

To What Extent Can and Should National Courts ‘Fill the Accountability Gap’?

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Abstract

International organizations are generally recognised as requiring privileges and immunities, in particular immunity from the jurisdiction of domestic courts, in order to remain independent and unimpeded in the fulfilment of their functions and duties. However, this approach often neglects the effect of a grant of immunity to international organizations, in that potential claimants may be deprived of their ability to raise claims against international organizations before the ‘natural forum’ of domestic courts. Recently, both legal doctrine and practice have devoted particular attention to the potential accountability gap created by sweeping jurisdictional immunities of international organizations. This has even led to calls for filling the gap by denying immunity. This paper will outline the development of the increased awareness of accountability gaps and assess the reactions so far. Finally, it will turn to an evaluation of the suitability of national courts as institutions for securing the accountability of international organizations.

Keywords

international organizations – immunity – accountability gap – national courts – access to court.

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1 Introduction

It is a well-accepted truism that international organizations need to enjoy privileges and immunities, in particular immunity from the jurisdiction of domestic courts, in order to remain independent and unimpeded in the fulfilment of their functions and duties. This underlying functionality rationale serves as the primary justification and yardstick for the scope of the immunity from legal process regularly enjoyed by international organizations on the basis of their constituent documents, general privileges and immunities treaties, and headquarters agreements;¹ and also in national legislation, or maybe customary rules.²

Such ‘functionalist’, organization-centred thinking neglects the effect of a grant of immunity to international organizations, in that potential claimants may be deprived of their ability to raise claims against international organizations before the ‘natural forum’ of domestic courts. Recently, both legal doctrine and practice have devoted particular attention to the potential accountability gap created by sweeping jurisdictional immunities of international organizations. They have even led to calls for filling the gap by denying immunity. This contribution will outline the development of the increased awareness of accountability gaps and assess the reactions so far. Finally, it will turn to an evaluation of the suitability of national courts as institutions for securing the accountability of international organizations.

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- 1 See *e.g.* Article 105(1) of the UN Charter: “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”; Article 67(a) of the Constitution of the World Health Organization: “The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions”; Article 133 of the Charter of the Organization of American States: “The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes”; Article VIII(2) of the Agreement Establishing the World Trade Organization: “The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions”; and Article 40(a) of the Statute of the Council of Europe: “The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions”.
 - 2 See A. Reinisch, ‘Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations: An Introduction’, in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, Oxford, 2013) p. 7 *et seq.* See also the contribution of Michael Wood to this Forum.

2 The Increasing Awareness Concerning “Accountability Gaps”

While the functionalist paradigm of thinking about international organizations has remained central to the discussion of their legal position, the rise of constitutionalist thinking has added new perspectives and has also affected the concept of immunities.³ The rule of law-inspired emphasis on rights and remedies led to a new conceptualization of the right of individuals to a remedy, and has implications for jurisdictional immunities. In particular, courts in states bound by the European Convention on Human Rights (‘ECHR’)⁴ have re-defined the relationship between immunity and the right of access to court as guaranteed by Article 6 of the ECHR.⁵ While traditionally, national courts and the European Court of Human Rights (‘ECtHR’), as well as the European Commission on Human Rights, were of the opinion that the right of access to court would only apply where national courts have jurisdiction in the first place and that immunity would not have to cede vis-à-vis the right of access to court,⁶ this has gradually given way to a jurisprudence that recognizes an inherent conflict between the two notions. In Europe, the debate was fuelled by the ECtHR and its landmark *Waite and Kennedy* case,⁷ in which the

3 See A. Reinisch, ‘Privileges and Immunities’, in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, Cheltenham, 2011) pp. 132–155; C. Wickremasinghe, ‘International Organizations or Institutions, Immunities before National Courts’, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law Vol. VI* (Oxford University Press, Oxford, 2012) pp. 10–18.

4 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS p. 221 (entered into force 3 September 1953) (‘hereinafter ECHR’).

5 Art. 6(1) of the ECHR: “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.”

6 See *Spaans v. The Netherlands*, Application No. 12516/86, 12 December 1988, European Commission on Human Rights, Decision on Admissibility, (1988) 58 Decisions and Reports p. 119, at p. 122, where the European Commission of Human Rights regarded the grant of immunity from suit to the Iran-United States Claims Tribunal by the Netherlands as a restriction of national sovereignty which did not give rise to an issue under the Convention: “The Commission notes that it is in accordance with international law that States confer immunities and privileges to international bodies like the Iran-United States Claims Tribunal which are situated in their territory. The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the Convention.”

7 *Waite and Kennedy v. Germany*, Application No. 26083/94, 18 February 1999, European Court of Human Rights, [1999] ECHR p. 13 (‘*Waite and Kennedy*’); *Beer and Regan v. Germany*,

Strasbourg court recognized that (civil) claims against international organizations affected the right of access to court under Article 6 of the ECHR. It further held that while this right of access to justice might be limited for legitimate purposes, such as protecting the independent functioning of an international organization, such limitation was only legitimate and permissible if it also was proportionate. In the Court's view, the proportionality of the grant of immunity depended upon the availability of "reasonable alternative means."⁸

National courts, at least in some European jurisdictions, were willing accomplices in diminishing the broad immunity of international organizations. French,⁹ Italian,¹⁰ and Belgian¹¹ courts started to deny immunity to international organizations in cases in which the recognition of the immunity would have deprived claimants of their right of access to justice.

It is too early to say whether this will remain isolated regional case-law or whether it will become mainstream thinking in relation to the immunities of international organizations. In particular, it seems unclear to what extent the recent *Jurisdictional Immunities* case before the International Court of Justice ('ICJ'),¹² which of course concerned state immunity, and its strong support for

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

- 8 *Waite and Kennedy*, para. 68: "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."
- 9 *UNESCO v. Boulois*, 20 October 1997, Tribunal de grande instance de Paris (ord. Réf.), (1997) Rev. Arb. p. 575; Cour d'Appel Paris (14^e Ch. A), 19 June 1998, (1999) xxiv *Yearbook Commercial Arbitration* p. 294, at p. 295: A plea of immunity was rejected because this "would inevitably lead to preventing [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]". See also *Banque africaine de développement v. M.A. Degboe*, 25 Janvier 2005, 04-41012, Cour de Cassation (Chambre sociale), (2005) 132 *Journal du droit international* p. 1142.
- 10 *Drago v. International Plant Genetic Resources Institute*, Corte di Cassazione, Judgment No. 3718/2007, ILDC 827 (IT 2007); *European University Institute v. Piette*, Corte di Cassazione, Judgment No. 149/1999, *Rivista di diritto internazionale privato e processuale* (2000) p. 472.
- 11 *Siedler (S.M.) v. Union de l'Europe occidentale*, 17 Septembre 2003, Cour d'Appel de Bruxelles (4^{ème} Ch.), *Journal des Tribunaux* (2004) p. 617, at paras. 62 *et seq.*, especially: "... the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the [Western European Union] [was] incompatible with Article 6(1) ECHR." See also *Union de l'Europe occidentale v. Siedler (S.M.)*, Case No. S.04.0129.F, 21 December 2009, Cour de cassation (3^{ème} Chambre), p. 20.
- 12 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, 3 February 2012, International Court of Justice, 2012 ICJ Reports p. 99.

traditional immunity concepts against erosion trends under the *ius cogens* banner¹³ will have implications on the law of international organizations' immunities. One must note that in *Stichting Mothers of Srebrenica v The Netherlands*,¹⁴ the ECtHR confirmed the immunity decision in the Dutch *Srebrenica* case¹⁵ and found that upholding the United Nations' immunity from suit did not amount to a violation of the right of access to court.¹⁶ Invoking the *Jurisdictional Immunities* case, the Strasbourg court relativized *Waite and Kennedy* by holding that it would not follow "that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court."¹⁷ It remains to be seen whether the ECtHR's decision in *Srebrenica v The Netherlands*, in combination with the position taken by the ICJ in the *Jurisdictional Immunities* case, will eventually result in domestic courts applying a more cautious approach when considering the denial of immunity to international organizations, even if no adequate and effective dispute settlement mechanisms are readily available.

It is important to note, however, that the demand for alternative, effective dispute settlement is not merely a European idiosyncrasy, but can be also found in universal immunity regimes like the *1946 Convention on the Privileges and Immunities of the United Nations* ('General Convention') containing an express treaty obligation to make available "appropriate modes of settlement of ... disputes arising out of contracts or other disputes of a private law character."¹⁸

It seems, however, rather clear that there is a human rights-driven need to close accountability gaps, irrespective of whether they result from immunity,

13 *Ibid*, at para 92 *et seq*. See also, e.g., *Criminal Proceedings against Milde*, Case No. 1072/2009, Italian Court of Cassation, (2009) 92 *Rivista di diritto internazionale privato e processuale* 618, ILDC 1224 (IT 2009); P. Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts', in O. K. Fauchald & A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) pp. 245–266.

14 *Stichting Mothers of Srebrenica et al. v. The Netherlands*, Application No. 65542/12, 11 June 2013, European Court of Human Rights (Third Section), Decision on Admissibility.

15 *Stichting Mothers of Srebrenica et al., v. United Nations*, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012).

16 See further the contribution of Thomas Henquet to this Forum.

17 *Stichting Mothers of Srebrenica et al. v. The Netherlands*, Application No. 65542/12, 11 June 2013, European Court of Human Rights (Third Section), Decision on Admissibility, para. 164.

18 See, e.g., Article VIII, Section 29(a) of the *1946 Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS p. 15 (entered into force 17 September 1946) ('General Convention'): "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."

the inability to accomplish service of process¹⁹ or other grounds leading to a lack of jurisdiction of national courts.²⁰

A parallel development to close accountability gaps can be discerned in other fields by ensuring effective dispute settlement mechanisms on various levels of international organizations' accountability. International organizations are under pressure to adopt, reform, and enhance staff dispute settlement possibilities through administrative tribunals or other institutions.²¹ In the field of operational activities of international organizations which may lead to incidental damage, claims commissions are demanded.²² Finally, the entire discussion about the human rights accountability of the United Nations for the terror listings in the aftermath of the *Kadi* cases,²³ and the gradual establishment of internal redress mechanisms leading to an Ombudsperson institution,²⁴ can be seen as part of the continuing efforts to prevent the

19 *See International Association of Machinists v. opec*, 18 September 1979, U.S. District Court C.D. Cal., 477 F.Supp 553 (C.D. Cal. 1979), *affirmed on other grounds*, U.S. Court of Appeals 9th Cir., 6 July–24 August 1981, 649 F.2d 1354 (9th Cir. 1981); *Prewitt Enterprises, Inc. v. opec*, 353 F.3d 916 (11th Cir. 2003).

20 National courts may use other 'avoidance techniques', like the act-of-state doctrine, non-judiciability, de-recognition of legal personality, etc.: *see the overview in A Reinisch, International Organizations Before National Courts* (Cambridge University Press, Cambridge, 2000) p. 35 *et seq.*

21 K. Schmalenbach, 'Dispute Settlement', in Klabbers & Wallendahl (eds), *supra* note 3, pp. 251–284, at p. 261 *et seq.*; K. Schmalenbach, 'International Organizations or Institutions, Legal Remedies against Acts of Organs', in Wolfrum (ed.), *supra* note 3, pp. 31–37; E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass?' (2002) 5 *International and Comparative Law Quarterly* pp. 1–15; A. Gordillo, 'The Administrative Law of International Organizations: Checks and Balances in Law Making. The Case of Discrimination' (2006) 18 *European Review of Public Law* pp. 289–312.

22 Schmalenbach, 'Legal Remedies against Acts of Organs', *supra* note 21, pp. 31–37; K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Peter Lang, Frankfurt am Main, 2004); K. Wellens, *Remedies Against International Organisations* (Cambridge University Press, Cambridge, 2002).

23 *Kadi (Yassin Abdullah) v. Council and Commission*, Case T-315/01, [2005] ECR II-3649; *Kadi (Yassin Abdullah) and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05P and C-415/05P, [2008] ECR I-6351; *Commission, UK and Council v. Kadi (Yassin Abdullah)*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013 (not yet reported), available at: < <http://curia.europa.eu/>>.

24 *See generally* A. Fabbriotti, 'Ombudsperson', in Wolfrum (ed.), *supra* note 3, pp. 973–977; A. Tsadiras, 'The Position of the European Ombudsman in the Community System of

creation of situations in which international organizations cannot be held accountable.

3 Prerequisites for National Courts to ‘Fill the Accountability Gap’

The exercise of jurisdiction by national courts should not be an end in itself, but rather the means to achieve an end: that is, the development of adequate alternative dispute settlement mechanisms within international organizations in order to ensure their accountability. This leads to the central issue of the present inquiry: whether national courts should step in to fill the accountability gap in situations in which international organizations would normally enjoy immunity from suit.

It appears that the crucial considerations when inquiring whether national courts should fill the accountability gap are: (a) whether they are suited to perform this task; and (b) whether such exercise of jurisdiction will disproportionately hinder the independent functioning of international organizations. Clearly, both aspects will always require nuanced answers: they will come as matters of degree and not as black-and-white, yes-or-no responses. Thus, each element in itself, and subsequently both elements combined, will require a balancing exercise.

3.1 *Sufficient Procedural Fair Trial Guarantees – Suitability and Expertise*

The first aspect of the suggested test of whether domestic courts are suited to fill accountability gaps is linked to the rationale of closing the gap in the first place: it addresses concerns about the fairness of the procedure to be guaranteed in case of claims brought against international organizations. Disregarding the immunity of international organizations is a response grounded in the need to provide access to justice for those who would otherwise not have any forum available to decide on their claims.²⁵ But this fair trial requirement is a

Judicial Remedies’ (2007) 32 *European Law Review* pp. 607–26. In relation to the Ombudsperson of the UN Security Council, see also K. Tünde Huber & A. Rodiles, ‘An Ombudsperson in the United Nations Security Council: a Paradigm Shift?’ (2012) 10 *Anuario Mexicano de Derecho Internacional* pp. 107–142. In relation to the Ombudsperson of the European Space Agency (‘ESA’), see C. Ryngaert, ‘Belgium’, in Reinisch (ed.), *supra* note 2, p. 67 *et seq.*

25 This was the clear policy rationale behind the *Waite and Kennedy* judgment, and also underlying national courts decisions such as *Siedler v Western European Union*, *supra*

two-way street, and implies that international organizations, when they are brought before domestic courts, also have to be afforded a fair and impartial process. While that may be considered to be stating the obvious, it should not be underestimated that, in practical terms, the fear of biased or otherwise inadequate judicial procedures before national courts appears to be one of the major concerns of international organizations. Their insistence on immunity is often precisely motivated by an apprehension of potential harassment by national litigation and undue influence of the forum state.²⁶ In this regard, one should clearly distinguish between two factors: on the one hand, general concerns in relation to harassment and the cost factor of any kind of legal proceedings (which necessarily leads to officials having to deal with the issues and lawyers having to be hired and paid for by the international organization);²⁷ and on the other hand, legitimate concerns about the due process expected from domestic courts. It appears that, for political reasons, international organizations are very reluctant to publicly voice these concerns, because they are premised on the assumption that some domestic court systems are less properly functioning than others; an assertion that an international organization may be hesitant to make, especially when it concerns the court system of one of its members. But these are valid considerations. It appears crucial that any piercing of the immunity veil in order to remedy the accountability gap can only be considered to be legitimate if it respects the fair trial guarantees enshrined in human rights instruments.

A further requirement that is linked to the fair trial aspect seems to be the suitability and expertise of a domestic court to hear claims against an international organization. Obviously, this will depend on the types of claims brought against international organizations. It appears hard to argue that ordinary civil

note 11. See also *SA Energies Nouvelles et Environnement v. Agence Spatiale Européenne*, 1 December 2005, Brussels Court of First Instance (1st chamber), (2006) *Journal des tribunaux*, No 6216, ILDC 1229 (BE 2005), p. 171; *SA Energies Nouvelles et Environnement v. Agence Spatiale Européenne*, 23 March 2011, Brussels Court of Appeal (1st chamber), No. 2011/2013, 2006/AR/1480, ILDC 1729 (BE 2011); *Consortium X v. Swiss Federal Government (Conseil fédéral)*, 2 July 2004, Swiss Federal Supreme Court, 1st Civil Law Chamber, partly published as BGE 130 I 312, ILDC 344 (CH 2004); *Paola Pistelli v. European University Institute*, 28 October 2005, Italian Court of Cassation, all civil sections, No. 20995, *Guida al diritto* 40 (3/2006), ILDC 297 (IT 2005).

26 See *Mendaro v. The World Bank*, 717 F.2d 610, at 615 (D.C.Cir. 1983) (referring to “the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory.”).

27 Reinisch, *supra* note 20, at p. 237 *et seq.*

courts of states would not be fully competent to adjudicate simple contract or tort claims. The fact that the defendant is an international organization is often only of marginal relevance to the legal issues in such cases, which may focus on statutory and contractual interpretation, legal remedies, questions of breach and civil liability.²⁸ Of course, the matter becomes more complex when the questions to be decided touch upon internal issues of international organizations, such as the powers of organs, the role of member states, the internal validity of resolutions, and so forth.²⁹ ‘Precedents’ like the *International Tin Council*³⁰ or *Srebrenica*³¹ cases come to mind: where the potential concurrent or subsidiary liability of member states of an international organizations for the debts incurred by such organization is at issue, “constitutional” matters of international organizations are clearly raised. Does the constituent instrument of an international organization provide for such liability? Does the absence of any such provisions indicate that member states’ liability must be presumed to be excluded, or should it rather be considered implicitly present? Similarly, where the responsibility of peacekeepers for failing to prevent the commission of atrocities against the civilian population is at stake, questions of the institutional law of the relevant organizations are raised. Does international responsibility lie with the troop contributing states and/or the organization? If responsibility is not shared in the first place, is it possible to consider that either entity may incur responsibility for aiding and abetting or otherwise? If so, would such responsibility be determined solely by general international law or by the internal law of the respective international organization?

Certainly, these are matters of the internal law of international organizations and/or of general international law, and there may be a valid argument that international courts and tribunals would be better equipped to address them than domestic courts. However, it appears difficult to argue that, as a

28 *Ibid.*, p. 383 *et seq.*

29 See the kind of legal challenges described in A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, Oxford, 2010).

30 *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry and Others*, 24 June 1987, United Kingdom High Court Queen’s Bench Division (Commercial Court), 77 ILR 56; *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry and Others and Related Appeals, and Maclaine Watson & Co Ltd v. Department of Trade and Industry, and Maclaine Watson & Co Ltd v International Tin Council*, 26 October 1989, United Kingdom House of Lords, 81 ILR 670; *Maclaine Watson & Co Ltd v. Department of Trade and Industry*, 29 July 1987, United Kingdom High Court Chancery Division, 80 ILR 39.

31 *Stichting Mothers of Srebrenica et al., v. United Nations*, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012).

matter of principle, domestic courts are not apt to solve such international issues. In many fields, national courts operate as decentralized enforcers of international law: they have to interpret treaties, ascertain customary international law,³² or decide upon international responsibility questions. Thus, they must also be presumed to be able to solve complex international law issues involving international organizations. It is here where the suggested balancing should come in. While national courts can hardly be considered to be generally unsuited to adjudicate cases involving international organizations, it may well be that they are often not in the best position to do so. Where other dispute settlement options are available to potential claimants and where these appear better suited to decide complex issues of international organizations law, domestic courts should abstain from filling any accountability gap by upholding jurisdiction. Instead, they should defer to other, probably international dispute settlement institutions. Clearly, this 'relative' approach of making the exercise of jurisdiction by national courts dependent on the availability of better-suited international ones requires some form of balancing. At the same time, it creates a strong incentive for international organizations to ensure that such better-suited international dispute settlement institutions do actually exist.

3.2 *Respect for the Independent Functioning of International Organizations*

Finally, the balancing should take into account the potentially intrusive nature of domestic court proceedings for international organizations. Clearly, every law-suit before a national court will entail some costs and interference with an international organization's work. In fact, the need to shield international organizations from interference with their independent functioning is generally regarded as being the main policy rationale for the immunity of international organizations.³³ However, it is also apparent that not all domestic litigation will imply the same degree of interference with the functioning of international organizations. In this regard, it would be important to identify criteria to assess different degrees of potential interference in order to

32 See further the contribution of Michael Wood to this Forum. See also A. Reinisch and P. Bachmayer, 'Customary International Law in Austrian Courts', available at <<http://ssrn.com/abstract=2289788>>.

33 See Leonardo Díaz-González, Special Rapporteur, *Fourth report on relations between States and international organizations (second part of the topic)*, 24 April 1989, UN Doc. A/CN.4/424, reproduced in the *Yearbook of the International Law Commission* (1989), Vol. II (Part One), pp. 153–168, at p. 157; see also *supra* note 3.

operationalize this element for a balancing exercise. It is immediately apparent that a simple contract claim for the payment of office supplies to an international organization is different from a compensation claim raised by victims of genocide alleging international responsibility of an international organization. The amounts involved, the legal questions to be addressed and in particular the potential “deterrence”-effect vis-à-vis the decision-making of international organizations will differ. Still, none of these elements lends itself to quick and easy assessment. Should the amount of compensation be a decisive element? Clearly, any domestic court judgment resulting in a small sum awarded against an international organization will not seriously hamper that international organization’s activities. However, any judgment rendered against an international organization entailing high financial obligations may cause serious budgetary problems for such organization. The ensuing problems may even prevent an international organization from fulfilling its tasks because of a lack of financial resources. These consequences are of course totally independent of the character of the underlying law-suit. That fact implies that the mere amount of financial liability is a particularly fortuitous element in assessing the interference potential of the exercise of jurisdiction of national courts.

Another element to be taken into account is the potential interference with the actual internal operation of international organizations through the exercise of jurisdiction of national courts. Again this will be a question of degree that will increase with the extent to which a national court will have to address issues of the internal law of an international organization. If litigants seek to force an international organization to adopt or to refrain from adopting a specific resolution determining its core functions, this is clearly different from a mere civil liability judgment. In this context, the underlying assumption of *Waite and Kennedy* may be helpful. Ultimately, the need to provide a fair procedure — at least under the ECHR — extends to the determination of claimants’ “civil rights and obligations”.³⁴ In many cases, this will imply that the right to

34 *König v. Germany*, Application No. 6232/73, 28 June 1978, European Court of Human Rights, para. 93: “Whilst the Court thus concludes that the concept of ‘civil rights and obligations’ is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right — and not its legal classification — under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States.”

have access to court is limited to typical private law disputes, which in turn may support the application of *iure gestionis* / commercial activities exceptions.

3.3 *Who Should Decide on Closing the “Accountability Gap”?*

On the assumption that the balancing of competing interests outlined above is acceptable, the main question remaining is a procedural one: who should engage in the balancing exercise — international organizations, national courts, or international ones?

Today, the prevailing model is that international organizations themselves should decide. Though many immunities instruments are not explicit in this respect, it is often the underlying assumption that the respective organizations — or rather its administrative head — should decide whether or not to invoke immunity, and whether or not to waive immunity.³⁵ There are nuances in whether such decisions should be subject to the full discretion of the international organization, or whether there is some mandate concerning the exercise of this prerogative in the constituent rules of an international organization.³⁶

See also Ringeisen v. Austria, Application No. 2614/65, 16 July 1971, European Court of Human Rights, para. 94 *et seq*; *Feldbrugge v. The Netherlands*, Application No. 8562/79, 29 May 1986, European Court of Human Rights, para. 26 *et seq*; and *Deumeland v. Germany*, Application No. 9384/81, 29 May 1986, Application No. para. 60 *et seq*. *See also* C. Rozakis, ‘The Right To A Fair Trial in Civil Cases’, (2004) 4(2) *Judicial Studies Institute Journal* pp. 96–106; P. van Dijk, ‘The Interpretation of “Civil Rights and Obligations” by the European Court of Human Rights - One more Step to Take’, in F. Matscher & H. Petzold (eds.), *Protecting Human Rights: The European Dimension – Essays in Honour of G. Wiarda* (Carl Heymanns, Cologne, 1988) pp. 131–143; T. Buergethal & W. Kewenig, ‘Zum Begriff der Civil Rights in Artikel 6 Absatz 1 der Europäischen Menschenrechtskonvention’, (1966/67) *Archiv des Völkerrechts* pp. 404–406; D. J. Harris, M. O. Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995).

35 However, some organizations have special rules. *See e.g.* Art. 3 of the 1949 *General Agreement on Privileges and Immunities of the Council of Europe*, concluded 2 September 1949, 250 UNTS p. 14 (entered into force 10 September 1952), providing that the Committee of Ministers should expressly authorize waivers of immunity. *See also* Art. xv, para. 2 (and Art. iv, para. 1(a) of Annex I to the) 1975 *Convention for the Establishment of a European Space Agency*, concluded 30 May 1975, 14 ILM p. 864 (entered into force 30 October 1980) (‘ESA Convention’), which provides for the ESA Council to waive the Agency’s immunity.

36 *See e.g.* Art. xv, para. 2 (and Art. iv, para. 1(a) of Annex I to the) ESA Convention: “... 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.”

In any event, actual practice has shown that international organizations are most reluctant to waive their immunity and tend to uphold immunity, even in circumstances — and by using arguments — that may be hard to justify.³⁷

The alternative is to have national courts determine whether or not to accord immunity in a specific case on the basis of the suggested balancing. This may be the natural task of courts, in the sense that they have to decide on the scope of immunity in many other situations as well, and that nowadays most jurisdictions have retreated from the idea that courts should be bound by ‘indications’ from their executive branch of whether or not to grant immunity.³⁸ However, such an external evaluation of the granting of immunity has inherent weaknesses. In particular, when national courts do not conform to the required standards of due process and do not provide a fair trial, it is unlikely that they will engage in a genuine balancing of interests.

Given that both international organizations and national courts are to some extent ‘judges in their own cause’, in the sense that international organizations are interested in avoiding litigation against them and that courts may have an interest in exercising their adjudicatory powers, it seems rational to look for alternative, more ‘neutral’ decision-makers. These could be found in the form of international courts or tribunals performing the balancing exercise and

37 See the UN’s invocation of immunity concerning compensation claims arising from the Haiti cholera outbreak. In response to compensation claims raised by Haitian victims of a cholera outbreak in 2010, which was probably caused by insufficient hygienic precautions prevailing in a UN peacekeeping camp, the UN Legal Counsel indirectly invoked the UN’s immunity by qualifying them as claims implying a “review of political and policy matters.” See Letter of Patricia O’Brien, Under Secretary-General for Legal Affairs, The Legal Counsel, to Brian Concannon, Esq., Institute for Justice & Democracy in Haiti, dated 21 February 2013: “With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable, pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.”

A copy of the letter is available at: <<http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>>.

38 Particularly in the United States, before the adoption of the *Foreign Sovereign Immunities Act* (‘FSIA’), the courts typically referred issues of sovereign immunity to the executive branch. The FSIA finally vested the exclusive authority of deciding on questions of immunity in the judiciary by providing in para. 1602 of the FSIA that “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States”. See H. Fox, *The Law of State Immunity* (2nd ed.), (Oxford University Press, Oxford, 2008) at p. 219; R. G. Steinhardt, ‘United States Foreign Sovereign Immunities Act (1976)’, in Wolfrum (ed), *supra* note 3, at pp. 550–554.

deciding whether or not domestic courts should adjudicate or grant immunity. While *ex-post* procedures assessing the lawfulness of the exercise of jurisdiction — as in the case of the *Jurisdictional Immunities* case³⁹ — may guarantee a thorough examination of the issues and could be feasible under some privileges and immunities instruments, it appears that such a review would be too slow and circumstantial. A better and more expedited way would be a form of a “preliminary ruling” in which an international court or tribunal would merely decide the incidental procedural issue of whether an international organization enjoys immunity or not.

The notion of a ‘preliminary ruling’⁴⁰ is, of course, linked to the specific system provided for in the Treaty on the Functioning of the European Union (‘TFEU’), whereby the Court of Justice of the EU has contributed considerably to the harmonious interpretation of EU law.⁴¹ Requests for preliminary rulings interrupt the main proceedings before national courts. Once the Court of Justice of the EU has clarified the EU law issue, this clarification is binding on national courts and has to be taken as a basis on which to continue the national court proceedings. While such preliminary rulings can be requested on all EU law issues, it is conceivable that a similar procedure for much more limited issues involving the ICJ could be designed.

The ICJ is already involved in possible disputes concerning the privileges and immunities of international organizations through clauses found in many host agreements, and most prominently in the General Convention, which provide for the ICJ to render advisory opinions in cases of differences between organizations and host states.⁴² On the basis of such a provision, the Court has

39 See *supra* note 12.

40 Art. 267(3) of the TFEU requires national courts “against whose decisions there is no judicial remedy under national law” to make a request for a preliminary ruling of the Court of Justice of the EU on any question of EU law which is then binding on the former. Article 267(2) of the TFEU provides that where questions relating to the interpretation of the EU Treaties as well as secondary EU law are “raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

41 See P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (5th ed.) (Oxford University Press, Oxford, 2011) p. 442 *et seq.*

42 Art. VIII, Section 30 of the General Convention: “All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of

in fact decided on the scope of jurisdictional immunities provided for in the General Convention in the past. In the *Cumaraswamy* case,⁴³ the ICJ rendered an advisory opinion holding that a UN Special Rapporteur enjoyed immunity from suit before Malaysian courts with respect to statements made in his official capacity. That the ICJ might also be involved in disputes concerning the scope of the immunity of an international organization itself is demonstrated in the lengthy dispute between Italy and the Food and Agriculture Organization ('FAO') concerning the latter's immunity. After Italian courts, including its Supreme Court of Cassation, had denied immunity in an action brought by the landlord of one of the buildings occupied by FAO in the *INPDAI* case,⁴⁴ the organization was about to prepare a request for an advisory opinion on the basis of its headquarters agreement, asking whether FAO was immune from every form of legal process in all cases in which it had not expressly waived its immunity; and, if not, what the specific exceptions to FAO's immunity from every form of legal process were.⁴⁵ This was averted only at the last minute.⁴⁶

In such situations, requests for advisory opinions are made after national courts have already rendered decisions limiting or disregarding jurisdictional immunities against the interests of international organizations. The proposal for a "preliminary reference" style request for an advisory opinion from the ICJ aims to shift immunity controversies to resolution at an earlier stage. The idea is to enable contracting states of the General Convention or of other immunities treaties in whose courts cases against international organizations are pending to request an advisory opinion of the ICJ on whether immunity should be upheld or not.

Applying a broad interpretation of the term 'difference', as it is currently contained in Article VIII, Section 30 of the General Convention, one could arguably consider that an international organization can make such a request

the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

43 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, International Court of Justice, Advisory Opinion, 1999 ICJ Reports p. 62. See also *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, 15 December 1989, International Court of Justice, Advisory Opinion, 1989 ICJ Reports p. 177.

44 *Food and Agriculture Organization v. Istituto Nazionale di Previdenze per i Dirigenti di Aziende Industriali ('INPDAI')*, Case No. 5399, 18 October 1982, Supreme Court of Cassation, (1992) 87 ILR p. 1.

45 FAO, 'Constitutional and general legal matters', (1985) *United Nations Juridical Yearbook* p. 81 *et seq.*

46 See, for more detail, Reinisch, *supra* note 20, at p. 131 *et seq.*

as soon as a case relating to its immunity is pending before a national court. This could allow the international organization to make a request for an advisory opinion. The fact that Article VIII, Section 30 of the General Convention and similar treaty clauses provide that such ICJ opinions “shall be accepted as decisive by the parties” is already a functional equivalent of the effect of preliminary rulings under the TFEU.

Nevertheless, it may be safer to make explicit provision for the introduction of the suggested limited preliminary ruling system in the applicable immunities instruments, such as multilateral privileges and immunities treaties or headquarters agreements. This would clearly require the political will on the part of states and international organizations to do so. But given the increasing importance of immunity issues from a “rule of law” and accountability perspective, such an enlarged role of the ICJ would appear feasible.

A more pragmatic short-term response for international organizations trying to avoid situations in which national courts may be tempted to “close the accountability gap” by denying immunity to international organizations would be increasing efforts to eliminate “accountability gaps” in the first place. This could be achieved by international organizations developing functioning alternative means of redress that make the balancing exercise described above superfluous. In fact, in the aftermath of *Waite and Kennedy*, many international organizations have tried to make sure that their internal / alternative dispute settlement mechanisms are functioning effectively, so as to avoid any discussion about the need to disregard immunity.

4 Conclusions

A rule of law-based international environment will continue to put pressure on international organizations to close accountability gaps. The exercise of power, whether on the domestic or the international plane, requires control and possibly review by judicial bodies. Where international organizations are not subject to the jurisdiction of international supervisory or adjudicative bodies and enjoy totally unrestricted immunity, this may create a lack of accountability. However, closing the accountability gap through national courts should be the measure of last resort (*ultima ratio*) only, not the new matter of course. The primary usefulness of national courts in this respect lies in the incentive they create for international organizations to work out adequate alternative mechanisms of dispute settlement.