

IMMUNITY OF INTERNATIONAL ORGANISATIONS AND ALTERNATIVE REMEDIES AGAINST THE UNITED NATIONS

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I. JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANISATIONS

A. Introduction

In the course of the last decades extensive literature devoted to the subject of immunity of States from the jurisdiction of foreign domestic courts has documented the now general acceptance of the distinction between acts *jure imperii* and *jure gestionis* and the concomitant limitation of immunity to the former. More recently, interest has been shown in exploring possibilities for assessing and determining responsibility for acts covered by the immunity and, in this connexion, the possible relevance and applicability of human rights standards¹.

In comparison, the writings on the immunity of international organisations² from the jurisdiction of domestic courts are neither extensive nor do they indicate any progressive development of the generally accepted rules of international law.

On this background, the present paper aims to address the nature and extent of jurisdictional immunity of international organisations by inquiring into the procedures for settlement of disputes regarding acts carried out on behalf of an international organisation and covered by immunity. In focus will be the tension between pertinent international human rights standards and the lack of access to judicial remedies against international organisations that is a consequence of their immunity.

B. Theory

Comparison with States

Although at first sight the immunity of States and that of international organisations appear to be similar, they are in fact quite different legal institutions³ as they are distinguishable with respect to the fundamental grounds on which they are built and in regard to the extent to which the immunity is recognized.

¹ See the trilogy of judgments, dated 21 November 2001, rendered by the European Court of Human Rights: 31253/96: *McElhinney v. Ireland*; 35763/97: *Al-Adsani v. United Kingdom*; 37112/97: *Fogarty v. United Kingdom*.

² The term “international organisation” as used here is synonymous with “intergovernmental organisation” and refers to an organisation established by an international convention or agreement, to which two or more States are Parties and, as such, Members of the organisation.

³ Felice Morgenstern, “Legal Problems of International Organizations” pp. 5-10.

In legal theory⁴, sovereign States are considered to possess equal international legal capacity and rights and to be bound by international customary law and the generally accepted principles of international law. Neither the substantial increase in the number of sovereign States in the last half of the 20th century, nor the advent and recognition of “micro” States with less than 100.000 inhabitants, have caused any change in these assumptions. As far as international organisations are concerned, their numbers have increased at a faster rate than that of States so that presently they outnumber the States. The variety of international organisations is wide: their memberships range from global to regional or sub-regional and their mandates and legal capacities vary from policy-oriented to sector-specific or technical and from comprehensive to strictly limited. While these differences are related to the respective official activities of each particular organisation, the fundamental grounds for their immunity do not appear to vary as a function of the differences in their respective mandates and legal capacities.

Avoidance Techniques

It is well established in judicial practice of domestic courts that complaints against international organisations on account of acts involving internal constitutional and administrative matters, including the employment conditions of an organisation’s staff, should be dismissed on account of lack of subject matter jurisdiction⁵. The rationale for declining jurisdiction goes beyond the typical unfamiliarity of domestic courts with the decision-making processes of international organisations, with the international administrative law applicable within each particular organisation, and with the connected considerations of diplomacy and evolving policies. Fundamentally, the motive for declining jurisdiction is the need to ensure the independence of the international organisation from any State, which is seen as necessary in order to enable its proper functioning. Dismissal on the ground of lack of subject matter jurisdiction is a prime example of “avoidance techniques” employed by domestic courts not to deal with suits against international organisations on other grounds than immunity. While in their effect the “avoidance techniques” are comparable to recognition of immunity, they do

⁴ See to the following, Jean-Flavien Lalive “L’immunité de juridiction des états et des organisations internationales” in Hague Academy of International Law: Recueil des Cours 84 (1953 III) pp. 205-396.

⁵ US Court of Appeals for the Circuit of the District of Columbia, 628 F. 2d 27 at 35 (1980) in the case of *Marvin R. Broadbent et al. v. OAS et al.* found that the “relationship of an international organization with its internal administrative staff is non-commercial, and, absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization.” The case had been brought – after exhaustion of all remedies internal to OAS – by seven former employees whose employment had been terminated due to a reduction in staff.

See also the Analysis of the above case and the Brief submitted by the United Nations in the capacity of *amicus curiae*. UNJY (1980) pp. 225-226 and 227-242, respectively.

not form part of the international legal rules on immunity but of the domestic procedural law of the forum State concerned⁶.

Grounds for Immunity

The traditional grounds for State immunity are not valid – at least not without substantial modification - for granting immunity to international organisations.

The (now historic) view that immunity against suits, whether before domestic or before foreign courts, is an inherent element of the sovereign quality of the State⁷ never was a consideration in connexion with international organisations since they do not possess sovereignty but are created by States through international agreements defining their legal status and capacities.

The principle of extraterritoriality which has been invoked to support the immunity against suits against a foreign State, including complaints against its diplomatic establishments in the forum State, presupposes the foreign State has a territory and a population that are subject to its legislative and executive authority and over which it exercises judicial jurisdiction - thereby providing a claimant with the possibility of suing before the domestic courts of the foreign State concerned. An international organisation has neither citizens, a comprehensive body of law applicable to its activities, nor a territory. Therefore, a complaint against an international organisation before a domestic court always will be directed against a foreign legal person and an alternative forum analogous to the possibility of suing a foreign State before its own courts is not available.

The applicability to international organisations of the distinction between acts *jure imperii* and *jure gestionis* - and thus the development from absolute to restricted immunity - appears not to be generally accepted. The characterization, by way of an analogy with activities attributable to a State, of certain activities of international organisations as “commercial” in nature and as unrelated to the official functions of the organisation is unconvincing although sometimes invoked by domestic courts. Should for example the purchase or lease of office space or the procurement of goods or services for the implementation of technical assistance projects in developing countries or for the transportation requirements of peace-keeping activities not be covered by immunity, then it

⁶ August Reinish, in “International Organizations Before National Courts”, pp. 99-127, describes the following avoidance techniques: 1) non-recognition as a legal person under domestic law, 2) non-recognition of a particular act – *ultra vires* acts and non-attributability, 3) the doctrines of act of state, political questions and non-justiciability, 4) lack of adjudicative power of domestic courts, 5) no case or controversy, 6) discretion to prevent harassing lawsuits and mock trials.

⁷ For suits against foreign States one may recall the maxims “*par in parem non habet imperium*” or “*par in parem no habet jurisdictionem*”.

would be possible for any State to exercise influence over the execution of such activities. Moreover, if decisions regarding the appointment, assignment and promotion of staff are not covered by immunity, States, especially host States, would be in a position to intervene notwithstanding that domestic political concerns regularly cause States to pursue unilateral interests to the detriment of the mandates conferred by the international community on the organisation.

C. Judicial Practice

Judicial Practice in Italy

Italian courts have held that customary international law does not extend absolute immunity to international organisations and that, in particular, international organisations established in Italy do not have immunity for transactions of a commercial nature, but only for acts related to their institutional purposes⁸. Thus, the Rome Court of First Instance in its judgment of 25 June 1969 in *Giovanni Porru v. FAO* dismissed a claim for employment related compensation “for lack of jurisdiction and but held there was ‘no rule of customary international law under which foreign States and subjects of international law in general are to be considered as immune from the jurisdiction of another State’. Such immunity could only be recognized with regard to public law activities, i.e., in the case of an international organization, with regard to the activities by which it pursues its specific purposes (*uti imperii*) but not with regard to private law activities where the organization acts on an equal footing with private individuals (*uti privatus*). In this respect the situation of subjects of international law was analogous to that of the Italian State...With regard to...the legal relations between FAO and the plaintiff, the Court held that acts by which an international organization arranges its internal structure fall undoubtedly in the category of acts performed

⁸ As far as specialized agencies of the United Nations are concerned, the decisions by Italian Courts should be seen in the light of the long pending dispute between Italy and the United Nations over the reservations contained in Italy’s instrument of accession to the Convention on the Privileges and Immunities of the Specialized Agencies, as communicated to the Secretary-General in 1952. On account of the reservations, the Secretary-General of the United Nations in his capacity of depositary did not accept the instrument for deposit and Italy was considered not to have acceded. The instrument of accession stated that immunity from jurisdiction would be accorded “insofar as said immunity is accorded to foreign States in accordance with international law” and that Section 21 which grants full diplomatic status and immunity to the executive heads and certain senior officials of the specialized agencies would be applied to officials of Italian nationality “with the same restrictions as are applicable, in accordance with international law, to diplomatic envoys of Italian nationality.” These statements were considered by the specialized agencies to constitute reservations and the instrument was not accepted for deposit because of their objections. UN Juridical Yearbook (1973) p. 197, ftnt. 3 and Felice Morgenstern “Legal Problems of International Organizations” pp. 6 and 9. Following protracted exchanges of views, the instrument was modified and Italy acceded without reservation on 30 August 1985. UNTS vol. 33 p. 261.

in the exercise of its established functions and that in this respect therefore the Organization enjoyed immunity from jurisdiction.”⁹.

On 7 June 1973, in a case over a claim by a former employee for terminal emoluments, the Court of Cassation in *Mrs. C. v. Intergovernmental Committee for European Migration (ICEM)* reconfirmed the distinction between private law activities and public law functions, on the basis of which the Court of first instance had denied immunity under the Convention on the Privileges and Immunities of the Specialized Agencies (hereinafter the “CPISA”)¹⁰, and rejected the argument of ICEM that it was not subject to this distinction. However, the Court of Cassation further held that “acts by which an international organization arranges its internal structure, including the rules laid down by it in respect of the employment relationship with the staff, were manifestations of the organization’s power under international law” and concluded that “the provisions and measures adopted by the ICEM, also in so far as they regarded terminal emoluments, were governed by the organization’s own system of rules; they were consequently not subject to the Italian legal system and were exempt from the jurisdiction of Italian Courts. Accordingly, the Court ...dismissed the case for lack of jurisdiction”¹¹.

On 18 October 1982, the Supreme Court of Cassation denied immunity to the Food and Agriculture Organization of the United Nations (hereinafter the “FAO”) for claims for increases in rent for office premises rented by FAO in Rome¹². As summarized in the UN Juridical Yearbook (1982), regarding international organizations the Court “recalled ...it had held that, irrespective of their public or private character, whenever they acted in the private law domain, they placed themselves on the same footing as private persons with whom they had entered into contracts, and thus forwent the right to act as sovereign bodies that were not subject to the sovereignty of others. It recalled that on other occasions it had upheld the immunity of foreign States (and of their public agencies) in connection with activities designed to achieve their public aims, while such immunity had been denied with respect to activities of a merely private nature...the Court had placed emphasis on the nature of the aims that such activities were destined to achieve, and whether or not they were directly related to the institutional aims pursued by the foreign entity.

⁹ See summary in UNJY (1969) pp. 238-239.

¹⁰ UNTS vol. 33 p. 261.

¹¹ See summary in UNJY (1973) pp. 197-198. See also A.N. Vorkink and M. C. Hakuta, World Bank Legal Department “Law Suits Against International Organizations: Cases in National Courts Involving Staff and Employment” (1985) p. 24.

¹² *Food and Agriculture Organization of the UN v. Istituto Nazionale di Previdenze per I Dirigenti di Aziende Industriali (INPDAL)*. Discussed by A. Reinisch in “International Organizations Before National Courts” pp. 131-133 and 187-188 and summarized in UNJY (1982) pp. 234-236.

The Court in its deliberations posed the question of jurisdiction in the traditional terms of the dichotomy of sovereign acts and private law transactions and, considering the private nature of the contract, concluded that there could be no doubt as to the jurisdiction of the Italian courts. ...it rejected FAO's argument...of a nexus between any of the activities and the aims of the organization. This could lead one to accept an unrestricted concept of immunity.”

The protracted dispute over the immunity of United Nations organisations established in Italy appears to have been overcome with the acceptance of Italy's unreserved accession on 30 August 1985 to the CPISA.

Judicial Practice in the United States

While the United States previously had recognized absolute immunity of foreign sovereigns, both the Tate Letter issued by the Department of State in 1952 and the adoption in 1976 of the US Foreign Sovereign Immunities Act (hereinafter the “FSIA”) limited the recognition to restricted immunity only. These developments gave rise to the view that also the immunity granted to international organisations under the US International Organizations Immunities Act of 1945 (hereinafter the “IOIA”) must be understood to be similarly restricted since the latter Act extended to international organisations

“...the same immunity from suit and every form of judicial process as is enjoyed by foreign governments...”¹³.

A leading case is that of *Marvin R. Broadbent et al. v. OAS et al*¹⁴, which concerned claims by seven former staff members of the Organization of American States (OAS) against OAS arising out of their dismissal (see fnnt. 5 above). A key issue was whether the OAS enjoyed only restricted immunity and whether such immunity was opposable to claims related to conditions of employment relationships. In favour of restricted immunity was that while the United States was a party to the Charter of the OAS, which required such immunities for OAS

“...as are necessary for the exercise of its functions and the accomplishment of its purposes,”

¹³ See UNJY (1977) p. 260: US District Court for the District of Columbia in its Order of 31 May 1977 in the case of *Dupree Associates v. the OAS and the General Secretariat of the OAS* examined the immunity extended by the International Organizations Immunities Act and, in view of the shift in policy to recognize the restrictive concept of immunity as the governing principle with respect to immunity for foreign sovereigns, held that international organisations were entitled only to restricted immunity considering the International Organizations Immunities Act had extended to them only that immunity enjoyed by foreign sovereigns.

¹⁴ Decision of the US Court of Appeals for the District of Columbia Circuit of 8 January 1980. 628 F.2d 27 (DC Cir. 1980).

it was not a party to the multilateral Agreement on the Privileges and Immunities of the Organization of American States. Article 2¹⁵ of the latter Agreement is almost identical to section 2 of the Convention on the Privileges and Immunities of the United Nations (hereinafter the CPIUN¹⁶), both provisions unambiguously granting absolute immunity. Ultimately, the Court sidestepped taking a position on the immunity question and the case was dismissed due to lack of subject matter jurisdiction¹⁷.

Finally, reference should be made to the decision of the US District Court for the Southern District of New York in the case of *De Luca v. United Nations Organization, Perez de Cuellar, Gomez, Duque, Annan et al.*¹⁸. De Luca pursued a claim for reimbursement of income taxes, to which staff subject to United States income taxation are entitled. The Court considered the varying exceptions to immunity under the IOIA and the FSIA but held that

“We need not consider the application of these exceptions to the instant case, for the UN Convention, which contains no such exceptions, provide sufficient grounds for finding the UN immune from the plaintiff’s claims”

and with this reasoning eventually recognized the United Nations enjoyed immunity under the CPIUN.

A legal opinion of United Nations Office of Legal Affairs¹⁹ refers to the attempts made in the United States to apply the restrictive immunity theory to international organizations, including the United Nations, and sums up as follows

“...In United States courts, such attempts have been based on the FSIA and on the provision in the United States International Organizations Immunities Act that ‘International organizations...shall enjoy the same amount of immunity from suit and every form of judicial process as is enjoyed by foreign governments’. As far as we are aware, no attempt to apply

¹⁵ OAS Agreement Article 2: “The Organization and its organs, their property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution.”

¹⁶ Adopted by the General Assembly of the United Nations 13 February 1946. UNTS vol. 1 p. 15. The specialized agencies are covered by the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, UNTS vol. 33 p. 261. The provisions on immunity in sections 4 and 5 in the latter Convention are identical to the corresponding sections 2 and 3 of the Convention on the Privileges and Immunities of the United Nations.

¹⁷ The Circuit Court held that the “relationship of an international organization with its internal administrative staff is non-commercial, and, absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization.”

¹⁸ 841 F. Supp. 531 (SDNY 1994), as cited by A. Reinisch in “International Organizations Before National Courts” p. 201.

¹⁹ UNJY (1999) pp. 94-95 at paragraph 19; available at www.un.org/law under “codification”. The legal opinion addressed the question whether there were reasons for the United Nations not to participate in competitive bidding for the execution of projects in competition with private sector firms and cautioned that to do so might invite a re-examination the organisation’s immunity.

the restrictive theory to the United Nations has been successful*. In this respect, we would note that the United States Government in briefs submitted to the courts in cases involving the United Nations, has supported the UN position that the restrictive theory of State immunity does not apply to the United Nations, *inter alia* because the United Nations derives its immunity from international obligations based on treaties to which the United States is a party, i.e., the United Nations Charter and the Convention on Privileges and Immunities of the United Nations, which do not recognize any difference between non-commercial and commercial acts. As we understand, the United States Government has recognized the application of the restrictive immunity theory to other international organization with which it does not have agreements similar to those with the United Nations.”

Conclusion

Accordingly, it follows from the foregoing survey of judicial practice that, absent treaty provisions, the generally accepted rule is that the immunity of international organisations is based on the principle of functionality, i.e. that the immunity encompasses all acts needed for the execution of the official functions and activities of the organisation and that the concrete determination of immunity must be based on the constitutional instrument and internal rules of the organisation in question.

D. Treaty Provisions Applicable to the United Nations

Turning to the United Nations as the prime example of an international organization with global membership and a very comprehensive mandate affords the opportunity to move from theory to positive law i.e. the applicable provisions of the Charter of the United Nations (hereinafter the “Charter”)²⁰ and of the CPIUN.

While the Charter in its Article 105²¹ merely contains a general call for the organization to enjoy the privileges and immunities necessary for the fulfilment of its purposes and for the details to be set out in a convention, the details as set out in the CPIUN,

* “We have not attempted to conduct a survey and analysis of the application to the rest of the United Nations system organizations of the restrictive theory of sovereign immunity.”

²⁰ Signed at San Francisco 26 June 1945. Entered into force 24 October 1945. USTS 993.

²¹ UN Charter: Article 105:

“1.The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for its purposes.”

.....

“2. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.”

section 2²², require absolute immunity to be granted. In fact, the requirement of immunity “from every form of legal process” encompasses all enforcement measures imposable by a judicial as well as an administrative or legislative authority, as is made clear by section 3²³ of the CPIUN, and as recently recalled in a Note Verbale to a Member State objecting to the seizure pursuant to a court order of motor vehicles belonging to UNICEF²⁴.

E. Amicable Settlement Procedures

Immunity from judicial and administrative jurisdiction is not an obstacle to the United Nations voluntarily agreeing to participate in an amicable settlement procedure such as negotiation, mediation or conciliation. In fact this is done from time to time, negotiation being chosen for pragmatic reasons as the first and usually effective modality. The relationship of amicable settlement procedures to alternative remedies such as arbitration is illustrated by the standard arbitration clause inserted in procurement contracts concluded with private sector entities²⁵. Of course, amicable settlements are distinguishable from arbitration and other alternative remedies by the decisive third-party role and the finality and binding force of the latter²⁶.

II. ALTERNATIVE REMEDIES AND HUMAN RIGHTS STANDARDS

A. Duty to Provide Alternative Modes of Settlement

At the same time the General Assembly in 1946 adopted the unrestricted immunity provision in section 2 of the CPIUN, it also imposed the obligation in section 29 to make arrangements for the settlement of certain disputes. Section 29 reads:

“Section 29. The United Nations shall make provisions for appropriate modes of settlement of:

²² CPIUN Article II, section 2: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”

²³ CPIUN Article II, section 3: “The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.”

²⁴ UNJY (2000) p. 32-35; available at www.un.org/law under “codification”.

²⁵ First sentence of the clause reads: “Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall, unless it is settled amicably by direct negotiation, be settled in accordance with the UNCITRAL Arbitration Rules then obtaining”. UN document A/C.5/49/65 of 24 April 1995.

²⁶ Second sentence of the standard clause reads: “The Parties agree to be bound by the arbitration award rendered in accordance with such arbitration, as the final adjudication of any such dispute, controversy or claim.”

- (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if the immunity has not been waived by the Secretary-General.”

No doubt, section 29 is aimed at reducing, and may to a certain extent reduce, the tension between the organisation’s enjoyment of absolute immunity and the resulting unavailability of judicial remedies for the settlement of disputes between the organisation and certain parties. Nevertheless, the evolution since 1946 of human rights standards, in particular the entitlement of everyone 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”, laid down in Article 10 of the Universal Declaration of Human Rights²⁷, may pose the question whether the scope of section 29 remains adequate and, in any event, invite an examination of the adequacy of the existing settlement modalities.

B. International Standards for Dispute Settlement

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereinafter the “UDHR”) was adopted on 10 December 1948 in the form of a resolution by the General Assembly of the United Nations. While not legally binding, it is a historic document that sets out a comprehensive catalogue of civil, political and social “rights” that became the foundation for the elaboration and adoption of legally binding, universal and regional conventions on human rights.

Especially pertinent for the present inquiry is Article 10 of the UDHR, which reads:

“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.”

It is noteworthy that this entitlement, in accordance with the general tenor of the UDHR, endorses the principle of non-discrimination, that it comprises private as well as criminal law rights, obligations and liabilities and that it is not limited to the protection of the other civil, political and social entitlements enounced by the UDHR.

Convention for the Protection of Human Rights and Fundamental Freedoms

This regional Convention (hereinafter the “Convention”) was adopted by the Council of Europe, opened for signature by its members on 4 November 1950 and entered into force

²⁷ UN GA/RES 217 (III) of 10 December 1948.

on 3 September 1953²⁸. It has been successively amended; the current version dates from 1 November 1998. Section II of the Convention provides for the establishment, composition, jurisdiction, procedures and powers of the European Court of Human Rights while section I sets out the “rights and freedoms” that each contracting State must secure to everyone.

Section 1²⁹ of Article 6 on the “Right to a fair trial” reads:

“1. In the determination of his civil rights and obligations or of any civil 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The Convention builds on the UDHR and, like the later Covenant, elaborates and expands the requirements to a fair and public hearing or trial. In particular, the Convention demands the same standards for the determination of civil rights and obligations (arising under the Convention) as for the determination of any other civil charge (or claim). Moreover, the Convention, like the Covenant, requires that the tribunal be “established by law”. The Convention does not expressly require the tribunal to be “independent” although that may be implied from the shared values of the member States. Similar, justifiable exceptions to the requirement of public proceedings are specified in the Convention and the Covenant, namely when required in the interest of morals, public order or national security, to protect the private lives of the parties or where, in the opinion of the court, publicity would prejudice the interests of justice.

International Covenant on Civil and Political Rights

After protracted negotiations to overcome hindrances posed by ideological differences between socialist and liberal States, the General Assembly in 1966 adopted the International Covenant on Civil and Political Rights (hereinafter the “Covenant”)³⁰. Upon ratification by the required number of 35 States, the Covenant entered into force on 23 March 1976. The Covenant *inter alia* established a Human Rights Committee of 18 Member States reporting to

²⁸ ETS No. 005.

²⁹ Sections 2 and 3 stipulate further rights of persons charged with or prosecuted for a criminal offence.

³⁰ UN GA/RES 2200 (XXI) of 16 December 1966. UNTS vol. 999 p. 171 and vol. 1057 p. 407.

the Economic and Social Council³¹ and on 28 March 1979 the provisions of Article 41 concerning the competence of the Committee to receive communications from State Parties alleging a violation by another State Party of its obligations under the Covenant also entered into force, upon the acceptance by 10 State Parties.

The Covenant requires the States Parties to provide procedural safeguards for individuals at two levels. Firstly, pursuant to Article 2.3, States Parties must ensure the availability of an effective remedy for any person whose rights or freedoms under the Covenant are violated, which must ensure that the relevant right is determined by a competent authority provided for by the legal system of the State. That may be a competent judicial, administrative or legislative authority. The State also must develop the possibilities of a judicial remedy. Secondly, in the first sentence of its Article 14.1, the Covenant provides as follows:

“1. All persons shall be 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.”

To the criteria of “independent”, “impartial”, “fair” and “public” that must be met by the tribunal according to the UDHR, the Covenant adds “competent”, and “established by law”, in addition to the legally binding effect of the decisions of the tribunal. With respect to charges of criminal offences, Article 14 requires the presumption of innocence and stipulates further requirements relating to the procedure and to the effectiveness of the defence. As the United Nations does not possess criminal jurisdiction, except for the international *ad hoc* criminal tribunals recently established by the Security Council, these aspects will not be pursued further.

Common international standards

Notwithstanding the differences just listed between the requirements of the Covenant and of the Convention, the similarities between them outweigh their differences to an extent

³¹ On 15 March 2006, the General Assembly replaced the Human Rights Committee by a Human Rights Council of 47 Member States elected by secret ballot by an absolute majority of the members of the General Assembly. The Council is established as a subsidiary organ of the General Assembly, to which it reports annually. While retaining the functions of the Commission, the procedures of the Council have been strengthened and it also undertakes a “universal periodic review...of the fulfilment of each State of its human rights obligations and commitments”. New is also that “the General Assembly, by a two thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.” A/60/L.48.

that allows the notion of generally accepted minimum international standards for a fair trial.

Accordingly, these standards may be summarized as follows:

- a) a tribunal established by law and competent to determine rights and obligations of everyone
- b) public proceedings
- c) competence, independence and impartiality of the tribunal
- d) fairness and equal rights in the procedure and
- e) a decision within a reasonable time.

These minimum standards will be used in the further discussion as criteria to measure the adequacy of the remedies available to private persons for the prosecution of claims against the United Nations arising out of disputes of a private law character. In this connexion, the term “disputes of a private law character” should be understood in a wide sense as employed by CPIUN Article 29(a) and (b)³² and, especially, as encompassing claims by staff arising out of their employment relationship and claims by parties to commercial type contracts concluded with the United Nations.

III. REMEDIES OF STAFF AGAINST THE UNITED NATIONS

A. United Nations Administrative Tribunal

“a tribunal established by law to determine rights and obligations of everyone”

The Administrative Tribunal of the United Nations was established by the adoption of its Statute by the General Assembly in 1949³³. The Statute has subsequently been amended³⁴. The current version dates from 2006³⁵.

Article 11.3 of the Statutes provides that “the judgments of the Tribunal shall be final and without appeal”. The finality is subject only to the possibilities of applying for a revision on the narrow ground of discovery of new facts of a decisive nature, as provided for in Article

³² If, in the view of the Organisation, a claim made against an official concerns an act done by the official in an official capacity, the Organisation will consider the claim to have been made against the Organisation and deal with it accordingly, i.e. claim immunity. See Report of the Secretary-General on the procedures in place for implementation of Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, A/C.5/49/65 of 24 April 1995, paragraph 30. Decisions on behalf of the UN as employer would be included in this concept.

³³ GA/RES 351 A (IV) of 24 November 1949.

³⁴ A consolidated version with effect from 1 January 2001 is set out in the Annex to GA/RES 55/159 of 12 December 2000.

³⁵ The most recent amendment has been adopted by GA/RES 59/283 of 2 June 2005. Operative paragraph 40 reads: “Decides to amend article 3, paragraph 1, of the statute of the Tribunal with effect from 1 January 2006, to read:

“The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Members shall possess judicial experience in the field of administrative law or its equivalent within their national jurisdiction. Only three members shall sit in any particular case.”

12, and of the Tribunal agreeing to interpret its own decision, which the Tribunal, absent any relevant norm in its Statute, has justified with references to general principles of law.³⁶

As the General Assembly with regard to internal administrative matters of the Organization must be considered the nearest available equivalent to a national legislature, the requirement of the minimum international standard of being “established law” undoubtedly is met.

According to Article 2 of the Statute, the Tribunal is “competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of employment of such staff members.” The Tribunal also is open to any staff member after the employment has ceased and to any other person, such as a surviving spouse, deriving an entitlement from such employment contract. Pursuant to Article 13, also claims under the regulations of the United Nations Joint Staff Pension Fund are within the competence of the Tribunal.

Accordingly, in order to be within the Tribunal’s jurisdiction a claim must derive from a concluded employment contract. Mere unsuccessful applicants cannot avail themselves of the Tribunal should they have grievances and wish to “allege the occurrence of prejudice or some other impropriety in the selection process”³⁷. Moreover, it is the policy of the Organisation “not to enter into any litigation or arbitration with such individuals but to reply in a reasoned manner to such individuals with a copy provided to their Permanent Mission if it has become involved in the matter”³⁸.

In the light of the general obligation in CPIUN Article 29 to make provisions for appropriate modes of settlement of disputes of a private law nature, the denial of a remedy to unsuccessful job applicants appears to be legally questionable. When considered on the basis of the common international standard of offering a judicial remedy, i.e. a hearing by a tribunal, to “all persons” or “everyone”, the policy of denying such a remedy clearly is at variance with the standard.

In the capacity of Chief Administrative Officer of the Organisation³⁹, the Secretary-General is the respondent to applications to the Tribunal. Although Tribunal decisions normally are final, the Statute of the Administrative Tribunal of the United Nations (UNAT) in this respect differs from that of the Statute of the Administrative Tribunal of the

³⁶ UNAT Judgment No. 61 *Crawford et al.* (1995) cites the advisory opinion of the International Court of Justice in the *Asylum Case* (27.11.1950) concerning the conditions for acting on a request for interpretation.

³⁷ Report of the Secretary-General on the procedures in place for implementation of Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations. A/C.5/49/65 of 24 April 1995, para. 24.

³⁸ *Ibidem*.

³⁹ UN Charter Article 97.

International Labour Organization (ILOAT), to which the specialized agencies⁴⁰ subscribe. Article 10.1 of the UNAT Statute⁴¹ modifies the finality of judgments for the rescission of the administrative decision or for the specific performance of the obligation involved by permitting that the Secretary-General may “decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his or her case, provided that the compensation shall not exceed...”. In contrast, the ILOAT decides itself⁴² whether rescission or specific performance “is not possible or desirable”, in which case it awards the applicant monetary compensation. Regarding the UNAT, the Joint Inspection Unit in 2004 stated⁴³ that “The fact that it is the Secretary-General and not the UNAT who decides whether, in the interest of the United Nations, to comply with the order for rescission or performance, or to pay the amount ordered by the Tribunal, undermines staff confidence in the Tribunal and raises questions regarding the independence and fairness of the process. It also creates an impression that the ILOAT enjoys greater authority than UNAT. UNAT itself has stated that this specific gap ‘represents a glaring example of injustice and discrimination between the two categories of staff members working under the United Nations system’⁴⁴”. That the Statutes of both Tribunals allow for compensation in lieu of rescission or specific performance may be understandable in view of the need to avoid intrusion into sensitive management decisions in matters such as termination, promotion, reassignment or relocation of staff. Nevertheless, in addition to lowering the degree of protection, leaving the ultimate decision to the respondent amounts to abandoning the minimum international standard of a decision by a tribunal established by law.

⁴⁰ Also certain other international organizations based in Europe have accepted the jurisdiction of the ILOAT.

⁴¹ UNAT Statute Article 10.1: “If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time, the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his or her case, provided that such compensation shall not exceed the equivalent of two years’ net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal’s decision shall accompany each such order.”

⁴² ILOAT Statute Article VIII: “...the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.”

⁴³ JIU Report 2004/3 on the Administration of Justice p. 2. A/59/280.

⁴⁴ Letter dated 8 November 2002 from the President of the UNAT to the Chairman of the Fifth Committee of the GA (A/C.5/57/25) of 20 November 2002, Annex II, para. 2. The letter stated *inter alia*: “...staff members of the organizations belonging to the United Nations system which are within the jurisdiction of the ILOAT may be reinstated by order of that Tribunal; staff members of the organizations which come under the UNAT cannot be reinstated by the latter’s order alone. It is significant in this regard to refer to the statement of senior officials of the United Nations Industrial Development Organization (UNIDO): ‘As soon as UNIDO became a specialized agency, it shifted its recognition from UNAT to ILOAT, which was considered to be stronger’.”

“public proceedings”

Article 9 of the UNAT Statute provides that “the oral proceedings of the Tribunal shall be held in public unless the Tribunal decides that exceptional circumstances require that they be held in private.” In spite of being less specific, the exception may be considered to generally correspond to the exceptional grounds set out in the Convention and the Covenant. Of greater concern is that oral proceedings normally are not held. Article 15 of the Rules of the Tribunal make the holding of oral proceedings, including the examination of witnesses and experts subject to approval by the presiding member of the Tribunal. Proceedings are always instituted by submission of an application in writing, however, and in practice, most cases consist exclusively in a written exchange comprising the initial application by the staff member (or successor in rights) and the answer by the respondent (the Organisation), which are mostly followed by applicant’s rejoinder and respondent’s sur-rejoinder, before the Tribunal deliberates in private and communicates its decision in writing to the parties⁴⁵.

That written proceedings are a mandatory first stage is customary also in domestic judicial systems and serve to clarify and document the claims and legal issues. An important feature, however, of public hearings is that they permit a confrontation between judges and applicants, thereby ensuring a high degree of transparency as an additional safeguard against miscarriage of justice. The justification that the evidence collected through the written proceedings is sufficient for a decision to be made, which frequently is advanced by the Tribunal when declining a request from an applicant for a hearing in public, therefore is not fully adequate. Nor does the circumstance that the employment rules of the United Nations may be of direct interest only to the staff and their dependents speak against greater transparency. Public hearings could be held at the major duty stations⁴⁶.

To the extent, therefore, that the Tribunal’s practice is to avoid holding public hearings, except for a session where the judgments are announced, this practice fails to provide the degree of transparency demanded by the minimum international standard.

“competence, independence and impartiality of the tribunal”

As amended with effect from 1 January 2006, Article 3.1 aims to ensure the Tribunal

⁴⁵ The decisions are printed and published as official documents of the United Nations. They are available from www.UN.org under “documents”.

⁴⁶ Presently, plenary sessions of the UNAT normally are held in New York, according to Article 5.4 of the Statutes, while ordinary or extraordinary sessions for the consideration of cases “shall be convened by the President at dates and places to be set by the President after consultation with the Executive Secretary” of the Tribunal, according to Article 6.4. The Practice is to hold two sessions per year, each of five weeks duration, in New York and Geneva. A/C.5/59/12 paragraph 9.

is competent, independent and impartial⁴⁷. Appointment is by the General Assembly for a period of four years with the possibility of re-appointment once, the Tribunal elects its own President and two Vice-Presidents and no member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he or she is unsuited for further service⁴⁸. Clearly important is that, according to Article 6 of the Statute, the Tribunal itself establishes its rules. Article 11.1-3 provide that all decisions are taken by a majority vote, that judgments shall state the reasons on which they are based and that they are final and without appeal.

The criterion of competence can now be considered to be met with respect to appointments after 1 January 2006. The addition of the requirement of prior judicial experience in administrative law or its equivalent within the candidates national jurisdiction is clearly an improvement over the practice of also appointing persons having prior experience exclusively from government service related to the United Nations⁴⁹. Although the acquisition of experience in respect of the internal administrative rules of the Organization cannot be dismissed as a relevant qualification, selection exclusively on this basis could decisively weaken observance of the criterion of independence from the government in whose service the experience was acquired and thus also the criterion of impartiality. This observation applies notwithstanding the absence of any formal rule requiring the Tribunal to be guided in its decisions by any other organ of the United Nations⁵⁰.

In all probability, the - partly interrelated - criteria of independence and impartiality can be met even better by persons with judicial experience. On the other hand, an appointment period of four years normally would be considered to be too short for a judge interested in re-appointment to remove all dependency on the government of the nationality of the judge, in view of the *de facto* necessity of being nominated⁵¹ by that government for appointment and re-appointment by the General Assembly. The fact that serving as a judge is not a full-time

⁴⁷ See fn. 35 above. A similarly worded amendment was passed in 2004 by General Assembly resolution 58/87, which required the members to “possess judicial or other relevant legal experience in the field of administrative law or its equivalent within the member’s national jurisdiction.” As of 2006 judicial experience is unconditionally required for the first time.

⁴⁸ Statute Article 3.2, 3 and 5.

⁴⁹ In a Note to the General Assembly, dated 27 October 2004, the Secretary-General informed that “UNAT members have included persons from a wide variety of backgrounds, including judges, lawyers, academics, diplomats and international civil servants.” A/C.5/59/12.

⁵⁰ Except for the International Civil Aviation Agency, the specialized agencies accept the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT). The ILOAT Statutes, Article III.1 provides: “The Tribunal shall consist of seven judges who shall be of different nationalities” and the competence of the ILOAT therefore has not been subjected to doubts.

⁵¹ Diplomatic practice in the United Nations system is for governments not to sponsor or vote for a candidate not nominated by the government of the candidate’s nationality, notwithstanding that formal rules normally are silent in this regard.

position and that the remuneration is relatively modest⁵² may to some extent explain why the appointment period is relatively short. This explanation, however, only serves to reinforce the impression of reduced resistance of the judges to external influence from Member States. A further upgrading of the independence and status of the members of the Tribunal would be desirable.

“fairness and equal rights in the procedure”

The procedural aspects are addressed in the Rules of the UNAT⁵³, established by the Tribunal pursuant to Article 6 of its Statute.

The procedure is in writing for all practical purposes, since the Tribunal rarely agrees to hold oral proceedings that may include examination of witnesses or experts as allowed under Article 15 of the Rules. This practice does not affect the parties’ equal rights in, or the fairness of, the procedure, especially when one takes into account the fact that the Tribunal does not consider cases *ex novo* but relies on the detailed written dossier produced during the preceding mandatory review by the internal administrative bodies, the Joint Appeals Board (hereinafter the “JAB”) and, when applicable, the Joint Disciplinary Committee (hereinafter the “JDC”)⁵⁴. The written procedure is initiated by an application stating and justifying the claim(s), which is followed by the respondent’s answer and then normally observations by the applicant on the answer. Additional written statements or documents may be permitted by the Tribunal unless the President considers the documentation to be “sufficiently complete” and instructs that the case be placed on the list for a hearing and the parties be informed thereof. The time limits for submission of written pleadings are of equal length for both parties and both have unhindered access to the relevant internal files, records and documents of the Organisation, including any confidential material.

While not addressed in the rules⁵⁵, in practice it is the Office of Legal Affairs of the United Nations that prepares the respondent’s answer and represents the respondent during the proceedings. It is doubtful, absent any express enabling rule, whether external legal counsel would be permitted to represent the respondent. With regard to the applicant,

⁵² The judges receive reimbursement of travel costs and a daily subsistence allowance during the sessions. In addition, the Secretary-General in 1994 has proposed to follow the practice for the ILO Administrative Tribunal and to raise the honorariums of the judges from each one US\$ annually to an amount of US\$ 105.100 to be shared among the seven judges. A/C.5/59/12 paragraphs 9-15.

⁵³ UN document: AT/11/Rev. 15.

⁵⁴ UNAT Statute Article 7: “1. An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.”

⁵⁵ Article 8.3 refers to “the representative of the respondent” without defining who may act in this capacity.

however, Article 13 of the Rules provides that the case either may be presented by the applicant in person or, upon designation by the applicant, by “a staff member of the United Nations or one of the specialized agencies” or “counsel authorized to practice in any country a member of the organization concerned.” The President of the Tribunal also may permit an applicant to be represented by a retired staff member.

The Rules appear to ensure full fairness in the proceedings. The parties have equal procedural rights, at least from a formal viewpoint. That in practice it places a greater additional burden in terms of time and costs on the applicant than on the respondent to prepare and present the case, either personally or by retaining a legal representative for these purposes, is quite obvious. It is, however, an “inequality” known to exist also within domestic jurisdictions. A possible solution could be an insurance scheme to cover the cost of external counsel, including retired staff members. Nevertheless, since experience has shown that familiarity with the internal rules and regulations is essential and since such specialized knowledge is rarely found outside the Organisation, normally applicants choose to be represented by trusted and competent colleagues, who are not members of the Office of Legal Affairs.

“a decision within a reasonable time”

The delay in arriving at a final decision is a matter of serious concern. Due to the requirement of exhaustion of internal administrative review procedures⁵⁶, the time from a case is initiated before the JAB until the UNAT delivers its judgment has increased to five years, of which the UNAT stage during the five year period preceding 2004 accounted for 27 to 37 months for cases arising in New York, 15 to 26 months for cases in Geneva, 19 to 26 months in Nairobi and 10 to 17 months in Vienna⁵⁷. This length of time is clearly excessive, especially considering the nature of the disputes and that most cases have arisen in New York or Geneva. A rectification of an employment related grievance after the passing of several years is unlikely in most cases to provide relief that restores the situation of the applicant approximately to what it would have been, had the wrongful decision not been taken. Lost career opportunities or loss of employment are serious injuries that result in immaterial as well as material losses. The permissible monetary compensation of up to two – and exceptionally three - years net salary, is not insignificant, but arguably does not amount to full compensation for the losses that are sustained in some cases. In any event, the excessive delay in arriving at a final decision is doubly damaging as it at the same time enlarges the injury and

⁵⁶ UNAT Statute Article 7. See also fnt. 54 above.

⁵⁷ A/59/408 p.2.

reduces the value of the monetary compensation and thus brings to mind the maxim of “justice delayed is justice denied.”

B. Joint Appeals Board and Joint Disciplinary Committee

Both the JAB and the JDC are internal administrative review bodies that do not have the standing of independent tribunals although *de facto* they function as a first instance discharging the fact-finding and documentation requirements of the UNAT. They are composed of a chairperson appointed by the Secretary-General after consultation with the staff, a member freely appointed by the Secretary-General and a further member elected by the staff. The JAB has the power to review complaints brought by a staff member against an employment related decision affecting him or her and to make recommendations thereon to the Secretary-General for his decision, while the JDC reviews allegations of misconduct by a staff member, brought by the Head of the Office of Human Resources Management on behalf of the Secretary-General, and makes recommendations thereon to the Secretary-General for his decision. Proceedings before the JAB are initiated by the Staff member concerned. The significance of the JDC, however, lies in the fact that no disciplinary measure, such as demotion, dismissal, suspension or fine, may be imposed without a prior hearing of both sides before the JDC. As neither the JDC nor the United Nations otherwise exercise criminal jurisdiction over the staff, criminal charges are prosecuted by domestic authorities under the applicable domestic penal law upon waiver, as appropriate, of the immunity of the staff member concerned by the Secretary-General. The JAB and, as applicable in disciplinary cases, the JDC proceedings must be completed before the UNAT may receive a case. The undue length of proceedings before the JAB, which, as mentioned above, typically extends to two to three years, is not duplicated by the JDC which is required to act expeditiously and normally completes its review and recommendation within 1-2 months.

IV. REMEDIES OF CONTRACTORS AGAINST THE UNITED NATIONS

A. Arbitration

In response to a request⁵⁸ of the General Assembly, the Secretary-General has reported⁵⁹ on “the procedures in place for the implementation of Article VIII, section 29” of the CPIUN. With respect to “disputes arising out of commercial agreements (contracts and

⁵⁸ General Assembly decision 48/493 B of 29 July 1994.

⁵⁹ A/C.5/49/65 of 24 April 1995.

lease agreements)”, information is provided on the practice of inserting a standard arbitration clause⁶⁰ in such contracts or agreements together with a standard clause on the non-waiver of privileges and immunities⁶¹.

Since the CPIUN requires all waivers to be express and bars waiver for execution measures, the net additional effect of the non-waiver clause may be to exclude any possibility of a judicial review of an arbitration award, including review of any proceedings leading to the award.

The UNCITRAL Arbitration Rules are widely accepted for inclusion in contracts between parties having their place of business in different countries. One or three arbitrators are appointed by the parties or, failing agreement between the parties on the appointments, by the American Arbitration Association or the International Chamber of Commerce as applicable. In spite of its qualities, the UNCITRAL Arbitration Rules or other recognized arbitration rules do not provide for arbitration bodies or procedures that meet the above mentioned standards of the international human rights instruments for a court at law. An arbitration panel is not a court established by law, but a prime example of a dispute settlement procedure that the parties may accept as an alternative to the available jurisdiction and decision of a competent civil court. The fact that significantly more disputes arising under commercial contracts are settled by arbitration than are formally litigated before the civil courts is due to the preference of the parties to the dispute for the lower procedural costs and the shorter time required for an arbitration award. Generally, domestic civil courts also retain a supervisory function over arbitration, which includes the power to set aside an award on the ground of fundamental procedural faults.

The formulation in the arbitration clause “arising out of or relating to this Contract” limits the purview of the arbitration to issues arising under concluded contracts only and excludes any grievance or claim on other grounds.

⁶⁰ The standard arbitration clause normally used reads: “Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall, unless it is settled amicably by direct negotiation, be settled by arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. Such arbitration shall be conducted under the auspices of the [American Arbitration Association (AAA) (for contracts to be performed within the USA)] [International Chamber of Commerce (ICC) (for contracts to be performed outside the USA)] which shall also serve as the Appointing Authority under the Rules. The Parties agree to be bound by the arbitration award rendered in accordance with such arbitration, as the final adjudication of any such dispute, controversy or claim.”

⁶¹ The standard non-waiver clause reads: “Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges or immunities of the United Nations, including, but not limited to, immunity from any form of legal process.”

B. Bidding Procedures

In order to implement its wide ranging mandates, the United Nations implements activities in fields such as development assistance, disaster relief and peace-keeping through commercial type contracts that are normally let in accordance with the organisation's procedures for international competitive bidding. Such competitive bidding procedures are required under the financial regulations and rules⁶² of the organisation and are conducted by procurement units located at the major duty stations and organisationally attached to major subsidiary organs and programs. The turnover through procurement accounts for a very significant share of the total budgets of the organisations in the UN system and in 1994 amounted to 6.4 billion US\$.

In spite of the care taken to conduct the bidding process correctly and to award contracts fairly, it is inevitable that bidders from time to time harbour grievances against the United Nations arising out of a bidding process, in which they have participated without being successful, relating to the award of the contract to another bidder or to the conduct of the procurement process. Unfortunately, no dispute settlement mode has been established to deal with such grievances and the related claims. The only avenue open for a disappointed bidder therefore is to attempt to negotiate with the United Nation, which, should the United Nations agree to enter into negotiations, would be a negotiation between parties with unequal standing in view of the immunity enjoyed by the organisation.

V. NON-CONTRACTUAL CLAIMS

The above mentioned report by the Secretary-General⁶³ also refers to non-contractual claims such as

- a) third-party claims for personal injuries, including tort claims arising from acts within the Headquarters of the UN in New York or arising from accidents involving vehicles operated by UN personnel
- b) claims related to the conduct of UN peace-keeping operations
- c) claims related to the conduct of operational activities for development
- d) certain other claims.

⁶² The bidding procedures and award criteria are set out in the Financial Regulations and Rules of the United Nations. The current version is contained in UN document ST/SGB/2003/7 of 9 May 2003.

⁶³ A/C.5/49/65 of 24 April 1995.

For the purposes of the present analysis it is significant that no arrangements for an “appropriate mode of settlement” of disputes in any of the aforementioned categories have been made. For tort claims arising within the UN headquarters a headquarters regulation has established maximum compensation amounts, but ultimately, failing a negotiated settlement, such claims may be settled *ad hoc* under the UNCITRAL Arbitration Rules. For vehicles third-party liability insurance is contracted, which from a pragmatic viewpoint takes care of this category. Peace-keeping operations may give rise to claims from civilians who sustain injuries or loss of property and their claims are settled by negotiation. The implementation of development assistance projects through the UN Development Programme (UNDP) and the execution of assistance by the UN International Childrens’ Emergency Fund (UNICEF) is carried out under agreements with the beneficiary countries, under which the recipient government assumes responsibility for dealing with, and satisfying, third-party claims, except in case of gross negligence or wilful misconduct by United Nations personnel⁶⁴. Any dispute or claim not within the responsibility of the government will have to be settled by negotiation since no special mode of settlement has been arranged.

VI. BALANCING IMMUNITY AGAINST RIGHT OF ACCESS TO A COURT

In its decisions of 18 February 1999 in the parallel cases of *Waite and Kennedy v. Germany*⁶⁵ and *Beer and Regan v. Germany*⁶⁶, the European Court of Human Rights (hereinafter the “ECHR”) has pronounced itself on the criteria to be applied in order to resolve the conflict that may arise in concrete cases between the right of everyone of access to a court, granted by Article 6.1 of the European Convention, and the immunity from jurisdiction enjoyed by an international organisation, i.e. the European Space Agency (hereinafter the “ESA”), under the ESA Convention and agreements between ESA and its host country, Germany.

⁶⁴ The relevant standard clause in UNDP agreements reads: “Assistance under this Agreement being provided for the benefit of the Government and people of -----, the Government shall bear all risks of operations arising under this Agreement. It shall be responsible for dealing with claims which may be brought by third parties against the UNDP or an Executing Agency, their officials or other persons performing services on their behalf, and shall hold them harmless in respect of claims or liabilities arising from operations under this Agreement The foregoing provision shall not apply where the Parties and the Executing Agency are agreed that a claim or liability arises from the gross negligence or wilful misconduct of the above-mentioned individuals”. A/C.5/49/65 paragraph 22.

⁶⁵ Application no. 26083/94.

⁶⁶ Application no. 28934/95.

In both cases the applicants had for several years performed services for ESA, but in the legal capacity of employees of firms with which ESA had contracted. The applicants had instituted proceedings before the Labour Court of Darmstadt, Germany, arguing that pursuant to German law they had acquired the status of employees of ESA. The Labour Court dismissed for lack of jurisdiction due to the immunity of ESA under the ESA Convention of 30 October 1980. The ECHR, however, relied on its decision of 21 February 1975 in *Golder v. the United Kingdom*⁶⁷ and found that the Court, notwithstanding its consideration of the immunity question “must next examine whether this degree of access limited to a preliminary issue was sufficient to secure the applicants’ ‘right to a court’, having regard to the rule of law in a democratic society.” The ECHR, on the one hand, recognized that Article 6.1 of the Convention “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal”⁶⁸ and, on the other hand, that this right “may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court”⁶⁹. As criteria to be applied by the Court in making this decision, the ECHR stipulated the following three:

- a) that the limitations are not so extensive “that the very essence of the right is impaired”
- b) that the limitations “pursue a legitimate aim”, and
- c) that there is a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.

In its further analysis, the ECHR found that while “where States establish international organisations...and where they attribute to these organisations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in the field of activity covered by such attribution”⁷⁰. In the concrete cases before it, the ECHR considered it a material factor “whether the applicants had available to them reasonable

⁶⁷ Application no. 4451/70. The UK Home Secretary had refused to permit Mr. Golder, a prison inmate, to send a letter to a solicitor for the purpose of instituting legal proceedings claiming violation of his civil rights while in prison. The ECHR found that the right of access to a court is subject to “limitations permitted by implication” taking into account that it by its nature calls for regulation by the State such as was done by the prison rules. The ECHR must pronounce itself “only on the point whether or not the application of those Rules in the present case had violated the Convention to the prejudice of Golder”. Judgment at para.s 38 and 39.

⁶⁸ See the judgments in *Waite and Kennedy* at para. 50 and *Beer and Regan* at para. 40.

⁶⁹ See the judgments in *Waite and Kennedy* at para. 59 and *Beer and Regan* at para. 49.

⁷⁰ See the judgments in *Waite and Kennedy* para. 67 and *Beer and Regan* para.57.

alternative means to protect effectively their rights under the Convention” and that since they argued an employment relationship with ESA “they could and should have had recourse to the ESA Appeals Board” established under the Staff Regulations of ESA to “hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member”⁷¹. In view of these circumstances the ECHR found there had been no violation of Article 6.1 of the European Convention. Apparently, the Court was satisfied with the effectiveness of the provision in regulation 33 of the ESA staff regulations that the Appeals Board shall be “independent of the Agency”, although the judgments do not comment in detail on this aspect.

VII. CONCLUSIONS

International organisations are exempted from the jurisdiction of domestic judicial and administrative authorities and therefore are not subject to suits, claims or enforcement proceedings in such domestic *fora*, including, in particular, those of the Member States of the organisation concerned.

The exemption from domestic jurisdiction extends to all official functions of the organisation concerned and for organisations in the United Nations system immunity is absolute. It may be counterbalanced by a concomitant international legal obligation of each organisation to provide or arrange alternative modes and procedures for the settlement of disputes or claims of a private law character involving the organisation.

The present survey has examined the remedies available to assert private law claims against the United Nations and sought to evaluate the adequacy of the remedies in the light of criteria derived from:

- (1) the duty of the United Nations to arrange for “appropriate modes” of settlement of disputes of a private law character, to which the United Nations is a party, or involving an official of the United Nations enjoying immunity, arising under Section 29 of the CPIUN, and
- (2) the international legal obligation, arising under human rights instruments, to ensure that everyone has access to a court at law for the determination of his or her rights and obligations and of any (criminal) charges.

⁷¹ See Judgments in *Waite and Kennedy* para.s 68-69 and *Beer and Regan* para.s 58-59.

The survey has shown that the United Nations has taken steps to discharge its concomitant obligations, in particular by establishing the UNAT and by inserting arbitration clauses in its commercial contracts.

UNAT

To the extent of its jurisdiction, the establishment of the UNAT appears to meet the obligation under Section 29 of the CPIUN to provide for “appropriate modes” of settlement of disputes involving claims by staff members. Nevertheless, as the jurisdiction of the UNAT is predicated on the existence of an employment relationship under the staff regulations and rules, it follows that claims from disappointed applicants and from individuals engaged on a contractual basis not falling under the staff regulations and rules (i.e. “consultants”), or from parties to commercial contracts concerning the delivery of goods or the performance of work or services, or from disappointed bidders having grievances arising out of their participation in international competitive bidding procedures conducted by the United Nations are all excluded from the purview of the UNAT.

A confirmation that the UNAT satisfies the standards established by international human rights instruments cannot be given without substantial reservations. In particular, the excessive length of time required to reach a final judgment arguably is a ground for disqualification and improvements are called for also in other respects such as independence, impartiality and public hearings. Considering that the CPIUN requires provisions to be made for “appropriate modes of settlement” without, however, defining “appropriate modes”, it arguably is a dynamic concept that must be understood in the context of the prevailing views among the parties to the CPIUN. In this regard, the criteria laid down in the widely accepted international human rights instruments can be considered to be applicable and, if so, the question arises whether the establishment of the UNAT offers adequate access to a court at law. Relevant guidance on this point may be found in the decisions by the ECHR in the parallel cases of *Waite and Kennedy v. Germany*⁷² and *Beer and Regan v. Germany*⁷³. The ECHR ruled that it is for the Court to appraise whether to uphold the limitation of the right of access to a court, which is a consequence of the immunity from jurisdiction, and that the availability of reasonable alternative means to protect the claimant’s rights is a material factor in the determination.

⁷² Application no. 26083/94.

⁷³ Application no. 28934/95.

Arbitration

The established and consistent practice of including arbitration clauses in commercial contracts, to which the organisation is a party, is a pragmatic solution that in practice has proved to be acceptable to the other parties and has enabled the United Nations to discharge important mandates and activities of the most varied nature through subcontracts with commercial firms and other private sector entities. The readiness of the other parties to accept arbitration clauses may well be due both to the common practice of commercial parties to opt for arbitration in lieu of more lengthy court proceedings and to the unavailability, in the case of the United Nations, of any competent court.

Although the majority of the United Nations commercial contracts are concluded as a result of competitive bidding, claims or disputes arising out of the procurement procedure are not covered by the arbitration clause. Nor has any other mode of settlement been established. The United Nations therefore is protected by immunity when responding to grievances or claims presented by disappointed bidders and when offering to negotiate a settlement is in an incomparably stronger position than the private sector entity. Such a situation may not be equitable and, in any event, reveals a failure to provide an “appropriate mode” of settlement for this category of private law claims.

There can be no question of a court of arbitration meeting the standards set out in the international human rights instruments for an independent tribunal, not the least because arbitration courts are not “established by law” and do not offer the same procedural guarantees as courts at law. To the extent therefore, that the CPIUN’s concept of an “appropriate mode of settlement” must be understood in the light of the right of access to a court enshrined in the widely accepted international human rights instruments, it is doubtful that arbitration constitutes “a reasonable alternative means” to protect the private law rights of claimants against the United Nations. Arbitration, therefore, may be acceptable only as an alternative, but not as the exclusive settlement mode.

Ad hoc Arbitration and Negotiation

Non-contractual claims are settled by negotiation or arbitration arranged *ad hoc*. The obligation under Section 29 of the CPIUN to “make provisions for appropriate modes of settlement” remains unimplemented in respect of these disputes of a private law character.

Abbreviations

ECHR	European Court of Human Rights
ETS	European Treaty Series (of the Council of Europe)
CPIUN	Convention on the Privileges and Immunities of the United Nations
CPISA	Convention on the Privileges and Immunities of the Specialized Agencies
GA	General Assembly (of the United Nations)
ILO	International Labour Organization
ILOAT	Administrative Tribunal of the International Labour Organization
JAB	Joint Appeals Board
JDC	Joint Disciplinary Committee
UN	United Nations
UNAT	Administrative Tribunal of the United Nations
UNICEF	United Nations International Childrens' Emergency Fund
UNJY	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series

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