

The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals

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Abstract

International organizations regularly enjoy immunity from suit in employment-related cases. Instead of litigation before various national courts, staff members are supposed to bring their complaints before internal grievance mechanisms and ultimately before administrative tribunals set up by the organizations. The scope of jurisdiction of such administrative tribunals largely covers the kind of staff disputes insulated from national court scrutiny as a result of the immunity from legal process enjoyed by international organizations. Inspired by the case law of the European Court of Human Rights, in particular its 1999 *Waite and Kennedy* judgment according to which the jurisdictional immunity of international organizations may depend upon the availability of “reasonable alternative means” to protect effectively the rights of staff members, more and more national courts are equally looking at the availability and adequacy of alternative dispute settlement mechanisms. Some of them have even concluded that the non-availability of legal protection through an administrative tribunal or the inadequacy of the level of protection afforded by internal mechanisms justifies a withdrawal of immunity in order to avoid a denial of justice contrary to human rights demands.

I. Introduction

1. Questions concerning the immunity of international organizations, in particular in the context of employment disputes, are of utmost importance to administrative tribunals, which have been established precisely for the purpose of settling disputes between international

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organizations and their employees in a predictable and coherent way. Litigation of staff disputes before national courts, perhaps even courts in different States, is thought to put the uniform employment law at risk and may lead to a fragmented and differentiated level of protection. As a matter of substance and of procedure, different national courts may provide international organizations' staff members with different remedies, claims and types of compensation; they may demand different forms of evidence and offer different procedural rights.¹ The immunity of the employer international organization is intended to avoid these consequences. At the same time, the availability of an alternative employment dispute settlement mechanism in the form of administrative tribunals is intended to ensure the uniform interpretation and application of the internal employment law of international organizations.

2. Viewed from this policy perspective, there is an obvious correlation between the scope of jurisdiction of administrative tribunals, on the one hand, and the immunity afforded to international organizations in employment matters, on the other. This relationship will be scrutinized in the first part of this paper. Beyond policy arguments, it will also look at the legal framework of the jurisdictional immunity granted to international organizations and it will address the relevant practice of national courts and administrative tribunals. In addition, questions of immunity and jurisdiction may arise with regard to administrative tribunals themselves. Disappointed staff members who have unsuccessfully brought their complaints before administrative tribunals may attempt to challenge their decisions. Whether this is possible is itself a matter of jurisdiction, i.e. a question of whether an appeal or review mechanism has been provided for. At the same time, immunity issues are raised where litigants turn to national courts in order to challenge administrative tribunal decisions.

II. The immunity of international organizations and the availability of administrative tribunals

3. The jurisdiction of administrative tribunals is usually seen as complementary to the immunity enjoyed by the respondent international organization. Because an international organization enjoys immunity in disputes brought by private parties, including staff members, it has to provide an alternative judicial or quasi-judicial recourse to justice. Thus, it establishes administrative tribunals or submits to the jurisdiction of existing administrative tribunals. This correlation is usually regarded as the consequence of a policy goal of providing staff members with access to a legal remedy in order to pursue their employment-related rights. But it is increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice.

1 See the reasoning of the D.C. Court of Appeals in the landmark case of *Broadbent v. OAS*, 628 F.2d 27, 35 (D.C.Cir. 1980) ("An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member States passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability or the organization to function effectively.").

4. The policy consideration that an international organization, and in particular one such as the United Nations (UN), should make provision for the orderly, judicial or quasi-judicial settlement of staff disputes was already clearly expressed in the advisory opinion of the International Court of Justice (ICJ) in the *Effect of Awards Case*,² in which it upheld the legality of the creation of the United Nations Administrative Tribunal (UNAT).³ The World Court stated as early as 1954 that it would

[...] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals [...] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.⁴

5. Clearly, the Court did not speak of a legal obligation incumbent upon the UN to set up an administrative tribunal. One should note, however, that this was not the question put before to the Court. Rather, the ICJ was asked to give an opinion on the issue of whether awards rendered by such a tribunal were binding. Whether the UN was empowered to set up the tribunal rendering such awards was an incidental question that it had to, and did, answer. It is remarkable, however, that in the above-quoted passage, the Court alluded to a human rights demand inherent in the UN Charter. It found that it would be “hardly consistent” with the goals of the UN and its Charter if this organization did not provide a legal remedy for staff disputes; obviously relying here on the underlying notion of a right of access to justice, as implicitly contained in the customary international law prohibition of a denial of justice⁵ and in contemporary human rights

2 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), 47.

3 Established by GA Res. 351 A (IV), 24 November 1949, amended by GA Res. 782 B (VIII), 9 December 1953 and GA Res. 957 (X), 8 November 1955, by GA Res. 50/54, 11 December 1995, by GA Res. 52/166, 15 December 1997, by GA Res. 55/159, 12 December 2000, by GA Res. 58/87, 9 December 2003 and by GA Res. 59/283, 13 April 2005. Pursuant to Art. 2 of its Statute, UNAT has jurisdiction over employment disputes between UN staff and the organization; in addition, staff disputes within IMO, ICAO and those concerning the staff of the ICJ and the ITLOS Registry and the International Seabed Authority may be heard (Art. 14 UNAT Statute). In 2007, the UN GA acted upon the recommendations of the Report of the Redesign Panel on the United Nations system of administration of justice, A/61/205, 28 July 2006, and agreed to replace the existing system by a “formal system of administration of justice [which] should comprise two tiers, consisting of a first instance, the United Nations Dispute Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies” within which a “decentralized United Nations Dispute Tribunal shall replace existing advisory bodies within the current system of administration of justice, including the Joint Appeals Boards, Joint Disciplinary Committees and other bodies as appropriate.” Administration of justice at the UN, GA Res. 61/261, 30 April 2007, paras 19, 20. Until the UN Appeals Tribunal replaces UNAT, “the United Nations Administrative Tribunal and other bodies, as appropriate, continue to function until the new system is operational with a view to clearing all cases that are before them.” *Ibid.*, para. 29.

4 *Effect of Awards*, above n.2, at 57.

5 Cf. *Ambatielos Case (Greece v. United Kingdom)*, 6 March 1956, 12 RIAA 83, 23 ILR 306, at 325 (“[...] the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any

instruments such as the 1948 UN General Declaration of Human Rights and the 1950 European Convention on Human Rights.⁶

6. One may still view the ICJ's opinion as a mere expression of a "policy" mandate for "compensating" the immunity of the UN with an alternative remedy. There are, however, other—and, from a historical perspective, probably even more pertinent—considerations that may be regarded as "harder" obligations for international organizations to provide not only legal remedies but also access to justice for staff members and other private parties. These considerations have found legal expression in the various privileges and immunities instruments which contain an obligation to make available dispute settlement mechanisms to those who are deprived of access to national courts as a result of the international organization's immunity from suit. The prime example of such an obligation is found in the Convention on the Privileges and Immunities of the United Nations, the so-called General Convention.⁷ While granting wide jurisdictional immunity to the UN,⁸ the Convention demands that

the United Nations shall make provisions for appropriate modes of settlement of [...] disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.⁹

7. An identical obligation is found in the Convention on the Privileges and Immunities of the Specialized Agencies,¹⁰ and similar obligations are contained in other privileges and immunities instruments dealing with other international organizations.¹¹ Strictly speaking, the obligation "to make provisions for appropriate modes of settlement" in the General and the Special Convention relates only to disputes arising out of private law contracts involving the UN and not to employment disputes. However, it is clear that the underlying situation

procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of country."); see also American Law Institute, Restatement (Third) Foreign Relations Law of the United States, Section 711 Reporters' n.2.B; J. Paulsson, *Denial of Justice in International Law* (2005), 134 et seq.; C.F. Amerasinghe, *Local Remedies in International Law* (2004).

6 See below text at n.24.

7 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15 (hereinafter General Convention).

8 Art. II Section 2 of the General Convention, above n.7, provides: "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."

9 Art. VIII Section 29(a) of the General Convention, above n.7.

10 Art. IX Section 31 of the Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.

11 For example, Art. XIX Section 50 of the Agreement Between the International Atomic Energy Agency and the Republic of Austria Regarding the Headquarters of the International Atomic Energy Agency, No. 4849, 339 UNTS 110 (entered into force on 1 March 1959), Austrian Federal Legal Gazette No. 82/1958 ("The IAEA shall make provision for appropriate methods of settlement of: (a) Disputes arising out of contracts and disputes of a private law character to which the IAEA is a party; [...]"); similarly, Art. 33 of the Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization, 14 April 1951, 96 UNTS 155.

of both types of private persons, the outside contractor envisaged by the treaty provisions and the employee apparently not covered, is almost identical. In both cases, the “weak” individual is seeking access to justice in pursuing his or her claims against the “strong”, immunity-protected international organization. Thus, it has been suggested that the dispute settlement obligations contained in the General and Special Convention and similar treaties might imply a duty of international organizations to establish administrative tribunals.¹²

8. Both the General Convention and the Special Convention are multilateral treaties concluded by the Member States of the UN and of the specialized agencies in question, and not by the organizations themselves. Thus, there is, strictly speaking, no direct treaty obligation on the organizations to carry out the duty to provide alternative dispute settlement mechanisms. However, it is obvious that the UN and other international organizations are the beneficiaries of the privileges and immunities contained in the General and the Special Convention and should thus also bear implicit duties.¹³ In fact, the absence of a clear direct treaty obligation is rarely addressed. Instead, international courts and tribunals regularly acknowledge the connection between the immunity from national courts and the obligation of the UN to provide for alternative dispute settlement modes as expressed in the General Convention.¹⁴

9. There are also other immunity provisions which stress the inter-relationship between immunity and the obligation to provide at least an alternative means of access to justice. This can be illustrated by reference to a number of provisions which aim at ensuring that immunity would not lead to a denial of justice. Typical examples of such an indirectly conditioned immunity are provisions which oblige an international organization to waive its immunity where such immunity “would impede the course of justice.”¹⁵ While the decision “to waive or not to waive” immunity remains that of the organization and is thus not reviewable by national courts, it is clear that this form of implicit limitation of the immunity of an international organization also reinforces the idea that potential claimants should at least have a right of access to some type of judicial or quasi-judicial dispute settlement.

12 I. Seidl-Hohenveldern, *Jurisdiction over Employment Disputes in International Organizations*, in: *Colección de Estudios Jurídicos en Homenaje al Prof. Dr. D. José Pérez Montero* (vol. III, 1988), 359, at 360.

13 See A. Reinisch, *International Organizations before National Courts* (2000) 143 et seq.

14 See the ICJ’s Advisory Opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Cumaraswamy), ICJ, 29 April 1999, ICJ Rep. 1999, 62, para. 66 (“The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that ‘[t]he United Nations shall make provisions for’ pursuant to Section 29.”). See also the view of an ICC arbitral tribunal in *A (organisation internationale) v. B (société)*, ICC Arbitration Award, 14 May 1972, Case No. 2091, *Revue de l’Arbitrage* (1975), 252 (“L’immunité de juridiction accordée à un organisme international qui n’a pas de juridictions propres oblige celui-ci à recourir à un arbitrage pour les litiges soulevés par son activité.”).

15 Cf. Art. IV(1)(a) Annex I to the Convention for the Establishment of a European Space Agency (ESA Convention) 1297 UNTS 161, 14 ILM 855 (“The Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.”).

II.A. Access to justice for employees of international organizations as a human rights concern

10. The need to provide for dispute settlement in order to counterbalance the immunity of international organizations is not only a demand of fairness and justice. Over time, the idea that everyone (including staff members of international organizations) has a right of access to justice, in the form of a right to have access to a court or an equivalent mechanism of independent and impartial dispute settlement, has gained ground. Regional international organizations, such as the European Community (EC)/European Union (EU), have gradually acknowledged that they are neither above the law nor unbound by human rights obligations simply because their constituent treaties do not contain any such duties. Instead, the European Court of Justice (ECJ) has developed a jurisprudence declaring human rights to be indirectly binding, because they form part of the general principles of law binding upon all subjects of international law.¹⁶ From its inception in the late 1960s/early 1970s, this EC/EU fundamental rights case law clearly had the potential to produce a spillover effect towards other international organizations; and it has done so. While there is an enduring debate over whether the UN, and in particular the Security Council, is bound by general international law, and thus by the human rights obligations that form part of custom and/or general principles,¹⁷ it has become an almost mainstream belief that international organizations are in general bound by international law.¹⁸

11. In fact, the concept that human rights are binding upon international organizations has been endorsed by many administrative tribunals in their jurisprudence. UNAT and the Administrative Tribunal of the International Labour Organization (ILOAT)¹⁹ have both endorsed the ECJ's view that general principles of law, which may contain fundamental

16 This ECJ jurisprudence was "codified" in Art. 6(2) of the EU Treaty, which provides: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

17 See A. Reinisch, *Developing a Human Rights and Humanitarian Law Accountability of the UN Security Council for the Imposition of Economic Sanctions*, 95 *American JIL* (2001), 851.

18 Cf. Restatement (Third), above n.5, Section 223; H. Schermers and N. Blokker, *International Institutional law* (2003), 1002; S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001); M. Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund, and International Human Rights Law* (2003).

19 Statute of the ILOAT, adopted by the International Labour Conference, 9 October 1946, amended on 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998: www.ilo.org/public/english/tribunal/stateng.htm. Art. II (5) ILO of the Administrative Tribunal Statute provides that "[t]he Tribunal shall also be competent to hear complaints [...] of officials [...] of any other intergovernmental organization approved by the Governing Body which has addressed to the Director General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the tribunal for this purpose, as well as its Rules of Procedure." Among others, WHO, UNESCO, FAO, WMO, IAEA and GATT have made such declarations. For a detailed list, see www.ilo.org/public/english/tribunal/orgs.htm.

rights obligations, can be relied upon in order to supplement the applicable staff rules and regulations of the organizations subject to their jurisdiction.²⁰

12. To the extent that one may consider the right of access to court (as contained, or at least implicit,²¹ in the Universal Declaration of Human Rights,²² the International Covenant on Civil and Political Rights (ICCPR)²³ and the European Convention of Human Rights (ECHR)²⁴ as also forming part of customary human rights law, it becomes apparent that international organizations may be under a duty to provide such access in cases of claims brought against them; should they fail to do so, they may encounter difficulties in insisting on their immunity from suit in national courts.

13. This view was shared and prominently formulated by the European Court of Human Rights (ECtHR) in two 1999 decisions, *Beer and Regan*²⁵ and *Waite and Kennedy*.²⁶ While

20 As early as 1957, the ILOAT held, in *Waghorn v. ILO* (1957) ILOAT Judgment No. 28, that it is also “bound [...] by general principles of law.” In *Franks v. EPO* (1994) ILOAT Judgment No. 1333, it included alongside “general principles of law” also “basic human rights”. Similarly, the World Bank Administrative Tribunal held that sexual discrimination or harassment violated “general principles of law”. *Mendaro v. IBRD*, World Bank Administrative Tribunal Reports Judgment No. 26 (1981), 9. See also more generally de Merode, World Bank Administrative Tribunal Reports Judgment No. 1 (1981) para. 28 (“[w]hile the various international administrative tribunals do not consider themselves bound by each other’s decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service”).

21 Cf. for the ECHR *Golder v. United Kingdom*, Application No. 4451/70, 21 February 1975, Series A No. 18 (1975), ECHR 1, para. 36; *Osman v. United Kingdom*, European Court of Human Rights, Application No. 23452/94, 28 October 1998 (1998), ECHR 101, para. 136. With regard to the ICCPR, the Human Rights Committee has referred to “equality before the courts, including equal access to courts” in General Comment No. 13: equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, para. 3.

22 Art. 10 of the Universal Declaration of Human Rights provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” GA Res. 217(III), UN GAOR, 3rd Session, Supp. No. 13, UN Doc. A/810 (1948) 71.

23 Art. 14, para. 1 of the ICCPR provides, inter alia, that “[a]ll persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” ICCPR, 19 December 1966, 999 UNTS 171 (1976).

24 Art. 6(1) of European Convention on Human Rights provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (hereinafter “ECHR”).

25 *Beer and Regan*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, (1999), ECHR 6.

26 *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, (1999), ECHR 13; 116 ILR 121, 134. See also A. Reinisch, *Case of Waite and Kennedy v. Germany*, Application No. 26083/94; *Case of Beer and Regan v. Germany*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, in: 93 AJIL (1999), 933; A. Reinisch/U.A. Weber, *The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, 1 International Organizations LR (2004), 59.

the Court acknowledged that the immunity of international organizations was “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments”,²⁷ it held that

a material factor in determining whether granting [...] immunity from [...] jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.²⁸

14. Although the ECtHR did not elaborate on what the specific characteristics of such “reasonable alternative means” might be, and although it did not make the availability of an alternative forum a strict prerequisite for immunity but only regarded it a “material factor”,²⁹ this “conditionality” for granting immunity to an international organization has fallen on fertile ground in the subsequent case law of various national courts in Europe.³⁰

15. The general principle of law that employees of international organizations should have access to a form of employment dispute settlement has also been recognized by administrative tribunals. The leading case is the ILOAT’s judgment in *Chadsey*, wherein the tribunal relied upon “the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.”³¹ In the later *Rubio* case, the ILOAT spoke more broadly of the principle “that an employee of an international organisation is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer.”³²

16. The UNAT expressly relied on the *Chadsey* holding in *Teixera*, in which the UN refused to agree to arbitrate a dispute that had arisen with a non-staff member for some three years.³³ Mindful of the UN’s duty to provide for appropriate modes of dispute settlement contained in Article VIII Section 29 of the General Convention, the Tribunal awarded damages to the applicant for the delay.

17. In some cases, administrative tribunals have even interpreted the scope of their jurisdiction in a deliberately broad fashion in order to avoid a situation which would deprive claimants of their right of access to dispute settlement. As early as the *Irani* case in 1971,³⁴ the UNAT had extended its jurisdiction to a dispute involving a non-staff member. It noted that

27 Waite and Kennedy, above n.26, para. 63.

28 Waite and Kennedy, *ibid.*, para. 68.

29 See N. Angelet and A. Weerts, *Les immunités des organisations internationales face à l’article 6 de la Convention européenne des droits de l’homme*, 134 *Journal du droit international* (2007), 3, 10.

30 See below text at n.53 et seq.

31 *Chadsey v. Universal Postal Union*, ILO Administrative Tribunal, 15 October 1968, Judgment No. 122, UNJYB (1968), 176.

32 *Rubio v. Universal Postal Union*, ILO Administrative Tribunal, 10 July 1997, Judgment No. 1644, para. 12. In spite of this finding, the ILOAT held that it was not competent to hear the complaint.

33 *Teixera v. Secretary-General of the United Nations*, UN Administrative Tribunal, 14 October 1977, Judgment No. 230.

34 *Irani v. Secretary-General of the United Nations*, UN Administrative Tribunal, 6 October 1971, Judgment No. 150.

unless the tribunal was competent in the case before it, the safeguard of some appeals procedure for the benefit of the applicant [as called for in *Chadsey*] would not exist, and article V of the contract between the applicant and the Organization [providing for the establishment of appropriate machinery to hear and to decide disputes] would not be respected.³⁵

18. In *Zafari*³⁶ and in *Salaymeh*,³⁷ the UNAT extended its jurisdiction to claims brought by local United Nations Relief and Works Agency (UNRWA) staff. Under normal circumstances, it was not the UN Administrative Tribunal itself, but rather a Special Panel of Adjudicators that was competent to hear such complaints.³⁸ The jurisdiction of this special panel was, however, very limited; it was basically restricted to scrutinizing the legality of a termination of employment. In *Zafari*, the applicant disputed that the end of his employment was to be qualified as an early voluntary retirement, whereas in *Salaymeh*, the applicant complained that the calculation of his contribution to UNRWA's pension fund was incorrect. In both cases, UNAT thought that the Special Panel of Adjudicators would lack jurisdiction. In the Tribunal's view, applicant *Zafari* was "thus deprived of any recourse against the decision of the Commissioner-General of UNRWA" and "has truly been denied justice."³⁹ UNAT particularly relied on the ICJ advisory opinions in *Effects of Awards*⁴⁰ and in *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*⁴¹ according to which "arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."⁴² On this basis, UNAT decided to fill the legal vacuum which the existing Staff Regulations and Staff Rules had left. It considered "that in the absence of any judicial procedure established by the area Staff Regulations and Staff Rules [...] the competence of the Tribunal as stated in its earlier judgements remains."⁴³

35 UNJYB (1971), 164.

36 *Zafari v. UNRWA*, UN Administrative Tribunal, 10 November 1990, Judgment No. 461.

37 *Salaymeh v. UNRWA*, UN Administrative Tribunal, 17 November 1990, Judgment No. 469.

38 Cf. D. Ruzić, *Le recours à l'arbitrage dans le contentieux de la fonction publique internationale: L'exemple du personnel local de l'U.N.R.W.A.*, 113 JDI (1986), 109 et seq.; I. Seidl-Hohenveldern, *Die internationalen Beamten und ihr Recht auf den gesetzlichen Richter*, in: Ballon/Hagen (eds), *Verfahrensgarantien im nationalen und internationalen Prozeßrecht—Festschrift für Franz Matscher* (1993), 441 et seq.

39 *Zafari v. UNRWA*, above n.36.

40 *Effects of Awards*, above n.2.

41 *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*, ICJ, 23 October 1956, Advisory Opinion, ICJ Reports (1956), 77.

42 *Ibid.*, 97.

43 *Zafari v. UNRWA*, above n.36, para X. In *Salaymeh*, the UN Administrative Tribunal relied on *Zafari* and held that "the Tribunal's competence is derived from the lack of any jurisdictional procedure laid down by the

19. The gradual consolidation of the idea that international organizations are under a human rights obligation to provide access to staff dispute settlement has also found expression in the opinion of some international organizations that the establishment of administrative tribunals was the fulfilment of an international legal obligation. For instance, when the World Bank Administrative Tribunal was set up in 1980, the official explanatory report referred to a principle accepted in many national legal systems and reaffirmed in the Universal Declaration of Human Rights which required that, wherever administrative power was exercised, a machinery should be available to accord a fair hearing and due process to an aggrieved party in cases of disputes.⁴⁴

II.B. National court decisions

20. In addition, national courts are starting to take note of the human rights implications of according immunity to international organizations. Traditionally, domestic courts dismissed claims brought against international organizations by staff members by simply relying upon the absolute⁴⁵ or functional⁴⁶ immunity from suit regularly granted to them.⁴⁷ Even where the grant of immunity may not have been explicit, national courts usually considered staff disputes to fall outside the scope of their jurisdiction. A good example is *Mendaro v. The World Bank*,⁴⁸ the leading US case on employment disputes within the International Bank for Reconstruction and Development (IBRD). The applicable provision in the IBRD's constituent document is unclear with respect to whether the Bank should enjoy immunity

UNRWA Staff Regulations and Staff Rules applicable to the Applicant." *Salaymeh v. UNRWA*, above n.37, para III.

44 Memorandum to the Executive Directors from the President of the World Bank, 14 January 1980, Doc. R80-8, 1 et seq., cited in Amerasinghe, *The Law of the International Civil Service (as Applied by International Administrative Tribunals)*, vol. I (2nd edn. 1994), 41. The World Bank Administrative Tribunal was established by a resolution adopted by the Boards of Governors of the IBRD, IDA and IFC on 30 April 1980.

45 Cf. *FAO v. Colagrossi*, Italian Corte di Cassazione, 18 May 1992, No. 5942, 101 ILR 386; *Bellaton v. Agence spatiale européenne*, French Cour de Cassation, Chambre sociale, 24 May 1978, No. 76-41.276, 25 AFDI (1979), 894.

46 Cf. *A.S. v. Iran—United States Claims Tribunal*, Supreme Court (Hooge Raad) of the Netherlands, 20 December 1985, 94 ILR, 327; *Mukoro v. European Bank for Reconstruction and Development and Another*, Employment Appeal Tribunal, 19 May 1994, 107 ILR, 604; *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (EDNY 1987) (“[A]n international organization’s self-regulation of its employment practices is an activity essential to the ‘fulfillment of its purposes,’ and thus an area to which immunity must extend.”); *X. v. EPO*, State Labor Court Berlin, 12 September 1994, 16 Sa 58/94 (unpublished), cited in Reinisch, *International Organizations before National Courts*, supra n. 13, 210 (“[T]he employment of personnel in order to fulfill its official functions [...] is part of the ‘official activities’ of an organization which are ‘strictly necessary’ in order to perform the administrative tasks provided for in the [European Patent] Agreement. Without personnel, the defendant cannot fulfill its administrative duties. In this respect one cannot differentiate on the basis of whether the employee in question himself performs an official task or fulfills any other externally visible function, or whether he ranks high in the hierarchy of the organization or is only entrusted with inferior auxiliary duties which are not directly perceived by the public or by contractual partners of the organization. The latter types of activities are also indispensable for the administrative work.”)

47 See the overview on pre-1998 cases in Reinisch, *International Organizations before National Courts*, above n.13, 162 et seq., 206 et seq.

48 *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983).

in respect of employment issues.⁴⁹ The US court, however, interpreted the provision to permit only suits in respect of external affairs of the Bank, thus holding the Bank immune from suits in employment disputes. According to the *Mendaro* court, the Bank's members only intended to waive the organization's immunity from suit with respect to its

debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from employees' suits arising out of internal administrative grievances is not necessary for the Bank to perform its functions, this immunity is preserved by the members' failure expressly to waive it.⁵⁰

21. With regard to employment disputes, the D.C. Court of Appeals expressly held that

the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory.⁵¹

22. More recently, however, national courts have taken care in examining the "human rights impact" of their immunity decisions. This "judicial notice" may take different forms. Courts may find that there are alternative remedies such as administrative or arbitral tribunals available to plaintiffs and that thus the immunity they accord to international organizations does not infringe upon claimants' fundamental right of access to court. More "radical" are decisions which deny immunity because no alternative remedy is available in a specific case.

23. The "human rights impact assessment" is particularly evident in a number of European countries, obviously inspired by the ECtHR case law in the wake of *Waite and Kennedy*.⁵² The availability of an alternative way of legal redress was important in the Belgian immunity decision in *Energies nouvelles et environnement v. Agence spatiale européenne*,⁵³ where the court held that in order to allow the European Space Agency's immunity from suit, alternative ways of legal recourse must be made available to claimants.⁵⁴ Because such alternative legal redress was in fact available and satisfied the

49 Art. VII Section 3 of Articles of Agreement of the International Bank for Reconstruction and Development, Washington, D.C., 27 December 1945, 2 UNTS 134 ("Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. [...]").

50 717 F.2d 610, at 615 (D.C.Cir.1983). See also with regard to the question of EUROCONTROL's immunity from suit in employment matters: *Eckhardt v. EUROCONTROL*, District Court of Maastricht, 12 January 1984, 16 NYIL (1985), 464; 94 ILR 331 (EUROCONTROL was "empowered to autonomously establish legal provisions relating to its personnel, which implies a right [...] to designate an exclusive Tribunal.").

51 717 F.2d 610, at 615 (D.C.Cir. 1983).

52 *Waite and Kennedy*, above n.26.

53 *Energies nouvelles et environnement v. Agence spatiale européenne*, Civ. Bruxelles (4e ch.), 1 decembre 2005, *Journal des tribunaux* (2006), 171.

54 *Journal des tribunaux* (2006), 171, 173 ("[...] pour admettre l'immunité de juridiction de l'A.S.E., [claimant] devait disposer de voies de recours alternatives.").

“reasonable alternative means” test developed by the ECtHR,⁵⁵ the Belgian court dismissed the action.

24. Moreover, the Swiss Federal Supreme Court addressed the availability of alternative means of dispute settlement as an important aspect in deciding upon the immunity of an international organization. *Consortium X. v. Swiss Federal Government (Conseil federal)*⁵⁶ was a rather complex case involving a challenge to the Swiss government’s decision not to exercise diplomatic protection on behalf of a Swiss company, which was demanding that an international organization agree to arbitration proceedings. The Swiss Supreme Court identified as one of the crucial issues at stake the “conflict between, on the one hand, the immunities from jurisdiction and enforcement of international organisations and, on the other hand, the right to an equitable procedure insofar as it relates to the fundamental right of access to a judge.”⁵⁷ Expressly relying on the ECtHR’s decision in *Waite and Kennedy*,⁵⁸ the Swiss Federal Court found that the system of arbitral proceedings foreseen in the general contract clauses of CERN pursuant to its Headquarters obligations⁵⁹ satisfied the right to fair proceedings as contained in Article 6 of the ECHR.

25. Similar considerations have also been relied upon by courts in cases of actions brought by staff members or other employment-related disputes. The availability of an internal employment dispute mechanism was a crucial consideration in the Italian immunity decision in *Pistelli v. European University Institute*.⁶⁰ The Italian Supreme Court dismissed the action brought by an institute employee. It found that the immunity from jurisdiction of the European University Institute did not infringe the Italian constitutional right of access to a court because there was an alternative judicial remedy in the form of an internal staff disputes commission.

26. The development of the jurisprudence in France is particularly instructive. Initially, French courts routinely dismissed employment-related actions directed against international organizations.⁶¹ For example, in *Hintermann v. Union de l’Europe*

55 See below text at n.82.

56 *Consortium X. v. Swiss Federal Government (Conseil federal)*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 2 July 2004, partly published as BGE 130 I 312, *International Law in Domestic Courts* (ILDC) 344 (CH 2004).

57 *Ibid.*, 2 (“La question matérielle que soulève le présent recours, mais qui n’est pas directement l’objet du litige, se rapporte au conflit existant entre, d’une part, les immunités de juridiction et d’exécution des organisations internationales et, d’autre part, le droit à un procès équitable, sous l’aspect du droit fondamental d’accès au juge.”).

58 *Waite and Kennedy*, above n.26.

59 Art. 24(a) of the Headquarters Agreement between CERN and Switzerland, Agreement between the Swiss Federal Council and the European Nuclear Organization in Switzerland of 11 June 1955, 249 UNTS 405, provides that CERN “shall make provision for appropriate methods of settlement of disputes arising out of contracts and other disputes in private law to which the organization is a party.”

60 *Paola Pistelli v. European University Institute*, Italian Court of Cassation, all civil sections, 28 October 2005, no. 20995, *Guida al diritto* 40 (3/2006), ILDC 297 (IT 2005).

61 *Chemidlin v. Bureau international des Poids et Mesures*, Tribunal Civil of Versailles, 27 July 1945, *Journal du Palais* 1945.2.124, 12 *Ann. Dig.* (1943–45), 281; *Weiss v. Institute for Intellectual Cooperation*, Conseil

occidentale,⁶² the Cour de Cassation granted immunity and rejected the claim by the former Vice Secretary-General of the WEU that the organization's immunity from suit violated his rights under Article 6(1) of the ECHR. In its 1995 annual report, however, the Cour de Cassation raised the issue of whether an organization's immunity could lead to a denial of justice that might be avoided by according primacy to the ECHR.⁶³

27. In the case of *Cultier v. Eutelsat*,⁶⁴ the availability of an internal dispute settlement mechanism for staff complaints was specifically considered by the Cour de Cassation in its decision to uphold the immunity granted to the organization in its constituent treaty as well as in its headquarters agreement. In the Court's view, the fact that the internal complaints commission envisaged by the headquarters agreement for employment disputes had been actually set up rendered the allegation of a denial of justice invalid.⁶⁵

28. In other cases, French courts have actually refused to accord immunity to international organizations where claimants would have been deprived of a forum hearing their claims. For instance, in *UNESCO v. Boulois*,⁶⁶ a French appellate court rejected UNESCO's plea of immunity by directly invoking the ECHR. The court thought that granting immunity "would inevitably lead to preventing [the claimant] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Article 6(1) of the [ECHR]."⁶⁷

d'Etat, 20 February 1953, 81 JDI (1954), 745; case note by Huet, 81 JDI (1954), 747; *Klarsfeld v. L'office franco-allemand pour la jeunesse*, Tribunal d'Instance de VIIIe Arrondissement de Paris, 19 February 1968, Cour d'Appel Paris, 18 June 1968; *Juris Classeur Périodique* (1969 II), 15725; International Institute of Refrigeration v. Elkaim, Court of Appeal of Paris (Twenty-first Chamber), 7 February 1984, 77 ILR (1988), 498–506; Cour de Cassation, 1. ch. civ., 8 November 1988; Bull. civ. (1988), I, 211, No. 309; *Gazette du Palais*, 21 February 1989, 38; 35 AFDI (1989), 875. There are, however, a few cases, where French courts upheld their jurisdiction over employment disputes because they found an implicit waiver on the part of the defendant organization; e.g. *Beaudice v. ASECNA*, Cour d'Appel de Paris, Première chambre, 25 November 1977, 106 JDI (1979), 128.

62 *Hintermann v. Union de l'Europe occidentale*, Cour d'appel de Paris, 10 April 1990, Cour de Cassation, 1. ch. civ., 14 November 1995, Bull. Civ. I, No. 413, 288; 124 JDI (1997), 141.

63 Cour de Cassation, Rapport annuel (1995), 418, cited by Byk, Case note on *Hintermann v. Union de l'Europe occidentale*, 124 JDI (1997), 142 ("Les immunités de juridiction des organisations internationales [...] ont, pour conséquence, lorsque n'est pas organisé au sein de chaque organisation un mode de règlement arbitral ou juridictionnel des litiges, de créer un déni de justice [...]. Ce déni de justice peut-il être évité par la primauté de la convention européenne des droits de l'homme, qui garantit le libre accès au juge et le procès équitable?").

64 *Cultier v. Organisation Européenne de télécommunications par satellite (Eutelsat)*, Cour de Cassation, Chambre sociale, 5 juin 2001, 98-44996.

65 *Ibid.* ("Attendu, en outre, que la cour d'appel a constaté que la commission de recours, prévue par l'article 22 de l'Accord de siège pour régler les litiges susceptibles de s'élever entre Eutelsat et les membres de son personnel au sujet de leurs 'conditions de service', lesquelles visent les conditions d'exécution et de rupture des contrats de travail, avait été instituée; qu'elle a, dès lors, exactement décidé que le grief allégué de déni de justice était dépourvu de fondement").

66 *UNESCO v. Boulois*, Tribunal de grande instance de Paris (ord. Réf.), 20 October 1997, Rev. Arb. (1997) 575; Cour d'Appel Paris (14^e Ch. A), 19 June 1998, XXIV a Yearbook Commercial Arbitration (1999), 294.

67 *Ibid.*, at 295. The case did not involve a direct action against UNESCO, but rather the question of a court appointment of an arbitrator pursuant to an arbitration clause contained in a private law contract between the organization and the claimant.

29. More recently, this “radical” approach was also relied upon by French courts in employment matters. A prominent recent example of this development is the litigation by a former employee of the African Development Bank who could not access the organization’s administrative tribunal because it was set up after his dismissal and thus lacked jurisdiction over his claim. In *Banque africaine de développement v. M.A. Degboe*,⁶⁸ the Cour de Cassation held that the impossibility of access to justice would constitute a denial of justice. Therefore, the defendant organization was not entitled to immunity from suit.⁶⁹ The African Development Bank⁷⁰ is a regional international organization with its headquarters in Abidjan, Côte d’Ivoire, and consists mostly of African States. France is a so-called non-regional member country. The Cour de Cassation did not rely on Article 6(1) of the ECHR, most likely as a result of the predominantly non-European membership of the Bank. Instead, it relied on the concept of “ordre public international” encompassing the prohibition of a “déné de justice”, or a “denial of justice”. This approach demonstrates that the idea of a “forfeiture” of immunity in cases in which no alternative remedy is provided for is not limited to those situations where the right of access to justice is derived from the ECHR. Rather, it indicates that this concept may be “transferable” to other jurisdictions, where it may be based on due process or the prohibition of denial of justice understood as elements of an “ordre public international” or equally of customary international law.⁷¹

30. A similar result was reached by the Italian Corte di Cassazione in *Drago v. International Plant Genetic Resources Institute*.⁷² A former employee of the defendant organization brought an action in Italian courts for unfair dismissal. Both the court of first instance in Rome and the appellate court dismissed the case because of the organization’s immunity from suit. The Supreme Court, however, reversed. It held that the jurisdictional immunity conferred upon the defendant organization in the headquarters agreement with Italy was incompatible with the fundamental right to institute proceedings to protect one’s rights contained in Article 24 of the Italian Constitution because the organization had not fulfilled its obligation pursuant to the headquarters agreement to provide an independent and impartial judicial remedy for the resolution of employment-related disputes. In fact, the International Plant Genetic Resources Institute did submit to the jurisdiction of the

68 *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 janvier 2005, 04-41012, 132 *Journal du droit international* (2005), 1142. See also L. Corbion, Note, 132 *Journal du droit international* (2005), 1143.

69 *Ibid.* (“Mais attendu que la Banque africaine de développement ne peut se prévaloir de l’immunité de juridiction dans le litige l’opposant au salarié qu’elle a licencié dès lors qu’à l’époque des faits elle n’avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges de cette nature, l’impossibilité pour une partie d’accéder au juge chargé de se prononcer sur sa prétention et d’exercer un droit qui relève de l’ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu’il existe un rattachement avec la France [...]”).

70 Agreement Establishing the African Development Bank, 7 May 1982, 1276 UNTS 3.

71 See above n.5.

72 *Alberto Drago v. International Plant Genetic Resources Institute (IPGRI)*, Court of Cassation, all civil sections, 19 February 2007, No. 3718, ILDC 827 (IT 2007).

ILOAT. However, since this submission took place after the dispute arose, the tribunal lacked jurisdiction and the plaintiff had in fact no alternative means of dispute settlement.

31. Furthermore, the development of Belgian jurisprudence on this issue has been remarkable. While in 1982 one could find decisions dismissing all human rights arguments about the availability of an effective judicial remedy against acts of international organizations,⁷³ in 2003 an appellate court disregarded the treaty-based immunity of an international organization because of human rights concerns. In *Siedler v. Western European Union*,⁷⁴ it found that the internal procedure for the settlement of employment disputes within the WEU did not offer the guarantees necessary to secure a fair trial. Thus, the limitation on access to domestic courts as a result of the organization's immunity from suit was incompatible with Article 6(1) of the ECHR. This case is particularly remarkable: a national court upheld its own jurisdiction and denied the immunity of an international organization in employment matters not because no alternative remedy was available, but rather because it thought that the alternative remedy did not conform to the requirements of Article 6(1) of the ECHR as interpreted by the ECtHR in *Beer and Regan*⁷⁵ and *Waite and Kennedy*.⁷⁶ In these cases, the Strasbourg Court had not only made the immunity of the organization in question dependent upon the availability of an alternative dispute settlement mechanism, but had also stressed that it was crucial "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."⁷⁷ The Belgian court thus investigated whether the internal appeals procedure for employment disputes within the WEU offered all of the guarantees inherent in the notion of a fair trial and found several shortcomings: there were no provisions for the execution of the judgments of the WEU appeals commission;⁷⁸ there was no public hearing and the publication of decisions was not guaranteed;⁷⁹ the members of the commission were appointed by the intergovernmental Council of the WEU for a short time period (two years) which created

73 *Dalfino v. Governing Council of European Schools and European School of Brussels, Belgium*, Conseil d'Etat, 17 November 1982, 108 ILR 638, 641, rejecting the challenge of a decision taken by the Governing Council of the European School in Brussels ("The possible absence of an effective remedy before a national court to secure respect for the right to education enshrined in Article 2 of Additional Protocol No. 1 or the right of defence including the right to a fair hearing under Article 6(1) of the [ECHR], does not authorize any extension of the competence of the Conseil d'Etat beyond the provisions of public policy which have determined that competence. Such a possible absence of any remedy cannot have the effect of giving the Conseil d'Etat jurisdiction to review the legality of the acts of an international organization even where that organization has its headquarters in Belgium.").

74 *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003, *Journal des Tribunaux* (2004), 617, ILDC 53 (BE 2003). See E. David, *Observations: L'immunité de juridiction des organisations internationales*, *Journal des Tribunaux* (2004), 619.

75 *Beer and Regan*, above n.25.

76 *Waite and Kennedy*, above n.26.

77 *Waite and Kennedy*, *Ibid.*, para. 68.

78 *Siedler v. Western European Union*, above n.74, para. 59 ("Rien n'est toutefois prévu quant à l'exécution de ses décisions.").

79 *Ibid.*, para. 60 ("[...] la publicité des débats n'est pas assurée, les audiences de la commission de recours sont secrètes [...] pas plus que la publicité des décisions.").

an excessively close link with the organization itself; it was not possible to challenge a particular member of the commission.⁸⁰ Thus, the court concluded that the WEU personnel statute did “not offer all the guarantees inherent in the notion of due process” and that therefore “the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the WEU [was] incompatible with Article 6(1) of the ECHR.”⁸¹

32. The availability of “reasonable” alternative means of redress as a requirement for the grant of jurisdictional immunity to international organizations was also discussed in the above-cited case of *Energies nouvelles et environnement v. Agence spatiale européenne*.⁸² A Brussels court upheld ESA’s immunity from suit because the claimant had one or more “reasonable” alternative means in the specific case.⁸³ In its judgment, the Belgian court explicitly relied upon the case law of the ECtHR and found that the possibility of diplomatic representations by the Belgian representative to ESA or even of bringing the claim before the organization’s ombudsman, while not strictly speaking a form of judicial or administrative redress, would constitute “reasonable alternative means” in the sense of the ECtHR’s jurisprudence.⁸⁴

33. These Belgian cases clearly demonstrate that national courts are increasingly scrutinizing not only the availability of an alternative dispute settlement mechanism, but also the adequacy of such mechanisms. Although rarely coming to such “radical” conclusions as the Belgian tribunal above, national courts have in fact been considering the adequacy of alternative remedies for some time. The jurisprudence of German courts is instructive in this regard. For instance, in *Hetzel v. EUROCONTROL*,⁸⁵ the German Constitutional Court not only affirmed that German courts lacked jurisdiction over employment disputes between EUROCONTROL and its staff, but also held that the organization’s immunity before German courts did not violate minimum requirements of the rule of law principle contained in the German Constitution because the exclusively competent ILOAT provided

80 *Ibid.*, para. 61 (“Le mode de désignation et la courte durée du mandat comportent le risque que les membres de la commission soient trop étroitement liés à l’organisation. L’immovibilité est un corollaire nécessaire de la notion d’indépendance. Une possibilité de récusation garantie de l’impartialité n’est pas prévue.”).

81 *Ibid.*, paras 62 et seq. (“Le recours organisé par le statut du personnel de l’UEO n’offre donc pas toutes les garanties inhérentes à la notion de procès équitable et certaines des conditions des plus essentielles font défaut. Il échet de constater dès lors que la limitation d’accès au juge ordinaire en raison de l’immunité juridictionnelle de l’UEO ne s’accompagne pas de voies de recours effectives au sens de l’art 6, §1 de la CEDH.”).

82 Civ. Bruxelles (4e ch.), 1 décembre 2005, *Journal des tribunaux* (2006), 171.

83 *Journal des tribunaux* (2006), 171, 173 (Claimant “avait en l’espèce une ou plusieurs voies alternatives raisonnables de recours, au sens de la jurisprudence de la Cour; qu’en conséquence, l’A.S.E. est fondée à se prévaloir de son immunité de juridiction en la présente cause.”).

84 *Journal des tribunaux* (2006), 171, 173 (“Que certes une telle procédure ne constitue pas un recours judiciaire ou administratif au sens strict du terme, mais qu’elle paraît constituer une ‘voie alternative raisonnable’ au sens où l’entend la cour, au vu de la jurisprudence précitée.”).

85 *Hetzel v. EUROCONTROL*, Federal Constitutional Court, Second Chamber, 10 November 1981, 2 BvR 1058/79, BVerfG 59, 63; NJW (1982), 512, DVBl (1982), 189, DÖV (1982), 404. See also on the background of *Hetzel v. EUROCONTROL* and the related case of *Strech v. EUROCONTROL*, Bleckmann, *Internationale Beamtenstreitigkeiten vor nationalen Gerichten* (1981); Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen* (1981).

an adequate alternative remedy. According to the German Constitutional Court, the Tribunal's

status and procedural principles conformed to an international minimum standard of basic procedural fairness as it is derived from developed legal orders following the rule of law and from the procedural law of international courts.⁸⁶

34. Moreover, in more recent cases, the German Constitutional Court adhered to a similar qualification of administrative tribunals. In *B. et al v. EPO*,⁸⁷ it reaffirmed that

[t]he proceedings before the ILOAT are independent of the internal appeals proceedings. The Tribunal decides on the basis of its legally defined jurisdiction and by way of a proper legal procedure, solely in accordance with legal principles and rules. Pursuant to Article III of the Statute of the ILOAT, its judges are under a duty to be independent and free from bias. Thus, the Federal Constitutional Court has decided that the status and the principles of procedure of the ILOAT satisfy both the international minimum standard of fundamental procedural fairness and the minimum rule of law demands of the Basic Law (cf. BVerfGE 59, 63 <91 f.>).⁸⁸

35. It is important to note, however, that to date, the German Constitutional Court has always assessed the adequacy of the alternative legal protection provided by administrative tribunals in the abstract and refused to look at individual circumstances. In addition, the Court very openly shifted the burden of proof to the applicants to demonstrate that the standard of legal protection received from or within an international organization was insufficient. This was particularly evident in the decision in *D. v. Decision of the EPO Disciplinary Board*,⁸⁹ in which the Court rejected a claim by a German patent attorney who failed the EPO bar examination and was unsuccessful in his challenge before the EPO Disciplinary Board. According to the German Constitutional Court

86 Hetzel v. EUROCONTROL, BVerfG 59, 63, at 91 ("Die Ausgestaltung des Rechtsschutzes für die Bediensteten von Eurocontrol zufolge der allgemeinen Beschäftigungsbedingungen sowie die Begründung der Gerichtsbarkeit des Verwaltungsgerichts der IAO hierfür entspricht zunächst einer weitverbreiteten Praxis internationaler Organisationen [...]. Status und Verfahrensgrundsätze des Gerichts entsprechen überdies einem internationalen Mindeststandard an elementarer Verfahrensgerechtigkeit, wie er sich aus entwickelten rechtsstaatlichen Ordnungen und aus dem Verfahrensrecht internationaler Gerichte ergibt [...]; sie widersprechen ferner insgesamt auch nicht rechtsstaatlichen Mindestanforderungen im Sinne des Grundgesetzes.")

87 *B. et al v. EPO*, Federal Constitutional Court, Second Chamber, 3 July 2006, 2BvR 1458/03.

88 *Ibid.*, para. 11 ("Das Verfahren vor dem ILOAT ist vom internen Beschwerdeverfahren unabhängig. Das Gericht entscheidet aufgrund rechtlich festgelegter Kompetenzen und im Rahmen eines rechtlich geordneten Verfahrens ausschließlich nach Maßgabe von Rechtsnormen und -grundsätzen die ihm unterbreiteten Verfahrensgegenstände. Seine Richter sind gemäß Art. III des ILOAT-Statuts zur Unabhängigkeit und Unparteilichkeit verpflichtet. Dementsprechend hat das Bundesverfassungsgericht festgestellt, dass Status und Verfahrensgrundsätze des ILOAT sowohl dem internationalen Mindeststandard elementarer Verfahrensgerechtigkeit als auch den rechtsstaatlichen Mindestanforderungen des Grundgesetzes genügen (vgl. BVerfGE 59, 63 <91 f.>").

89 *D. v. Decision of the EPO Disciplinary Board*, Federal Constitutional Court, Second Chamber, 28 November 2005, 2 BvR 1751/03.

the complainant failed to show that the legal protection afforded with regard to [EPO bar] admission decisions generally and obviously fell short of the level of legal protection required by the German Basic Law. The alleged errors of the Disciplinary Board in the application of the examination and admission rules [. . .] are not serious enough to cast doubt on whether the level of fundamental rights protection guaranteed by the Basic Law has been achieved in its general structure.⁹⁰

36. The availability of a reasonable alternative dispute settlement mechanism for staff disputes was also a crucial issue in *Pistelli v. European University Institute*,⁹¹ in which the Italian Court of Cassation held that

[a]s has been noted, the dispute resolution organ is a truly judicial body. The selection of the members of the Committee from a list compiled by an international judicial organ satisfies the requirements of independence and impartiality for the body charged with resolving disputes between staff and the Institute; a body, as has been said, which is considered equivalent to the Court of Justice of the European Communities.⁹²

37. Whether national courts correctly assess the adequacy of the level of alternative legal protection afforded to staff members by administrative tribunals or other alternative dispute settlement mechanisms may be questionable in individual cases. While they may generally be too deferential towards the quality of the alternative legal protection,⁹³ they may sometimes be overly zealous in questioning the adequacy of the alternatives.⁹⁴ The important point is that there is a clear development in the case law of domestic courts towards abandoning the traditional view of the immunity of international organizations, which merely decided on the basis of the applicable immunity provisions without considering the human rights impact of the decisions. The human rights-based notion of access to justice

90 Ibid., para. 11 (“Der Beschwerdeführer legt nicht dar, dass der Rechtsschutz gegen Zulassungsentscheidungen das vom Grundgesetz geforderte Ausmaß an Rechtsschutz generell und offenkundig unterschreitet (vgl. BVerfGE 73, 339 <387>). Die vom Beschwerdeführer gerügten Fehler der Disziplinarkammer bei der Anwendung des Prüfungs- und Zulassungsrechts haben, ungeachtet der Frage, inwieweit sie sachlich begründet sind, nicht das Gewicht, um Zweifel daran zu wecken, dass das Niveau des vom Grundgesetz gewährleisteten Grundrechtsschutzes strukturell erreicht werde.”).

91 *Pistelli v. European University Institute*, above n.60.

92 Ibid., 14.3 (“L’organo di risoluzione delle controversie, come si è constatato, è una vera e propria istanza giurisdizionale. La scelta dei membri della Commissione all’interno di un elenco formato da organismi giurisdizionali internazionali soddisfa i requisiti di indipendenza e terzietà dell’organo deputato alla risoluzione delle controversie tra il personale e l’Istituto, organo, come si è detto, considerato equivalente alla Corte di giustizia Cee.”).

93 Cf. the criticism by Massimo Iovane of the Italian Court of Cassation’s judgment in *Pistelli v. European University Institute*, above n.60, that there was “no further analysis on the composition of the commission, on its procedural rules, on the substantive norms it applies, or on the possibility of challenging its decisions before an appellate mechanism.” ILDC 297 (IT 2005), Comment 3.

94 Cf. Maarten Vidal’s criticism that in *Siedler v. Western European Union*, above n.74, “the Brussels Labor Court of Appeals seems to have been overzealous in transposing the qualitative criteria of Article 6, para. 1, of ECHR to the level of international administrative tribunals.” ILDC 53 (BE 2003), Comment 5.

or similar customary international law or national constitutional law concepts of access to judicial determination of one's rights are playing an increasingly important role in the decision whether to grant an international organization immunity from suit.

III. The immunity of administrative tribunals and the possibility to challenge their decisions in national courts

38. Apart from the correlation between the jurisdictional immunity of an international organization and the availability of alternative dispute settlement mechanisms such as administrative tribunals, another immunity-related issue is likely to become increasingly relevant: the question of the immunity of administrative tribunals themselves, and whether and to what extent the decisions of these tribunals can be challenged by either national or international courts and tribunals.

39. It is obvious that "regular" judicial review of decisions of administrative tribunals is only available where the respective instruments make provision for such remedies. They can either allow appeals as in the traditional system within the EU⁹⁵ and as envisaged by the new UN system of administration of justice,⁹⁶ or they may permit extraordinary forms of review, such as the possibility of making a reference to the ICJ for an advisory opinion that was available to UNAT and ILOAT for a certain period of time.⁹⁷

40. From an immunity perspective, it is more interesting to ask whether decisions of administrative tribunals may be challenged before national courts. Clearly, there is no direct avenue of legal control available to national courts to review the decisions of administrative tribunals. Similarly, administrative tribunals, usually set up as subsidiary organs of international organizations, "benefit" from the immunity of the international organization which established them. However, there are a number of possible indirect forms of control which may be considered.

41. One interesting early example of an attempted indirect review of a decision of a quasi-judicial body is a case brought before English courts, in which the claimant sought to question a decision of the European Commission of Human Rights by suing one of its individual

95 With the creation of the Court of First Instance in 1989, competent to hear staff disputes, an appeal to the ECJ was made possible. In 2004, the Council of the EU decided to establish the European Union Civil Service Tribunal, Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal (2004/752/EC, Euratom), 9 November 2004, OJ L 333/7. The new rules permit appeals to the Court of First Instance.

96 Pursuant to GA Res. 61/261, Administration of justice at the UN, 30 April 2007, paras 19, the existing UNAT system shall be replaced by a "formal system of administration of justice [which] should comprise two tiers, consisting of a first instance, the United Nations Dispute Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies".

97 Cf. Art. XII ILOAT Statute. In 1955, the UNAT Statute was amended, making provision in its new Art. 11 for a limited review of UNAT judgments through requesting advisory opinions from the ICJ. That system was abolished in 1996. See also P. Sands and P. Klein, *Bowett's Law of International Institutions* (5th edn. 2001), 427 et seq.

members for negligence. *Zoernsch v. Waldock et McNulty*⁹⁸ was dismissed on the basis of the functional immunity enjoyed by the defendants.⁹⁹ Another case involved an attempt to challenge a decision of an international organization. In the *Lenzing AG's European Patent* case,¹⁰⁰ an English court was asked to review the legality of the revocation of the applicant's European patent by the relevant bodies of the European Patent Office. The court, however, dismissed the action, acknowledging that it lacked jurisdiction over such final decisions.¹⁰¹ In a related case, the German Constitutional Court also decided that German courts lacked the power to review patent decisions of the European Patent Office because they did not constitute the exercise of German sovereign authority;¹⁰² thus, it too refused to hear *Lenzing AG's* challenge. Similar outcomes can be found in the case law of Belgian¹⁰³ and French¹⁰⁴ courts, which regularly hold that decisions of international organizations are beyond the power of review of national courts.¹⁰⁵

42. The same considerations apply with regard to decisions of administrative tribunals. It has been generally recognized by national courts that they do not have jurisdiction to review the judgments of administrative tribunals. A good example is the French Conseil d'Etat decision in *Popineau v. Office Européen des Brevets*,¹⁰⁶ in which a former employee of the European Patent Office tried to "appeal" against a decision of the

98 Court of Appeal, 24 March 1964, (1964) All E.R. 265, 3 ILM (1964), 425.

99 The Court of Appeal referred to the "immunity in respect of an act done by [the State official] in his official capacity during his tenure of office." 3 ILM (1964), 425.

100 *Lenzing AG's European Patent*, Queen's Bench Division (Crown Office List), 20 December 1996, (1997) Reports of Patent, Design and Trademark Cases 245.

101 *Ibid.* ("The United Kingdom has agreed with the other States members of the European Patent Convention that the final arbiter of revocation under the new legal system is to be the Board of Appeal of the EPO. [...] It is the agreed EPO equivalent of the House of Lords, Cour de Cassation, or Bundesgerichtshof. It is not for national courts to query its doings, whether in a direct or collateral attack.")

102 BVerfG, 8 January 1997, NJW 1997, 1500 ("Die Verfassungsbeschwerde eines ausländischen Beschwerdeführers gegen die Beschwerdeentscheidung einer technischen Beschwerdekammer des Europäischen Patentamtes ist mangels Beschwerdebefugnis unzulässig, da in der Handhabung der für die Beschwerdekammer des Europäischen Patentamtes geltenden Verfahrensregeln jedenfalls gegenüber einem ausländischen Beschwerdeführer kein Akt der öffentlichen Gewalt i.S. von § 90 I BVerfGG liegt.")

103 *Dalfino v. Governing Council of European Schools and European School of Brussels, Belgique, Conseil d'Etat*, 17 November 1982, 108 ILR 638, 641, rejecting a challenge against a decision taken by the Governing Council of the European School in Brussels. ("[N]either the European School of Brussels I, nor the Governing Council of the European School, are organized or controlled by the Belgian public authorities and [do not apply] Belgian laws and regulations relating to education but rather regulations adopted by international agreement [...]. Neither the European School nor the Governing Council are administrative authorities within the meaning of Section 14 of the Coordinated Laws on the Conseil d'Etat, which only applies to administrative authorities created and organized by a Belgian public authority.")

104 *Chambre Syndicale des Transports Aériens, France, Conseil d'Etat*, 22 July 1994, RGDIP (1995), 159; 111 ILR 500, 502, rejecting a challenge against EUROCONTROL's route charges ("French administrative courts have no competence to examine the legal justification for the unit rates of charges fixed by an international body.")

105 See in more detail A. Reinisch, *Verfahrensrechtliche Aspekte der Rechtskontrolle von Organen der Staatengemeinschaft*, 42 *Berichte der Deutschen Gesellschaft für Völkerrecht* 2005 (2007), 43 et seq.

106 *Popineau v. Office Européen des Brevets, Conseil d'Etat, Sections du Contentieux*, 7eme sous-section, 15 February 1995, No. 161.784.

ILOAT¹⁰⁷ confirming the termination of his employment. The French Conseil d'Etat simply stated that no international convention nor any domestic legislation or regulation gave it competence to render a judgment of that kind,¹⁰⁸ and therefore dismissed the action.

43. While it is clear that national courts do not provide a direct form of control, such as appeal or annulment procedures, it appears that recent tendencies of national courts, supported by the case law of human rights bodies such as the ECtHR, may increasingly lead to a form of indirect control, assessing not only the availability of administrative tribunals but also the adequacy of the legal protection granted by such alternatives to national courts. If the human rights-inspired case law of national courts, as discussed above,¹⁰⁹ continues to develop into mainstream thinking, there will be an increasing need to examine the actual level of protection granted by international administrative tribunals. To date, national courts have generally been rather deferential in assessing the quality of the legal protection given to staff members before administrative tribunals. However, it is not impossible that national courts will become more assertive in exercising their own jurisdiction if complainants manage to persuade them that the procedural treatment they receive before administrative tribunals falls short of international standards, as amply demonstrated by the Belgian case of *Siedler v. Western European Union*.¹¹⁰

IV. Conclusion

44. The relationship between the scope of jurisdiction of administrative tribunals and the immunity of international organizations in employment matters, originally devised as a practical matter aimed at ensuring the autonomy and independence of the internal staff law of international organizations, has received renewed attention from a human rights perspective and a growing demand for “good governance” within international organizations.

45. The notion that the jurisdictional immunity enjoyed by international organizations may depend upon the availability of “reasonable alternative means to protect effectively” the rights of those affected by their activities¹¹¹—as developed by the ECtHR in its *Waite and Kennedy* judgment—is increasingly accepted by a number of national courts, in particular, in Europe. In case of employment disputes, the alternative means of protection is usually embodied in the availability of administrative tribunals which have jurisdiction over staff disputes.

46. That national courts are increasingly looking not only at the availability of such alternative means of protection but also at their adequacy from a “fair trial”/“due

107 In re POPINEAU (Nos. 6, 7 and 8), ILO Administrative Tribunal, 13 July 1994, Judgment No. 1363.

108 *Popineau v. Office Européen des Brevets*, above n.106 (“[A]ucune stipulation d’une convention internationale, ni aucune disposition législative ou réglementaire ne donne compétence au Conseil d’Etat pour connaître d’un tel jugement.”).

109 See above text starting at n.52.

110 *Siedler v. Western European Union*, above n.74.

111 *Waite and Kennedy*, above n.26, para. 68, the quotation is found above at n.28.

process” perspective should not be viewed as a threat to administrative tribunals. Rather, in the sense of an enlightened judicial dialogue which might contribute to the strengthening of fundamental rights, it should support administrative tribunals in their quest for reforming their own methods of the “administration of justice”.