CAHDI
Committee of Legal Advisers on Public International Law
Comité des Conseillers Juridiques sur le Droit International Public

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

OPINION OF THE CAHDI

ON RECOMMENDATION 2122 (2018) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – "JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS AND RIGHTS OF THEIR STAFF"

1. On 7 February 2018, the Ministers' Deputies at their 1306th meeting agreed to communicate *Recommendation 2122 (2018) of the Parliamentary Assembly of the Council of Europe* (PACE) on "*Jurisdictional Immunity of International Organisations and Rights of their Staff*" to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by the end of March 2018[1].

2. The CAHDI examined the above-mentioned Recommendation at its 55th meeting (Strasbourg, France, 22-23 March 2018) and made the following comments concerning those aspects of Recommendation 2122 (2018) of particular relevance to the Terms of Reference of the CAHDI.

3. From the outset, the CAHDI thanked the PACE for acknowledging its work in relation to the subject of the "Jurisdictional immunity of international organisations". In this respect, the CAHDI pointed out that the theme of "Immunity of States and International Organisations" is currently on the agenda of all its meetings as a permanent item. Indeed, the issue of State immunity – sometimes also known as "jurisdictional immunity"[2]- has been examined by the CAHDI from very early on of its existence in 1991 through its assessments of the implementation of the 1972 *European Convention on State Immunity* (ETS No.74) and afterwards through its Pilot Project regarding State Immunities which led to the CAHDI publication on "*State Practice Regarding State Immunities*" by Martinus Nijhoff in 2006.

4. During its 37th meeting in 2009, the CAHDI agreed to enlarge this topic to international organisations in order to discuss and examine the activities and actions of international organisations covered by jurisdictional immunity. The question of the **settlement of disputes of a private character to which an international organisation is a party** was later included in the agenda of the CAHDI at its 47th meeting in March 2014 at the request of the Dutch delegation. When examining this issue, the CAHDI points out that indeed the privileges and immunities of international organisations serve the legitimate purpose of protecting the independence of international organisations, which is crucial for the effective performance of their functions. In general terms, the European Court of Human Rights (ECtHR) stated that "it does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court"[3]. The immunity of international organisations may prevent individuals who have suffered harm (third-party claims for personal

---

[1] The Ministers' Deputies specifically indicated in their decision that they "agreed to communicate it [Recommendation 2122 (2018)] to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 21 March 2018. However, taking into account that the 55th meeting of the CAHDI took place on 22 and 23 March, it was agreed to send the CAHDI opinion to the Secretariat of the Committee of Ministers on 26 March 2018.
This PACE Recommendation 2122 has also been communicated to the Steering Committee for Human Rights (CDDH) for information and possible comments and to the Administrative Tribunal for opinion.

[2] See explanations on this terminology made by Mr Peter Tomka in his paper "Pilot Project of the Council of Europe on State Practice Regarding State Immunities" in *The CAHDI Contribution to the Development of Public International Law* (Brill Nijhoff 2016), Edited by the Council of Europe, pp.23-39.

[3] ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013, para. 164.

injury or death or property loss or damage) because of the conduct of an international organisation from bringing a successful claim before a domestic court. Furthermore, the CAHDI noted that this immunity has been increasingly challenged based on an alleged incompatibility of upholding immunity with the right of access to court. The existence of an alternative remedy provided to the claimant by the international organisation is important in this context.

5. Concerning the issue of the settlement of third-parties claims, the CAHDI pointed out – for illustrative purposes – some recent events mainly in relation to peacekeeping operations of the United Nations (UN)[4] and some case-law of the ECtHR involving international organisations where their immunity from the civil jurisdiction of domestic courts had been upheld. Some CAHDI delegations acknowledged that there has been, for a long period, a gap in the judicial protection of the rights of individuals in some cases involving international organisations before national courts. Nevertheless, they also pointed out that progress has been achieved and that there is not one uniform solution for all international organisations and for all activities carried out by those organisations[5].

6. The CAHDI underlines that the legal issues arising from the PACE **Recommendation 2122,** and PACE **Resolution 2206** associated with it, are very similar to those described above. Nevertheless, the CAHDI points out that while in both cases the immunity of international organisations before domestic courts may have an impact on the judicial protection of the rights of the individuals concerned , the legal position of the latter is not always the same, since, the staff of international organisations usually have access to an internal dispute settlement procedure developed by the international organisation as an alternative means of judicial protection while third parties who have suffered harm as a result of an unlawful conduct of the organisation involved do not have any judicial protection if the immunity of the international organisation is not waived. As mentioned by the PACE, the CAHDI points out that indeed due to the privileges and immunities of international organisations, international civil servants normally have no recourse to national courts regarding employment related matters. Furthermore, the CAHDI agrees with the PACE that against the background of the Council of Europe's responsibility for setting international human rights standards and promoting the rule of law at all levels, the Organisation has a special duty to offer its staff timely, effective and fair justice. Nevertheless, the CAHDI underlines that in conformity with the **case law of the ECtHR** the key factor in determining whether granting international organisations immunity from jurisdiction of the national courts is permissible under the *European Convention on Human Rights* (ECHR) is whether the applicants concerned had available to them **"reasonable alternative means"** to effectively protect their rights under the ECHR[6]. An increasing number of agreements on privileges and immunities contain an explicit obligation for international organisations to provide alternative means of private dispute settlement. The PACE in paragraph 1.1.1 of its Recommendation 2122 made reference indeed to these "reasonable alternative means of legal protection" which should be accessible in the event of disputes between international organisations and their staff.

7 In the framework of the **Council of Europe**[7], the CAHDI notes that the rights, obligations and alternative means – to access to national courts – for the legal protection of the staff of the

---

[4] In October 2013, Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN. The judgment of the Southern District Court of New York handed down on 9 January 2015 concluded that the UN was immune from the plaintiffs' suit. An appeal was lodged on 12 February 2015 before the United States Court of Appeals for the Second Circuit. The oral arguments were heard on 1 March 2016. In its judgment of 18 August 2016, the United States Court of Appeals for the Second Circuit upheld the immunity of the United Nations.

[5] See CAHDI Meeting Reports from the 52nd, 53rd and 54th meetings (docs. CAHDI (2016)23; CAHDI (2017)14 and CAHDI (2017) 23).

[6] ECtHR, *Beer and Regan v. Germany*, no. 28934/95, Grand Chamber judgment of 18 February 1999; ECHR, *Waite and Kennedy v. Germany,* no. 26083/94, Grand Chamber judgment of 18 February 1999; ECHR, *Chapman v. Belgium,* no. 39619/06, decision of 5 March 2013; ECHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013.

[7] The privileges and immunities enjoyed by the Council of Europe are governed by Article 40 of the *Statute of the Council of Europe*, as further elaborated under the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol.*

Organisation are set out in the *Council of Europe Staff Regulations*[8]. As it is mentioned in the Preamble of the *Staff Regulations* "*The Council of Europe, in its day-to-day functioning, shall respect all the principles and ideals which the Organisation defends. In particular, in the administration of the Secretariat, the Secretary General shall endeavour to realise the conditions which will ensure the effective application of the rights and principles set out in the revised European Social Charter, in so far as these are applicable to an international organisation*". The CAHDI further notes that the settlement of disputes which may arise between the Council of Europe and its staff is governed by "*PART VII: Disputes*" of the *Staff Regulations*. The Council of Europe has the following system for resolving employment disputes: a "Complaints procedure" (Article 59[9] of *Staff Regulations*) and an "Appeals procedure" (Article 60[10] of *Staff Regulations*). The administrative complaint is submitted to the Secretary General through the Director of Human Resources and it may be referred to an "Advisory Committee on Disputes"[11]. In the event of either explicit rejection in whole or in part, or implicit rejection of this complaint, the complainant may appeal, under Article 60 of the *Staff Regulations*, to the Administrative Tribunal set up by the Committee of Ministers. The *Statute of the Administrative Tribunal* is contained in *Appendix XI* of the *Staff Regulations*.

8. The CAHDI also notes that **the jurisdiction of the Administrative Tribunal of the Council of Europe** was extended to officials of the *Central Commission for the Navigation of the Rhine* (CCNR) by Agreement on 16 December 2014 as well as to officials of *The Hague Conference on Private International Law* by Agreement on 24 November 2017 and to officials of the *Intergovernmental Organisation for International carriage by Rail* (OTIF) by Agreement on 8 December 2017.

9. As mentioned in the Explanatory Memorandum prepared by the PACE Rapporteur Mr Volker Ullrich[12] for the elaboration of Recommendation 2122 and Resolution 2206, there is a large variety and types of competent bodies for labour disputes within international organisations. The CAHDI recalls that the United Nations, for instance, has a two tier system for resolving employment disputes: the UN Disputes Tribunal (UNDT) and the UN Appeals Tribunal (UNAT). International institutions such as the Organisation for Economic Co-operation and Development (OECD) and the North Atlantic Treaty Organisation (NATO) have set up their own administrative tribunals. Others administrative tribunals have competence to hear complaints from other organisations as it is the case of the International Labour Organisation (ILO) Administrative Tribunal whose jurisdiction has been recognised by over 60 organisations and entities. In this respect, the CAHDI recalls that the International Labour Organisation Administrative Tribunal (ILOAT) in its Judgment No. 3127 stated that "The right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Thus,

---

[8] The *Staff Regulations and its Appendices* were adopted by Resolution Res(81)20 of the Committee of Ministers on 25 September 1981, with the exception of Appendix VIII, which was adopted by Resolution Res(83)12 of 15 September 1983. The Committee of Ministers regularly updates the St*aff Regulations*.

[9] **Article 59 of Staff Regulations:** ***"****1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.*

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General." […].

[10] **Article 60 of the *Staff Regulations***: *"In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers".*

[11] **Article 59 paragraph 6 of the *Staff Regulations*: *"****The Advisory Committee on Disputes shall comprise four staff members, two of whom shall be appointed by the Secretary General and two elected by the staff under the same conditions as those for the election of the Staff Committee. The committee shall be completely independent in the discharge of its duties. It shall formulate an opinion based on considerations of law and any other relevant matters after consulting the persons concerned where necessary. The Secretary General shall, by means of a rule, lay down the rules of procedure of the committee."*

[12] Report by the PACE Committee on Legal Affairs and Human Rights on "Jurisdictional immunity of international organisations and rights of their staff", Doc 14443, 29 November 2017.

except in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body"[13]. As mentioned in the previous paragraph, the Administrative Tribunal of the Council of Europe has also extended its jurisdiction to officials from other international organisations.

10. Concerning the reference contained in paragraph 1.4.1 of the PACE Recommendation 2122 on the **right of access of trade unions** to administrative tribunals of international organisations, the CAHDI refers to the case of *SUEPO and Others v. the European Patent Organisation "EPO"*[14], where the Dutch Supreme Court held in its judgement of 20 January 2017, quashing the previous judgments in the case by the interim relief judge and The Hague Appeal Court, that EPO was entitled to invoke its immunity from jurisdiction in a dispute with two trade unions. The Dutch Supreme Court applied the test developed by the ECtHR in its jurisprudence (on the acceptability of granting jurisdictional immunity to international organisations thus limiting the right of access to a court under Article 6 of the ECHR provided that litigants had a reasonable alternative means of protecting their rights) concluding that litigants had a reasonable alternative means of protecting their rights effectively; trade unions were sufficiently protected by the internal dispute settlement procedure provided for by EPO under which individual employees and staff representatives could ultimately take their complaint to the ILO Administrative Tribunal. According to the Dutch Supreme Court, this meant that the essence of their right of access to a court had not been impaired.

11. Concerning points 1.4.1 and 1.4.2 of the Recommendation and with reference to what has been said in paragraphs 7, 9 and 10 above and, without wanting to comment on the rightness of these recommendations, the CAHDI draws the attention of the Committee of Ministers to the fact that, should it deem appropriate to start a reflection on this subject, this would imply changes to the Statute of the Administrative Tribunal Council of Europe (in particular to articles 10 and 12) and would have budgetary and administrative consequences.

12. The CAHDI has further examined, during its meetings, the issue of striking a balance between upholding the immunity of international organisations and the rights of their staff when a labour or employment dispute arises. For instance, in a case involving the immunity of EPO[15], the ECtHR held that, with regards to the complaint about the lack of access to courts and the allegedly deficient procedures within the EPO and the Administrative Tribunal of the ILO, the availability of an arbitration procedure constituted a reasonable alternative means to have the complaint examined in substance and consequently the applicant's protection of fundamental rights had not been manifestly deficient. Similarly, in another case examined by the CAHDI[16], the Court of Appeals of Brussels held that an arbitration clause contained in a service contract between the claimant and NATO guaranteed the right of access to a court pursuant to Article 6 of the ECHR.

13. Taking into account the above mentioned considerations, the CAHDI reiterates that in general in accordance with national and international case law, the immunity of international organisations is consistent with the right to a fair trial (Article 6 ECHR) but the protection awarded to the individuals is to be proportional and to constitute a "reasonable alternative means" of dispute settlement. Furthermore, the existence of administrative tribunals has been found in principle to meet the human rights standards established under the ECHR[17] and the reason not to insist on the review by national courts of decisions by administrative tribunals.

---

[13] ILOAT, Judgment No. 3127, 113th Session, 2012, *V.C. v.Centre for the Development of Enterprise*, para. 13.
[14] Hoge Raad, *SUEPO and Others v. the European Patent Organisation* ("EPO"), judgment of 20 January 2017, ECLI:NL:HR:2017:57.
[15] ECtHR, *Klausecker v. Germany,* Application No. 415/07, *Decision* of 6 January 2015.
[16] Cour d'appel de Bruxelles, Etat belge (SPF Affaires étrangères) c. Michel Poortmans, n° 2014/AR/2570, decision of 11 January 2016
[17] See footnote 6,ECtHR, *Waite and Kennedy v. Germany,* no. 26083/94, Grand Chamber judgment of 18 February 1999, paras 50-74.

14. The CAHDI further reiterates that the issue of privileges and immunities of international organisations and the rights of their staff is of high complexity and multidimensional nature, involving both the independence of international organisations as well as the accountability of international organisations. This topic indeed raises not only legal questions but also many political ones. Therefore, the CAHDI considers that the preservation of the independence and effectiveness of international organisations speaks in favour of a cautious approach.

15. The CAHDI consequently considers that the proposal of the PACE concerning the possibility "*to carry out a comparative study of the extent to which the internal remedy systems in international organisations are compatible with Article 6 of the European Convention on Human Rights (ETS No. 5) and with other relevant human rights (including social rights) […]*" would at present be premature as different international organisations are examining the introduction of new alternative means of staff dispute settlement. Furthermore, the vast differences existing between the various types of international organisations would render a comparative study very difficult. In addition, considering that there is no uniform solution for all international organisations and for all activities they carry out the difficulties reaching an encompassing solution should be highlighted. Finally the CAHDI pointed out that the existing case law of the European Court of Human Rights addresses the question of the compatibility of the internal remedy systems in international organisations with Article 6 of the ECHR.

16. Concerning paragraph 2 of the PACE Recommendation 2122, the CAHDI underlines that, as mentioned above, the Committee is regularly examining the issue of jurisdictional immunity of international organisations under all its different angles.