

## **5. THE RIGHT OF STAFF MEMBERS TO A TRIBUNAL AS A LIMIT TO THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS IN EUROPE**

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### **INTRODUCTION**

“There is no liberty if the power to judge is not separated from the legislative and the executive power,”<sup>1</sup> as Charles de Montesquieu observed already in 1748. The separation of powers is one of the most fundamental conditions for the rule of law, forms a characteristic principle of constitutional law and is thus one of the main points discussed in the debate on constitutionalisation of international law.<sup>2</sup>

Indeed, the question of the independence of the judicial power stemming from this principle, and especially the question of the possibility to legally enforce its implementation, is still a matter of concern today regarding international organisations. The definition of this last term

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<sup>1</sup> C. MONTESQUIEU, *L’Esprit des lois*, t. I, Paris, Classiques Garnier, 2011, p. 169 (translated by the author): “Il n’y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutif.”

<sup>2</sup> See e. g. G. ULFSTEIN, “Institutions and Competences,” in J. KLABBERS, A. PETERS, G. ULFSTEIN, *The Constitutionalization of International Law*, Oxford/New York, Oxford University Press, 2009, pp. 60-62; A. PETERS, “Reconstruction constitutionnaliste du droit international: arguments pour et contre,” in H. RUIZ FABRI, E. JOUANNET, V. TOMKIEWICZ (eds.), *Select Proceedings of the European Society of International Law*, vol. 1, 2006, Oxford/Portland/Oregon, Hart Publishing, 2008, p. 363.

remains subject to a debate which goes beyond the topic of this chapter.<sup>3</sup> For the moment, we shall use the definition of the United Nations International Law Commission, according to which an “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”<sup>4</sup>

In order to operate independently of its member states, an international organisation employs its own staff. The qualification of an employment relationship as such is conditioned by a “contract of employment entered into between an individual and an international organization [which] is a source of rights and duties for the parties to it.”<sup>5</sup>

As the International Court of Justice (ICJ) points out in a 1954 advisory opinion, “[i]t was inevitable that there would be disputes between the Organization and its staff members as to their rights and duties.”<sup>6</sup> However, in the absence of an institution vested by the employing organisation with the power to settle such disputes, and recognised as an independent and impartial tribunal by the applicant, the staff member turns to the national judges. In this case, the organisation in question usually raises its immunity from jurisdiction<sup>7</sup> as a total or partial protection from the action of national tribunals.

Until the end of the twentieth century, national judges generally used this argument in order to justify the inadmissibility of the case, or they declined jurisdiction, without verifying whether the organisation had

<sup>3</sup> For a general presentation of this term, see e. g. S. BASTID, “Place de la notion d’institution dans une théorie générale des organisations internationales,” in A. MESTRE, *L’évolution du droit public: études offertes à Achille Mestre*, Paris, Sirey, 1956, pp. 43-51; J.-P. JACQUÉ, “Le constat,” in SFDI, *Colloque de Strasbourg: Les organisations internationales contemporaines*, Paris, Pedone, 1988, pp. 3-43 ; F. SEYERSTED, *Common Law of International Organizations*, Leiden/Boston, Martinus Nijhoff Publishers, 2008, pp. 37-64; H. G. SCHERMERS, N. BLOKKER, *International Institutional Law*, Leiden/Boston, Martinus Nijhoff Publishers, 5<sup>th</sup> ed. 2011, pp. 30-59, §§ 29-59; M.-C. RUNAVOT, “L’avenir du ‘modèle intergouvernemental’ de l’organisation internationale,” *RGDIP*, vol. 115, 2011, pp. 675-709.

<sup>4</sup> United Nations, General Assembly, doc. A/66/10, *Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011). Text of the draft articles on the responsibility of international organizations*, p. 52, § 87, art. 2 (a), first sentence.

<sup>5</sup> ICJ, *Judgment No. 2869 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development, Advisory Opinion of 1 February 2012: I.C.J. Reports 2012*, p. 28, § 76, or, in certain cases, an accepted letter of nomination.

<sup>6</sup> ICJ, *Effect of awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954*, p. 57.

<sup>7</sup> J. SALMON (dir.), *Dictionnaire de droit international public*, Bruxelles, Bruylants/AUf, 2001, p. 561: “Protection accordée à une organisation internationale, qui lui permet d’échapper totalement ou partiellement à l’action des tribunaux étatiques.” It is to be distinguished from the privileges which grant a material benefit.

attributed jurisdiction to a competent tribunal.<sup>8</sup> Yet, the need for recourse to courts or tribunals set up by each international organisation resulting from the absence of legal remedies before national courts was underlined as early as 1921, on the occasion of the birth of the League of Nations.<sup>9</sup> Since then, the question has remained a topic of concern<sup>10</sup> and even the Institute of International Law highlighted in two resolutions that international organs should provide “judicial redress” against their decisions.<sup>11</sup> For some, the right to legal remedy was prescribed by the common public interest,<sup>12</sup> or by the principle of legality,<sup>13</sup> or even by the rules of natural justice.<sup>14</sup>

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<sup>8</sup> Examples of decisions not recognising a limit to the immunity from jurisdiction of international organisations in France: *Conseil d'État*, 20 Febr. 1953, Weiss (*Institut de coopération intellectuelle*), *Recueil des arrêts du Conseil d'État*, 1953, p. 87; *Cass. 1<sup>ère</sup> civ.*, 14 Nov. 1995, *Hintermann v/ Western European Union (WEU)*; *Cass. soc.*, 4 March 2003, *X v/ Agence intergouvernementale de la francophonie*, application n° 01-41099. See for a critical and global analysis with more references: A. REINISCH, *International Organizations before National Courts*, Cambridge, Cambridge University Press, 2000. See also C. DOMINICE, “Observations sur le contentieux des Organisations internationales avec des personnes privées,” *AFDI*, vol. 45, 1999, pp. 623-648; Q. D. NGUYEN, “Les priviléges et immunités des organisations internationales d’après les jurisprudences nationales depuis 1945,” *AFDI*, vol. 3, 1957, pp. 262-304. For a general overview on how domestic courts dealt with disputes involving international organisations see K. WELLENS, *Remedies against International Organisations*, coll. “Cambridge Studies in International and Comparative Law,” Cambridge, Cambridge University Press, 2002, pp. 114-129, and on a potential increase of the role of domestic courts in dispute resolution involving international organisations see pp. 208-219. For an ancient presentation of the first decisions of the French *Conseil d'État*, see C. ROUSSEAU, “Jurisprudence française en matière de droit international public (1929-1931),” *RGDIP*, vol. 41, 1934, pp. 85-86.

<sup>9</sup> P. GRUNEBAUM-BALLIN, “De l’utilité d’une juridiction spéciale pour le règlement des litiges intéressant les services de la S.D.N.,” *Rev. dr. int. lég. comp.*, vol. 2, 1921, pp. 67-82, esp. pp. 78-82.

<sup>10</sup> E. g. J.-B. SIALELLI, “note sous l’arrêt de la Cour de cassation, 1<sup>ère</sup> section, arrêt du 6 juillet 1954, *Procureur général près la Cour de cassation c/ Sté Immobilière Dehodencq*,” *JDI*, vol. 83, 1956, p. 140: “[faute de tribunaux supranationaux] l’immunité de juridiction conduit donc toujours au déni de justice; elle place en définitive l’organisation internationale au-dessus des lois. Cette situation ne peut être tolérée. Il appartient à l’État qui a renoncé à la compétence de ses tribunaux sans prévoir de compétence de remplacement de se substituer à l’organisation internationale. Si l’action diplomatique échoue, la responsabilité de l’État signataire ne pourrait-elle pas être mise en œuvre devant les tribunaux administratifs nationaux [...]?” See also G. LANGROD, “La Réforme 1955 du Tribunal Administratif des Nations Unies,” *ZaöRV*, vol. 17, 1956, p. 250.

<sup>11</sup> Institute of International Law, resolution, session of Amsterdam, 25 Sept. 1957, *Judicial Redress against the Decisions of International Organs*, art. 3 (1); resolution, session of Oslo, 6 Sept. 1977, *Contracts Concluded by International Organizations with Private Persons*, art. 7-9.

<sup>12</sup> P. SIRAUD, *Le Tribunal administratif de la Société des Nations*, Paris, Librairie Mariale, 1942, p. 19, speaking of “l’intérêt général.”

<sup>13</sup> M. BEDJAOUI, *Fonction publique internationale et influences nationales*, Paris, Pedone, 1958, pp. 423-424, refers to the “principe de légalité.”

<sup>14</sup> *Accord collectif sur une procédure de règlement des différends conclu entre le Bureau international du Travail (BIT) et le Syndicat du personnel du BIT*, 13 Sept. 2000, art. 1 (3), International Labour Organisation (ILO) website, <http://www.ilo.org/public/french/staffun/docs/grievances.htm>, consulted on 17 Jan. 2013.

A real change in case law at a larger scale emerged only at the end of the last century. In Germany, the leading decision was *Hetzl versus Eurocontrol* (Eurocontrol II), rendered on 10 November 1981 by the *Bundesverfassungsgericht*. The Court verified whether, regarding the fundamental principles of the Constitution, the limits to the authorisation to transfer sovereign powers to international organisations according to article 24 (1) of the Basic Law were exceeded: this could be the case if, at the time of the creation of an intergovernmental institution and of its organisational and legal design, the guarantee of an effective legal remedy against acts of the public authority – already enshrined in the *Rechtsstaatsprinzip* – has not been sufficiently accommodated.<sup>15</sup>

Almost fifteen years later, the French *Cour de cassation* approached the topic cautiously at the occasion of the case *Hintermann versus Western European Union*, decided on 14 November 1995. Even though the Court did not apply a similar test, it engaged a debate on the following question in its annual report: “The consequence of international organisations’ immunity from jurisdiction [...] is the creation of a denial of justice, where there is no arbitral or jurisdictional dispute settlement mechanism organised inside each organisation. Can this denial of justice be avoided by a primacy of the European Convention on Human Rights, which guarantees the free access to a judge and to a fair and public hearing?”<sup>16</sup> Finally, on 19 June 1998, the Paris Court of Appeal rejected the immunity argument of UNESCO to give full effect to the prescribed arbitration procedure.<sup>17</sup>

The Swiss Federal Tribunal also cleared the way for a limit to immunity from jurisdiction based on the prohibition of denial of justice by deciding on 25 January 1999 that this immunity of an international organisation in the

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<sup>15</sup> Decision of the German *Bundesverfassungsgericht* (*BVerfGE*), 2. Senat, 10 Nov. 1981, *Hetzl v/ Eurocontrol (Eurocontrol II)*, *BVerfGE* 59, 63, §§ 79-100, esp. § 79: “mit Blick auf die Grundprinzipien der Verfassung bestehende Grenzen dieser ‘Übertragungsermächtigung’ [kraft Art. 24, Abs. 1, GG] könnten überschritten sein, wenn bei der Schaffung einer zwischenstaatlichen Einrichtung und bei ihrer organisatorischen und rechtlichen Ausgestaltung der – schon im Rechtsstaatsprinzip verankerten – Gewährleistung eines wirksamen Rechtsschutzes gegen Akte der öffentlichen Gewalt nicht hinreichend Rechnung getragen wurde.”

<sup>16</sup> French Cass., *Rapport annuel*, 1995, p. 418 (translated by the author): “Les immunités de juridiction des organisations internationales [...] ont pour conséquence, lorsque n'est pas organisé au sein de chaque organisation un mode de règlement arbitral ou juridictionnel des litiges, de créer un déni de justice [...]. Ce déni de justice peut-il être évité par la primauté de la convention européenne des droits de l'homme, qui garantit le libre accès au juge et le procès équitable?”.

<sup>17</sup> French *Cour d'appel de Paris*, 19 June 1998, *UNESCO c/ Boulois*, *Revue de l'arbitrage*, 1999, pp. 343-345, commented by C. JARROSSON, who welcomed the decision (*eod. loc.*, pp. 345-349). Also agreeing with the decision: E. GAILLARD, I. PINGEL-LENUZZA, “International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass,” *ICLQ*, vol. 51, 2002, p. 13.

case of disputes with its staff would be worrisome from the point of view of the rule of law if this led to a denial of justice.<sup>18</sup>

The European Commission of Human Rights for its part, without establishing a principle, verified in a very brief manner on 27 October 1998 in the case *Vito Failla versus Italy* whether a staff member of the North Atlantic Treaty Organisation (NATO) had access to an internal court and found that the right to legal remedy had been guaranteed, because the applicant had access to NATO's Appeals Board which could be considered as a jurisdictional body according to the Italian case law.<sup>19</sup>

The key-decisions in this matter were the judgments *Waite and Kennedy versus Germany* and *Beer and Regan versus Germany*, rendered on 18 February 1999 by the European Court of Human Rights (ECtHR), originally concerning disputes with the European Space Agency (ESA).<sup>20</sup> The ECtHR declared that neither the immunity from jurisdiction of international organisations,<sup>21</sup> nor the right to a tribunal,<sup>22</sup> is absolute. Unlike its former case law,<sup>23</sup> “[f]or the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”<sup>24</sup> Since then, the number of national courts accepting the absence of an internal legal process as a limit to the immunity from jurisdiction of a given international organisation has been growing steadily

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<sup>18</sup> Which was not the case in this dispute concerning the *League of Arab States*, Swiss federal tribunal, 25 Jan. 1999, commented by I. SEIDL-HOHENVELDERN, “Immunität der Arabischen Liga im Arbeitsstreit mit örtlich rekrutierten Bediensteten,” *IPRax*, vol. 19, 1999, pp. 273-274, who is in favour of the reasoning, p. 274.

<sup>19</sup> Eur. Com. H. R. (First Chamber), 27 Oct. 1998, *Vito Failla v/ Italy*, decision on the admissibility of the application n° 40720/98. See also Eur. Com. H. R., 12 April 1996, *Hendricus van der Peet v/ Germany*, on the admissibility of the application n° 26991/95, circumventing the control whether an equivalent protection to the Eur. Conv. H. R. is guaranteed in the legal order of the European Patent Office (EPO), considering that the disputes concerning recruitment, employment and retirement of civil servants (whether national or international) would not be covered by art. 6 (1) Eur. Conv. H. R.

<sup>20</sup> As Germany upheld ESA's immunity, and as ESA is not a party to the Eur. Conv. H. R., the applicants filed a case against Germany. The legal reasoning was confirmed for instance by ECtHR, 11 May 2000, *A. L. v/ Italy*, decision on the admissibility, application n° 41387/98, originally concerning the NATO.

<sup>21</sup> ECtHR, Grand Chamber, 18 Febr. 1999, *Waite and Kennedy v/ Germany*, application n° 26083/94, § 67; 18 Febr. 1999, *Beer and Regan v/ Germany*, application n° 28934/95, § 57.

<sup>22</sup> ECtHR, Grand Chamber, *Waite and Kennedy v/ Germany*, *eod. loc.*, § 59; *Beer and Regan v/ Germany*, *eod. loc.*, § 49; see also judgment *Luis Maria Lopez Cifuentes v/ Spain*, 7 July 2009, § 26, oddly recalling the decision of the Eur. Com. H. R., 12 Dec. 1988, *Spaans v/ Netherlands*, n° 12516/86, *DR* 58, pp. 122-125.

<sup>23</sup> Eur. Com. H. R. *Spaans v/ Netherlands*, *ibid.*

<sup>24</sup> ECtHR, Grand Chamber, *Waite and Kennedy v/ Germany*, *op. cit.* note 21, § 68; *Beer and Regan v/ Germany*, *op. cit.* note 21, § 58.

in matters concerning disputes between international organisations and their staff.<sup>25</sup>

The following question arises: to what extent and with which consequences is the right of a staff member to a tribunal recognised as a limit to immunity from jurisdiction by the national courts and the ECtHR in Europe? More generally speaking, do international organisations evolve towards a constitutional model incorporating the principle of rule of law under the influence of these courts, especially in Europe?

It follows from a legal analysis that the right of recourse to the courts constitutes a legal norm, which judges of national courts and of the ECtHR may oppose to international organisations and which may constitute a limit to their immunity from jurisdiction (I). Nevertheless, this prohibition of the denial of justice is not entirely guaranteed in practice (II).

### I. THE OPPOSABILITY OF THE LIMIT TO IMMUNITY TO INTERNATIONAL ORGANISATIONS

The opposability of the prohibition of denial of justice to international organisations by national or European courts results from the fact that this rule is established both by international (A) and by national law (B).

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<sup>25</sup> For instance, Dutch District Court of the Hague, *Rechtbank's-Gravenhage*, 13 Febr. 2002, *H. B., E. P. and K. S. v/ International Service for National Agricultural Research, NIPR*, n° 268, 2004, English translation in *NYIL*, vol. 35, 2004, pp. 453-458; *Hoge Raad*, 23 Oct. 2009, *X v/ EPO*, n° 08/00118; District Court of The Hague, 16 July 2013, *X v/ EPO*, n° 1223887/12-31860, English unofficial translation available on the website of the Staff Union of EPO, <https://www.suepo.org/rights/public/archive/nl-epo-immunity-entranslation.pdf>, consulted on 7 Nov. 2013; French *Cass. soc.*, 25 Jan. 2005, *Degboe v/ African Development Bank*, application n° 04-41012; *soc.*, 11 Febr. 2009, *De Beaugrenier v/ UNESCO*, application n° 07-44240; *soc.*, 29 Sept. 2010, *Illemassene v/ Organisation for Economic Co-operation and Development (OECD)*, application n° 09-41030; Italian *Corte Suprema di Cassazione*, 28 Oct. 2005, *Pistelli v/ Istituto universitario europeo*, n° 20995; 19 Febr. 2007, *Drago v/ Istituto internazionale per le risorse*, n° 3718; German *Bundesgerichtshof*, 9 July 2009, *X v/ Europäische Schule Frankfurt am Main*, III ZR 46/08, esp. §§ 35-36; *BVerfGE*, 27 Jan. 2010, *S. v/ EPO*, 2 BvR 2253/06, § 20; Belgian *Cour du Travail*, Bruxelles, 17 Sept. 2003, *Mme S v/ WEU*, published in *JT*, vol. 123, 2003, pp. 617-619, confirmed on this point by the Belgian *Cass.*, 21 Dec. 2009, n° S.04.0129.F; Swiss CA Canton of Geneva, *Juridiction des prud'hommes*, 25 March 2009, *X v/ Organisation of the Islamic Conference*, CAPH/53/2009, § 3, confirmed by the *Tribunal fédéral*, Civ. I, 21 Dec. 2009, 4A\_216/2009.

*A. – The customary character of the  
right of recourse to the courts*

Although the right of recourse to the courts constitutes a general principle (1), it does not amount to a peremptory norm of international law (2).

*1. A general principle*

The right of recourse to the courts is a shield against denial of justice.<sup>26</sup> The prohibition of the denial of justice stems from a custom which goes back to the thirteenth century<sup>27</sup> and can be found in most national legal orders, which makes it a general principle *of law*<sup>28</sup> in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice. As the ECtHR has recalled in its judgment *Golder versus United Kingdom of Great Britain and Northern Ireland*: “The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 § 1 must be read in the light of these principles.”<sup>29</sup>

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<sup>26</sup> For that reason, the World Bank Board of Directors has set up its Administrative Tribunal on 30 Apr. 1980, with the competence “to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979” (*Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation*, art. XVII), *i. e.* to judge disputes which arose before its establishment, “[e]ncontre au principe général applicable en la matière,” D. RUZIÉ, “Le pouvoir des organisations internationales de modifier unilatéralement la condition juridique des fonctionnaires internationaux. Droits acquis ou droits essentiels,” *JDI*, vol. 109, 1982, pp. 421-436, p. 422, footnote 7.

<sup>27</sup> C. DE VISSCHER, “Dénie de Justice,” *RCADI*, vol. 52, 1935, pp. 370-371. See also *e. g.* E. de VATTEL, *Le Droit des Gens ou Principes de la Loi Naturelle appliqués à la conduite et aux affaires des Nations et Souverains*, 1758, Washington, Carnegie Institution of Washington, 1916, vol. 1, book 2, chapter 18, p. 536, § 350 and J. PAULSSON, *Denial of Justice in International Law*, Cambridge, Cambridge University Press, 2005, p. 65.

<sup>28</sup> C. ROUSSEAU, *Principes généraux du droit international public*, Paris, Pedone, 1944, p. 917; see also S. BASTID, “Have the U. N. Administrative Tribunals Contributed to the Development of International Law?”, in W. FRIEDMANN, L. HENKIN, O. LISSITZYN, *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup*, New York/London, Columbia University Press, 1972, pp. 309-310. As for the practice in national legal orders, see S. EL SAWAH, *Les Immunités des États et des organisations internationales*, Bruxelles, Larcier, 2012, pp. 37-66 and its annexe, pp. 768-773, providing a table comparing the constitutions of 47 states around the world and their rules concerning the *État de droit*, fundamental rights and freedoms, separation of powers, independence and impartiality of the judges, *Habeas corpus* and the right to access to a judge.

<sup>29</sup> Eur. Court H. R., 21 Febr. 1975, *Golder case*, series A, vol. 18, taking its decision in plenary session, application n° 4451/70, p. 17, § 35.

The role of such principles inspired from national law is to avoid a *non liquet*. They are therefore supplementary,<sup>30</sup> as has been specified by the Administrative Tribunal of the League of Nations since its first decisions rendered on 15 January 1929,<sup>31</sup> and confirmed by the Administrative Tribunal of the International Labour Organisation (ILOAT).<sup>32</sup> As Charles Rousseau explains it, this subsidiarity is based on the principle *lex specialis derogat legi generali*.<sup>33</sup> For that, the general principles of law are different from international custom and form an independent source of law.<sup>34</sup>

In addition to its quality of a general principle of law, the prohibition of denial of justice results from the existence of international relations and from relations between legal orders. Thus, it is also a general principle of international law<sup>35</sup> and accordingly an international custom.<sup>36</sup> It is actually not impossible that one and the same rule is qualified both.<sup>37</sup> For instance, according to Suzanne Bastid, “[t]he availability of a legal remedy – as a guarantee of respect for the law – may now be considered a general

<sup>30</sup> C. ROUSSEAU, *Principes généraux*, *op. cit.* note 28, p. 890, § 511; H. RUIZ FABRI, *Sur quelques aspects de la théorie de la coutume en droit international contemporain*, PhD thesis in law, Bordeaux, University of Bordeaux I, 1989, p. 525; G. M. PALMIERI, “Fonction publique internationale et droit international des droits de l’homme,” in SFDI-IIDH, *Journées d’études de Strasbourg: La soumission des organisations internationales aux normes relatives aux droits de l’homme*, Pedone, 2009, p. 58.

<sup>31</sup> It states that they are to be applied as a subsidiary, “à défaut de l’existence dans telle espèce d’un droit positif” (Administrative Tribunal of the League of Nations, judgments n° 1, 2 and 3, 15 Jan. 1929). See also C. ROUSSEAU, *Principes généraux*, *op. cit.* note 28, p. 890, § 511.

<sup>32</sup> ILOAT, judgment n° 30, 13 July 1957, *Sharma v/ILO*; ILOAT, judgment n° 490, 3 June 1982, *Guthapfel v/European Organisation for Nuclear Research (CERN)*, § 3: “The Tribunal will determine the complainant’s status by reference to the Staff Rules and Regulations and only where they are silent will it apply the general principles governing international public service.”

<sup>33</sup> C. ROUSSEAU, *Principes généraux*, *op. cit.* note 28, p. 925, § 527.

<sup>34</sup> H. RUIZ FABRI, *Aspects de la théorie de la coutume*, *op. cit.* note 30, p. 528.

<sup>35</sup> E. g. H. ASCENSIO, “Le règlement des différends liés à la violation par les organisations internationales des normes relatives aux droits de l’homme,” in SFDI-IIDH, *op. cit.* note 30, p. 116.

<sup>36</sup> On the customary character of general principles of international law: M. VIRALLY, “Le rôle des ‘principes’ dans le développement du droit international,” *Recueil d’études de droit international en hommage à Paul Guggenheim*, Paris, diffusion A. Lesot, 1968, p. 532; H. RUIZ FABRI, *Aspects de la théorie de la coutume*, *op. cit.* note 30, pp. 529-530. On the customary character of the right of recourse to the courts: E. DAVID, “Bruxelles (9<sup>e</sup> ch.), 4 mars 2003. Observations,” *JT*, vol. 122, 2003, p. 687, §§ 15-16, commenting however a decision on immunity from execution.

<sup>37</sup> Hélène Ruiz Fabri asserted that it shall not be excluded that general principles of law are not by nature transitional in the sense that their normal vocation would be to be in the end absorbed, in particular, by a customary rule, or, possibly, by an agreement (H. RUIZ FABRI, *op. cit.* note 30, p. 528). On this possibility in general: *eod. loc.*, p. 531: “En définitive, il semble que dans cette catégorie de règles, on puisse caractériser une échelle de détachement progressif du droit interne jusqu’à un rattachement pur au droit international. Dans ce cadre, la nécessité de rattacher à la coutume progresse au même rythme, la velléité d’absorption coutumière étant présente en permanence. La distinction entre deux catégories de principes, pour être pédagogique et mettre en valeur le caractère non uniforme de leur origine, est à cet égard un peu réductrice, en tous cas, dans la relation qui s’établit avec la coutume.”

principle of law in the sense of Article 38 of the Statute of the International Court. This is so by virtue of a customary international rule, that international organizations today appear bound to establish legal remedies for the good of all their personnel and of those who may invoke statutory rules [...].”<sup>38</sup>

International organisations are bound by international custom in the relationship with their staff members,<sup>39</sup> so they are also bound by the general principle which prohibits the denial of justice. For instance, the ICJ considered in its 1954 advisory opinion that “[i]t would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations [...] to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.”<sup>40</sup>

Only one year earlier, the ILOAT considered that “the Administrative Tribunal, by virtue of the very purpose for which it was created, should be considered as governed by general legal principles (*instance de droit commun*) with the necessary powers to guarantee the security of employment of all officials attached to the International Labour Organisation [(ILO) and that,...] in the absence of [...] specific conditions being provided, they [officials attached to the ILO] cannot be left without any right of appeal.”<sup>41</sup> In 1968 it stated even more explicitly: “While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognised so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that

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<sup>38</sup> S. BASTID, « U. N. Administrative Tribunals », *op. cit.* note 28, pp. 309-310. See also G. NOVAK, A. REINISCH, “Desirable standards for the design of administrative tribunals from the perspective of domestic courts,” in E. OLUFEMI (ed.), *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal*, Leiden/Boston, Martinus Nijhoff Publishers, 2012, pp. 278-279.

<sup>39</sup> ILOAT, judgment n° 630, 5 Dec. 1984, *Rudin (n° 3) v/ ILO*, § 5: “The rights and duties of international officials are not determined exclusively by the Staff Regulations. Custom and usage matter as well and indeed they do no more than consecrate general principles which are embodied in the law in most countries.” See also CA The Hague, 4 July 2011, *X v/ EPO*, application n° 200.065.887/01, § 16, referring to international custom, international Human Rights conventions and general principles of law.

<sup>40</sup> ICJ, *Advisory Opinion of July 13th, 1954*, *op. cit.* note 6, p. 57, concerning the UN.

<sup>41</sup> ILOAT, judgment n° 11, 12 Aug. 1953, *Micheline Desgranges v/ ILO*.

any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.”<sup>42</sup>

Since then, the ILOAT has on several occasions given full effect to the right to appeal,<sup>43</sup> taking it even beyond the right to access to a court, for instance concerning internal administrative proceedings,<sup>44</sup> and continues to apply it.<sup>45</sup> Also the Administrative Tribunal of the Council of Europe affirms that international agents have to have access to a jurisdiction which judges the disputes in which they are involved<sup>46</sup> and the new United Nations Appeals Tribunal (UNAT) considers this principle in a similar manner.<sup>47</sup>

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<sup>42</sup> ILOAT, judgment n° 122, 15 Oct. 1968, *Chadsey v/ Universal Postal Union (UPU)*.

<sup>43</sup> E. g. ILOAT, judgment n° 885, 30 June 1988, *West (n° 10) v/ EPO*, § 2: “An EPO staff member [...] has the right to submit an internal appeal and, if still dissatisfied, to appeal ultimately to the Tribunal. The existence of the right is in the interest of both sides since it serves to maintain harmony, general efficiency and good morale in the Organisation,” confirmed by ILOAT, judgments n° 1328, 31 Jan. 1994, *Bluske (n° 3) v/ World Intellectual Property Organisation (WIPO)*, § 13; n° 1451, 6 July 1995, *Hamouda et al. v/ UPU*, § 28: “and any conflict of jurisdiction must invariably be so resolved as to allow no judicial void where conflicting jurisdictions decline competence;” n° 1660, 10 July 1997, *Aschenbrenner (n° 2), Tanner-Zwettler, Girod and Hertzschuch v/ European Free Trade Association*, § 15: “According to Judgment 1330 (*in re Bangasser and others*) of 31 January 1994 and other precedents, the right to appeal to an international administrative tribunal forms part of the essential safeguards that international civil servants must enjoy. The defendant surely realised that access to the Tribunal formed part of its staff’s acquired rights;” n° 1773, 9 July 1998, *Cissé (n° 1 and 2) v/ ILO*, § 6, accepting its competence, because the deputy director had refused the applicants request for arbitration, i. e. the procedure provided for by the parties; n° 2139, 15 July 2002, *Mr. D. H. U. v/ International Atomic Energy Agency*, § 6: “The right of international officials to resort to all internal and jurisdictional remedies available to them without detriment to their career is an essential guarantee to which the Tribunal attaches the greatest importance;” n° 2232, 16 July 2003, *Bustani v/ Organisation for the Prohibition of Chemical Weapons*, § 9: “Although the procedural rules governing appeals by staff members to the Tribunal do not appear to be appropriate to the case of the Director-General [...], that weakness cannot deprive him of his right, as an international civil servant, to come before the Tribunal.”

<sup>44</sup> E. g. ILOAT, judgment n° 451, 14 May 1981, *Dora Dobosch v/ Pan American Health Organisation*, § 8: “But when the proceedings have been allowed to deteriorate to a point at which there is a denial of justice, that is, when the delay is inordinate and inexcusable, such an intention can be inferred.” See also ILOAT, judgments n° 2551, 12 July 2006, *Mrs. M. P. v/ International Telecommunication Union*, § 13; n° 3144, 4 July 2012, *Ms. S. N. G. v/ WIPO*, § 8.

<sup>45</sup> ILOAT, judgment n° 2715, 6 Febr. 2008, *Mr. M. Z. v/ Customs Co-operation Council*, § 13: “[...] An international organisation commits a serious breach of the general principles of law by violating, through such conduct, international civil servants’ right of appeal, especially to the Tribunal.” (In order to obtain payment of the sum in question, the complainant had to renounce all means of appeal, pursuant to a unilateral act from the Secretary General).

<sup>46</sup> Council of Europe Administrative Tribunal, application n° 255/1999, 22 March 2000, *Maria Grazia Loria-Albanese v/ Secretary General*, § 22: “les agents internationaux ont droit à ce qu’une juridiction statue sur les différends qui les concernent.”

<sup>47</sup> UNAT, judgement n° 2011-UNAT-116, 11 March 2011, *Iskandar v/ Secretary General of the United Nations*, § 28: “Without access to the administration of justice system within the United Nations, Iskandar would have no right to an effective remedy from the competent tribunal in respect of administrative decisions taken by [African Union/United Nations Hybrid operation in Darfur.] UNAMID. This would be a denial of justice.” The principle was also affirmed in judgement n° 2011-UNAT-120, 11 March 2011, *Gabaldon v/ Secretary General of the United Nations*, § 29.

It results that international organisations do not only have a “moral and political duty” to set up a jurisdiction for the types of disputes studied here,<sup>48</sup> but also a legal obligation, as the right of recourse to the courts is a general principle of law and even international custom which is opposable to international organisations. However, this solid legal basis does not amount to a *jus cogens* character of the right of recourse to the courts.

## 2. *The absence of jus cogens character*

At the end of the twentieth century the idea started to emerge that the right to a tribunal falls under *jus cogens*, peremptory norms of general international law.<sup>49</sup> The legal consequences of such a qualification are defined in the first sentence of article 53 of the Vienna Convention on the Law of Treaties (VCLT): “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”<sup>50</sup>

Although it is true that national judges in Europe cannot declare a treaty granting immunity from jurisdiction to an international organisation void, what they do is to set aside one of the two rules after having struck a balance between the rule granting immunity and the right to legal remedy. In doing so, they consider that the two legal rules are situated at the same level in the hierarchy of norms under international law:<sup>51</sup> one exists according to an international agreement and the other by virtue of international custom.

As an exception, the Italian *Corte Suprema di Cassazione* referred in its decision *Pistelli versus Istituto universitario europeo* to article 6 of the European Convention on Human Rights, read together with article 6 (2) of the

<sup>48</sup> A. PELLET, *Recherche sur quelques questions d'actualité. L'exemple de l'OCDE: Les voies de recours ouverts aux fonctionnaires internationaux*, Paris, Pedone, 1982, pp. 15-16.

<sup>49</sup> C. DOMINICÉ, “Observations sur le contentieux des Organisations internationales,” *op. cit.* note 8, p. 638; M. AUDIT, “Immunité de juridiction des organisations internationales et droit à un procès équitable,” *RCDIP*, vol. 93, 2004, p. 418: “L’arrêt [de la Cour d’appel de Paris du 7 oct. 2003, *Banque africaine de développement c/ M. A. Degboe*] a donc implicitement analysé la présence d’une hiérarchie, matérielle cette fois-ci, des normes issues du droit international public. On rejoint alors l’idée selon laquelle il existerait un *jus cogens* au regard de ce dernier ordre juridique, des règles véhiculant des principes si fondamentaux qu’elles se placent au-dessus des autres,” slightly adjusting this idea on p. 419; M. G. PALMIERI, “Fonction publique internationale,” *op. cit.* note 30, p. 58: “La valeur juridique des principes généraux du droit, caractérisée par l’impérativité, et la non-dérogeabilité, les apparaîtent au *jus cogens*. Tel est également l’avis d’une certaine doctrine, notamment sud-américaine;” C. F. AMERASINGHE, “Accountability of International Organisations for violations of the Human Rights of Staff,” in J. WOUTERS et al. (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp/Cambridge/Portland, Intersentia, 2010, p. 528 and p. 531.

<sup>50</sup> VCLT, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331, entered into force on 27 Jan. 1980, art. 53.

<sup>51</sup> P. SANDS, P. KLEIN, *Bowett’s Law of International Institutions*, London, Thomson Reuters Limited, 6<sup>th</sup> ed. 2009, p. 499, § 15-054.

Treaty on European Union<sup>52</sup> as “*jus cogens*” of European “institutionality.”<sup>53</sup> However, it limited the effect of this norm to the legal order of the European Institutions, it did not even consider that there was a breach of that norm, and upheld in the end the Institute’s jurisdictional immunity. Furthermore, the Court did not qualify the right of recourse to the court as a *jus cogens* right later on in similar cases, even though it refused the jurisdictional immunity.<sup>54</sup> It is therefore doubtful whether the Italian *Corte Suprema di Cassazione* seeks to uphold its qualification, or even meant peremptory norms of international law in general when referring to *jus cogens*. It should also be noted that, even in the sphere of application of the European Convention on Human Rights, the right of recourse to the courts is not protected by article 15 of this Convention and, consequently, does not amount to a non-derogable right or to *jus cogens*.<sup>55</sup>

If the right of recourse to the courts were a rule of *jus cogens* character, the international administrative tribunals would have to declare themselves competent at all times, which they do not do as they carefully respect the limits set by their statutes.<sup>56</sup> Moreover, immunity from jurisdiction of international organisations would be unlawful as such because it aims at prohibiting access to national courts. But this is not the case as its precise

<sup>52</sup> EU, Official Journal of the European Communities, C 325/5, 24 Dec. 2002, *Consolidated version of the Treaty on European Union*, art. 6 (2): “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.”

<sup>53</sup> Italian *Corte Suprema di Cassazione*, 28 Oct. 2005, *Pistelli v/ Istituto universitario europeo*, n° 20995, ILDC translation, ILDC 297 (IT 2005), § 14.3: “L’istituto, del resto, è stato creato da paesi aderenti all’Unione europea per valorizzare il patrimonio culturale dell’Europa e le sue tradizioni costituzionali, nonché le sue istituzioni; non poteva, quindi, fondarsi su di una convenzione in contrasto con un valore cardine dell’istituzionalità europea e del suo *ius cogens*, valore consacrato dall’art. 6, par. 2, del Trattato sull’Unione [...] letto in connessione con l’art. 6 della Convenzione europea di diritto dell’uomo e l’art. 46, lett. d), dello stesso Trattato UE (si veda anche l’art. 14 del Patto sui diritti civili e politici) – e dall’art. II-47, par. 2, della Carta fondamentale dei diritti dell’Unione.”

<sup>54</sup> Italian *C. Sup. Cass.*, 19 Febr. 2007, *Drago v/ Istituto internazionale per le risorse*, n° 3718, § 7.

<sup>55</sup> See also E. DAVID, “Bruxelles,” *op. cit.* note 36, p. 687, n° 17. Furthermore, the Swiss *Tribunal fédéral* has confirmed in 2008 in a case concerning the application of Security Council resolutions, that the right of recourse to the courts as it is inscribed in art. 14 of the International Covenant on Civil and Political Rights and in art. 6 of the Eur. Conv. H. R. is not a peremptory norm of general international law and that conceiving a regional *jus cogens* would be inconsistent with article 53 of the Vienna Convention (Swiss *Tribunal fédéral*, 23 Jan. 2008, *Nada v/ Seco*, BGE 133 II 450 (2007), § 8.2).

<sup>56</sup> See e. g. ILOAT, judgement n° 2657, 11 July 2007, *M. R. K. v/ EPO*, § 5: “However regrettable a decision declining jurisdiction may be, in that the complainant is liable to feel that he is the victim of a denial of justice, the Tribunal has no option but to confirm the well-established case law according to which it is a court of limited jurisdiction and ‘bound to apply the mandatory provisions governing its competence’, as stated in Judgment 67, delivered on October 1962.”

*raison d'être* is to ensure international organisations' independence from states<sup>57</sup> and to guarantee equal treatment of all staff members. It avoids heterogeneity in the national case law regarding international organisations<sup>58</sup> and thus forum shopping. Such immunity is for these reasons of much use and not a "shameless fraud."<sup>59</sup> Consequently, the right of recourse to the courts is not a rule of *jus cogens* character.<sup>60</sup>

It also should be noted that there is no need to qualify the right of recourse to the courts as a rule of *jus cogens* character,<sup>61</sup> since its customary nature already obliges international organisations to respect the prohibition of the denial of justice.

#### B. – *The prohibition of denial of justice: a fundamental national rule*

In practice, national judges refer neither to the general principle nor to international custom when striking a balance between the right of recourse to the courts and the jurisdictional immunity of international organisations. They prefer to apply rules inherent to their own legal order. In the domestic law of European states, three different legal bases of the right of recourse to the courts are being applied: article 6 (1) of the European Convention on Human Rights, the right of recourse to the courts as a principle of constitutional value (1) and the national conception of the international public policy (2).

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<sup>57</sup> E. g. I. SEIDL-HOHENVELDERN, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen: Rechtsgutachten für Eurocontrol*, Berlin, Duncker & Humblot, 1981, pp. 13, 31.

<sup>58</sup> E. g. I. SEIDL-HOHENVELDERN, *Rechtsgutachten, eod. loc.*, pp. 13, 19.

<sup>59</sup> It was indeed qualified as such by G. L. RIOS, E. P. FLAHERTY, "International organization reform or impunity? Immunity is the problem," *ILSA J. Int'l & Comp. L.*, vol. 16, 2010, p. 434.

<sup>60</sup> See also J.-F. FLAUSS, "Droit des immunités et protection internationale des droits de l'homme," *RSDIE*, vol. 10, 2000, p. 306; E. DAVID, "Bruxelles," *op. cit.* note 36, p. 686, §§ 6, 17; H. FOX, in I. PINGEL, *Droit des immunités et exigences du procès équitable*, Paris, Pedone, 2004, p. 73; J.-F. FLAUSS, "Immunités des organisations internationales et droit international des droits de l'homme," in SFDI-IIDH, *op. cit.* note 30, pp. 81-83; G. FASANO, *Relecture contemporaine des priviléges et immunités des organisations intergouvernementales et autres entités internationales*, PhD thesis, Paris, University Paris 1, 2010, pp. 256-257; S. EL SAWAH, *Immunités des États et des organisations internationales*, *op. cit.* note 28, p. 427.

<sup>61</sup> See A. REINISCH, U. A. WEBER, "In the shadow of Waite and Kennedy: the jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement," *IntlOrgLRev*, vol. 1, 2004, p. 93.

### *1. A principle rooted in the national legal orders*

The Belgian,<sup>62</sup> the Dutch<sup>63</sup> and the Swiss<sup>64</sup> judges, for instance, tend to take for basis article 6 (1) of the European Convention on Human Rights. However, international organisations are usually not parties to this Convention<sup>65</sup> and, by virtue of the principle *pacta tertiis nec nocent nec prosunt*,<sup>66</sup> article 6 (1) of the Convention is not binding on international organisations.<sup>67</sup> Here, this rule is not applied as a rule of an international treaty, but as a rule that forms an integral part of the national legal order, which, again, is not opposable as such to international organisations.<sup>68</sup>

The ECtHR on the other hand could refer to this article 6 (1) because it only examined whether the states parties to the Convention complied with it. So, it does not directly pass judgement on the international organisation which is the employer, unlike the national courts.

The advantage of the reference to the Constitution of the forum state, especially by the German<sup>69</sup> and the Italian<sup>70</sup> judges, is that it underlines that the right of recourse to the courts is a condition of the separation of powers and is one of the conditions *sine qua non* of the *Rechtsstaatlichkeit*. Nevertheless, this rule only takes effect in the domestic legal order. Is there therefore an operational link between legal orders missing to be able to oppose this rule to international organisations?

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<sup>62</sup> Brussels *Tribunal de Travail*, 1 Febr. 2005, *Auditeur du Travail v/ Chapman, NATO, NACMA and the Belgian State*; Brussels *Tribunal de Travail*, 17 Sept. 2003, *Siedler v/ WEU, JT*, vol. 123, 2003, pp. 617-619; Belgian *Cour de cassation*, 21 Dec. 2009, *WEU v/ Siedler*, n° S.04.0129.F.

<sup>63</sup> *Hoge Raad der Nederlanden*, 23 Oct. 2009, *X c/ EPO*, 08/00118.

<sup>64</sup> Swiss CA, Canton of Geneva, 25 March 2009, *op. cit.* note 25, § 3.

<sup>65</sup> Leaving besides the case of the EU, which committed to adhere to the convention (art. 6 (2) of the Treaty on the functioning of the EU, signed on 13 Dec. 2007, and came into force on 1 Dec. 2009).

<sup>66</sup> *I. e.* the international custom taken up by the art. 34 and 35 of the *VCLT*, 23 May 1969, *op. cit.* note 50, and taken up *mutatis mutandis* by the art. 34 and 35 of the *VCLT between States and International Organisations or between International Organisations*, doc. A/CONF/129/15, 21 March 1986, not yet in force.

<sup>67</sup> French *Cass. soc.*, 11 Febr. 2009, *De Beaugrenier v/ UNESCO*, application n° 07-44240, implicitly; *Cass. soc.*, 29 Sept. 2010, *Illemassene v/ OECD*, application n° 09-41030, implicitly.

<sup>68</sup> *VCLT*, 23 May 1969, *op. cit.* note 50, art. 27, first sentence, taken up *mutatis mutandis* by the *VCLT between States and International Organisations or between International Organisations*, *op. cit.* note 66, art. 27 (1).

<sup>69</sup> German *BVerfGE, Eurocontrol II*, *op. cit.* note 15, §§ 79-100; *BVerfGE*, 27 Jan. 2010, *S. v/ EPO*, 2 BvR 2253/06, § 20.

<sup>70</sup> Italian *C. Sup. Cass., Pistelli v/ Istituto universitario europeo*, 28 Oct. 2005, n° 20995, §§ 14-14.3; *C. Sup. Cass., Drago v/ Istituto internazionale per le risorse*, 19 Febr. 2007, n° 3718, § 6.5.

The third solution is to refer to the *ordre public international*, the international public policy, as done by the French judges since the case *Degboe versus African Development Bank*, of 25 January 2005.<sup>71</sup>

## 2. The international public policy as a possible junction

In French law, the term *ordre public international* is borrowed from private international law. If one adopts a general conception of this branch of law of which no unambiguous definition exists,<sup>72</sup> it is an instrument to manage the plurality of laws.<sup>73</sup> As some public actors have developed activities which do not necessarily require the exercise of public-authority powers but are rather of a private nature, this branch of law is not only applied to international relations between private persons, but also to cases between a private person and a public entity.<sup>74</sup> Thus, the rules on competence, such as the prohibition of denial of justice, falling under private international law might be applied to disputes involving international organisations before national courts.<sup>75</sup>

The concept of international public policy aims at “limiting the application of the foreign law to the extent that its rules are incompatible with the essential principles of the law of the forum state.”<sup>76</sup> It may precisely safeguard constitutional values, such as the right to an effective remedy<sup>77</sup> which implies the right of recourse to an independent and impartial body,<sup>78</sup>

<sup>71</sup> French *Cass. soc.*, 25 Jan. 2005, *Degboe v/ Banque africaine de développement*, application n° 04-41012.

<sup>72</sup> For other definitions, see for instance J. SALMON (dir.), *Dictionnaire*, *op. cit.* note 7, pp. 386-387.

<sup>73</sup> P. FRANCESCAKIS, “Introduction à l’édition française,” in S. ROMANO, *L’ordre juridique*, Paris, Dalloz, 1975, pp. xv-xvi: “Ce que fait en réalité le droit international privé quand il opère de la sorte – et ce qu’il fait de manière plus apparente que le droit international dit public – c’est gérer un pluralisme juridique”; D. BUREAU, H. MUIR WATT, *Droit international privé*, t. I, Paris, Puf, 2007, p. 32, § 14: “[un] instrument de gestion de la diversité des droits.”

<sup>74</sup> G. GOLDSTEIN, E. GROFFIER, *Droit international privé*, t. I, Cowansville (Canada), Les éd. Yvon Blais Inc., 1998, p. 4, § 2.

<sup>75</sup> I. PINGEL, “De l’immunité de juridiction des organisations internationales constitutive d’un déni de justice,” *RCDIP*, vol. 94, 2005, pp. 477-483.

<sup>76</sup> J. SALMON (dir.), *Dictionnaire*, *op. cit.* note 7, p. 788: “limiter l’application de la loi étrangère dans la mesure où les dispositions de celle-ci sont incompatibles avec des principes essentiels de la loi du for.”

<sup>77</sup> Professor Nicolas MAZIAU, legal secretary to the Criminal Chamber of the French *Cour de cassation*, affirmed twice, in his conferences on 25 Feb. 2013, “La Cour de cassation et le droit international,” organised by university Paris 2, and on 25 Apr. 2013, “La réception du droit international public par la Cour de cassation,” organised by University Paris 1, that the *ordre public international* to which the Court refers in the decisions studied here aims at applying the right to an effective remedy as enshrined in article 13 Eur. Conv. H. R.

<sup>78</sup> P. MERTENS, *Le droit de recours effectif devant les instances nationales en cas de violation d’un droit de l’homme*, Bruxelles, Ed. de l’Université de Bruxelles, 1973, pp. 78-79: “On voit mal, en effet, comment un recours ‘effectif’ – si on donne à cette ‘effectivité’ tout son sens –

*i. e.* a court, as a keystone of the principle of the *Rechtsstaatlichkeit*. The French judges seem to pursue on this point the same objective as their German and their Italian colleagues.<sup>79</sup>

Furthermore, the joint action of the states, creating an international organisation, gives birth to a new partial legal order.<sup>80</sup> This legal order is internal to that body and comes immediately in the scope of international law,<sup>81</sup> which distinguishes it from the domestic legal order of each state. For this reason, and by virtue of the rule that “[a] party [to a treaty] may not invoke the provisions of its internal law as justification for its failure to perform a treaty,”<sup>82</sup> neither private international law, nor constitutional law of the forum state may be applied in their entirety to a dispute between an international organisation and its staff members.

Nevertheless, because of the dual and deep rootedness of the right of recourse to the courts both in national law, as a principle of constitutional value, and in international law as a general principle of international law, there is continuity in the content transported by the two norms, which exceptionally allows opposing a national rule against an international organisation.<sup>83</sup> This continuity is also present in the Belgian, the Dutch and the Swiss, respectively the German and the Italian solutions, which are consequently also opposable to an international organisation.

Even though the principal aim of the *ordre public international* is to protect fundamental national values of the forum state,<sup>84</sup> this does not hinder

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*pourrait être introduit auprès d'un organe qui n'offre pas certaines garanties d'indépendance. Et on voit tout aussi mal comment on pourrait, dans toutes les hypothèses, garantir l'indépendance d'un organe politique.” p. 85: “Mais un recours effectif [...] devra présenter des garanties minimales de compétence, d'indépendance et d'impartialité”.*

<sup>79</sup> German *BVerfGE*, *Eurocontrol II*, *op. cit.* note 15, § 79; Italian *C. Sup. Cass.*, *op. cit.* note 70.

<sup>80</sup> E. LAGRANGE, *La représentation institutionnelle dans l'ordre international*, La Haye/Londres/New York, Kluwer Law International, 2002, p. 46; J. SALMON (dir.), *Dictionnaire*, *op. cit.* note 7, p. 786: “*Ordre juridique. A. Ensemble de règles de droit, constituant un système régissant une société ou un groupement donné.*”

<sup>81</sup> See e. g. Swiss CA, Canton of Geneva, 25 March 2009, *op. cit.* note 25, § 2.

<sup>82</sup> *VCLT*, 23 May 1969, *op. cit.* note 50, art. 27, first sentence, taken up *mutatis mutandis* by the *VCLT between states and International Organisations or between International Organisations*, *op. cit.* note 66, art. 27 (1).

<sup>83</sup> See also E. DAVID, “*Bruxelles*,” *op. cit.* note 36, p. 687, § 15: “*les droits de la personne [ne relèveraient pas] d'une règle supérieure, reconnaissance coutumière qui, comme telle, lierait aussi les organisations internationales?*”; § 16: “*Il en va à fortiori ainsi dès lors que la règle appliquée n'est que l'expression de la 'prééminence du droit' consacrée par la CEDH dans son préambule (5<sup>e</sup> considérant) et traduisant l'existence d'un ordre public européen. Aucune organisation internationale basée en Europe ne pourrait prétendre être au-dessus d'un système fondé sur la 'prééminence du droit'.*” See also A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford/New York, Oxford University Press, 2011, pp. 288-292.

<sup>84</sup> E. g. L. CORBION, *Le déni de justice en droit international privé*, Aix-en-Provence, PUAM, 2004, p. 255, § 285: “*l'ordre public reste avant tout une réaction de défense de la société française.*” That's one reason why several French scholars criticise the approach chosen by the

a rule of this character from reflecting a principle coming at once under national *and* international law.<sup>85</sup> It has been argued that the French *ordre public international* aims at setting aside a foreign rule.<sup>86</sup> This might be true for matters concerning the substance of a case. But in the special case of the principle prohibiting the denial of justice, it is applied if the forum state is not competent according to its regular (national) rules of competence and if no other *court* has jurisdiction, in order to avoid denial of justice. So, this particular rule may actually “set aside” the rule of the forum state denying a national court’s competence. Moreover, the benefit of referring to international public policy is that its vocation is to regulate the relationship between legal orders and may act as an overarching link between them. The specific rule studied here enshrines at the same time the national constitutional principle of the rule of law *and* the international prohibition of denial of justice. In this new domain, international public policy fulfils its historical mission to go beyond the process of the usual application of rules to strive for a concretely satisfying result.<sup>87</sup> This solution contributes in addition to the “internationalisation” of international public policy, as a concept also coming under international public law.<sup>88</sup>

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French courts, *e. g.* M. FORTEAU, “L’ordre public ‘transnational’ ou ‘réellement international’: L’ordre public international face à l’enchevêtrement croissant du droit international privé et du droit international public,” *JDI*, vol. 138, 2011, p. 17, footnote 56: “La solution n’est, juridiquement, guère convaincante car une norme interne (*l’ordre public international*) ne peut écarter une norme conventionnelle (*l’immunité*). Par ailleurs, *l’immunité* se distingue de la compétence. L’astuce en l’occurrence a consisté à déplacer le débat du plan du droit international public (conflit insoluble de conventions) au plan du droit international privé (raisonnement en termes d’ordre public international) pour mieux l’esquiver (mais alors en le travestissant) le problème.”

<sup>85</sup> See also G. NOVAK, A. REINISCH, “Desirable standards...,” *op. cit.* note 38, pp. 299-300, 302.

<sup>86</sup> S. EL SAWAH, *Immunités des États et des organisations internationales*, *op. cit.* note 28, p. 425, § 1012; p. 473, § 1120.

<sup>87</sup> P. LAGARDE, *Recherches sur l’ordre public en droit international privé: Thèse pour le doctorat*, Paris, LGDJ, 1959, pp. 237-239, esp. p. 239: “L’ordre public intervient justement pour redonner sens à et vie à l’ensemble, en procédant aux ajustements nécessaires. [...] Sans doute faut-il manier cet instrument avec quelque prudence, mais il ne faut plus le considérer *a priori* comme étant nécessairement l’instrument d’une politique nationaliste. Il faut voir en lui un élément du perfectionnement technique des règles de conflit de lois que leur petit nombre rend trop générales et par là imparfaites. Il faut reconnaître que sans l’ordre public, le droit international privé serait souvent incapable de remplir sa délicate mission d’apporter à des litiges privés leur solution adéquate;” J. FOYER, “Remarques sur l’évolution de l’exception d’ordre public international depuis la thèse de Paul Lagarde,” pp. 285-302, in M.-N. JOBARD-BACHELLIER, P. MAYER (dir.), *Mélanges en l’honneur de Paul Lagarde. Le droit international privé: esprit et méthodes*, Paris, Dalloz, 2005, p. 295.

<sup>88</sup> For other scopes, see M. FORTEAU, “L’ordre public ‘transnational’,” *op. cit.* note 84, pp. 3-49, esp. p. 9, § 15: “l’ordre public international (au sens du droit international privé) est soumis aujourd’hui à un processus non pas seulement de ‘transnationalisation’ [...], mais aussi d’internationalisation (au sens du droit international public, c’est-à-dire au sens où l’ordre public international trouve désormais une partie de son ancrage dans le droit international public dont il épouse alors la nature et le régime des sources et des normes);” E. ROBERT, “The jurisdictional

It would be premature to conclude from a study encompassing exclusively the practice in Europe that the right to access to the courts constitutes a rule of truly international public policy character.<sup>89</sup> However, taking into account the conclusions concerning the customary nature of the right of recourse to the courts and the absence of its *jus cogens* character, it results that according to international law the international rules of international public policy do not necessarily amount to *jus cogens*.<sup>90</sup>

As the national judges and the judges of the ECtHR are the ones applying these rules, they also hold the power to interpret their scope. The French *Cour de cassation* for instance makes it clear in the decisions following *Degboe versus African Development Bank* that it applies the French conception of the international public policy.<sup>91</sup> From this arises the question whether the standard applied to examine the existence of legal recourse open to staff members within international organisations is high enough to guarantee the rule of law.

## II. THE CAUTIOUS IMPLEMENTATION OF THE RIGHT OF RE COURSE TO THE COURTS

In practice, one observes that domestic judges and the judges of the ECtHR are rather careful while applying the right of recourse to the courts and usually prefer to uphold immunity (A). In doing so, they do not draw all the conclusions from the existence of the right to a legal remedy (B).

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immunities of international organizations: the balance between the protection of the organizations' interests and individual rights," in N. ANGELET et al., *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*, Bruxelles, Bruylant, 2007, p. 1453: so, "[i]n that context, the international public order character of the prohibition of the denial of justice contributed to universalize the rule and prevent the possible criticism of the inopposability of the European public order norms." On this topic in general, see also A. ORAKHELASHVILI, *Peremptory Norms in International Law*, coll. "Oxford Monographs in International Law," Oxford, Oxford University Press, pp. 7-35, esp. pp. 24-31.

<sup>89</sup> Some authors have qualified the principle as forming part of the "*ordre public européen*," E. DAVID, "Bruxelles," *op. cit.* note 36, p. 687, § 16.

<sup>90</sup> See also G. JAENICKE, "International Public Order," *MPEPIL*, vol. 2, 1995, p. 1348; A. ORAKHELASHVILI, *op. cit.* note 88, p. 29: "Arguably peremptory norms are not the only element of international public order. The latter could also include foundational principles of international law such as sovereign equality."

<sup>91</sup> French *Cass. soc.*, 11 Febr. 2009, *De Beaugrenier v/ UNESCO*, application n° 07-44240; *soc.*, 29 Sept. 2010, *Illemassene c/ OECD*, application n° 09-41030.

*A. – An immunity-friendly implementation of the right of recourse  
to the courts*

The way in which national courts and the ECtHR are weighing up the two rules examined here tends to lead to a softened guarantee of the right of recourse to the courts (1), which is even less strict when the responsibility of a member state, and not of the organisation itself, is at stake (2).

*1. A more theoretical than practical equivalent-protection-test*

As mentioned in the introduction, applying a reasoning similar to the “*Solange*”-decisions of the German *Bundesverfassungsgericht*,<sup>92</sup> “[f]or the [ECtHR], a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”<sup>93</sup>

Nevertheless, it can be noticed that the limitation to immunity consisting in a right of recourse to the courts has been recognised by the ECtHR and by most of the national judges only in the absence of a quasi-jurisdictional body set up by the employing international organisation.<sup>94</sup> This may be partly explained by the fact that the term “reasonable alternative means” is larger than recourse to a purely jurisdictional body.<sup>95</sup> Moreover, it is presumed that the organisation provides an adequate jurisdictional procedure, and it is up to the applicant to prove that the body in question is not independent, not impartial, or does not guarantee the right to a fair trial.<sup>96</sup>

Consequently, the possibility for the international organisation only and not for the staff members to appeal against a judgement does not constitute a

<sup>92</sup> *BVerfGE* (2. Senat), 29 May 1974, *Internationale Handelsgesellschaft mbH v/ Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *BVerfGE* 37, 271, § 45; applied also by: *BVerfGE Eurocontrol II*, *op. cit.* note 15, §§ 90-97; 3 July 2006, *B. et al. v/ EPO*, *2BvR 1458/03*, §§ 11-23.

<sup>93</sup> ECtHR, *Waite and Kennedy*, *op. cit.* note 21, § 68; *Beer and Regan*, *op. cit.* note 21, § 58.

<sup>94</sup> See for instance, the jurisprudence indicated above, note 25. Same observation: B. TAXIL, “Les ‘différends internes’ des organisations internationales: des modes appropriés de règlement juridictionnel des différends,” *RGDIP*, vol. 116, 2012, p. 613.

<sup>95</sup> N. ANGELET, A. WEERTS, “Les immunités des organisations internationales face à l’article 6 de la Convention européenne des droits de l’homme,” *JDI*, vol. 134, 2007, pp. 3-26; E. ROBERT, “Jurisdictional immunities of international organizations,” *op. cit.* note 88, p. 1456.

<sup>96</sup> *BVerfGE Eurocontrol II*, *op. cit.* note 15, § 91; 3 July 2006, *op. cit.* note 92, § 23; J.-F. FLAUSS, “Droit des immunités et protection internationale des droits de l’homme,” *op. cit.* note 60, p. 322: “En circonscrivant très étroitement l’intensité du contrôle de proportionnalité exercé sur la limitation apportée au droit d’agir en justice, le juge européen des droits de l’homme établit de facto une présomption de conventionnalité au projet des mesures d’octroi du bénéfice de l’immunité de juridiction.”

violation of the right to a fair trial.<sup>97</sup> An “established” competence (but not necessarily legal knowledge) of all the members of the body in question deciding as the highest legal authority is sufficient according to the ECtHR.<sup>98</sup> Moreover, a so-called arbitration procedure, where one arbitrator, sitting on his own, is nominated in advance by the organisation (and not by both parties together), who is also the president of the internal joint appeals board, before whom the applicant does not have the possibility to be assisted by a legal counsel entirely external to the organisation and where the arbitrator has no explicit obligation to motivate his decision, is not contrary to the French conception of the international public policy.<sup>99</sup>

It is particularly regrettable that the national judges have upheld an organisation’s immunity from jurisdiction because a quasi-jurisdictional body existed in the legal order of the organisation, when this body later declined its competence for whatever reason. For instance, even though the French courts upheld Eurocontrol’s immunity in a case involving an employee of one of its subcontractors working *de facto* for Eurocontrol, the ILOAT considered it had no jurisdiction *ratione personae*.<sup>100</sup> In another case, the administrative tribunal of the Organisation for Economic Co-operation and Development (OECD) declared an appeal time-barred, because the claimant made an application before this tribunal only once the French courts have upheld OECD’s immunity from jurisdiction.<sup>101</sup>

This lenient application of the right of recourse to the courts has been justified with the argument that if the application were too severe, the activity of international organisations might be paralysed, and this would amount to an interference with the effective accomplishment of their mission.<sup>102</sup> Yet, the ICJ has affirmed since 1954 that “the power to establish a tribunal, to do justice as between the Organization and the staff members,

<sup>97</sup> *BVerfGE, Eurocontrol II*, op. cit. note 15, § 92.

<sup>98</sup> ECtHR, 11 May 2000, *A. L. v/ Italy*, on the admissibility of the application n° 41387/98.

<sup>99</sup> French Cass. soc., 11 Febr. 2009, *De Beaugrenier v/ UNESCO*, application n° 07-44240.

<sup>100</sup> ILOAT, judgment n° 2503, 1 Febr. 2006, *Mr. F. M. v/ European Organisation for the Safety of Air Navigation (Eurocontrol)*, § 4: “Since the complainant is not an official of Eurocontrol, and cannot produce any employment contract signed with the latter, it follows, as the Agency rightly contends, that the Tribunal does not have jurisdiction over this dispute. The complainant cannot, moreover, invoke a denial of justice, since the French court before which he filed his case retained jurisdiction to rule on the effects of his employment relationship with the last temporary employment agency which hired him for simulation assignments, and reclassified the contracts between him and the agency. 5. The fact that Eurocontrol relied on its immunity from jurisdiction and the Tribunal’s competence to hear disputes between the Agency and its staff in order to challenge the jurisdiction of the *conseil de prud’hommes*, cannot deprive it of its right to request that the Tribunal decline jurisdiction in accordance with its Statute.”

<sup>101</sup> OECD Administrative Tribunal, application n° 69, 24 March 2011, *Mme I. v/ Secretary General*.

<sup>102</sup> E. ROBERT, “Jurisdictional immunities of international organizations,” op. cit. note 88, p. 1460.

was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity.”<sup>103</sup> Thus the international context of the disputes is not at all ignored, but, on the contrary, the national judges can have a positive effect on the before-mentioned efficient working of the Secretariat by encouraging improvement in guaranteeing the right to legal remedy on a subsidiary basis. Besides, if the national judge comes into play only by necessity and applies in substance the internal law of the organisation,<sup>104</sup> then neither the efficiency nor the autonomy of the latter are in danger.<sup>105</sup>

As long as the judges do not strictly examine the actual existence of “reasonable alternative means” which provide “effectively” the right to an independent and impartial trial (both objectively and subjectively) the right of recourse to the courts is not truly protected.<sup>106</sup> Some find that a risk of a “regression of the standard of protection” of the individual’s rights falling under international law may result.<sup>107</sup> In fact, the level of the “at least equivalent” protection of Human Rights is not reached within some international organisations. Yet, a double standard in this matter is not justified if the rule of law is an overarching concept.<sup>108</sup> The decision of the Belgian judges on 21 December 2009 in *Western European Union versus Siedler*, to strictly apply the criteria of independence, impartiality and the

<sup>103</sup> It has based the legality of the establishment of the United Nations Administrative Tribunal on this fact, ICJ, *Advisory Opinion of July 13th, 1954*, *op. cit.* note 6, p. 57. See also S. BASTID, “Have the U. N. Administrative Tribunals Contributed to the Development of International Law?”, *op. cit.* note 28, p. 302.

<sup>104</sup> Which is often the position taken by the national judge (*e. g.* French *Cass. soc.*, 4 Dec. 1980, *Vuillod v/ Banque centrale des États de l’Afrique de l’Ouest*, AFDI, vol. 27, 1981, pp. 841-842; CA Colmar, 28 Oct. 2004, *M. Frey-Amstad v/ Aéroport de Bâle-Mulhouse*, application n° 4 A 03/02631; Swiss CA, Canton of Geneva, 25 March 2009, *op. cit.* note 25, § 2; Belgian *Cass.*, 21 Dec. 2009, *WEU v/ Siedler*, application n° S.04.0129.F/1), unless an explicit rule adopted by the organisation refers to national law (French *Cass. soc.*, 25 Jan. 2006, *M. X. v/ L’Établissement public binational franco-suisse aéroport de Bâle-Mulhouse*, application n° 05-41557; *Cass. soc.*, 24 Oct. 2007, *X. v/ Securitas Transport Aviation Security*, application n° 06-60301).

<sup>105</sup> See also E. GAILLARD, I. PINGEL-LENUZZA, “International Organisations and Immunity from Jurisdiction,” *op. cit.* note 17, pp. 7, 15 and G. NOVAK, A. REINISCH, “Desirable standards...,” *op. cit.* note 38, pp. 277, 299.

<sup>106</sup> See also G. NOVAK, A. REINISCH, “Desirable standards...,” *op. cit.* note 38, p. 279, and, on the practice in Switzerland and coming to the same conclusion, T. NEUMANN, A. PETERS, “Switzerland,” in A. REINISCH (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, Oxford, Oxford University Press, 2013, pp. 266-267.

<sup>107</sup> Professor Flauß calls it a “régression du standard de protection,” J.-F. FLAUSS, “Droit des immunités et protection internationale des droits de l’homme,” *op. cit.* note 60, p. 323; J.-F. FLAUSS in SFIDI-IIDH, *op. cit.* note 60, p. 86; See also A. REINISCH, A. WEBER, *op. cit.* note 61, p. 68, pp. 78-79, p. 89.

<sup>108</sup> J.-F. FLAUSS, “Droit des immunités et protection internationale des droits de l’homme,” *op. cit.* note 60, p. 323: “la prééminence du droit dans une société démocratique n’est pas divisible.”

right to a fair trial is for these reasons most welcome.<sup>109</sup> In the same vein, on 16 July 2013, the District Court of The Hague refused to grant immunity from jurisdiction to the EPO even though it considered the ILOAT to be independent and impartial, because, according to the ILOAT Registrar, the procedure before the ILOAT would have taken fifteen years. Therefore, the procedure established by the EPO “would deprive [the applicant] of a fair process. This would lead to the EPO’s immunity becoming disproportional and may therefore be overruled.”<sup>110</sup> Only the future can tell whether this finding will be confirmed in case of an appeal.

As far as the responsibility of member states for the absence of a legal remedy in the legal order of an international organisation is concerned, the protection standard is even lower.

## *2. Member states’ responsibility limited to manifest violations*

Since the end of the 1970s, another type of recourse has been introduced before the ECtHR against some member states for not having respected their obligations falling under the Convention in the framework of international organisations. These submissions aimed at circumventing the question of whether the international organisation itself could be held liable for a violation of article 6 (1) of the European Convention on Human Rights as it is usually not bound by it.<sup>111</sup> Even though the European Commission of Human Rights did not exclude this possibility in principle,<sup>112</sup> it did avoid examining these cases and justified their inadmissibility by other considerations.

It was not until the case *Melchers and Co. versus Federal Republic of Germany*, decided on 9 February 1990, that the condition for holding states liable in such circumstances was formulated. The European Commission of Human Rights stated: “the transfer of powers to an international organisation is not incompatible with the [European Convention on Human

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<sup>109</sup> Belgian Cass., 21 Dec. 2009, *WEU v/ Mme S*, n° S.04.0129.F.

<sup>110</sup> District Court of The Hague, 16 July 2013, *op. cit.* note 25.

<sup>111</sup> Eur. Com. H. R., 10 July 1978, *Confédération française démocratique du travail v/ the European Communities, alternatively: their Member States a) jointly and b) severally*, decision on the admissibility of the application n° 8030/77, vol. 13, pp. 231-140; Eur. Com. H. R., 19 Jan. 1989, *Christiane Dufay v/ the European Communities, alternatively: their Member States a) jointly and b) severally*, decision on the admissibility of the application n° 13539/88.

<sup>112</sup> The possibility that “the act complained of, which was carried out by an organ of the European Communities, can involve the responsibility of the 9 Member States of the European Communities under the Convention” (Eur. Com. H. R., *Confédération française démocratique du travail v/ the European Communities, eod. loc.*, § 5).

Rights] provided that within that organisation fundamental rights will receive an equivalent protection.”<sup>113</sup>

After initially refusing its competence *ratione personae* in the cases *Boivin versus France and Belgium and 32 other member states of the Council of Europe*,<sup>114</sup> concerning Eurocontrol, and then in the case *Connolly versus 15 member states of the Council of Europe*, concerning the European Commission,<sup>115</sup> the ECtHR finally accepted to examine the legal remedies provided by an international organisation, only a few months later, in its decision *Gasparini versus Italy*.<sup>116</sup> In this case, the applicant was a staff member of the NATO and the plea went against a state for having violated the right of recourse to the courts while exercising its executive powers. Indeed, as a NATO member, a state has an obligation of result concerning the position it has to take in order to guarantee the right of recourse to the courts, for instance when adopting the statutes of a tribunal of an international organisation. Nevertheless, the standard applied to check whether there was a violation is even less strict than the previous one: “the member states [of an international organisation and who are a party to the European Convention on Human Rights] are obliged, *at the moment when they transfer some of their sovereign powers to an international organisation to which they adhere*, to make sure that the rights guaranteed by the Convention benefit in the framework of this organisation a protection equivalent to the one provided by the mechanism of the Convention.”<sup>117</sup> Thus, according to the Court, and referring to its reasoning in *re Bosphorus*, the question came down to checking whether “the protection of fundamental rights granted by the international organisation concerned was manifestly deficient.”<sup>118</sup>

Only one month after the *Gasparini*-decision, in the case *Taner Beygo versus 46 member states of the Council of Europe*, the Court again refused

<sup>113</sup> Eur. Com. H. R., 9 Febr. 1990, *Melchers & Co. v/ Federal Republic of Germany*, decision on the admissibility of the application n° 13258/87, vol. 64, p. 145.

<sup>114</sup> ECtHR, 9 Sept. 2008, application n° 73250/01.

<sup>115</sup> ECtHR, 9 Dec. 2008, *Bernard Connolly v/ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom*, decision on the admissibility of the application n° 73274/01.

<sup>116</sup> ECtHR, 12 May 2009, *Emilio Gasparini v/ Italy and Belgium*, application n° 10750/03.

<sup>117</sup> *Ibid.*, translated, and italics added, by the author.

<sup>118</sup> Translated by the author. Original quote: “les États membres [d'une organisation internationale et qui sont parties à la CEDH] ont l'obligation, au moment où ils transfèrent une partie de leurs pouvoirs souverains à une organisation internationale à laquelle ils adhèrent, de veiller à ce que les droits garantis par la Convention reçoivent au sein de cette organisation une ‘protection équivalente’ à celle assurée par le mécanisme de la Convention. En effet, la responsabilité d'un État partie à la Convention ne pourrait être mise en jeu au regard de celle-ci s'il s'avérait ultérieurement que la protection des droits fondamentaux offerte par l'organisation internationale concernée était entachée d'une ‘insuffisance manifeste’ (*Bosphorus*, précédent)” (ECtHR, 12 May 2009, *Gasparini v/ Italy*, application n° 10750/03).

to examine the legal remedies provided by the organisation.<sup>119</sup> But even in this case, the Court admitted the possibility to receive an application against member states in this type of dispute and specified the point the applicant should have presented in stating: “the applicant did not claim that the member states of this organisation had failed to comply with their obligations under the Convention by transferring their competences to the Council of Europe and by not providing for a system of protection of fundamental rights ‘equivalent’ to that provided by the Convention within the meaning given to that term in the *Bosphorus*-decision”<sup>120</sup> (translation from the French original by the author). So the analysis of the *Gasparini*-case has been upheld.

This lower standard for member states of an international organisation can be explained by the fact that the former act in consultation with other states and are therefore only indirectly responsible for the functioning of the organisations’ jurisdictional body. However, these requirements are so low that the Court never “condemned” a state in dispute with an applicant who considers himself to be a staff member of an international organisation. Therefore, the scrutiny by the ECtHR has been qualified as inadequate.<sup>121</sup>

But should this lower standard be maintained also in the case where all member states of the organisation are parties to the European Convention on Human Rights or bound by an equivalent standard of protection? And are not member states obliged to act in a way that the internal law of an organisation is regularly upgraded, especially as the law evolves,<sup>122</sup> and as the protection that states must grant in this field is today much higher than it was in the past?

In *re Gasparini*, the Court did not discuss in detail the requirements for nomination of the members of the NATO Appeals Board.<sup>123</sup> Its three members are chosen from persons with an established knowledge, of which

<sup>119</sup> ECtHR, 16 June 2009, application n° 36099/06. See E. DECAUX, “Griefs incompatibles ratione personae avec la Convention,” *JDI*, vol. 137, 2010, pp. 959-961.

<sup>120</sup> ECtHR, 16 June 2009, *ibid.*: “la Cour observe que le requérant ne prétend pas qu’en transférant leurs compétences au Conseil de l’Europe, les Etats membres de cette organisation auraient manqué à leurs obligations au titre de la Convention, en ne prévoyant pas un système de protection des droits fondamentaux ‘équivalent’ à celui assuré par la Convention, au sens donné à ce terme dans l’arrêt *Bosphorus*.”

<sup>121</sup> B. TAXIL, “Les ‘différends internes’ des organisations internationales,” *op. cit.* note 94, p. 616.

<sup>122</sup> R. VON JHERING, *Der Kampf um’s Recht* (1872), Frankfurt, Klostermann, 1989, p. 16: “die Idee des Rechts ist ewiges Werden, das Gewordene aber muss dem neuen Werden weichen” (“the idea of the law is an eternal Becoming; but that which has Become must yield to the new Becoming,” translated from the fifth German edition by J. J. LALOR, Chicago, Callaghan, 2<sup>nd</sup> ed. 1915, p. 13).

<sup>123</sup> G. VANDERSANDEN, “Juges internes et juridictions nationales: conflit de compétences?”, in G. M. PALMIERI (ed.), *New developments in the legal protection of international and european civil servants*, Bruxelles, Bruylants, 2012, p. 281.

at least one shall have knowledge in law.<sup>124</sup> Even if one imagined oneself in the year 1965, one may doubt whether this requirement of an “established knowledge” (“compétence établie”) of the majority of the Board’s members, which is not even necessarily knowledge in the legal domain, would have been sufficient to constitute a body which may take final decisions based on the law.<sup>125</sup>

In the end, the principle to limit the immunity of international organisations by the right of recourse to the courts has an impact on the evolution towards a separation of the jurisdictional power in the administrative law of international organisations only in those cases where the right of recourse to the courts has been privileged and the immunity has been set aside.

#### *B. – The moderate consequences of the cautious implementation of the limit to immunity*

The impact of national and European case-law in this field on the improvement of legal remedies provided by international organisations depends on how strictly the judges verify the remedies’ existence and quality (1). Moreover, the legal solutions offered remain specific to employment disputes (2).

##### *1. An encouragement for reforms within international organisations*

As a result of the softened analysis by national courts, international organisations are only occasionally encouraged to improve their administration of justice. Thus, it is probably thanks to the literal application of the ECtHR’s criteria (established in *re Waite and Kennedy* and in *re Beer and Regan*), by the Belgian *Cour de cassation* in *re Western European Union versus Siedler*, that, even though the organisation was dissolved, an Appeals Board with members nominated for a period of five years instead of two was set up and has jurisdiction for disputes between the Western European Union and its former staff.<sup>126</sup> On the other hand, in spite of the decisions of the French<sup>127</sup> and the Italian<sup>128</sup> Courts of cassation, neither the

<sup>124</sup> Translated by the author from doc. 20 Oct. 1965, *Règlement du personnel civil de l’OTAN, annexe IX, Règlement relatif aux réclamations et recours*, art. 4.11.

<sup>125</sup> See G. VANDERSANDEN, “Juges internes et juridictions nationales,” *op. cit.* note 123, p. 284.

<sup>126</sup> WEU, doc. 8 July 2011, *WEU Staff Rules, Chapter X. Appeals Board*, art. 51.

<sup>127</sup> French Cass. soc., 25 Jan. 2005, *Degboe v/ African Development Bank*, application n° 04-41012; *Statuts du Tribunal administratif de la Banque africaine de développement*, 16 July 1997, [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Statut\\_du\\_](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Statut_du_)

African Development Bank, nor the International Plant Genetic Resources Institute seem to have extended the competence of their jurisdictional body to disputes that had arisen before they were set up. So it is after all up to the organisation to decide whether it wishes to evolve, in accordance with the principle of its independence, just as the United Nations did, after decades of hesitation.

However, the number of organisations having recognised the competence of the ILOAT is particularly high. Since the year 2000, the following organisations have taken this step: the African, Caribbean and Pacific Group of states,<sup>129</sup> the Agency for International Trade Information and Cooperation,<sup>130</sup> the European Telecommunications Satellite Organisation,<sup>131</sup> the International Organisation of Legal Metrology,<sup>132</sup> the International Organisation of Vine and Wine,<sup>133</sup> the Centre for the Development of Enterprise,<sup>134</sup> the Permanent Court of Arbitration,<sup>135</sup> the South Centre,<sup>136</sup> the International Organisation for the Development of Fisheries in Eastern and Central Europe,<sup>137</sup> the Technical Centre for Agricultural and Rural Cooperation ACP-EU,<sup>138</sup> the International Bureau of Weights and Measures,<sup>139</sup> the Global Fund to Fight AIDS, Tuberculosis and Malaria<sup>140</sup> and

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Tribunal\_Administratif.pdf, consulted on 18 Oct. 2012, art. 17 (2), first sentence: “Nonobstant les dispositions du présent Statut, le Tribunal n'est pas compétent pour connaître de toute requête contestant une décision administrative dont le fait génératrice est antérieur à la création du Tribunal.”

<sup>128</sup> Italian *C. Sup. Cass.*, 19 Febr. 2007, *Alberto Drago v/ Istituto internazionale per le risorse*, n° 3718.

<sup>129</sup> ILO, doc. GB.291/PFA/19/2, 1 Nov. 2004, *Matters relating to the Administrative Tribunal of the ILO / (MRILOAT)*. The organisation was established on 6 June 1975. Headquarters: Brussels.

<sup>130</sup> ILO, doc. GB/292/PFA/20/3, 7 March 2005, *MRILOAT*. The organisation was established on 30 April 2004. Headquarters: Geneva.

<sup>131</sup> ILO, doc. GB/294/PFA/18/3, 6 Oct. 2005, *MRILOAT*. The organisation was provisionally established in 1977 and reformed the last time on 28 Nov. 2002 making it a commercial company operating under French law. Headquarters: Paris.

<sup>132</sup> ILO, doc. GB.294/PFA/18/4, 6 Oct. 2005, *MRILOAT*. The organisation was established on 12 Oct. 1955. Headquarters: Paris.

<sup>133</sup> ILO, doc. GB.295/PFA/9/1, 22 Febr. 2006, *MRILOAT*. The organisation was established on 3 April 2001, but it succeeded the International Wine Office, established on 29 Nov. 1924. Headquarters: Paris.

<sup>134</sup> ILO, doc. GB.298/PFA/21/1, 8 Febr. 2007, *MRILOAT*. The organisation was established on 28 Febr. 1975. Headquarters: Brussels.

<sup>135</sup> ILO, doc. GB.300/PFA/19/2, 2 Oct. 2007, *MRILOAT*. The organisation was established on 29 July 1899. Headquarters: The Hague.

<sup>136</sup> ILO, doc. GB.300/PFA/19/3, 5 Nov. 2007, *MRILOAT*. The organisation was established on 1 Sept. 1994. Headquarters: Geneva.

<sup>137</sup> ILO, doc. GB.301/PFA/18/2, 7 Febr. 2008, *MRILOAT*. The organisation was established on 23 May 2000. Headquarters: Copenhagen.

<sup>138</sup> ILO, doc. GB.301/PFA/18/3, 14 Febr. 2008, *MRILOAT*. The organisation was established on 31 Oct. 1979. Headquarters: Wageningen, the Netherlands.

<sup>139</sup> ILO, doc. GB.301/PFA/18/4, 19 Febr. 2008, *MRILOAT*. The organisation was established on 20 May 1875. Headquarters: Sèvres, France.

the International Centre for the Study of the Preservation and Restoration of Cultural Property.<sup>141</sup> Moreover, the disputes which arose against the NATO, even though the national courts usually upheld its immunity from jurisdiction, have brought about a reform adopted on 12 Mai 2013 which has replaced its Appeals Board by an administrative tribunal. Similarly, the Central Commission for the Navigation of the Rhine considers setting up an independent and impartial legal recourse mechanism. The Belgian, Dutch, French and Italian case-law certainly had a role to play when these decisions were taken, as most of these organisations have their headquarters in one of these countries. This holds also for the case-law of the ECtHR.

As for the functioning of the ILOAT, the ICJ has underlined in its 2012 advisory opinion that “the Court maintains its concern about the inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT.”<sup>142</sup> The future will tell whether the organisation manages to seize the opportunity to establish an authentic appeals procedure.

## *2. An encouragement limited to certain types of disputes*

In light of this analysis, one may wonder whether the violation of the right of recourse to the courts constitutes a limit to jurisdictional immunity of international organisations in all cases involving international organisations.<sup>143</sup> However, although this approach could be identified in Europe, with regards to the special field of disputes between an organisation and its staff, and maybe in disputes which arose from a contract concluded with an organisation, this approach has not yet been successfully applied to other cases.<sup>144</sup> The legal solutions presented here are specific to disputes between international organisations and its staff. Interestingly, it is also in

<sup>140</sup> ILO, doc. GB.303/PFA/15/2, 31 Oct. 2008, *MRILOAT*. The organisation was established on 1 Jan. 2002. Headquarters: Geneva.

<sup>141</sup> ILO, doc. GB.306/PFA/19/2, 18 Sept. 2009, *MRILOAT*. The organisation was established in 1959. Headquarters: Rome.

<sup>142</sup> ICJ, *Advisory Opinion*, 1 Febr. 2012, *op. cit.* note 5, p. 19, § 48.

<sup>143</sup> Answering this question positively, J.-F. FLAUSS, “Droit des immunités et protection internationale des droits de l’homme,” *op. cit.* note 60, p. 318; G. VANDERSANDEN, “Juges internes et juridictions nationales,” *op. cit.* note 123, p. 264, taking a step further: “une telle immunité doit être circonscrite à sa seule valeur fonctionnelle (qui est de protéger l’autonomie d’action et de fonctionnement de l’organisation), de sorte qu’elle ne saurait empêcher le pouvoir judiciaire [national] de connaître d’une éventuelle méconnaissance des droits fondamentaux et de les sanctionner.” See also A. PETERS, “Die funktionale Immunität internationaler Organisationen und die Rechtsweggarantie,” *RSDIE*, vol. 21, 2011, pp. 397-428, esp. p. 420, concerning the immunity from execution.

<sup>144</sup> See also A. REINISCH, “Conclusions,” in A. REINISCH (ed.), *Challenging Acts of International Organizations before National Courts*, Oxford/New York, Oxford University Press, 2010, esp. pp. 271-272.

this field where national court judgments make the few explicit references to foreign court judgments.<sup>145</sup> This again incites to consider the development of a special *corpus juris communis* in this domain.

In this way, an organisation exercising its functions and violating human rights – without this being the main objective of the action or inaction, but a side-effect – remains protected by its immunity from jurisdiction even if there is no recourse to international courts.<sup>146</sup> Therefore, according to the law as it is applied in Western Europe, the right to legal recourse in these matters constitutes a limit<sup>147</sup> to jurisdictional immunity of international organisations, overriding the latter only in disputes with its staff members (or any direct contractor) if no alternative legal remedy is at the claimant's disposal. The right to a legal remedy is not necessarily inherent to the rule of jurisdictional immunity conceived as an auto-limited rule, but the fruit of the research of the equilibrium between the two norms.

## CONCLUSION

The constitutional character of the right of recourse to the courts in national legal orders, which, in a given national legal order, makes it a part of that order's supreme rules, does not pertain to the rule with the same content coming under international law: although this chapter has shown that the right of recourse to the courts constitutes a general principle of international law, it is not hierarchically superior compared to treaty obligations, such as immunity from jurisdiction of international organisations.

It is up to each international organisation to guarantee within its legal order a separate jurisdictional power which can be seized by its staff members if it wishes to benefit from jurisdictional immunity and to run no risk of loosing a case before national courts. Under the subsidiary and more

<sup>145</sup> A. REINISCH, R. JANIK, "The Personality, Privileges, and Immunities of International Organizations before National Courts – Room for Dialogue," in A. REINISCH (ed.), *The Privileges and Immunities...*, *op. cit.* note 106, esp. p. 330.

<sup>146</sup> E. g. ECtHR, 11 June 2013, *Stichting Mothers of Srebrenica and others v/ the Netherlands*, application n° 65542/12, esp. §§ 161-165; Dutch Hoge Raad, 13 Apr. 2012, *Mothers of Srebrenica v/ The Netherlands and the United Nations*, 10/04437, esp. § 4.3.6: "Die immuniteit is absoluut." The Kadi-case (ECJ, 3 Sept. 2008, *Yassin Abdullah Kadi, Al Barakaat International Foundation v/ Council of the European Union*, C-402/05 P and C-414/05 P), and similar disputes do not concern directly international organisations, or states for their action within an organisation, but the possibility for the ECJ to exercise judicial review of a list established by the United Nations Security Council and annexed to a regulation of the European Union and therefore to apply judicial review to a text incorporated in the European Union's legal order.

<sup>147</sup> As opposed to "exception," as the principle *lex specialis derogat legi generali* is not applied, but two norms of the same legal value are opposed.

or less strict scrutiny of the national judges, international organisations are to make a first step towards the rule of law. However, even though progress has been made, the ideal described by Georges Vandersanden in which the fundamental rights listed in the European Convention on Human Rights (or resulting from general principles of law) are to be applied in all legal orders – international or national – and in which the judicial power, as it is organised in each of these orders has to ensure their full application in accordance with the interpretation given by the ECtHR,<sup>148</sup> is not reached at this stage.

Moreover, the state of progress in the implementation of the right of recourse to the courts and the guarantee of the rule of law in general varies from one organisation to another. There is a need for the organisation itself to become aware of the existence of a deficit. This is an ongoing process at the United Nations,<sup>149</sup> where the Heads of states declared in a High-level Meeting of the General Assembly: “We recognize that the rule of law applies to all states equally, and to international organisations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.”<sup>150</sup> But then again, international organisations also need to have at their disposal the necessary financial resources for a good administration of justice and the political support of their member states, as well as operational execution mechanisms of the judgments.<sup>151</sup>

Thus, in the end, the existence of the liberty described by Charles de Montesquieu, the guarantee of the rule of law and the setting up of a system satisfying the *Rechtsstaatsprinzipien* in international organisations is, in the first place, in the hands of those against whom the least demanding tests in this framework are applied: their member states.

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<sup>148</sup> G. VANDERSANDEN, “Juges internes et juridictions nationales,” *op. cit.* note 123, p. 265.

<sup>149</sup> See doc. A/65/318, 20 Aug. 2010, *Strengthening and coordinating United Nations rule of law activities. Report of the Secretary-General*, § 94; doc. A/66/749, 16 March 2012, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels. Report of the Secretary-General*, §§ 11 c and d.

<sup>150</sup> United Nations, General Assembly, resolution A/RES/67/1, 30 Nov. 2012, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, § 2, first sentence.

<sup>151</sup> United Nations, General Assembly, doc. A/66/749, *op. cit.* note 149, § 17.

