead claimants to increasingly turn to the member States.

19. The above suggests that the settlement of disputes of private character to which an international organization is a party merits attention<sup>7</sup>.

20. In view of the differences between international organizations, disputes of a private law character to which an international organization is a party require an analysis taking into account the characteristics of the organization concerned. By way of example, the following suggests possible measures to strengthen the settlement of disputes of a private character arising from UN peace operations.

### **Possible measures to strengthen the settlement of disputes of a private character arising from UN peace operations**

21. Possible ways of strengthening the implementation of Section 29 CPIUN concern either access to a claims settlement mechanism, or the criteria used by such a mechanism to consider a claim.

22. Access to a claims settlement mechanism

a. Establish standing claims commissions as envisaged in the model SOFA

Establishing a standing claims commission in each UN operation would ensure that from the outset of the operation there is a mechanism that claimants have access to. It would also contribute to the perceived impartiality of the claims settlement mechanism in UN operations.

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<sup>7</sup> This conclusion is supported by work done in academic circles. Reference may in particular be made to the study by the International Law Association, conducted between 1996 and 2004, on the accountability of international organizations.

b. Waiving immunity of the Organization in selected cases

Waiving immunity would lead to the possibility for a domestic court to adjudicate a claim from individuals. The CPIUN provides for the right and the duty of the Secretary-General to waive the immunity of any UN official or expert on mission in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN. Although it does not expressly provide for the same possibility in case of the Organization itself, the same rationale applies. The lack of an alternative avenue could be an important factor in determining whether the course of justice would be impeded in a particular case.

c. Establish an ombudsperson

This is a less far-reaching measure than waiving immunity. An ombudsperson could investigate complaints from individuals arising from the conduct of a peace operation. He or she could make recommendations concerning the handling of such complaints, such as compensation or the means by which processes may be improved. Inspiration could be drawn from the precedent of the establishment by the UN Security Council of the Ombudsperson, who reviews requests from individuals, groups, undertakings or entities seeking to be removed from the Al-Qaida Sanctions List of the Security Council's Al-Qaida Sanctions Committee<sup>8</sup>.

23. Criteria for considering a claim

a. Revisiting the standards used for considering a claim

### Guiding questions

1. Do you share our analysis concerning the current state of the settlement of disputes of a private character to which an international organization is a party?
2. What is your experience with the settlement of disputes of a private character to which an international organization is a party in your legal system?
3. In particular, are there examples in your legal system of perceived shortcomings in the settlement of disputes of private character to which an international organization is a party, leading claimants to turn to the member States?
4. Do you consider that the strengthening of the settlement of disputes of a private character to which an international organization is a party merits attention?
5. Specifically in respect of settlement of private claims in UN peace operations, how do you see the merits of the possible measures described above?

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<sup>8</sup> The office of the Ombudsperson was established by Security Council Resolution 1904 of 17 December 2009.