

IN THE SHADOW OF WAITE AND KENNEDY

THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS, THE INDIVIDUAL'S RIGHT OF ACCESS TO THE COURTS AND ADMINISTRATIVE TRIBUNALS AS ALTERNATIVE MEANS OF DISPUTE SETTLEMENT

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I. THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS

International organizations are said to enjoy functional immunity, the immunity necessary to ensure their independent functioning.¹ However, what appears like a rather restrictive concept of immunity, in practice turns out to be a fairly broad and almost unlimited immunity from the jurisdiction of national courts. The reason for this seemingly paradoxical state of affairs can be explained easily with regard to the paradigmatic international organization, the United Nations. While the UN Charter speaks of a mere functional immunity to be enjoyed by the organization before national courts,² this standard is nowhere clearly

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¹ Amerasinghe, *Principles of the Institutional Law International Organizations* (1996), p. 370; Klabbbers, *An Introduction to International Institutional Law* (2002), p. 148; Sands and Klein, *Bowett's Law of International Institutions* (5th ed., 2001), p. 487. See also Restatement (Third) of the Foreign Relations Law of the United States (1986) § 467, para. 1: "Under international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfilment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties."

² Art. 105, UN Charter, provides: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

defined. Rather, the General Convention,³ the multilateral treaty regulating, *inter alia*, the scope of the UN's jurisdictional immunity, speaks of "immunity from suit" in an unqualified way.⁴ This unqualified, hence unlimited immunity has been generally, and particularly by the UN itself, understood to mean absolute immunity.⁵

The UN is not the only international organization where this is the case. In fact, a large number of international organizations enjoy functional immunity which is not defined either in their constituent instruments or elsewhere.⁶

³ Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter "General Convention"].

⁴ According to Art. II, 2 General Convention the organization "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity". The same broad grant of immunity can be found in Art. III, 4 Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

⁵ According to the UN Office of Legal Affairs, "[t]he immunity accorded international organizations [...] is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive". UN Office of Legal Affairs, Memorandum to the Legal Adviser, UNRWA, UNJYB (1984), p. 188. Similarly the UN argued in an *amicus* brief before American courts that "the immunities of States are those attributable to sovereigns and thus reflect those that States reserve to themselves, whether absolute or relative; those of international organizations are functional and thus reflect their needs, which require complete protection from national jurisdiction". The UN as *amicus curiae* in *Marvin R. Broadbent et al. v. OAS et al.*, UNJYB (1980), pp. 224, 230. See also Gerster and Rotenberg, Article 105, in: Simma (ed.), *The Charter of the United Nations: A Commentary* (2d ed., 2002), pp. 1314, 1318; Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, Virginia JI of International Law (1995), pp. 53, 84; Reinisch, *International Organizations Before National Courts* (2000), p. 158.

⁶ See, e.g., Art. 133, OAS Charter ("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"); Art. 67 (a), WHO Constitution ("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."); Art. VIII, para. 2, Agreement Establishing the WTO ("The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions"); Art. 40 (a), Statute of the Council of Europe, 5 May 1949, ETS No. 1 ("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.").

Rather, subsidiary instruments, such as multilateral agreements on privileges and immunities, sometimes also bilateral headquarters agreements,⁷ provide for an unqualified immunity from suit.⁸

Many national courts have also regarded such an absolute immunity of international organizations as a requirement under customary international law.⁹

Of course, one should not overlook certain recent trends towards limiting the jurisdictional immunity of international organizations. There have been attempts to find more restrictive solutions to organizational immunities. These attempts can be found both as a matter of treaty law, in formulating more adequate immunity provisions, and as a result of court practice. The international development banks were among the historical avant-garde. Their immunity does not cover some of their core financial activities such as issuing debt instruments or making loans. Typical examples are the Articles of Agreement of the World Bank and various regional development banks¹⁰ which allow private creditors to

⁷ See, e.g., Art. VIII, s.16, Agreement regarding the Headquarters of the FAO, 31 October 1950, 1409 UNTS 521 (“immunity from every form of legal process”); Art. 8, Headquarters Agreement between the Government of the United Kingdom and the International Tin Council, London, 9 February 1972, 834 UNTS 287 (“immunity from jurisdiction and execution”). Some headquarters agreements do not contain any rules on jurisdictional immunity since they are only meant to be complementary to the multilateral privileges and immunities agreements. Cf. s.26, Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, U.S.-U.N., 11 U.N.T.S. 11.

⁸ “Immunity from every form of legal process” is provided for in Art. 3, General Agreement on Privileges and Immunities of the Council of Europe, 2 September 1949, ETS no. 2, 250 U.N.T.S. 14; Art. 2, Agreement on Privileges and Immunities of the OAS, 15 May 1949, OAS Treaty Ser. 22.

⁹ Schermers and Blokker, *International Institutional Law* (3d ed., 1995), p. 1007; Seidl-Hohenveldern, *L’immunité de juridiction et d’exécution des Etats et des organisations internationales*, in: *Droit international 1, Cours et Travaux de l’Institut des hautes études internationales de Paris (1979-1980)*, pp. 109, 160. See also cases discussed in Reinisch, *supra*, fn. 5, pp. 157 ff, 194 ff.

¹⁰ Art. VII, 3 Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 2 U.N.T.S. 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.”). An identical provision can be found in Art. XI, 3, para. 1, Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, 389 U.N.T.S. 70.

sue the organization in loan transactions.¹¹ A number of immunity instruments concerning international organizations expressly exclude immunity for certain tort actions, for instance, with regard to car accidents.¹²

In addition to limitations on immunity as a result of treaty law, also the case law in some countries, in particular in the US¹³ and in Italy,¹⁴ has contributed to

¹¹ See, e.g., *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C.Cir. 1967); 63 ILR 337.

¹² Cf. Art. 3 (1) (b), EPO Immunities Protocol (provides for an exception from immunity “in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle”). Protocol on Privileges and Immunities of the European Patent Organisation, 5 October 1973, 1065 UNTS 199, at <www.european-patent-office.org/legal/epc/e/ma5.html>. See also Art. IV (1) (b), Annex I to the ESA Convention (providing for immunity except “in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Agency, or in respect of a motor traffic offence involving such a vehicle”). Convention for the Establishment of a European Space Agency, Paris, 30 May 1975, 14 ILM (1975), 855, at <www.esa.int/convention>.

¹³ In the US the International Organizations Immunities Act (IOIA) 1945, 59 Stat. 669, 22 U.S.C.A. §§ 288 *et seq.* provides that international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” Since then judicial and legislative developments, in particular the adoption of the Foreign Sovereign Immunities Act (FSIA) 1976, 90 Stat. 2891, 28 U.S.C.A. §§ 1330 *et seq.*, have led to a restrictive immunity concept applying to foreign states. Therefore “[i]t is unclear whether the [IOIA], by granting to international organizations immunity co-extensive with that of foreign governments, confers the absolute immunity foreign governments enjoyed at the time of the Act’s passage, or the somewhat restrictive immunity provided for in the [FSIA] [...]” *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, at 71 (E.D.N.Y. 1987). Many US decisions apparently use a restrictive immunity test when dealing with international organizations. Cf. *Morgan v. IBRD*, 752 F. Supp. 492, at 494 (D.D.C. 1990), *Tuck v. Pan American Health Organization*, 668 F.2d 547 (D.C.Cir. 1981); *De Luca v. United Nations Organization, Perez de Cuellar, Gomez, Duque, Annan, et. al*, 841 F. Supp. 531, 533 fn. 1 (S.D.N.Y. 1994).

¹⁴ An older line of cases relying on the *iure imperii/iure gestionis* distinction to determine the scope of jurisdictional immunity of international organizations, such as *Branno v. Ministry of War*, Corte di Cassazione, Riv. dir. int. (1955), 352, 22 ILR 756; *Porru v. FAO*, 25 June 1969, Rome Court of First Instance (Labor Section), [1969] UNJYB 238; *Allied Headquarters in Southern Europe (HAFSE) v. Capocci Belmonte*, Corte di Cassazione (Sezione Unite), 5 June 1976, No. 2054, 12 RDIPP (1976), 860, [1977] ItYBIL 328; *FAO v. INPDAL*, Supreme Court of Cassation, 18 October 1982, [1982] UNJYB 234, was abandoned in *FAO v. Colagrossi*, Corte di Cassazione, 18 May 1992, No. 5942, 75 RivDI (1992), p. 407, where the Italian Supreme Court recognized the absolute immunity from suit of the defendant international organization.

a considerable restriction of the otherwise almost unlimited immunity from suit of international organizations. Here one can clearly recognize a trend towards an assimilation of international organization immunity to state immunity.¹⁵

The crucial problem apparently remains to find a workable and practicable test for a functional immunity. There is a clear affirmation by member states, national courts and scholars that functional immunity is the appropriate immunity standard for international organizations. This follows as a matter of positive law from the widespread use of a functional immunity standard in the relevant constituent treaties of international organizations.¹⁶ However, the practice of courts interpreting this standard bears evidence of the difficulty of making sense of functional immunity.¹⁷

The traditional view seems to be that functional immunity necessarily leads to absolute immunity as a result of the functional personality concept of international organizations. As opposed to states, the international legal personality of international organizations is generally considered to be functionally limited. In other words, international organizations enjoy legal personality only to the extent required to perform their functions. In a legal sense they are unable to act beyond their functional personality. Any acts not covered by such a limited personality are *ultra vires*. At the same time international organizations enjoy functional immunity, covering acts in the performance of their functions. Since international organizations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied. This idea has been aptly captured in the notion that “any activity of an international organization is either official or *ultra vires*.”¹⁸

However, it is not necessarily true that the functionally limited personality of an international organization always has to lead to its immunity from suit.¹⁹

¹⁵ See the cases discussed in Reinisch, *supra*, fn. 5, pp. 186 ff.

¹⁶ See *supra*, fn. 6.

¹⁷ See Klabbers, *supra*, fn. 1, p. 149.

¹⁸ Seidl-Hohenveldern in an unpublished report to the ILA Committee on State Immunity, quoted in Final Report on State Immunity, ILA Buenos Aires Conference 1994, p. 475. See also Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (6th ed., 1996) p. 275.

¹⁹ See Bekker, *The Legal Position of Intergovernmental Organizations* (1994), p. 39 (arguing that “an ... [international organization] shall be entitled to ... no more [jurisdictional immunity] than ... what is strictly necessary for the exercise of its functions in the fulfilment of its purposes”). See also Reinisch, *supra*, fn. 5, p. 343.

Sometimes the relevant immunity instruments expressly mandate a restrictive notion of the scope of functional immunity. For instance, the EPO Immunities Protocol provides that the “official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.”²⁰ Such language only makes sense if there are certain official acts that should enjoy immunity and other activities for which no immunity will be enjoyed. Otherwise, it would indeed be redundant.

In applying a stricter functional immunity standard national courts have sometimes denied immunity to international organizations where they considered a specific activity to fall outside the scope of the functionally necessary.²¹ In general, however, they tend to accept a rather broad scope of functional necessity covering, in particular, employment disputes as long as they involve the exercise of functions of the international organization and do not concern purely technical support or secretarial work.²²

At the end of the day, most attempts to make functional immunity work in a way that does not lead to absolute immunity have not been very successful. This raises the question whether there are any alternative solutions.

In the quest for an appropriate immunity standard for international organizations, the paramount underlying rationale of functional immunity, the protection of the independent functioning of the organization, should be kept in mind. It has been observed that this purpose should be balanced against the

²⁰ Art. 3 (4), EPO Immunities Protocol, *supra*, fn. 12.

²¹ *Camera confederale del lavoro and Sindicato scuola C.G.I.L. v. Istituto di Bari del Centro internazionale di alti studi agronomici mediterranei*, Pretore di Bari, 15 February 1974, [1977] ItYBIL 315 (later reversed by the Corte di Cassazione). See in detail *Reinisch*, *supra* note 5, 212.

²² See, for instance, the approach of the Italian courts re-introducing a “*iure imperii*”/“*iure gestionis*” differentiation to qualify employment relationships with international organizations: *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v. Jasbez*, Corte di Cassazione, 21 October 1977, Case No. 4502, [1978] RivDI 577; [1977] ItYBIL h319; 77 ILR 602; *Chirico v. Istituto di Bari del Centre International de Hautes Études Agronomiques Méditerranéennes (CIHEAM)*, Tribunale Bari, 10 October 1985, 38 RivDI (1985), 901-904; 87 ILR 19; See also *ICEM v. Di Banella Schirone*, Corte di Cassazione, 8 April 1975, Case No. 1266, [1976] ItYBIL 351; 59 RivDI (1976), 819; 77 ILR 572; *Bruno v. U.S.A.*, Corte di Cassazione, 25 January 1977, Corte di Cassazione (Sezione Unite), 25 January 1977, No. 355, [1978] RivDI 569, [1977] ItYBIL 344; *Lo Franco et al. v. NATO*, Corte di Cassazione, 22 March 1984, [1984] RivDI 671.

equally cogent demand of protecting the interests of potential litigants in having a possibility to pursue their claims against an international organization before an independent judicial or quasi-judicial body.²³

This is by no means a revolutionary demand. In fact, it can be easily demonstrated that similar considerations have contributed to the limitation of state immunity.²⁴ The necessity to treat states like non-state parties if they act like non-state actors, for instance by entering into commercial contracts, has served as a strong underlying rationale of limiting state immunity. What was then often phrased as a matter of commercial fairness clearly also implied an issue of providing a level playing field: if states chose to enter the marketplace they should do so under the same conditions as other market participants.²⁵ By limiting state immunity to their sovereign (*iure imperii*) activities and denying it for their commercial (*iure gestionis*) activities, private parties entering into (commercial) dealings with states no longer faced the risk of being deprived of judicial remedies.

II. THE RIGHT OF ACCESS TO COURT

Since the mid-20th century it has also been the human rights rationale of providing access to justice to private parties which reinforced the necessity to restrict the jurisdictional immunity of states. Though most human rights instruments do not expressly comprise a right of access to court, it is clear from the interpretation of the texts that the fair trial guarantees contained in such documents as the Universal Declaration of Human Rights,²⁶ the International

²³ These competing interest have been clearly spelled out by the Dutch Supreme Court in *A.S. v. Iran – United States Claims Tribunal*, Supreme Court (Hooge Raad) of the Netherlands, 20 December 1985, [1994] ILR 327, 329 (“On the one hand there is the interest of the international organization having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances; on the other there is the interest of the other party in having its dispute with an international organization dealt with and decided by an independent and impartial judicial body.”).

²⁴ See Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, BYIL (1951), p. 220; Fox, *The Law of State Immunity* (2002), p. 118.

²⁵ Cf. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

²⁶ Art. 10, 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

Covenant on Civil and Political Rights (ICCPR),²⁷ the European Convention of Human Rights (ECHR),²⁸ and others²⁹ include a right of access to court. For the European Convention this was expressly acknowledged in a number of judgments where the European Court of Human Rights (ECtHR) held that Article 6 (1) ECHR “embodie[d] the right to a court” because it “secure[d] to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal”.³⁰ That the fair trial guarantee includes a right of access to court is also true for the other human rights documents.³¹

Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter “UDHR”].

²⁷ Art. 14, para. 1, International Covenant on Civil and Political Rights, 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.” International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter “ICCPR”].

²⁸ Art. 6, para 1, European Convention on Human Rights, states: “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”].

²⁹ In the *Rubio* Case the ILOAT seemed to acknowledge “that refusal to entertain [the applicant’s] case would be denial of due process and contrary to general principles, to the Universal Declaration of Human Rights and to the American Convention on Human Rights of 22 November 1969.” *Rubio v. Universal Postal Union*, ILO Administrative Tribunal, 10 July 1997, Judgment No. 1644, para. 12.

³⁰ *Waite and Kennedy v. Germany*, European Court of Human Rights, Application No. 26083/94, European Court of Human Rights, February 18, 1999, para. 50 (relying on *Golder v. United Kingdom*, Application No. 4451/70, 21 February 1975, Series A No. 18, [1975] ECHR 1, para. 36, and the recent *Osman v. United Kingdom*, European Court of Human Rights, European Court of Human Rights, Application No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 136).

³¹ For the UDHR this is confirmed by the draft language of its Art. 10 which originally provided that “[e]very one shall have access to independent and impartial tribunals in the determination of any criminal charge against him, and of his rights and obligations.” Report of the UN Human Rights Commission, (ECOSOC) Official Records, 3rd year, 6th Session, E/600, Annex A (emphasis added). With regard to the ICCPR, the UN Human Rights Committee in its General Comment No. 13 apparently viewed access to court as an inherent part of the rights under Article 14 of the Covenant when it spoke of “equality before the courts,

In addition there is a strong argument in favor of the existence of unwritten international law, be it a general principle of law or a customary rule, which demands the availability of judicial or quasi-judicial remedies.³² Such demands underlie the traditional rules prohibiting a denial of justice as they have been developed in a long line of arbitration decisions in the context of minimum standards concerning the treatment of foreigners³³ and as they are now considered to embody customary international law human rights standards.³⁴

The human rights rationale of providing access to court is equally cogent in the context of the immunity of international organizations: the relevant human rights instruments clearly phrase the underlying fair trial rights as rights of individuals entitling them to have a fair third-party adjudication of their claims against anyone else, regardless of whether the opponent might be another private party, a foreign state or an international organization.

In fact, the necessity for the availability of dispute settlement mechanisms may be even more relevant in the case of international organizations than of states since states can (almost) always be sued before their own domestic courts whereas international organizations usually do not have any comparable internal courts.³⁵

including equal access to courts.” General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, 13 April 1984, para. 3, at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument#](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument#). See also Nowak, *U. N. Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 239.

³² With particular reference to international organizations and the rights of staff members it has been argued already in the 1970s that the “availability of a legal remedy – as a guarantee of respect for the law – may now be considered a general principle of law in the sense of Article 38 of the Statute of the International Court. This is so by virtue of a customary international rule that is tending to assert itself more and more, that international organizations today appear bound to establish legal remedies for the good of all their personnel and to those who may invoke statutory rules.” Bastid, “Have the U.N. Administrative Tribunals Contributed to the Development of International Law”, in: Friedmann et al. (eds.), *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup* (1972), p. 309.

³³ Restatement (Third), *supra*, fn. 1, § 711 (Reporters’ Note 1: “It is a wrong under international law for a state to deny a foreign national access to domestic courts.”).

³⁴ *Ibid.*, cmt. A (“As regards natural persons, most injuries that on the past would have been characterized as “denials of justice” are now subsumed as human rights violations.”).

³⁵ See *infra* text, at fn. 128.

The option to sue foreign states before their own domestic courts in case they enjoy jurisdictional immunity abroad suggests that the right of access to court may also be pursued before different alternative fora. The right of access to court may be flexible enough not to require states to provide always and exclusively their own judicial system. Rather, it may permit them to provide access to either their own courts or to an adequate alternative system of dispute-settlement. In the case of international organizations, which do not possess their own domestic courts, the availability of such an alternative dispute-settlement mechanism will be crucial. If claims are brought against international organizations before national courts and if they are dismissed as a result of the defendant organization's immunity, the forum state will violate the claimant's right of access to court unless it ensures that there is an alternative adequate dispute-settlement mechanism available.

Such a demand for an adequate dispute-settlement mechanism for claims against international organizations derives not only from a fundamental rights argument. Rather, it seems to flow from a forceful combination of legal considerations all pointing to the same direction and requiring a reconsideration of the traditional absolute immunity paradigm. Broadly speaking these separate streams of legal thinking may be identified as:

- A. Immunity instruments calling for the establishment of dispute-settlement mechanisms,
- B. Decisions of international courts and tribunals upholding a direct obligation of international organizations to provide for adequate dispute-settlement mechanisms, and
- C. The case-law of human rights bodies as well as national courts calling for effective alternative dispute-settlement as a precondition to uphold immunity.

A. Immunity Instruments

The idea that immunity should be granted to international organizations only upon the condition that adequate alternative redress mechanisms are available to third parties finds a clear legal expression already in the UN General Convention which provides 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.”³⁶

In the *Curamaswamy Case*,³⁷ the ICJ touched upon the UN’s obligation to provide for alternative modes of dispute settlement as a corollary of its right to immunity. The Court stressed that the organization itself may become liable for acts performed by their agents in an official capacity. It may thus have to respond to claims brought by third parties which, in the ICJ’s view, are excluded from the jurisdiction of national courts. Instead, they should be settled in accordance with the “appropriate modes of settlement” provided for in the General Convention.³⁸

The inter-relationship between immunity and the availability of alternative dispute settlement mechanisms has also been acknowledged in the concern that domestic courts might disregard their immunity unless they provided for alternative dispute settlement mechanisms for their staff members.³⁹ UN studies have viewed the relationship in a similar way when they assert that the availability of such alternatives excludes a violation of human rights or constitutional standards and should thus lead national courts to uphold the immunity enjoyed by the organization.⁴⁰

³⁶ Art. VIII, s.29 (a), General Convention, *supra*, fn. 3.

³⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Cumaraswamy)*, [1999] ICJ Rep. 62.

³⁸ The ICJ underlined “that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. 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.” *Cumaraswamy Case*, *supra*, fn. 37, para. 66.

³⁹ Amerasinghe notes that in such case “national courts could be induced to assume jurisdiction in such cases.” Amerasinghe, 1 *The Law of the International Civil Service* (2d rev. ed., 1994), p. 45.

⁴⁰ Gerster and Rotenberg, *supra*, fn. 5, p. 1318 (relying on two UN Studies dating from 1967 and 1985 when asserting that “[a]s long as alternative means of legal recourse (internal appeal procedures; arbitration) are at the claimant’s disposal, neither Article 10 Universal Declaration of Human Rights nor constitutional guarantees by States compel national courts to deny immunity and to start legal proceedings against the UN”).

B. The Obligation to Provide for Adequate Alternative Dispute-Settlement Mechanisms

On a general level, it has been said that as a corollary of jurisdictional immunity, international organizations are under an “obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in which they may become involved.”⁴¹

In the *Effect of Awards Case*⁴² the ICJ went beyond the direct implication of the General Convention and found a more general obligation to provide for alternative dispute settlement, in the specific context of staff disputes, by asserting 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.”⁴³ Some international organizations have in fact justified the establishment of administrative tribunals as the fulfillment of an international legal obligation.⁴⁴

Similarly, administrative tribunals of international organizations themselves have recognized the general principle that employees should have access to a form of employment dispute settlement.⁴⁵ This is part of a long tradition of

⁴¹ *Díaz-González*, Fourth report on relations between States and international organizations (second part of the topic), UN Doc. A/CN.4/424, YBILC (1989), vol. II (Part One), pp. 153-168, 161.

⁴² *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] ICJ Rep. 47.

⁴³ *Ibid.*, p. 57.

⁴⁴ The explanatory report of the IBRD President on the establishment of the World Bank Administrative Tribunal refers to a principle accepted in many national legal systems and reaffirmed in the Universal Declaration of Human Rights which requires that, wherever administrative power is exercised, a machinery should be available to accord a fair hearing and due process to an aggrieved party in cases of disputes. See Memorandum to the Executive Directors from the President of the World Bank, 14 January 1980, Doc. R80-8, 1 *et seq.* (cited in Amerasinghe, *supra*, fn. 39, p. 41).

⁴⁵ In the *Chadsey Case* the ILOAT identified “the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.” *Chadsey v. Universal Postal Union*, ILO Administrative Tribunal, 15 October 1968, Judgment No. 122. In the *Rubio Case* the ILOAT speaks of the valid 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” *Rubio v. Universal Postal Union*, ILO Administrative Tribunal, 10 July 1997, Judgment No. 1644, para. 12., at <www.ilo.org/public/english/tribunal/fulltext/1644.htm>.

various administrative tribunals to test the conduct of international organizations not only along the yardstick of the internal staff rules and regulations but also by reference to “general principles of law”, including fundamental human rights principles, which are considered binding upon organizations.⁴⁶

With regard to the obligation to provide access to judicial dispute settlement for employees,⁴⁷ which is generally perceived an international legal obligation by administrative tribunals, various administrative tribunals have developed different strategies: Some have embarked on a broad interpretation of their jurisdictional competence in order to avoid a denial of justice of an aggrieved employee who would have no other recourse against his/her employer organization.⁴⁸ On the other hand, administrative tribunals have sometimes found very clear words for the negative implications on fundamental rights where they felt compelled to deny their jurisdiction.⁴⁹

⁴⁶ Already in 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 next to “the 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*, 1985 World Bank Administrative Tribunal Reports Judgment No. 26, p. 9.

⁴⁷ Seidl-Hohenveldern, „Die internationalen Beamten und ihr Recht auf den gesetzlichen Richter“, in: Ballon and Hagen (eds.), *Verfahrensgarantien im nationalen und internationalen Prozeßrecht, Festschrift für Franz Matscher* (1993), p. 441.

⁴⁸ See the leading ILOAT case *Chadsey v. Universal Postal Union*, ILO Administrative Tribunal, 15 October 1968, Judgment No. 122; See also *Zayed v. the Universal Postal Union*, ILO Administrative Tribunal, 23 January 1990, Judgment No. 1013; *Zafari v. UNRWA*, UN Administrative Tribunal, 10 November 1990, Judgment No. 461, *Salaymeh v. UNRWA*, UN Administrative Tribunal, 17 November 1990, Judgment No. 469. See also Reinisch, *supra*, fn. 5, pp. 272 ff.

⁴⁹ *Mr. “A”, Applicant v. International Monetary Fund*, ILO Administrative Tribunal, 12 December 1999, Judgment No. 1991-1, paras. 96, 97 (“The jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be. At the same time, the Tribunal feels bound to express its disquiet and concern at a practice that may leave employees of the Fund without judicial recourse. Such a result is not consonant with norms accepted and generally applied by international governmental organizations. It is for the policy-making organs of the Fund to consider and adopt means of providing contractual employees of the Fund with appropriate avenues of judicial or arbitral resolution of disputes of the kind at issue in this case, notably disputes over whether the functions performed by a contractual employee met the criteria for a staff appointment rather than those for contractual status.”).

While much of the existing case-law focuses on staff disputes, it is clear that the obligation to provide for alternative dispute settlement mechanisms is not limited to staff disputes but also extends to private law disputes between organizations and third parties.⁵⁰ An arbitration panel expressly held that an international organization's immunity from suit entailed its duty to arbitrate.⁵¹

C. Adequate Alternative Dispute-Settlement Mechanisms as a Precondition for Immunity – Subsidiary Jurisdiction of National Courts

There is a clearly discernible trend in recent immunity decisions, both concerning foreign states and international organizations, to consider the availability of alternative fora when deciding whether to grant or deny immunity. This is a healthy development which serves the purpose of securing access to justice while preserving the independence of foreign states and international organizations.

This development is supported by a number of scholars who point out that the grant of immunity might entail a denial of justice if not accompanied by possibilities for alternative dispute settlement.⁵² This danger was also judicially acknowledged.⁵³ Of course, a denial of justice would be the obvious consequence of providing no access to a court or other judicial dispute settlement

⁵⁰ See Art. VIII, s. 29, General Convention, *supra*, fn. 36.

⁵¹ “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 le litiges soulevés par son activité.” *A (organisation internationale) v. B (société)*, ICC Arbitration Award, 14 May 1972, Case No. 2091, *Revue de l’Arbitrage* (1975) 252.

⁵² Ruzié, “Diversité des Juridictions Administratives Internationales et Finalité Commune. Rapport Général”, in: Société Française pour le Droit International (ed.), *Le Contentieux de la Fonction Publique Internationale*. Paris (1996), pp. 11, 13; 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*. Oviedo (1988), pp. 359, 368.

⁵³ See also the French Cour de Cassation opinion in its annual report of 1995: “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 [...]”. Cour de Cassation, Rapport annuel (1995), 418, cited by Byk, Case note to *Hintermann v. Union de l’Europe occidentale*, 124 JDI (1997), 141, 142.

mechanism.⁵⁴ Thus it is understandable that some immunity agreements state an obligation to waive immunity where such immunity might otherwise lead to a denial of justice.⁵⁵

In fact, one may interpret the rulings of some international administrative tribunals as an encouragement to individual complainants to raise a fundamental rights argument before national courts in cases where they are unable to exercise their limited jurisdiction in staff disputes.⁵⁶

The idea of an effective alternative forum requirement was initially developed by national courts in the context of a fundamental rights review of acts of supranational and international organizations. Obviously, there is a difference between contractual or tort claims against such organizations and allegations of fundamental rights violations perpetrated by the organizations themselves. However, in both cases recourse to judicial remedies before national courts is usually barred as a result of the organizations' jurisdictional immunity. It may well be that it was on account of the particular importance of the underlying fundamental rights claims that a more differentiated approach towards international organizations was first developed in that context.

⁵⁴ The nexus between the traditional international law topics of denial of justice and the human rights notion of access to court can be found in the ECtHR's in the *Golder* judgment where the Court held that: "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice." *Golder*, ECtHR, 21 February 1975, Ser. A, No. 18, para. 35.

⁵⁵ For instance, Art. IV (1) (a), Annex I to the ESA Convention, *supra*, fn. 12, provides: "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."

⁵⁶ For instance, in the *Rubio* Case the ILOAT made the following suggestion: "So she [the applicant] cannot succeed in her plea – which she may plead before a domestic court – that refusal to entertain her case would be denial of due process and contrary to general principles, to the Universal Declaration of Human Rights and to the American Convention on Human Rights of 22 November 1969. However valid the principle she cites – 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 – the Tribunal cannot but declare that it is not competent." *Rubio v. Universal Postal Union*, ILO Administrative Tribunal, 10 July 1997, Judgment No. 1644, para. 12.

I. Fundamental Rights Review of Acts of International Organizations

An effective alternative forum requirement was first and most clearly expressed by the German Constitutional Court in its *Solange* jurisprudence. There, in the context of European Community law, the German highest court generally accepted a splitting of competence between the European Court of Justice (ECJ) and national courts in the field of human rights protection. While in *Solange I* the court upheld the admissibility of a human rights scrutiny by the German Constitutional Court “as long as” Community law does not contain a comparably adequate fundamental rights protection,⁵⁷ *Solange II* reversed the reasoning and justified the lack of competence of the German judiciary over acts of Community organs “as long as” an equal human rights protection is guaranteed by the ECJ.⁵⁸ This “receding” jurisdiction has to be seen in conjunction with the parallel development of an “expanding” jurisdiction of the ECJ over alleged human rights infringements by the EC. While initially the ECJ dismissed actions against the Community alleging fundamental rights violations for lack of jurisdiction,⁵⁹ it developed in the late 1960s/early 1970s a by now firmly established jurisprudence regarding fundamental rights violations as infringements of general principles of (Community) law which can be challenged by an annulment action.⁶⁰

The German Constitutional Court’s position to require an effective alternative forum is not limited to the “special” case of the European Communities.⁶¹

⁵⁷ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, Federal Constitutional Court, 29 May 1974, *Common Market Law Reports* (1974), p. 540 (hereafter *Solange I*).

⁵⁸ *In re application of Wünsche Handelsgesellschaft*, Federal Constitutional Court, 22 October 1986, *Common Market Law Reports* (1987), p. 225 (hereafter *Solange II*).

⁵⁹ See Case 1/58, *Stork v. High Authority* [1959] ECR 17; Cases 36-8 and 40/59, *Geitling v. High Authority* [1960] ECR 423; Case 40/64, *Sgarlata and others v. Commission* [1965] ECR 215.

⁶⁰ Starting with Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73, *Nold v. Commission* [1974] ECR 491. See also Alston (ed.), *The EU and Human Rights* (1999); Neuwahl and Rosas (eds.), *The European Union and Human Rights* (1995).

⁶¹ It has been recently affirmed in a decision sometimes referred to as *Solange III* clearly expressing the Court’s willingness to scrutinize acts of European Community organs that threaten to infringe basic rights of German citizens: “Acts done under a special power,

It is also applied to other international/supranational organizations such as EUROCONTROL⁶² or EPO.⁶³

Further, it should be kept in mind that the *Solange* jurisprudence is not only an idiosyncratic German development but was more or less explicitly followed by other national courts. The most prominent example clearly is the Italian Constitutional Court which held in the *Frontini* Case that limitations of sovereignty cannot allow, in any manner, EC institutions to violate “the fundamental principles of our constitutional order or the inalienable rights of the human person.”⁶⁴

Most importantly, the effective alternative forum requirement was also endorsed by the Strasbourg human rights institutions. In the *Melchers Case*,⁶⁵ the European Commission of Human Rights relied on this same idea when denying the admissibility of a complaint directed against a Community act by finding that the Community legal order contained a sufficiently developed system of guaranteeing fundamental rights. The *Melchers Case* was referred to in the *Heinz Case*,⁶⁶ which involved a complaint brought against individual

separate from national powers of Member States, exercised by a *supra*-national organization also affect the holders of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the Constitutional Court, the object of which is the protection of constitutional rights in Germany – in this respect not merely as against German state bodies.” *Brunner et al. v. The European Union Treaty (Constitutionality of the Maastricht Treaty)*, German Federal Constitutional Court, 12 October 1993, CMLRev (1994), pp. 251, 253.

⁶² Soon after the first *Solange* case the highest German Courts relied on its main reasoning in regard to other international organizations. In the *EUROCONTROL-Flight Charges Cases* both the Federal Administrative Court and the Federal Constitutional Court held that the lack of jurisdiction of German courts over administrative acts of the defendant organization did not violate German constitutional law guarantees since the alternative forum available satisfied the requirements of a broad and effective legal protection. Federal Administrative Court, 16 September 1977, BVerwGE 54, 291; Federal Constitutional Court, Second Chamber, 23 June 1981, BVerfG 58, 1; NJW (1982), 507.

⁶³ Federal Constitutional Court, 4 April 2001, 2 BvR 2368/99, NJW 2001, 2705.

⁶⁴ *Frontini v. Ministero Delle Finanze*, Italian Constitutional Court, Case 183/73, [1974] 2 CMLR 372.

⁶⁵ *M & Co. v. Federal Republic of Germany*, European Commission on Human Rights, Application No. 13258/77, 9 February 1990, 64 Decisions and Reports (1990), 138.

⁶⁶ *Heinz v. Contracting Parties who are also Parties to the European Patent Convention*, European Commission on Human Rights, Application No. 12090/92, 10 January 1994, 76-A DR (1994), 125.

EPO Member States claiming that they were responsible for an alleged property rights violation by that organization. The complaint was declared inadmissible because the Commission considered that decisions taken by the European Patent Office did not involve the exercise of national jurisdiction within the meaning of Article 1 ECHR. The Commission expressly noted the availability of an alternative internal redress mechanism with various “procedural safeguards” which satisfied the Commission’s requirement that “within [EPO] fundamental rights will receive an equivalent protection.”⁶⁷

In the *Matthews Case*,⁶⁸ the European Court of Human Rights reaffirmed that the contracting states remained responsible for ensuring that the Convention rights were guaranteed.⁶⁹ For the first time it found a violation of the Convention by a member state of the European Communities resulting from the member’s failure to ensure that its obligations under EC law did not violate the ECHR although the act in question was attributable to the EC and not to the individual EC Member State. An important aspect of this case was the absence of a possibility to review the legality of the challenged act before the ECJ because it was not a “normal” act of the Community, but a treaty within the Community legal order.⁷⁰ Thus, there would not have been any alternative dispute settlement mechanism available.

2. Immunity of International Organizations Case Law

Initially national courts tended to avoid finding a conflict between the right of access to court and immunity of international organizations. An illustrative example can be found in the well-known Belgian cause-célèbre concerning compensation claims against the UN, the *Manderlier Case*.⁷¹ The twofold approach consisted of, on the one hand, denying the obligatory force of the

⁶⁷ *Heinz v. Contracting Parties who are also Parties to the European Patent Convention*, *supra*, fn. 66, p. 128.

⁶⁸ *Denise Matthews v. United Kingdom*, European Court of Human Rights, Application No. 24833/94, 18 February 1999, [1999] ECHR 12.

⁶⁹ The Court held that “[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’.” *Matthews*, *supra*, fn. 68, para. 32.

⁷⁰ *Ibid.*, para. 33.

⁷¹ *Manderlier v. Organisation des Nations Unies and État Belge (Ministre des Affaires Étrangères)*, Civil Tribunal of Brussels, 11 May 1966, J.T. 10-12-1966, No. 4553, 121, *Pasicrisie Belge* (1966), III, 103, 45 ILR (1972), 446.

fundamental right itself and, on the other hand, questioning the scope of the obligation vis-à-vis international organizations. In this case the lower courts found that the fundamental right “to a public hearing by an independent and impartial tribunal in the determination of his rights and obligations” as embodied in Article 10 of the Universal Declaration of Human Rights was not legally binding because it regarded the Universal Declaration as a non-binding “mere [...] collection of recommendations” without the force of law.⁷² With regard to the clearly binding ECHR the court rather unconvincingly avoided the issue by reasoning that the Convention “was concluded between fourteen European states only, and cannot be applied to and imposed upon the United Nations.”⁷³ The resulting immunity of the organization was confirmed by the appellate court though it recognized that “in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations” and that this situation “does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights.”⁷⁴ It is clear that any assertion that the right of access to court would only be hortatory is untenable today. Equally, the argument that an obligation imposed on European states to provide access to court could not apply in civil proceedings brought before such national courts only because the defendant in such proceedings is an international organization whose membership comprises also non-European states has not gained persuasive strength over the years.

Despite these early non-starters, the idea of an effective alternative forum requirement – developed in the context of protecting against fundamental rights violations by international organizations – also gained ground in “ordinary” immunity cases where private parties faced this jurisdictional obstacle when they tried to pursue their contractual, delictual or other claims against international organizations. It resulted from a gradual acknowledgement that sweeping immunity provisions exempting international organizations from the jurisdiction of national courts might conflict with the forum states’ human rights obligation to provide access to court.⁷⁵

⁷² *Ibid.*, p. 451.

⁷³ *Ibid.*, p. 452.

⁷⁴ *Manderlier v. Organisation des Nations Unies and État Belge*, Brussels Appeals Court, 15.9.1969, [1969] UNJYB 236, 237.

⁷⁵ This influence is apparent in the Commission report in *Waite and Kennedy*, where the Commission directly cited a crucial passage of the *Melchers Case*: “States may transfer to international organisations competences [...] and may also grant these organisations

The German Federal Constitutional Court transposed its own *Solange* reasoning to genuine immunity cases. In *EUROCONTROL II*,⁷⁶ the Court affirmed that German courts lacked jurisdiction over employment disputes between EUROCONTROL and its staff. Since the exclusively competent ILO Administrative Tribunal provided an adequate alternative remedy, the organization's immunity before German courts did not violate minimum requirements of the rule of law principle contained in the German Constitution.⁷⁷

This approach to the problem of the jurisdictional immunity of international organizations was adopted by the ECtHR in the two landmark-decisions of *Beer and Regan*⁷⁸ and *Waite and Kennedy*.⁷⁹ In these cases the Strasbourg Court recognized that the immunity granted to an international organization can lead to an infringement of an individual's right of access to court⁸⁰ unless mitigated by the availability of adequate alternative means of redress. Based on its earlier case-law with regard to the inherent limitations of Article 6 (1) ECHR,⁸¹ the Court held that, while states were permitted to regulate the right of access to court, any resulting limitations must not impair the essence of this right. According to the ECtHR, a limitation would not be compatible with Article 6 if (1) it did not pursue a legitimate aim, and (2) there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. With regard to the first part of this compatibility test, the Court accepted that the

immunity from jurisdiction [...] "provided that within that organisation fundamental rights will receive an equivalent protection".” *Waite and Kennedy v. Germany*, Application No. 26083/94, European Commission of Human Rights, 2 December 1997, Report, para. 73.

⁷⁶ *Hetzel v. EUROCONTROL*, Federal Constitutional Court, Second Chamber, 10 November 1981, 2 BvR 1058/79, BVerfG 59, 63 (hereafter *EUROCONTROL II*); NJW (1982), 512, DVBl (1982), 189, DÖV (1982), 404.

⁷⁷ See also on the background of *Hetzel v. EUROCONTROL* and the related case *Strech v. EUROCONTROL Bleckmann*, Internationale Beamtenstreitigkeiten vor nationalen Gerichten; Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen* (1981).

⁷⁸ *Beer and Regan*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, [1999] ECHR 6.

⁷⁹ *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13.

⁸⁰ The ECtHR held that "there may be implications as to the protection of fundamental rights." *Waite and Kennedy Judgment*, *supra*, fn. 79, para. 67.

⁸¹ *Osman v. United Kingdom*, *supra*, fn. 30, para. 147; *Fayed v. United Kingdom*, Judgment of 21 September 1994, Series A No. 294, para. 65.

immunity of international organizations was “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments”⁸² and thus regarded the corresponding restriction of access to court as a legitimate objective. Concerning the second element, the required proportionality, the Court thought 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.”⁸³

While establishing a persuasive analytical framework to test the legitimacy of immunity grants to international organizations, the *Waite and Kennedy* decision itself fails to apply its own test in a stringent manner to the facts at issue.⁸⁴ In the court’s view the requirement of the availability of alternative dispute settlement mechanisms was fulfilled because ESA had established an internal appeals board. It did not address, however, the concern of the dissenters on the Commission that the applicants in the particular case were probably not able to resort to this internal remedial mechanism of ESA.⁸⁵

The idea that courts should be guided in their immunity decisions with regard to international organizations by the availability of alternative dispute settlement mechanisms has also gained ground in national court judgments. This is true both for cases where the organization’s immunity has been upheld and only a more or less explicit reminder of the international organization’s obligations to provide for alternative dispute settlement is made as well as, and even more forcefully, where national courts are guided by the absence of alternative remedies in justifying their denial of immunity.

That the immunity from jurisdiction enjoyed by international organizations must not lead to a total deprivation of judicial protection for potential claimants against such international organizations is clearly expressed in a decision of the Swiss Supreme Court where it described the obligation to provide for alternative

⁸² *Waite and Kennedy* Judgment, *supra*, fn. 79, para. 63.

⁸³ *Ibid.*, para. 68.

⁸⁴ For a criticisms of this “timidity”, see Flauss, *Droit des immunités et protection internationale des droits de l’homme*, 10 *Schweizerische Zeitschrift für internationales und europäisches Recht* (2000), pp. 299, 323. See also Reinisch, *Case of Waite and Kennedy*, *AJIL* (1999), p. 933.

⁸⁵ *Waite and Kennedy v. Germany*, Application No. 26083/94, European Commission of Human Rights, 2 December 1997, Report, Dissenting Opinion of Mr. G. Ress, para. 2.

dispute settlement mechanisms as a “counterpart” to the jurisdictional immunity enjoyed by them.⁸⁶

In its long-standing jurisprudence limiting the jurisdictional immunity of international organizations along the lines of a restrictive state immunity concept, the Italian courts were sometimes expressly mindful of the constitutional law requirement laid down in Article 24 of the Italian Constitution⁸⁷ “that the legitimate interests of citizens should be afforded judicial protection.”⁸⁸ This consideration re-enforced the restrictive approach towards the granting of immunity. However, even when correcting its traditional restrictive immunity approach vis-à-vis international organizations by regarding the grant of an unqualified immunity as implying absolute immunity in *FAO v. Colagrossi*,⁸⁹ the Italian Supreme Court discussed whether such denial of jurisdiction would conflict with the obligation to provide access to court under Article 24 of the Italian Constitution. The Court rejected that argument considering that the dispute settlement obligation incumbent upon FAO in its headquarters agreement “would effectively guarantee the right of an employee of the organization to bring an action against it in order to protect his/her rights.”

American courts have also shown an awareness that the grant of immunity to international organizations may conflict with constitutional law demands of providing a forum for the settlement of disputes. For instance, in the *Urban v. United Nations* Case the D.C. Court of Appeals recognized that a “court must take great care not to ‘unduly impair [a litigant’s] constitutional right of access to the courts’”.⁹⁰ Another American court engaged in a balancing exercise between the UN’s right to immunity and the constitutional right of American

⁸⁶ “L’immunité leur garantissant d’échapper à la juridiction des tribunaux étatiques, les organisations internationales au bénéfice d’un tel privilège s’engagent envers l’Etat hôte, généralement dans l’accord de siège, à prévoir un mode de règlement des litiges pouvant survenir à l’occasion de contrats conclus avec des personnes privées. Cette obligation de prévoir une procédure de règlement avec les tiers constitue la contrepartie à l’immunité octroyée (...).” *Groupement d’Entreprises Fougerolle et consorts c/ CERN*, 1ère Cour civile du tribunal fédéral Suisse, 21 décembre 1992, ATF 118 Ib 562.

⁸⁷ Art. 24 (1) Italian Constitution provides: “Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi.” (“Everyone can take judicial action to protect individual rights and legitimate interests.”)

⁸⁸ *FAO v. INPDAI*, Supreme Court of Cassation, 18 October 1982, [1982] UNJYB 234, 235.

⁸⁹ *FAO v. Colagrossi*, Corte di Cassazione, 18 May 1992, No. 5942, [1992] RivDI 407.

⁹⁰ *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985).

citizens of access to court in the *People v. Mark S. Weiner* case.⁹¹ Although the court did not have to decide this issue, it made it clear that it would not simply allow immunity to override the “right of every citizen to petition for redress in [American] courts.”⁹²

While in all these cases the immunity of international organizations was ultimately upheld, other national courts actually allowed proceedings against organizations. In denying jurisdictional immunity to them courts have used the non-availability of alternative remedies as a forceful argument supporting their decisions.

Thus, a German administrative court found an implicit acceptance of the jurisdiction of national courts (and thus waiver of immunity) refusing to assume that the problem of alternative dispute settlement has not been seen or was intentionally unresolved by the legislator.⁹³

Also a Greek court found its denial of immunity to an international organization “reinforced by the fact that in the opposite case, for the largest part of disputes of private law concerning the international organisations, nowhere on earth would there be jurisdiction.”⁹⁴

⁹¹ *People v. Mark S. Weiner*, 378 N.Y.S.2d 966, Criminal Court of the City of New York, N.Y. County, 19 January, 1976; [1979] UNJYB 249.

⁹² The court was of the opinion that “[t]here is a limit to which the international agreement creating the United Nations can inure to the detriment, disadvantage, and unequal protection of a citizen of the United States” and that “[a] basic concept and motivating factor of the founders of this Republic was the absolute right of every citizen to petition for redress in its courts.” *People v. Mark S. Weiner*, 378 N.Y.S.2d 966, 975.

⁹³ “Will man nicht unterstellen, daß der Satzungs- bzw. der Gesetzgeber, der diese Satzung ratifiziert hat, das Problem, ob und welcher Gerichtsbarkeit die Beklagte unterworfen ist, ungelöst sein lassen wollte oder nicht gesehen haben sollte, so verbleibt nur die einzig mögliche Auslegung, daß die Europäischen Schulen sich der Gerichtsbarkeit des Landes ihres jeweiligen Sitzes unterworfen haben.” *X. et al. v. European School Munich II*, Bayerisches Verwaltungsgericht (Administrative Court) München, 29 June 1992, M 3 K 90.4137-4141 (unpublished) (on file with the author). This decision was, however, reversed on appeal Bayerischer Verwaltungsgerichtshof (Administrative Court, 7th Chamber) München, 15 March 1995, Deutsches Verwaltungsblatt (1996), 448.

⁹⁴ *International Centre for Superior Mediterranean Agricultural Studies*, Court of Appeals of Crete, 191/1991 (unofficial translation provided by the Ministry of Foreign Affairs of the Hellenic Republic to the author).

In *UNESCO v. Boulois*⁹⁵ a French appellate court rejected a plea of immunity by directly invoking the ECHR. The court thought that granting immunity “would inevitably lead to preventing [Mr. Boulois] 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 Art. 6 (1) of the [ECHR].”⁹⁶

3. State Immunity Case Law

The idea to make the granting of immunity dependent upon the availability of an alternative forum can also be found in a number of state immunity and related immunity decisions. However, state immunity decisions reveal that the potential friction between a constitutional law or human rights-based right of access to court and the immunity of states or international organizations has not always been recognized by national courts and human rights bodies. In fact, there are two fundamentally different approaches to the question of immunity and access to court. The modern balancing test, developed by German courts and espoused by the ECtHR as well as by many national courts, is still contrasted by a traditional, “no conflict” approach that tends to deny the inherent friction.

This approach does not see any real conflict between immunity and access to court simply because immunity is regarded as an international law requirement which deprives states of their jurisdiction over certain types of defendants. The obligation to provide access to court applies only where states do have jurisdiction in the first place. Similarly, from an historical point-of-view the rules on state immunity may be regarded as pre-existing norms of international law which were not intended to be affected by Article 6 (1) ECHR. Thus, the further validity of state immunity might be seen as an implicit exception to Article 6 (1).⁹⁷

⁹⁵ *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, XXIVa Yearbook Commercial Arbitration (1999) 294; Rev. Arb (1999) 343.

⁹⁶ XXIVa Yearbook Commercial Arbitration (1999), pp. 294, 295. The case did not involve a substantive claim but rather the question of a court appointment of an arbitrator according to an arbitration clause contained in a private law contract between the organization and the claimant.

⁹⁷ See Damian, *Staatenimmunität und Gerichtszwang* (1985), p. 17; Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, ZaöRV (1971), pp. 246, 256; Jones, *Article 6 ECHR and Immunities Arising in Public International Law*, ICLQ (2003), p. 463; Voyiakis, *Access to Court v. State Immunity*, ICLQ (2003), p. 297.

This view also underlay human rights decisions like *Spaans v. The Netherlands*⁹⁸ where the Strasbourg Commission 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.⁹⁹ It is also reflected in the concurring opinion of Mr. K. Herndl in the *Beer and Regan* and *Waite and Kennedy* Commission decisions, who – explicitly relying on *Spaans* – considered that German courts did not have any jurisdiction over private law disputes affecting the defendant international organization.¹⁰⁰

Recently, the view that there is no real conflict between the grant of immunity and the obligation to provide access to court was adopted in the English *Holland v. Lampen-Wolfe* case.¹⁰¹ There the House of Lords was of the opinion that Article 6 ECHR could only be infringed where a contracting state party possessed jurisdiction in the first place. According to the Law Lords this was not the case where it was under an obligation to grant immunity. In their opinion, Article 6 of the Convention provides procedural guarantees in relation to due process, but does not in itself provide a basis of jurisdiction where such jurisdiction is not permitted under international law. Where a defendant enjoys immunity the forum state lacks jurisdiction and therefore cannot legally provide or deny access to its courts.

One might also wonder whether the significance of the *Waite and Kennedy* case-law has been diminished as a result of a series of recent decisions of the ECtHR in the context of state immunity. In three 2001 judgments, in *Al-Adsani*

⁹⁸ European Commission of Human Rights, Application No. 12516/86, 12 December 1988, 58 Decisions and Reports (1988), 119, 107 ILR 1.

⁹⁹ “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.” 58 Decisions and Reports (1988), 119, at 122.

¹⁰⁰ *Waite and Kennedy v. Germany*, Application No. 26083/94, European Commission of Human Rights, 2 December 1997, Report, concurring opinion of M K. Herndl.

¹⁰¹ *Holland v. Lampen-Wolfe*, House of Lords, 20 July 2000, [2000] 3 All ER 833, 1 WLR 1573. See also Fox, *Access to Justice and State Immunity*, Law Quarterly Review (2001), p. 10.

v. UK,¹⁰² *Fogarty v. UK*,¹⁰³ and *McElhinney v. Ireland and UK*,¹⁰⁴ the Strasbourg court saw no Article 6 violations by grants of immunity. It is important to note, however, that – different from *Holland v. Lampen-Wolfe* and its own older cases such as *Spaans v. Netherlands* – the ECtHR found that Article 6 was applicable.¹⁰⁵ Rather, the particular grants of immunity did not constitute infringements.

Al-Adsani concerned an English decision granting immunity to a foreign state in a case involving an allegation of torture in that state.¹⁰⁶ *Fogarty* involved an Embassy employment dispute and *McElhinney* attacked an Irish Supreme Court decision which had held that sovereign immunity applied because the tortious acts of a soldier who was a foreign state's servant or agent were an exercise of "jus imperii."¹⁰⁷ In all three cases the European Court of Human Rights found no violation of the Convention considering that "the grant of immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."¹⁰⁸ Expressly relying on its two-part test of justifying a limitation of the right of access to court as developed

¹⁰² *Al-Adsani v. UK*, Appl. No. 35753/97, 1 March 2000 (Admissibility), 21 November 2001 (Judgment);

¹⁰³ *Fogarty v. UK*, Appl. No. 37112/97, 1 March 2000 (Admissibility), 21 November 2001 (Judgment), 34 EHRR 302; See also *Emberland*, European Court of Human Rights decisions on immunity of foreign states from suit and the right of access to courts in civil cases (*McElhinney v. Ireland*, *Al-Adsani v. United Kingdom*, *Fogarty v. United Kingdom*), *AJIL* (2002), p. 699.

¹⁰⁴ *McElhinney v. Ireland and UK*, Appl. No. 31253/96, 9 February 2000 (Admissibility), 21 November 2001 (Judgment).

¹⁰⁵ The British government – unsuccessfully – argued in the *Al-Adsani* Case that Article 6 was not applicable because the UK had no jurisdiction as a result of the grant of immunity. *Al-Adsani v. UK*, Appl. No. 35753/97, 21 November 2001 (Judgment); para. 44. See also Jones, *Article 6 ECHR and Immunities Arising in Public International Law*, *ICLQ* (2003), p. 463.

¹⁰⁶ *Al-Adsani v. Government of Kuwait and Others*, 21 January 1994 Court of Appeal, 100 ILR 465, 103 ILR 420, 12 March 1996, 107 ILR 536.

¹⁰⁷ *John McElhinney (Plaintiff) v. Anthony Ivor John Williams and Her Majesty's Secretary of State for Northern Ireland (Defendants)*, Supreme Court, 15 December 1995, Irish Reports, 1995, Vol. 3, pp. 382-405, 103 ILR 311.

¹⁰⁸ *Al-Adsani*, *supra*, fn. 102, para. 54; *Fogarty*, *supra*, fn. 103, para. 34; *McElhinney*, *supra*, fn. 104, para. 5.

in *Waite and Kennedy*,¹⁰⁹ the ECtHR held that “a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹¹⁰

While the Court found the legitimate aim of restricting access to court in the perceived international obligation to grant immunity it failed to seriously question whether the proportionality requirement had been complied with.¹¹¹ Instead of looking for alternative dispute settlement mechanisms along the lines expressed in *Waite and Kennedy*,¹¹² it had recourse to an interpretation technique trying to avoid inconsistencies between ECHR demands and other rules of international law.¹¹³ Ultimately, this led the ECtHR to conclude that “measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.”¹¹⁴ Clearly the interests of private claimants in having access to court are out of sight and thus a balancing against the interests of the beneficiaries of immunity does not take place. Instead, at least in *Al-Adsani*, the Strasbourg court focused in the remainder of its proportionality discussion on the additional argument about the implication of a possible *jus cogens* character of the torture prohibition on immunity in civil compensation suits.¹¹⁵ This lack of any serious discussion of the proportionality may have been motivated by the fact that in state immunity cases there is always a natural alternative forum in

¹⁰⁹ See *supra*, fn. 30.

¹¹⁰ *Al-Adsani, supra*, fn. 102, para. 53.

¹¹¹ Voyiakis, *Access to Court v. State Immunity*, ICLQ (2003), pp. 297, 311; Orakhelashvili, *State Immunity and International Public Order*, GYIL (2002), p. 227.

¹¹² See *supra*, fn. 30.

¹¹³ *Al-Adsani, supra*, fn. 102, para. 55 (“The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.”).

¹¹⁴ *Ibid.*, para. 56.

¹¹⁵ By a close 8 to 7 vote the Court, while accepting that the “prohibition of torture has achieved the status of a peremptory norm in international law”, rejected the argument that a “State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.” *Al-Adsani, supra*, fn. 102, para. 61.

the defendant state. Nevertheless, it cannot distract from the fact that the Court here falls short of its own demands as expressed in previous cases.¹¹⁶

Of course, one must acknowledge that also national courts tend to restrict the proportionality test and frequently are satisfied by stating that immunity is a principle of international law and thus any restriction of the non-absolute right of access to court may be justified.

In an important Spanish pre-*Al-Adsani* decision in the *Abbott Case*,¹¹⁷ the Spanish Constitutional Court pursued this avenue when it had to address the issue whether an absolute immunity from execution would be contrary to a right of access to courts. The Court recognized that such immunity would be contrary to the fundamental right to a fair hearing by a tribunal, as established in Article 24 of the Spanish Constitution.¹¹⁸ However, it found that this right was not absolute and did not cover the measures of constraint against the property of foreign states protected by international immunities. In the Court's view the principle of sovereign equality – upon which state immunity is based – was a legitimate ground to restrict the scope of Article 24 of the Spanish Constitution. In a subsequent case, the same court reaffirmed that the fundamental right to a judicial decision and its execution may be limited by legitimate exceptions – the immunity of foreign states being one of these legitimate exceptions.¹¹⁹

A fairly clear echo of the ECtHR's judgments can be discerned in the Greek Supreme Court's *Distomo Massacre* decisions which involved the issue whether a national authorization requirement for enforcement measures was compatible

¹¹⁶ See in this regard the dissenting opinion of Judge Loucaides: "Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1 of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings." *Ibid.*

¹¹⁷ *Diana Gayle Abbott (individual) v. República de Sudáfrica (State)*, Constitutional Court, 1 July 1992, Aranzadi 1992, No. 107.

¹¹⁸ Art. 24, Spanish Constitution 1978, BOE 29.12.78, provides: "1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his legitimate rights and interests, and in no case may he go undefended."

¹¹⁹ *Esperanza Jequier Beteta (individual) v. Embajada de Brasil (State)*, Tribunal Constitucional (Constitutional Court), 27 October 1994, Aranzadi 1994, no. 292 BOE, 29.11.1994.

with the right of access to court.¹²⁰ They were the follow up to the Greek court judgments denying jurisdictional immunity to Germany in compensation claims for Second World War atrocities.¹²¹ At the enforcement stage, however, the Greek Supreme Court thought that while the right to effective remedies in case of enforcement proceedings may, under certain conditions, be subject to restrictions, such restrictions should be provided for by law and should not violate the substance of the protected right or be disproportionate to the aim pursued and the means employed.¹²² The Supreme Court further held that the refusal of the Minister of Justice to consent to enforcement proceedings against a foreign state was not contrary to the ECHR and the ICCPR if such enforcement proceedings were directed against the property of a foreign state serving *iure imperii* purposes or if these proceedings might endanger the international relations of the country with foreign states. A complaint against this latter decision before the ECtHR has been unsuccessful.¹²³

Also the Slovenian Constitutional Court¹²⁴ was influenced by the approach pursued by the Spanish and Italian courts as well as the ECtHR. In a case concerning compensation for property damage during the Second World War, the grant of immunity to the defendant state was challenged by reliance on a constitutional right of access to court as well as by the invocation of Article 6 ECHR. The court rejected that claim holding the interference with the right of

¹²⁰ The question arose whether prior consent of the Greek justice ministry to enforcement proceedings against foreign states was contrary to Art. 6, para. 1, ECHR, and Art. 2, paras. 3, 14, ICCPR. *Prefecture of Boeotia v. The Fed. Rep. of Germany*, Supreme Court (Areios Pagos) Chamber, Judgment 302/2002, 19 February 2002.

¹²¹ *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Leivadia, Case No. 137/1997, 30 October 1997, partly reprinted in: 50 *Revue Hellenique de droit international* 595–602; see also Bantekas, *Case note*, AJIL (1998), pp. 765–768; Areios Pagos, Case No 11/2000, 4 May 2000, excerpts reprinted in: 32 *Kritische Justiz* 472, 475 (2000) (in German). See also Gavouneli and Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany*, AJIL (2001), pp. 198–204; Dolzer, *Der Areopag im Abseits*, NJW (2001), p. 3525; Hobe, *Durchbrechung der Staatenimmunität bei schweren Menschenrechtsverletzungen – NS-Delikte vor dem Areopag*, IPrax (2001), p. 368.

¹²² Supreme Court (Areios Pagos) Plenary, Judgments 36 and 37/2002, 28 June 2002.

¹²³ *Kalogeropoulou v. Greece and Germany*, Appl. No. 59021/00, 12 December 2002 (Admissibility), declaring the complaint inadmissible, largely relying on its own reasoning in the *Al-Adsani* decision.

¹²⁴ *A.A. (individual) v. Germany (state)*, Constitutional Court of the Republic of Slovenia, 8 March 2001, Up-13/99-24, Official Journal of the Republic of Slovenia, No. 28/01 (on file with the author).

access to court proportionate.¹²⁵ According to this decision a limitation of the right of access to court “must be needed and necessary for reaching a pursued constitutionally legitimate goal and in proportion to the importance of this goal.” In the Court’s view the principle of state immunity as such serves a “constitutionally legitimate” purpose. In a significant way, however, it went beyond the *Al-Adsani* reasoning of the ECtHR¹²⁶ and the Spanish and Greek immunity decisions. It did not merely assert that the principle of sovereign equality, protected by state immunity, was necessary for preserving international cooperation and cohesion between the states. Rather, it contemplated the interests of the private party seeking access to court when it observed that “the complainant is not deprived by the challenged ruling of all judicial protection, but only of such before domestic courts.” The fact that a lawsuit might be brought in the defendant state’s courts “where an argument in favor of judicial state immunity has no value” was an important consideration for the Slovenian Constitutional Court. This demonstrates an approach mandated by *Waite and Kennedy*¹²⁷ – which was expressly invoked by the Slovenian Court – that the availability of an alternative forum is a decisive criterion for the proportionality of jurisdictional immunity under access to court considerations.

The Slovenian case also shows that the state immunity decisions must be distinguished from cases involving the immunity of international organizations in an important way. In all these cases immunity did not totally deprive the private claimant of dispute settlement mechanisms. In state immunity cases there is

¹²⁵ *Ibid.* (“An interference with the right to judicial protection is allowed if it is in conformity with the principle of proportionality. This means that a limitation must be needed and necessary for reaching a pursued constitutionally legitimate goal and in proportion to the importance of this goal. Judicial immunity reflects the principle of the equality of states and thereby respects for the independence and integrity of another state. This goal is constitutionally legitimate and the exclusion of judicial protection is needed and necessary for achieving this goal. The goal can only be achieved by the exclusion of court jurisdiction in another state. The exclusion of judicial protection in the Republic of Slovenia is also proportionate to the importance of the pursued goal. Respect for the principle of sovereign equality is necessary for preserving international cooperation and cohesion between the states. On the other hand, the complainant is not deprived by the challenged ruling of all judicial protection, but only of such before domestic courts. According to general rules on jurisdiction (actor sequitur forum rei), the complainant may sue the Federal Republic of Germany before its courts, where an argument in favor of judicial state immunity has no value.”).

¹²⁶ See *supra*, fn. 102.

¹²⁷ See *supra*, fn. 30.

almost always, though sometimes rather inconveniently, the option of suing the foreign state before its own domestic courts. For most types of claims against international organizations, however, this is not the case. The only exceptions are staff disputes where a functional equivalent to a domestic court, an internal board or an administrative tribunal, is usually available. Even in these situations, however, it is clear from the mandate in the *Waite and Kennedy Case*¹²⁸ that the mere existence of such alternatives would not suffice to justify immunity. Rather, these alternative ways of redress must afford a protection equivalent to the one states are obligated to provide under their fair trial obligations.¹²⁹

A clear reminder of the inter-relationship between the right of access to court and immunity in the sense that the latter will be in conformity with the former only if an alternative forum is available can be seen in a recent Austrian Supreme Court decision involving a foreign head of state. While the Austrian courts held that a foreign incumbent head of state was shielded by immunity from a paternity suit, they made it clear, however, that this immunity was conditional upon the availability of an alternative forum in the home state of the foreign head of state. The court reasoned that only if legal action against an incumbent head of State in his home country is impossible “and due to the State’s obligation under civil human rights law to provide access to courts, would Plaintiff be entitled to a decision on the merits by the court, and would a claim to that effect probably prevail over the provisions on immunity.”¹³⁰

4. Other Conflict Solution Approaches

When analyzing the development of an effective alternative forum requirement as an important factor in order to assess the legitimacy of according or denying immunity to a foreign state or international organization one has to recognize that this development is still ongoing and that it has all the characteristics of a gradual process. The development seems to corroborate the New Haven School’s fundamental insight that international law is less a set of stable rules

¹²⁸ See *supra*, fn. 30.

¹²⁹ See *infra*, part III.

¹³⁰ *W. (individual) v. J.(H).A. F.v.L. (Head of State)*, Austrian Supreme Court (Oberster Gerichtshof), 14 February 2001, No. 7 Ob 316/00xx, Austrian Review of International and European Law (2001), pp. 350, 355.

than a process of claims and counterclaims with regard to the content of certain normative assumptions.¹³¹

Indeed, it would be hard to argue that either the traditional “no conflict” approach or the modern balancing test can be regarded as the only dogmatic truth. Rather, it appears to be the consequence of a shift of emphasis from a traditional international law perspective, primarily focusing on the dignity of equal sovereigns and upholding a balanced comity among nations, towards a human rights centered notion of international law, protecting the rights of individuals as the ultimate beneficiaries, if not subjects of law.¹³²

Balancing the different underlying interests is not the only conceivable result of this development. In fact, it would be a very legal approach to seek solutions for the conflict between the exigencies of immunity and the demands of access to court by having resort to traditional conflict solution techniques. While *lex posterior*- and *lex specialis*-approaches do not seem to have played an important role in this context, the contemporary appeal of looking for a hierarchical solution is undeniable. It found very clear expression in the ECtHR’s *Al-Adsani* judgment¹³³ where the most controversial issue ultimately was whether the accepted *jus cogens* character of the prohibition of torture overrode the customary rule of immunity in a civil compensation action. According to the Court’s majority, relying on a perceived lack of state practice,¹³⁴ this was not the case.¹³⁵ The strong dissent demonstrated the inherent weakness

¹³¹ Cf Higgins, *Problems and Process: International Law and How We Use it* (1994), pp. 5 ff.

¹³² See Shaw, *International Law* (4th ed., 1997), p. 183.

¹³³ See *supra*, fn. 102.

¹³⁴ *Al-Adsani*, *supra*, fn. 102, para. 62 (“It is true that in its Report on Jurisdictional Immunities of States and their Property (see paragraphs 23-24 above) the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.”).

¹³⁵ *Ibid.*, para. 61 (“Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial

of the differentiation between criminal and civil proceedings, arguing that the very concept of *jus cogens* implies a hierarchically superior position vis-à-vis all other non-*jus cogens*.¹³⁶ That also national courts may reach conclusions different from the ECtHR's majority can be seen in the Greek Supreme Court decision in the *Distomo Massacre Case* at the jurisdictional stage.¹³⁷

Of course, the *Al-Adsani* discussion concerned the question whether state immunity in civil proceedings survived the challenge of a peremptory norm prohibiting torture. It did not discuss the potential *jus cogens* character of the right of access to court and the consequence of such a status on a conflict with immunity. Indeed, it may be difficult to argue that all human rights possess a *jus cogens* character.¹³⁸

However, a hierarchically higher status of human rights obligations may also exist in other situations. From a domestic law perspective, the content of human rights guarantees may be simultaneously protected, for instance, by a human rights treaty and by constitutional fundamental rights. If conflicting immunity rules enjoy only the status of ordinary internal law then the national courts of such a state are probably under an obligation to give precedence to the constitutional law rules. This would be the case, for instance, in Austria where the entire ECHR enjoys the status of constitutional law¹³⁹ and where the rules

authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.”)

¹³⁶ *Ibid.* (joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) (finding that “acceptance [...] of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions”). See also Bianchi, *Denying State Immunity to Violators of Human Rights, Austrian JI of Public and International Law* (1994), p. 195 (earlier debate); Bröhmer, *State Immunity and the Violation of Human Rights* (1997), p. 196; Kokott, “Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen”, in: *Festschrift für Rudolf Bernhardt* (1995), pp. 135, 148 *et. seq.*

¹³⁷ *Prefecture of Voiotia v. Federal Republic of Germany*, Areopag, Case No. 11/2000, 4 May 2000, *supra*, fn. 121.

¹³⁸ See Shelton, *Human Rights and the Hierarchy of International Law Sources and Norms: Hierarchy of Norms and Human Rights: Of Trumps and Winners*, Sask. L. Rev. (2002), p. 299.

¹³⁹ The rank of constitutional law was retroactively conferred upon the Convention through legislation in 1964; BGBl. Nr. (Federal Law Gazette No.) 1964/59.

conferring jurisdictional immunity on States and international organizations are generally regarded as being incorporated in the rank of ordinary federal law. So far Austrian courts managed to avoid addressing the consequences of a conflict between immunity and access to court claims. In the foreign head of state paternity suit, quoted above, however, the Austrian Supreme Court made a remarkable *obiter dictum*. It stated that “[i]n the light of the arguments by the authors quoted above, the considerations on the fundamental civil rights [on the right of respect to family life] would supersede the aspects of international law – and thus override the exemption [of the foreign head of State from jurisdiction] because of immunity – only if an [...] application for an affiliation order by the illegitimate child in the home country of the foreign head of State was inadmissible or barred, e.g. due to procedural reasons.”¹⁴⁰

A similar hierarchical reasoning may have been an important consideration in the Italian *Condor and Filvem* Case¹⁴¹ where the requirement of an executive authorization for enforcement measures against states was held to be contrary to the constitutional right of access to court enshrined in Article 24 of the Italian Constitution.¹⁴²

A conflict between a treaty obligation to grant jurisdictional immunity to an international organization and a constitutional law obligation to provide access to court had already been addressed by the Italian Court of Cassation in the *FAO v. INPDAI* Case.¹⁴³ In rejecting the organization’s claim of immunity, the Court used a hierarchical argument, though not in a quite explicit fashion. Rather, it attempted to remove the conflict by observing that under FAO’s constitutive treaty Member States were only required to accord to the organization immunities “in so far as it may be possible under their own constitutional procedure.” In the Italian Court’s view the Italian Constitution required that immunity from suit as it may have been granted to international organizations should take into account the principle laid down in Article 24 of the Constitution that the legitimate interests of citizens should be afforded judicial protection.

Going beyond the framework of national constitutional jurisprudence the French Cour de Cassation considered the idea that according primacy or

¹⁴⁰ *W. (individual) v. J.(H).A. F.v.L.(Head of State)*, Austrian Supreme Court, *supra*, fn. 130, p. 355.

¹⁴¹ *Condor and Filvem v. Ministry of Justice*, Constitutional Court, July 15, 1992, *Rivista di diritto internazionale privato e processuale*, 1992, 941; 101 ILR, 394.

¹⁴² See *supra*, fn. 87.

¹⁴³ Supreme Court of Cassation, 18 October 1982, [1982] UNJYB 234.

supremacy to the rules of the ECHR might avoid a denial of justice in the case of immunity granted to an international organization.¹⁴⁴

In addition and without resorting to the concept of *jus cogens*, one might validly ask whether, as a matter of policy, a conflict between the interests of persons enjoying immunity and those seeking access to court should not be decided in favour of the latter. It has been suggested that “there is sufficient reason to argue that the interests of the international organization as the *ratio legis* of the immunities granted should be subordinated to the promotion of good administration of justice.”¹⁴⁵ With regard to the jurisdictional immunity of international organizations it has been said that “international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice.”¹⁴⁶ Similarly, submissions were made before the ECJ concerning the “inadequacy of the proposition that ascribes absolute immunity to such organizations [...] taking into account, moreover, of the need not to deprive individuals of the protection afforded to subjective rights that might be impaired by the activities of international organizations [...]”.¹⁴⁷

III. IMPLICATIONS OF THE ALTERNATIVE REMEDIES REQUIREMENT

The acceptance of the modern trend which makes the jurisdictional immunity of international organizations dependent on the availability of adequate alternative forms of redress has far-reaching implications. The obligation of international organizations to make available to claimants “reasonable alternative means to protect effectively their rights”,¹⁴⁸ is not limited to providing a forum. It is also necessary that such an alternative forum fulfills certain criteria as to its effectiveness.

¹⁴⁴ The court considered that an organization’s immunity may lead to a denial of justice and asked whether “[c]e 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?” Cour de Cassation, Rapport annuel (1995), 418, cited by Byk, *supra*, fn. 53, p. 142.

¹⁴⁵ Wellens, *Remedies against International Organisations*, p. 209.

¹⁴⁶ Gaillard and Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, ICLQ (2002), pp. 1, 2.

¹⁴⁷ *SAT Fluggesellschaft mbH v. EUROCONTROL*, Case 364/92, ECJ, 19 January 1994, [1994] ECR I 43, 48.

¹⁴⁸ Waite and Kennedy, *supra*, fn. 79, para. 68.

A. Effectiveness as a criteria for adequate alternative means

For an alternative forum to be adequate the applicability of the entire body of law that is necessary to guarantee an effective protection must be assured. In ECtHR cases concerning Article 6 (1) ECHR, such as *Waite and Kennedy*¹⁴⁹ or *Beer and Regan*,¹⁵⁰ or decisions of the German Federal Constitutional Court like *Solange I*¹⁵¹ and *II*,¹⁵² the applicability of the law required to protect human rights of the ECHR to individuals is beyond doubt. It is not questioned that the ECHR has a binding quality on Member States. However, it remains at the discretion of a Member State how the provisions of the ECHR are implemented. For example, although Germany has transformed the provisions of the ECHR, not as constitutional law, but as ordinary federal law,¹⁵³ the German Federal Constitutional Court has consistently held that the various provisions of the German Basic Law cover those of the ECHR. This is considered consistent with the ECHR since the protection of individuals under the German Basic Law goes beyond that of the ECHR. This relationship is similar to that between a state and an international organization of which the state is a member, in that, there remains a requirement upon the member state to ensure that fundamental rights protection meets equivalent standards within the organization as those within that member state.¹⁵⁴

Despite this, the scope of the law applied by international administrative tribunals, like UNAT or ILOAT, and by internal dispute settlement mechanisms, like the ESA Appeals Board or others,¹⁵⁵ is unclear. These dispute settlement mechanisms have statutes relating to the proceedings¹⁵⁶ which limit the applicable law to the terms of appointment and conditions of service applicable to the organization concerned. Formally, definitions of this nature exclude other sources of law, including fundamental rights.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Beer and Regan, supra*, fn. 78.

¹⁵¹ *Internationale Handelsgesellschaft, supra*, fn. 57.

¹⁵² *In re application of Wünsche Handelsgesellschaft, supra*, fn. 58.

¹⁵³ Cf. Bundesgesetzblatt BGBI 1952 II, 686; 1968 II, 1116, 1120; 1989 II, 546 for further details see Ipsen, *Völkerrecht* (1990), § 45, Rz. 3ff.

¹⁵⁴ *Matthews v. UK, supra*, fn. 68, paras. 31-35; *Solange II, supra*, fn. 58.

¹⁵⁵ E.g., Appeals Boards of the ESA, ESRO, ELDO, NATO, OECD and OEEC; see: Amerasinghe, *The Law of the International Civil Service, supra*, fn. 39.

¹⁵⁶ For e.g. the ILOAT see: *Statute and Rules of the Administrative Tribunal*, at <www.ilo.org/public/english/tribunal/stateng.htm>.

For instance, Article II (1) of the 1998 ILOAT Statute provides that “[t]he Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials [...] and of [...] provisions of the Staff Regulations”.¹⁵⁷ Any further clarification or practical indication to the extent of applicable law in cases before the ILOAT is missing in the ILOAT Statute. In its jurisprudence the ILOAT has confirmed that this reference to staff regulations means only those of the organization of which a complainant is (or was) an official and does not include the staff regulations of any other organization.¹⁵⁸

Occasionally, the Tribunal refers to general principles of law such as “equality before the law”.¹⁵⁹ However, the ILOAT has been quite explicit in stating that it “will not review criteria laid down in any national law. The only rules it will apply are those that govern the international civil service and in this case they are the EPO Service Regulations [...]”.¹⁶⁰ In a 1998 case the ILOAT pointed out that “[a] firm line of precedent says that rights under a contract of employment may be express or implied, and include any that flow from general principles of the international civil service or human rights [...]”.¹⁶¹ However, in a more recent case, the ILOAT found that while “[t]he Member States of the [Organization] are all signatories to the European Convention on Human Rights, the Organization [...] as such is not a member of the Council of Europe and is not bound by the Convention in the same way as signatory states”.¹⁶² Although the ILOAT in this decision further pointed out that

¹⁵⁷ Art. II (1), *Statute and Rules of the Administrative Tribunal* for ILO related cases; Art. II (5) for other organizations which have accepted the jurisdiction of the ILOAT.

¹⁵⁸ *Zhu v. UNIDO*, ILO Administrative Tribunal, 11.07.1996, Judgment No. 1509, para. 12, at <www.ilo.org/public/english/tribunal/fulltext/1509.htm> with reference to Judgment 231 (in re *Sletholt*), <www.ilo.org/public/english/tribunal/fulltext/0231.htm>.

¹⁵⁹ See, e.g., *J.M.W. v. EPO*, ILO Administrative Tribunal, 04.02.2004, Judgment No. 2292, para. 11, <www.ilo.org/public/english/tribunal/fulltext/2292.htm>; *Bajaj v. WHO*, ILO Administrative Tribunal, 31.01.2001, Judgment No. 2023, para. 10, at <www.ilo.org/public/english/tribunal/fulltext/2023.htm> referring to the principle of equal pay for work of equal value.

¹⁶⁰ *Geisler and Wenzel v. EPO*, ILO Administrative Tribunal, 30.06.1988, Judgment No. 899, para. 14, at <www.ilo.org/public/english/tribunal/fulltext/0899.htm>.

¹⁶¹ *Awoyemi v. UNESCO*, ILO Administrative Tribunal, 09.07.1998, Judgment No. 1756, para. 3, at <www.ilo.org/public/english/tribunal/fulltext/1756.htm>.

¹⁶² *J.M.W. v. EPO*, *supra*, fn. 159, para. 11.

“the general principles enshrined in the Convention, particularly the principles of non-discrimination and the protection of property rights [...] are part of human rights, which, [...] in compliance with the Tribunal’s case law, apply to relations with staff”¹⁶³

it failed to clearly identify the applicable rights and the scope of those rights. In particular, it did not discuss the relevant case-law of the ECtHR or other human rights bodies in order to determine the precise content of the human rights guarantees professedly protected by the ILOAT.

Such failure to identify the content of the applicable legal rules leads to a situation where applicants are not able to effectively protect their rights. This especially applies to health and safety at work protection, fire protection or protection against unlawful harm caused by superior authorities; since although such protection mechanisms derive from fundamental rights, adequate protection can only be enforced if the scope of applicable law can be clearly identified. Such arguments support the assertion that alternative means of redress are not sufficient in themselves, but that a clear and comprehensive definition of the law applicable to the cases submitted to the alternative means is also required.

Although the ILOAT frequently asserts that it applies human rights,¹⁶⁴ there are indications that this is sometimes not the case. With regard to the protection of marriage, family and children born outside of marriage, the ILOAT stated that

“[t]he complainant refers in vain to ‘the ideal ... of the protection of families and children’. This ideal carries no legal weight.”¹⁶⁵

Judgments like this and others¹⁶⁶ where the ILOAT referred to its limited jurisdiction and a lack of direct applicability of international conventions and

¹⁶³ *Ibid.*

¹⁶⁴ *Franks and Vollerling v. EPO*, ILO Administrative Tribunal, 31.01.1994, Judgment No. 1333, para. 5, at <www.ilo.org/public/english/tribunal/fulltext/1333.htm>.

¹⁶⁵ *M.R. v. EPO*, ILO Administrative Tribunal, 15.07.2002, Judgment No. 2127, para. 5, at <www.ilo.org/public/english/tribunal/fulltext/2127.htm>.

¹⁶⁶ *Pibouleau v. WHO*, ILO Administrative Tribunal, 13.11.1978, Judgment No. 351, para E. and Considerations para. 7, at <www.ilo.org/public/english/tribunal/fulltext/0351.htm>; *M.R.A.-O. v. UNESCO*, ILO Administrative Tribunal, 03.02.2003, Judgment No. 2193, para. 8, at <www.ilo.org/public/english/tribunal/fulltext/2193.htm>; *Placci v. ITU*, ILO Administrative Tribunal, 12.07.2000, Judgment No. 1976, para. 2 and 4, <www.ilo.org/public/english/tribunal/fulltext/1976.htm>.

national law as well as to the principles of such conventions,^{166a} suggest that it cannot be assumed from summary statements that the standard of Human Rights protection provided by the ILOAT is adequate.

In support of the assertion that the ILOAT applies Human Rights, the EPO adopted the following declaration, as a sort of preface to its Service Regulations,

“The Administrative Council and the President of the Office note that when reviewing the law applied to EPO staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organization but also general legal principles, including *human rights*. The Administrative Council also noted with approval the President’s declaration that the Office adheres to the said legal provisions and principles.”¹⁶⁷

In spite of this declaration, it remains unclear upon which law a complaint alleging non-observance of specific rights, in substance or in form, could be based. The matter is further obscured by the consistent assertion of the EPO that the ECHR does not apply.¹⁶⁸

[ilo.org/public/english/tribunal/fulltext/1976.htm](http://www.ilo.org/public/english/tribunal/fulltext/1976.htm)>; *J. M-E. v. EPO*, ILO Administrative Tribunal, 03.02.2002, Judgment No. 2211, paras. 7-8, the Tribunal awarded punitive costs against the applicant. No provision exists for such an award therefore it represents a violation of Article 6.1 ECHR, <www.ilo.org/public/english/tribunal/fulltext/2211.htm>.

^{166a} *E.E.H. v. EPO*, ILO Administrative Tribunal, 16.07.2003, Judgment No. 2236, Consideration 11: “Regardless of whether or not the complainant’s arguments regarding the inequitable nature of the treatment she received are valid, they cannot prevail over the application of rules which bind the Organisation and which it applied correctly. Neither the plea based on disregard for the principle of equity nor that based on the breach of principles enshrined in the European Convention on Human Rights, to which international organisations such as the EPO are not party, can in any event be admitted.” at <www.ilo.org/public/english/tribunal/fulltext/2236.htm>.

¹⁶⁷ Declaration adopted at the 55th meeting of the Administrative Council of December 13th to 15th 1994; see EPO-document CA/PV 55, CA/104/94, point 66 and Communiqué No. 257.

¹⁶⁸ In a recent case before the ILOAT, the EPO stated that “[i]t rejects the complainant’s arguments resting on the European Convention on Human Rights. The EPO is not bound by the Convention or any protocol thereto.” See: *J.M. W. v. EPO*, ILO Administrative Tribunal, 17.07.2003, Judgment No. 2237, Statement of facts and evidence part “C”, published under: <www.ilo.org/public/english/tribunal/fulltext/2237.htm>.

Consequently, the question remains, how to identify and define in sufficient detail legal terms like “general principles of law” or “basic human rights”. One might refer to databases like “TRIBLEX”¹⁶⁹ which may contain a proper thematic analysis of the case-law of the ILOAT. But even this can only provide access to some aspects of the case-law; although the keyword index of this database contains terms like “applicable law”¹⁷⁰, “general principles”¹⁷¹ or “Universal Declaration of Human Rights.”¹⁷² Instead of clear definitions under these references, the Tribunal declared that “[t]he law that the tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organization, but general principles of law and basic human rights.”¹⁷³ Without an unambiguous determination of the precise content of the applicable law, which has to be observed by and enforced through adequate alternative dispute settlement mechanisms, the test stipulated by the ECtHR to guarantee “not theoretical or illusory rights, but rights that are practical and effective”¹⁷⁴ must fail.

With regard to the fact that tribunals like the ILOAT exercise jurisdiction over international organizations which were established by states of very different, and sometimes incomparable, legal systems, the understanding of unspecified terms like “general principles of law” or “basic human rights” may differ widely.¹⁷⁵ Because these terms are so general and do not refer to specific provisions or fair trial guarantees contained for example in the ICCPR or the ECHR, it remains not only unclear which rights are applicable but also to what extent and with which precise content these rights are applicable.

Taking into account that member states of international organizations have not necessarily entered into the same human rights treaties, one may not easily assume or refer to the validity of principles or rights provided for by these trea-

¹⁶⁹ ILOAT database TRIBLEX, access under: www.ilo.org/dyn/triblex/triblex_browse.home.

¹⁷⁰ “Applicable Law” (72 extracts) cf. TRIBLEX-database, www.ilo.org/dyn/triblex/triblex_browse.home.

¹⁷¹ “General Principle” (168 extracts) cf. TRIBLEX-database, www.ilo.org/dyn/triblex/triblex_browse.home.

¹⁷² “Universal Declaration of Human Rights” (3 extracts) cf. TRIBLEX-database, www.ilo.org/dyn/triblex/triblex_browse.home.

¹⁷³ *Franks and Vollerling v. EPO*, ILO Administrative Tribunal, 31.01.1994, Judgment No. 1333, para. 5, published under: www.ilo.org/public/english/tribunal/fulltext/1333.htm.

¹⁷⁴ Waite and Kennedy, *supra*, fn. 79, para. 67.

¹⁷⁵ *Franks and Vollerling v. EPO*, *supra*, fn. 164, para. 5.

ties. Whether such treaties are binding upon international organizations is also not beyond doubt. Further difficulties arise in so far as defendant organizations themselves are not always able to join those conventions.¹⁷⁶ Thus, it appears that a determination of unspecified terms like “general principles of law” or “basic human rights” cannot be interpreted to imply specific provisions. They are therefore of limited assistance in defining the law applicable to disputes between the staff of international organizations and the organizations themselves.

Despite the fact that external tribunals and internal appeals boards are impeded from any direct recourse to legal sources like the ECHR or national health and safety legislation, the legal sphere in which an international organization was established and exists cannot be without influence on the determination of the applicable law. Tribunals like the ILOAT have held that any national law from member states of international organizations is generally not applicable.¹⁷⁷ In decisions where the complainant cites legislation and case law in a host state, the ILOAT ruled, that “an international organization [is] not subject to any national law”¹⁷⁸ or that national law “is not binding on the Tribunal and its relevance [...] is not an aid to the interpretation of the contract between the parties.”¹⁷⁹

The position taken by the ILOAT in these decisions¹⁸⁰ is questionable, since to do so without provision of adequate alternatives seriously limits the ability of staff to practically and effectively defend their rights.

Privileges and immunities, granted to international organizations, cover on the one hand “privileges” with respect to national law and regulations, e.g. tax-law, right of residence, import and export rights, etc.; and on the other hand “immunities”, such as immunity from suit or enforcement measures.¹⁸¹ These immunities have led to a situation where the law which is applicable to an

¹⁷⁶ With regard to the ECHR, see: *J.M.W. v. EPO*, *supra*, fn. 176, para. 11.

¹⁷⁷ See *supra*, fn. 160.

¹⁷⁸ *Saunoi v. INTERPOL*, ILO Administrative Tribunal, 26.06.1990, Judgment No. 1020, para. 11, published under: <www.ilo.org/public/english/tribunal/fulltext/1020.htm>.

¹⁷⁹ *Acosta Andres, Azola Blanco & Veliz Garcia (No. 2) v. ESO*, ILO Administrative Tribunal, 20.12.1983, Judgment No. 570, para. 7, published under: <www.ilo.org/public/english/tribunal/fulltext/0570.htm>.

¹⁸⁰ See: ILO Administrative Tribunal, Judgment No. 2097, para. 10; No. 1509, para. 12; No. 1369, para. 14; No. 899, para. 14; No. 477, para. 6; No. 453, para. 3; Nos. 378; 335; 322; 28.

¹⁸¹ Cf. Reinisch, *supra*, fn. 5, pp. 15 f.

international organization and its staff cannot be enforced by the authorities of the host state. This situation arises despite the fact that immunities are granted solely to ensure the unimpeded functioning of the organization,¹⁸² since the organizations themselves have been permitted to determine how the immunities should be applied.

The weakness of this approach was demonstrated in the case of *Rombach-Le Guludec*,¹⁸³ where a member of staff was allegedly assaulted by the President of an international organization and sustained injury and consequential pain and distress. Her request to lift the immunity of the President was refused. The competent State Prosecutor in Munich made further requests for the immunity to be lifted. Following further refusal an appeal was made to the ILOAT which declared itself not competent to intervene since the matter was outside of the Tribunals competence.

The inadequacy of the law applicable in an alternative forum, due in part to the statutes and rules of the alternative forum, and the lack of enforceability of applicable law before national courts, leads to a situation where staff members of international organizations are not able to effectively defend their rights, including those granted by the ECHR. The law which is inapplicable before administrative tribunals can only be enforced before a national court if the organization first agrees to lift its immunity. This in effect requires that the organization, which is a party to the dispute, first judges the case to merit lifting the immunity. In this situation the appearance of fairness and application of accepted judicial standards and fundamental rights in disputes between international organizations and their staff is lost.

B. Assessment of the Protection Provided by a Forum as an Alternative Means

Even though some of the alternative means for the settlement of disputes between private parties and international organizations, for example appeals

¹⁸² Cf. European Space Agency, Convention ESA SP-1271(E); Annex I Privileges and Immunities, Art. XXI and XXII; ILO Headquarters Agreement with Switzerland, 11.03.1946, Arts. 21, 22; European Patent Convention, Protocol on Privileges and Immunities, 05.10.1973 Art. 19.

¹⁸³ *Rombach-Le Guludec v. EPO*, ILO Administrative Tribunal, 30.01.1997, Judgment No. 1581, published under: www.ilo.org/public/english/tribunal/fulltext/1581.htm.

boards¹⁸⁴ or appeals committees,¹⁸⁵ or tribunals, like UNAT or ILOAT, have existed for a long time and are well known, it may be questioned whether they (still) meet the criteria of adequacy and effectiveness under the *Waite and Kennedy* standard. The adequacy of an alternative forum requires, *inter alia*, that they not only do justice, but are also seen to do justice.¹⁸⁶ Therefore general legal principles for judicial hearings must apply.¹⁸⁷ Beside the aspect of applicable law, mentioned above under section III.A., a number of formal aspects must be evaluated as well as the jurisprudence of the alternative forum. These aspects include ensuring the personal and/or material independence of a tribunal and the judges, and the suitability of procedural provisions to guarantee a fair and impartial trial. The jurisprudence of an alternative forum must be evaluated in order to determine amongst other things the consistency of the decisions with respect to fundamental rights.

An internal appeals committee which, under its own rules, is not entitled to make a judgment but simply provide advice to the head of the organization can not be regarded as an adequate alternative remedy mechanism. Examples include the Board of Appeal of the WHO, the Collective Agreement on Conflict Prevention and Resolution of the ILO, and the Internal Appeals Committee of the EPO. Despite the non-judicial nature of these bodies the ILOAT has relied upon them for the taking of evidence and particularly oral proceedings.

In *Vollering No. 21*,¹⁸⁸ the applicant asserted that the content of his letter which was alleged to be discrediting towards the Administrative Council comes from a misunderstanding which arises from the EPO translation of the letter. The EPO challenges this assertion on the grounds that a member of the Internal Appeals Committee was able to read the original. The ILOAT relied upon the opinion of the Internal Appeals Committee without further investigation.

¹⁸⁴ See *supra*, fn. 155.

¹⁸⁵ See, e.g.: *Appeals Committee* of the EPO provided for in the “Service Regulations for Permanent Employees of the European Patent Office”, Title III, Arts 106 – 113.

¹⁸⁶ *Kress v. France*, European Court of Human Rights, Application No. 39594/98, 07.06.2001, [2001] ECHR 382, para 7.

¹⁸⁷ German Federal Constitutional Court, see: BVerfG, 2 BvR 2368/99 of 04.04.2001, para 1 – 23, <www.bverfg.de/>; *Waite and Kennedy*, *supra*, fn. 79, para 68.

¹⁸⁸ *Vollering v. EPO (No. 21)*, ILO Administrative Tribunal, 30.01.2002, Judgment No. 2114, B para 6 , C 3 , Considerations 14 and 15, published under: <www.ilo.org/public/english/tribunal/fulltext/2114.htm>.

In *Hemmerlein-Bensch*¹⁸⁹ the applicant requested her husband be permitted to give evidence to the ILOAT, asserting that he was a material witness. The defendant organization stated that the Internal Appeals Committee had found no evidence to support her assertion that her employment contract was of a permanent nature. The ILOAT accepted the view of the Internal Appeals Committee without further investigation and refused the oral proceedings requested.

ILOAT has emphasized the proximity of the Internal Appeals Committees for the taking of evidence and on that basis has uncritically adopted its conclusions.¹⁹⁰ Moreover, in *Popineau*¹⁹¹ the ILOAT stated that the internal proceedings within EPO adequately met the requirements for a fair trial. This assertion ignores the fact that neither the Disciplinary Committee nor the Internal Appeal Committee are judicial instances.

1. Independence of Administrative Tribunal Judges

The professional qualification of judges of international administrative tribunals as well as of decision-makers of internal appeals boards or other alternative remedy mechanisms is an important issue.¹⁹² Nevertheless, the statutes of the ILOAT and, until recently of the UNAT,¹⁹³ are silent on this question. The

¹⁸⁹ *Hemmerlein-Bensch v. EPO*, ILO Administrative Tribunal, 8 July 1999, Judgment No. 1869, published under: <www.ilo.org/public/english/tribunal/fulltext/1869.htm>. *Kern v. EPO (No. 11)*, ILO Administrative Tribunal, 30 January 2002, Judgment No. 2101, published under: <www.ilo.org/public/english/tribunal/fulltext/2101.htm>.

¹⁹⁰ In the *Michael* Case the ILOAT stated that “the Tribunal – must attach great importance to the findings of the internal Appeals Committee. Before the Committee witnesses can be heard and questioned, and their evidence recorded; the members of the Committee will have the background knowledge necessary to evaluate the evidence properly.” *Michael v. EPO*, ILO Administrative Tribunal, 17 March 1986, Judgment No. 736, para. 4, published under: <www.ilo.org/public/english/tribunal/fulltext/0736.htm>.

¹⁹¹ *Popineau v. EPO (Nos. 6, 7 and 8)*, ILO Administrative Tribunal, 13 July 1994, Judgment No. 736, para. 23, published under: <www.ilo.org/public/english/tribunal/fulltext/1363.htm>. (“Whatever drawbacks there may be in the overlap between the disciplinary and appeal procedures, the complainant’s procedural rights were in any event scrupulously observed. There was therefore no breach whatever of his right to a fair trial”).

¹⁹² Amerasinghe, *The Law of the International Civil Service*, *supra*, fn. 39, p. 66, lit. (b) with further indications and reference.

¹⁹³ The UNAT Statute was amended in 2003 when the following language was added to Art. 3 (1): “Members shall possess judicial or other relevant legal experience in the field of administrative law or its equivalent within the member’s national jurisdiction.” General

statute of the ILOAT refers only to “judges”.¹⁹⁴ The question of professional qualification is of specific importance for the independence of members of an alternative forum and addresses the issue of their ability to fairly adjudicate.¹⁹⁵ An express requirement of the necessary legal expertise of persons intended to sit on administrative tribunals would clearly enhance the legitimacy of such adjudicatory bodies.¹⁹⁶

While judges of the ILOAT were in practice often eminent and well known jurists this is rather the exception for internal appeals boards.¹⁹⁷ In the *Beer and Regan* case the ECtHR held that even a single internal dispute settlement mechanism could be sufficient to meet the requirements of Art 6 (1) ECHR. However, the level of qualification for members of such an instance was not considered at all.¹⁹⁸

One might argue, that legal qualification of at least one member of an internal appeals board is sufficient. But in a situation where no further appeal against a judgment is granted, this is not acceptable since it does not adequately guarantee the fairness of judgments. In those circumstances, not only the chairman but also the other members should be persons of a recognized high moral character, who must possess the qualifications required for an appointment to judicial office.

Assembly Resolution on Administration of Justice at the United Nations (A/RES/58/87), 9 December 2003.

¹⁹⁴ Amerasinghe, *The Law of the International Civil Service*, *supra*, fn. 39, p. 66, lit. (b). Art. III (1) ILOAT Statute provides: “The Tribunal shall consist of seven judges who shall all be of different nationalities.”

¹⁹⁵ Pescatore, “Two Tribunals and One Court – some current problems of international staff administration in the jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice”, in: Blokker and Muller (eds.), *Toward more effective supervision by international organizations* (1994), p. 219.

¹⁹⁶ It has been argued that judges serving on administrative tribunals should be “lawyers of distinction in the employment field (with some experience in human rights)” Legal Opinion on ILOAT Reform by Geoffrey Robertson Q.C., (hereafter Robertson Opinion), para. 8, available under www.ilo.org/public/english/staffun/info/iloat/robertson.htm.

¹⁹⁷ See, e.g., ESA Appeals Board, NATO Appeals Board, ILO Ombudsman, WHO, EPO etc.

¹⁹⁸ The ECtHR merely found that staff members of ESA had recourse to the ESA Appeals Board which, according to ESA Staff Regulations, was “independent of the Agency” and had jurisdiction “to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member” *Beer and Regan*, *supra*, fn. 78, para. 58.

At least one member of such a board should have significant experience as a judge, and it is of course desirable, that board members possess some practical experience in the field of labour law and the settlement of employment disputes. A failure to meet such qualification requirements will weaken the ability of an alternative forum to meet the requirements of fairness and impartiality and may also bring into question the independence of the board.

The appointment, reappointment and tenure of judges or members of internal boards are also of critical importance.¹⁹⁹ With regard to aspects like status, income, reputation and the influence, which judges and members of established tribunals may enjoy, one should take into account that their personal interest in keeping such a position may influence their ability to act independently and impartially as long as the statutes do not exclude the possibility of reappointment.

The appointments of ILOAT judges are made by the ILO Conference. Whilst the Conference is an organ of the defendant organization, it may be argued that it exhibits sufficient independence to fulfil the role of appointment authority. However, it would appear that the Director-General of the ILO has a monopoly on the presentation of candidates to the ILO Congress for appointment to the bench of the ILOAT. Furthermore, the staff members of the Tribunal, including the Registrar, are appointed by the Director-General of the ILO. The Director-General is a party to (almost) all disputes between the ILO and its staff members. A similar situation exists for the ESA Appeals Board. Appointments to the Appeals Board are made by the ESA Council. However, the Director-General of ESA has a dominant influence on proposals to the Council for appointment.²⁰⁰

In cases where the tenure of office of judges is quite short, where their service is subject to re-appointment and where the nomination of candidates remains under the control of the defendant organization, serious questions arise regarding the independence and impartiality of an appointed judge or member of an internal appeals board.²⁰¹

A further factor that may influence the independence and impartiality of alternative means, such as the ILOAT, is their reliance upon the “client”

¹⁹⁹ Legal Opinion on ILOAT Reform by Dr Ian Seiderman, (hereafter Seiderman Opinion), available under <www.ilo.org/public/english/staffun/info/illoat/seiderman.htm>.

²⁰⁰ ESA Council Rules of Procedure ESA/C(79)69, Rules 12-14; ESA Staff Regulations Rules and Instructions, ESA/ADMIN(81)2 Rule 34/1 (i).

²⁰¹ Amerasinghe, Principles, *supra*, fn. 1, p. 455; Robertson Opinion, *supra*, fn. 196, paras. 6 and 7; Seiderman Opinion, *supra*, fn. 199, para. 4.

organizations. For example, the ILOAT is financed by fees paid by the client organizations on a per case basis.²⁰² Although there are 44 organizations which currently use the ILOAT over 61 per cent of the current case load is distributed over only 6 organizations.²⁰³ Of these, two stand out particularly, the European Patent Office (19.5 per cent), and World Health Organization (15.7 per cent).

Furthermore, many of the organizations which use the UNAT and ILOAT are not bound to these alternative means, and may change between these Tribunals, or establish their own internal means. For the larger organizations this could represent a viable alternative.

2. Fundamental Principles of Procedure

In the *Eurocontrol II* case,²⁰⁴ which is the only assessment of the adequacy of the ILOAT by a constitutional court, the German Federal Constitutional Court dealt with an application of an employee of Eurocontrol. Large elements of the Court's observations and considerations go beyond the legal relationship between the defendant organization and its employees. The Court concentrated on the competence of the ILOAT and compared the procedure available there to some fundamental principles. The Court held that

“[t]he status and principles of procedure of the tribunal also reflect an international minimum standard for a fair trial as it has emerged from developed systems for the rule of law and from the rules of procedure of international courts; altogether they do not contradict [...] the minimum requirements for the rule of law in the sense of the Basic Law.”²⁰⁵

In addition, the Court remarked that the ILOAT was a “genuine judicial body”²⁰⁶ set up by a treaty under public international law and which, by reason of its

²⁰² ILOAT Statute Art. IX Para 2 and Annex Article IX para 2,

²⁰³ Case load statistics 1994-2004 for the following organizations: European Patent Office, World Health Organization, Eurocontrol, Food and Agriculture Organization, International Labour Organization, and European Southern Observatory.

²⁰⁴ *Eurocontrol II*, *supra*, fn. 76.

²⁰⁵ *Ibid.*, p. 512.

²⁰⁶ *Ibid.*, p. 514. See also Kunz-Hallstein and Ullrich, *Münchener Joint Commentary on the EPC*, Art. 13 EPC, marginal no. 15 f; *Ullrich*, ZBR (1988), 49, 49 ff., expressly referring to “*Eurocontrol II*”.

fixed judicial powers and in consequence of a legally ordered procedure, decided upon the matters submitted to its procedure exclusively in accordance with legal norms and principles. The Court further stated, referring to Article III of the ILOAT Statute that the judges “were under a duty to be independent and impartial”.²⁰⁷ Pointing out that the claimant himself had not alleged such a breach, and that it was not otherwise apparent, the Court came to the conclusion that this duty did not appear to have been breached either in general or in the particular case brought by the petitioner.

The question remains, however, whether the 1981 reasoning of the German Court can still be upheld, in particular, whether the criteria considered necessary for an adequate alternative means of dispute settlement continue to be fulfilled by administrative tribunals such as ILOAT. It should further be noted that the applicant did not challenge the competence of the ILOAT and such a challenge was subsequently formalized as a requirement for an assessment to be undertaken in the Maastricht decision.²⁰⁸

a) Access to the ILOAT for Potential Claimants

Although the German Federal Constitutional Court held that the access to the Tribunal was not rendered unreasonable by Article VII of the ILOAT Statute, it remarked that certain problems could flow from the fact that the ILOAT in Geneva may be geographically remote for some applicants and/or the language of its procedure.²⁰⁹ Basically only “members of staff of international organizations” have access to the ILOAT, without having regard to the fact that third parties, such as successors in title to members of staff (heirs, etc.), unsuccessful job applicants and longstanding external workers, may also require access to the ILOAT. Persons other than staff members will not necessarily possess the qualifications, for example linguistic ability, financial independence or the particular legal standing (residence permit, immunity, the opportunity to use a translation service etc.) which may be safely assumed for members of staff of international organizations.

Liaci, an applicant to the EPO, contested the decision of the Office not to appoint him. The ILOAT declared that it was not competent to hear the case since

²⁰⁷ *Eurocontrol II*, *supra*, fn. 76, p. 514.

²⁰⁸ *Brunner et al. v. The European Union Treaty (Constitutionality of the Maastricht Treaty)*, *supra* note 61; BVerfGE 89, 155 ff.

²⁰⁹ *Eurocontrol II*, *supra*, fn. 76, p. 514.

Liacy had not (yet) entered into an employment relationship with the Office.²¹⁰ The immunity of the EPO left Liacy with no alternative means.

The consequences of such hindrances to access to the ILOAT are strikingly obvious in the more recent case of the Chinese complainant Qin.²¹¹ In this case the husband, as successor in title to his deceased wife who had been a member of staff of the ILO, did not obtain an extension of his residence permit for Switzerland. He was therefore unable to promote the (further) review of the case of his wife who had died at her own hand, allegedly resulting from harassment in the course of her employment at the ILO.

For such cases, as for cases involving indigent claimants before the ILOAT, no adequate safeguards are provided that would enable them adequately to pursue their legal rights. In contrast, institutions such as legal aid exist in national legal systems to ensure that indigent people are also enabled to obtain the assistance of the courts in enforcing their rights. Equally, the preparation and conduct of a trial should not be impeded or rendered impossible by the withdrawal or refusal of a residence permit. *A fortiori* where, as a result of geographic distance (China to Switzerland) and of linguistic barriers (Chinese-English or French), there are special difficulties rendering attendance at the seat of the tribunal necessary.

In a recent 2003 case,²¹² the ILOAT imposed for the first time a cost penalty against a complainant which was awarded to the defendant organization. It declared that in future those penalties will not necessarily be only nominal.²¹³ Even though this decision was not challenged, there are serious doubts as to whether this act was lawful since no provision in the ILOAT Statute or the Service Regulations of the defendant organization provide for such a measure.

²¹⁰ *Liacy v. EPO*, ILO Administrative Tribunal, 12 July 2000, Judgment No. 1964, para. 4, published under: <www.ilo.org/public/english/tribunal/fulltext/1964.htm>.

²¹¹ *Qin v. ILO (Nos. 1, 2)*, ILO Administrative Tribunal, 9 July 1998, Judgment No. 1752, published under: <www.ilo.org/public/english/tribunal/fulltext/1752.htm>. Cf. Report: „Après le suicide d’une employée, une plainte vise le directeur du BIT – Victime de harcèlement, une jeune Chinoise a mis fin à ses jours il y a cinq ans. Le procureur général demande la levée de l’immunité diplomatique de Michel Hansenne.“ in: *Tribune de Genève*“ of 18.11.1998.

²¹² *M.E. v. EPO*, ILOAT, 03.02.2003, Judgment No. 2211, paras. 7 and 8 published: <www.ilo.org/public/english/tribunal/fulltext/2211.htm>.

²¹³ *Ibid.*

The Statute rather states that the defendant organization is to bear the costs of the proceedings.²¹⁴

b) The Lack of Oral Proceedings

In *Eurocontrol II*,²¹⁵ the German Federal Constitutional Court further expressed its view with reference to the procedural law of the ILOAT that the basic principles of legal hearings and a minimum standard of procedural equality were provided for by Articles IV to VII of the ILOAT Statute and its Rules of Procedure.

The demonstrable practice of the ILOAT since 1989 to routinely omit or refuse any oral hearing was naturally not considered in the *Eurocontrol II* Case of 1981 and may lead to a different evaluation today. Especially with regard to the manner in which the ILOAT neglects to gather proper evidence itself and instead relies on findings of internal dispute settlement mechanisms like the IAC of the EPO and others, one may detect a decisive lack of procedural guarantees before the ILOAT.²¹⁶

c) The Actual Jurisprudence of the ILOAT

In the absence of a clear identification which and to what extent general legal principles are applicable to an alternative dispute settlement mechanism, the actual case-law of administrative tribunals has to be evaluated. As the German Federal Constitutional Court has held in its *Solange I* and *II* decisions as well as in the later *Maastricht* decision,²¹⁷ an evaluation of the actual jurisprudence of administrative tribunals is required. The German Court emphasized that it will exercise its fundamental rights jurisdiction in relation to supranational organizations²¹⁸ only insofar as a claimant can show in detail that the relevant mandatory safeguards of a fundamental right under the German Constitution is *in general* not provided for within the sphere of the organization involved.²¹⁹

²¹⁴ ILOAT Statute Art. IX Para 2 and Annex Article IX para 2,

²¹⁵ *Eurocontrol II*, *supra*, fn. 76, pp. 512 ff..

²¹⁶ Robertson Opinion, *supra*, fn. 196, paras. 9 et seq.

²¹⁷ *Brunner et al. v. The European Union Treaty (Constitutionality of the Maastricht Treaty)*, *supra*, fn. 61; BVerfGE 89, 155 ff.

²¹⁸ In addition to the EC the German Federal Constitutional Court regards Eurocontrol and EPO as supranational organizations.

²¹⁹ *Brunner et al. v. The European Union Treaty (Constitutionality of the Maastricht Treaty)*, *supra*, fn. 61.

Such a standard of proof can only be satisfied by a thorough evaluation of the actual jurisprudence and detailed knowledge of actual practice of the organizations in staff matters. It is clear that it would not be sufficient to judge the adequacy of alternative dispute settlement means solely on the basis of the statute of the body concerned or the service regulations of the organization concerned; such an approach would permit potentially serious flaws to remain undetected.

An evaluation of the jurisprudence of a tribunal or appeals board is only possible if their decisions are published. It would also appear useful to have access to the court files. This is problematic in some organizations, for instance, with regard to the ESA Appeals Board, since its decisions are not published. This would make such analysis impossible without access to the internal files of the Appeals Board. With regard to the ILOAT, access is provided for all judgments through the database TRIBLEX and the keyword list.²²⁰ However, no access is provided to the court files.

IV. CONCLUSION

A review of national court decisions concerning the immunity of international organizations, as well as state immunity, has demonstrated that the concept to make the granting of immunity dependent upon the availability of adequate and effective alternative means of dispute settlement, as expressed succinctly in the *Waite and Kennedy* Case, is not only upheld by the ECtHR, it is embedded into a broader context of similarly reasoned national court decisions and it has been further reinforced by a recent judicial trend emphasizing the absolute character of the fundamental rights guarantee of access to the courts which overrides potential immunity defences. However, the core requirement for the granting of immunity of having an adequate and effective alternative dispute settlement mechanism available has not been seriously tested by either the *Waite and Kennedy* decision or corresponding national court judgments such as *Eurocontrol II*.

A closer scrutiny of the actual practice of the most important alternative dispute settlement mechanisms in the context of cases brought against international organizations, various administrative tribunals, in particular, the ILOAT, reveals serious deficiencies with regard to their adequacy and effectiveness. In particular, the mechanism for appointing judges to the ILOAT and the regular

²²⁰ See *supra*, fn. 169.

denial of oral hearings fall short of internationally required standards of a fair trial, as expressed, *inter alia*, in Article 6 (1) ECHR. Furthermore, the law applied by these alternative means appears to lack the clarity required to enable an applicant to effectively defend his rights.

Taking these fundamental rights deficits seriously may lead national courts, as well as the ECtHR, to reassess their readiness to accept an unqualified immunity from suit of defendant international organizations.