The impact of the ECHR on Austria's practice as host state of international organisations

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The (European) Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")[1] and the judgments of the European Court of Human Rights (here "European Court") have a considerable impact on legal developments in Austria. This led, *inter alia*, to the creation of Austria's two-tier administrative court system, to a well-balanced solution for the voting rights of prisoners – a major problem in other countries, as I understand – and to a more tolerant approach towards issues of sexual orientation. In my contribution to this panel, however, I would like to tell you about current cases, most of them still pending, before the Austrian Constitutional Court concerning the interpretation of Article 6 of the European Convention. These cases – together with previous judgments of the European Court itself – already have a major impact on Austria's practice as host state of international organisations.

The cases concern employment disputes between staff members and former staff members of international organisations with headquarters in Vienna. They address the difficult relationship between the right to a fair trial, enshrined in Article 6 of the European Convention, on the one hand, and the immunity of international organisations from national jurisdiction, on the other.

Austria is one of the few states that have granted constitutional status to the European Convention and its Protocols. Cases relating to the interpretation of Austria's obligations under the European Convention can therefore reach the Constitutional Court. Moreover, Article 140a of the Austrian Constitution entrusts the Court with the assessment of the constitutionality or the legality of international treaties. Therefore, the interpretation of treaties, like headquarters agreements and others, can be brought before the Constitutional Court in the same way as the Court assesses the constitutionality of laws and the legality of regulations. All this presupposes the Austrian understanding of the relationship between international and domestic law – "moderate monism", as we call it – allowing for the direct applicability of sufficiently clear treaties as part of domestic law, without the enactment of domestic legislation. Headquarters agreements with international organisations usually fulfil this condition and consequently have to be directly applied by the Austrian courts and other authorities. This, in particular, is the case for provisions granting immunity, which have to be respected *ex officio*.

[1] Federal Law Gazette 210/1958 as amended.

Access to the Constitutional Court for individuals traditionally requires the direct applicability of an allegedly unconstitutional provision to that individual. However, in 2015, access was further facilitated. Now, by the introduction of the right of the parties to a dispute before an ordinary court have the right to request, as part of the appeal proceedings, an examination of the constitutionality of a statutory or a treaty provision by the Constitutional Court.[2]

Three former staff members of two international organisations based in Vienna have so far exercised that right to question the constitutionality of international treaties before the Constitutional Court. At the moment, we are confronted with a fairly recent decision of the Constitutional Court of 2016, rejecting a complaint, and four pending Constitutional Court cases relating to the immunity of international organisations. It is quite likely that these four cases will be decided in the near future. What makes them interesting for constitutional lawyers is that the Article 140a procedure is rarely resorted to and that, so far, it has never led to a decision in substance. This may change with some of the present cases. What makes the cases interesting for international lawyers is that – notwithstanding the skilled advocacy of Austria's government lawyers – the future judgments may pronounce the unconstitutionality of certain aspects of the immunity of international organisations in view of a possible violation of Article 6 of the European Convention by Austria. This could be the case if the Court accepts the argument that Austria has violated this Article, which enjoys constitutional status, by granting international organisations immunity before Austrian courts and other authorities even for disputes with their staff members and former staff members, without ensuring that the organisations dispose of adequate alternatives to Austria's jurisdiction.

As you are well aware, the relationship between the immunity of international organisations and the right to a fair trial under Article 6 of the European Convention has been the subject of important judgments of the European Court of Human Rights and of learned writings of international lawyers. The legal opinions of these writers, including present members of the International Law Commission, have been much in demand among international organisations in Austria and among persons considering raising claims against such organisations. Interested persons are either staff members or former staff members of international organisations or economic operators demanding payment from international organisations. It is generally recognised that the immunity of international organisations from the jurisdiction of the courts and other authorities of their host state, and of other states, is necessary for their independent functioning. However, Article 6 of the European Convention requires a determination of civil rights and obligations "by an independent and impartial tribunal established by law". One way of dissolving the tension between these two concepts

[2] *"Parteiantrag auf Normenkontrolle"*, see Article 140(1)(d) of the Austrian Federal Constitution, Federal Law Gazette 1/1930 as amended by Federal Law Gazette I 114/2013, applicable also to treaties in view of Article 140a of the Austrian Federal Constitution.

is to resort to obligatory arbitration proceedings, a method traditionally envisaged in headquarters agreements. However, whether this traditional method really fulfils the criteria of the right to a fair trial under Article 6 or the right to an effective remedy under Article 13 of the European Convention is a point for further discussion, in particular in view of the often insurmountable costs of arbitration proceedings, also for relatively small claims.

Thus, for employment disputes with staff members and former staff members, adequate mechanisms within the international organisation appear to be a better option. However, to avoid a violation of the European Convention by the host state, such mechanisms would have to comply with the case law of the European Court, in particular with the principles enounced in the cases *Waite and Kennedy v. Germany* and *Beer* and *Regan v. Germany*.[3] In these cases, the Court had accepted the granting of immunity to an international organisation, provided that "the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention". The quality of such alternative means is undoubtedly improved if they provide for an appeal to an external body, like the UN Appeals Tribunal[4] or the Administrative Tribunal of the International Labour Organisation (ILO).[5] However, these external bodies cannot avoid scrutiny as to their independence and effectiveness either.

In 2015, a former staff member of the International Atomic Energy Agency in Vienna availed herself of the then new possibility to request, in the course of ordinary court proceedings before the Labour and Social Court and Regional Court of Appeal in Vienna, an assessment by the Austrian Constitutional Court of the constitutionality of a treaty provision. The applicant argued that the immunity provision of the Agency's Headquarters Agreement with Austria of 1957[6] was unconstitutional because it allegedly violated Article 6 of the European Convention. She also argued that the alternative mechanisms for dealing with employment cases against the Agency, namely the internal Joint Appeals Board and the ILO Administrative Tribunal, did not offer equivalent legal protection, comparable to a court of law. The Tribunal's judges, she criticised, were only serving renewable short-term appointments made by a political body.[7] In addition, complainants could not examine all documents, requests for public hearings were usually rejected, and the proceedings were inappropriately long. All this indicated, according to her, a violation of Article 6 of the

[3] ECtHR, *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18 February 1999; ECtHR, *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999.
[4] The United Nations Appeals Tribunal (UNAT) is based on its Statute, adopted by UN General Assembly Resolution 63/253 of 24 December 2008 as amended; https://www.un.org/en/internaljustice/unat/unat-statute.shtml.
[5] The Administrative Tribunal of the International Labour Organisation (ILOAT) is based on its Statute, adopted by the International Labour Conference on 9 October 1946 as amended; http://www.ilo.org/tribunal/about-us/WCMS_249194/lang--en/index.htm .
[6] Agreement between the Republic of Austria and the International Atomic Energy Agency regarding the Headquarters of the International Atomic Energy Agency, Federal Law Gazette 82/1958 as amended.
[7] Article III (2) ILOAT Statute: "The judges shall be appointed for a period of three years by the Conference of the International Labour Organization."

European Convention and the unconstitutionality of the immunity provision of the Agency's Headquarters Agreement.

Against this, the government argued in line with the European Court's case of *Bosphorus v. Ireland*[8] that, as long as an international organisation protected the fundamental rights in a way comparable to the protection provided by states, there was a rebuttable presumption in favour of compliance with the Convention. However, in accordance with the Court's decision in *Gasparini v. Italy and Belgium*,[9] it was sufficient that states parties, when transferring competences, had assumed in good faith that the internal dispute settlement mechanisms of the organisation were not manifestly deficient. The Court did not require that decisions at all levels were taken by instances qualifying as courts of law: it was sufficient that the Agency's Joint Appeals Board decisions could be complained against at the ILO Tribunal, which took its decisions on the basis of competences defined by law and applying established legal procedures.

The government argued further that the immunity of the Agency was not only based on the immunity provision of the Headquarters Agreement, which was the subject of the proceedings, but that the Agency´s immunity was also, like in the case of other organisations, based on the Agency's Statute[10] and even on customary international law. The function of headquarters agreements was to provide clarifications and certain additional rights, not to serve as the only base for the privileges and immunities of international organisations.

Considering these arguments, the Constitutional Court, in a procedural decision of 25 February 2016,[11] rejected the request. It reasoned that even by repealing the immunity provision of the Headquarters Agreement, the alleged unconstitutionality would not have been remedied, as there existed another legal base for the Agency's privileges and immunities, namely its Statute.

With this procedural decision, the Court did not pronounce itself on the government's argument that the immunity of international organisations was also based on customary international law. Furthermore, it did not have to go into the merits of the case and to examine whether the ILO Administrative Tribunal fully qualified as a "reasonable alternative means", as understood by the European Court.

This procedural decision was a relief for the foreign ministry's legal department for the moment, but it increased our alertness for the fair trial provision of the European Convention.

[8] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005.
[9] ECtHR, *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.
[10] Statute of the International Atomic Energy Agency, Federal Law Gazette 216/1957.
[11] See case SV 2/2015-18, decided by the Constitutional Court on 25 February 2016.

Thus, when an amendment of the Headquarters Agreement[12] with another international organisation, the OPEC Fund for International Development (OFID), was negotiated in the subsequent years, the Amending Protocol that entered into force on 1 August 2020[13] added, *inter alia*, two new immunity provisions. In addition to an exception already contained in other headquarters agreements excluding immunity for car accidents and the infringement of traffic regulations, a new Article 9(2) contains important rules on the settlement of disputes between the organisation and private parties: Any dispute between the organisation and a private party is to be settled by an agreed dispute settlement mechanism or a tribunal composed of a single arbitrator. Employment disputes, however, are not within the competence of the tribunal. The provision states that "[e]mployment disputes between OFID and its employees shall be settled by an effective dispute resolution mechanism pursuant to OFID´s internal regulations which protects the rights of the employees." This wording is intended to ensure the compatibility of OFID's immunity with Austria's obligations concerning the right to a fair trial and the right to an effective remedy under Articles 6 and 13 of the European Convention as well as the respective guarantees granted by Article 47 of the European Union Charter of Fundamental Rights.[14]

However, as I have mentioned in the beginning, the legal controversy continues with respect to other international organisations, as we have now four employment dispute cases relating to international organisations before the Constitutional Court. One of these cases takes up the old dispute with the International Atomic Energy Agency and challenges now not only the immunity provisions of the Agency's Headquarters Agreement, but also the immunity provision of the Agency's Statute. As you remember, the fact that the Statute itself was not challenged was the reason for the Constitutional Court in 2016 to reject the complaint. With the challenge now also against the Statute, the government's argument that the immunity of international organisations is also based on customary international law gains more importance. In the government's submission to the Court, this argument was supported in particular by references to judicial decisions of the Austrian Supreme Court[15] the *Amtsgericht Bonn,*[16] the *Rechtsbank Maastricht,*[17] the Italian *Corte Suprema di Cassazione,*[18] the

[12] Agreement between the Republic of Austria and the OPEC Fund for International Development Regarding the Headquarters of the Fund, Federal Law Gazette 248/1982, as amended.
[13] Federal Law Gazette III 94/2020.
[14] Official Journal C 202 of 7 June 2016, 389.
[15] OGH 1.12.2005, 6 Ob 150/05k.
[16] Amtsgericht Bonn 23 August 1961, Monatsschrift für Deutsches Recht 16 (1962) 315, quoted in *Reinisch*, International Organizations Before National Courts (Cambridge Studies in International and Comparative Law 10), 2000/2004, 149, 160 FN 657, 167f, 248; also in *Seidl-Hohenveldern*, Failure of Controls in the Sixth International Tin Agreement, in *Blokker* and *Muller* (eds), Towards More Effective Supervision by International Organizations, Essays in Honour of Henry G. Schermers (1994), I, 271.
[17] Rechtbank Maastricht 12 January 1984, *Eckhardt v. European Organization for the Safety of Air Navigation Control*, 94 ILR 331.
[18] Corte Suprema di Cassazione 25 November 1985, *Cristiani v. Italian Latin-American Institute*, 87 ILR 21.

Netherlands *Hoge Raad*[19] and the *Tribunal des Prud'hommes du Canton de Genève*.[20] If the Constitutional Court accepts this argument, it may reject the complaint once again, as repealing the immunity provision of the Statute would not remedy the situation, given that the Agency's immunity was also based on customary international law.

Furthermore, once again, in the case concerning the International Atomic Energy Agency as well as in the three other pending cases concerning the Organization of the Petroleum Exporting Countries (OPEC) – not to be confused with the OPEC Fund for International Development (OFID), previously referred to - the quality of the "reasonable alternative means" provided by the organisation to replace access to Austrian jurisdiction is an issue. Here again, we rely on the relevant jurisprudence of the European Court of Human Rights, now helpfully summarised in the judgment *Klausecker v. Germany,*[21] stating "that the attribution of privileges and immunities to international organisations was an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments".[22] Consequently, "the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law."[23]

Coming to the end of my presentation, you can imagine the great interest with which we are waiting for the decisions or judgments of the Constitutional Court in these cases. Should the Constitutional Court uphold the complaints against the immunity provisions of the international organisations, the Austrian government will have to work closely with the international organisation or organisations concerned (in particular with their legal advisers) to restore the constitutionality of the headquarters agreements. In that case, the Constitutional Court will probably grant a period of up to two years to amend the relevant treaty provisions.

A possible way to achieve this objective may be to refer to the solution found together with the OPEC Fund for International Development (OFID) and extend it to other international organisation. Thus, the headquarters agreements would explicitly stipulate, as in the case of OFID, that "employment disputes […] shall be settled by an effective dispute resolution mechanism pursuant to [the organisation´s] internal regulations which protects the rights of the employees." Such amendments would oblige international organisations to revise their internal regulations accordingly, in order to offer "reasonable alternative means" for employment disputes with their staff that effectively protect their rights. This would be a further example of the impact of the European Convention on Human Rights and Fundamental Freedoms on Austria's practice as host state of international organisations.

[19] Hoge Raad 20 December 1985, *Ary Spaans v Iran-United States Claims Tribunal*, 94 ILR 321.
[20] Tribunal des Prud'hommes (TPH) du Canton de Genève 17 November 1993, *ZM v Permanent Delegation of the League of Arab States to the United Nations*, 116 ILR 643.
[21] ECtHR, *Klausecker v. Germany*, no. 415/07, 29 January 2015.
[22] At 67.
[23] At 72.

In any event, the cases referred to in this presentation have raised our awareness for fair trial and effective remedy issues in the context of the immunity of international organisations and the desirability to address them, by the appropriate drafting of headquarters agreements and legislation, before they have an opportunity to reach Strasbourg.