Overcoming Immunity: The Impact of Domestic Court Decisions on the Enforcement of the Fair Trial Obligations of International Organisations

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ABSTRACT

This thesis examines whether decisions of domestic courts in cases involving International Organisations (IOs) have the effect of enforcing, i.e., promoting compliance by IOs with, their obligation to ensure fair trial rights to individuals. This results in turn in the increased adjudication and enforcement of the responsibility of IOs for the breach of their legal obligations.

The thesis establishes firstly that IOs bear obligations under international law to ensure fair trial rights to private persons affected by their conduct. Secondly, it considers whether (a) the practice of domestic and international courts and tribunals or (b) the application of a different rule of international law renders the denial of immunity to IOs and the exercise of jurisdiction by domestic courts in claims against IOs lawful in situations where individuals' fair trial rights are not ensured. Thirdly, assuming that there is no lawful basis for domestic courts to deny immunity to IOs in instances where the claimant's fair trial rights are not upheld, the thesis considers whether the decisions of domestic courts trigger reactions from States and IOs that result in IOs complying with their fair trial obligations.

The thesis makes two claims — (a) that the practice of domestic and international courts has not resulted in the immunity of IOs before domestic courts becoming subject to the satisfaction of the claimant's fair trial rights and that the application of the rules allowing for the suspension of treaty obligations on account of material breach and

countermeasures constitute plausibly but not conclusively lawful means for denying immunity to IOs in situations where the claimant's fair trial rights have not been ensured; and (b) that even if there are no means to lawfully deny immunity to IOs due to the violation of the claimant's fair trial rights, the decisions of domestic courts in claims against IOs, including those that deny immunity to IOs and also those that do not deny immunity, but signal to States and IOs that IOs' fair trial obligations must be fulfilled, have the effect of triggering reactions from States and IOs that result in IOs incrementally complying with their fair trial right obligations.

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TABLE OF ABBREVIATIONS

ACHR –American Convention on Human Rights

ARSIWA – Articles on the Responsibility of States for Internationally Wrongful Acts

CIL - Customary International Law

CFIEU – Court of First Instance of the European Union

CJEU - The Court of Justice of the European Union

CPIUN – Convention on the Privileges and Immunities of the United Nations

ARIO - Articles on the Responsibility of International Organizations

ECHR - European Convention on Human Rights

ECJ – European Court of Justice

ECmHR - European Commission on Human Rights

ECtHR – European Court of Human Rights

ETS – European Treaty Series

HRC - Human Rights Committee

HRC GC - Human Rights Committee General Comment

IACtHR – Inter American Court of Human Rights

ICCPR - International Covenant on Civil and Political Rights

IO – International Organisation

ILA – International Law Association

ILC – International Law Commission

ILO - International Labour Organization

IHL – International Humanitarian Law

ILDC – International Law in Domestic Courts

ILM – International Legal Materials

IMF – International Monetary Fund

IYIL – Italian Yearbook of International Law

NATO – North Atlantic Treaty Organization

NYIL – Netherlands Yearbook of International Law

OAU - Organization of African Unity

OUP – Oxford University Press

ONUC - United Nations Operation in the Congo

OXIO – Oxford Reports on International Organizations

PCIJ - Permanent Court of International Justice

RGDIP - Revue Générale de droit International Public

RDIPP - Rivista di Diritto Internazionale Privato e Processuale

VCLT - Vienna Convention on the Law of Treaties

VCLT-IO - Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations

UDHR - Universal Declaration of Human Rights

UNAT – UN Administrative Tribunal

UNCITRAL - United Nations Commission on International Trade Law

UNDP – United Nations Development Programme

UNGA - United Nations General Assembly

UNJY - United Nations Juridical Yearbook

UNRIAA – United Nations Reports on International Arbitral Awards

UNSC - United Nations Security Council

UNTS – United Nations Treaty Series

USTS – United States Treaty Series

YBILC/ YILC – Yearbook of the International Law Commission

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PART I

THE OBLIGATION OF INTERNATIONAL ORGANIZATIONS TO ENSURE THE FAIR TRIAL RIGHTS OF INDIVIDUALS

CHAPTER 1

THE PROBLEM OF HOLDING INTERNATIONAL ORGANISATIONS RESPONSIBLE FOR THE BREACH OF THEIR OBLIGATIONS THROUGH CONDUCT AFFECTING INDIVIDUALS

I. INTRODUCTION

This thesis examines whether decisions of international and domestic courts[1] in cases involving International Organisations (IOs) have the effect of enforcing the obligation of IOs to ensure fair trial rights[2] to individuals.[3] Increased enforcement of IOs' fair trial obligations results in turn in the increased adjudication and enforcement of the responsibility of IOs for the breach of their other legal obligations through conduct impacting individuals.[4]

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[1] This includes the decisions of regional international courts such as the European Court of Human Rights (ECtHR), the decisions of which are binding on the parties, in matters which arise from a claim against an IO before a domestic court. See further, chapter 3, pp 102 – 103.

[2] 'Enforcement' of the obligation of IOs to ensure fair trial rights in this context means any measures directed towards or having the result of compliance by IOs with their primary obligation to ensure fair trial rights to individuals. This includes, but is not limited to, the invocation and implementation of the responsibility of IOs for breach of their fair trial obligations. See further chapter 2, section III. On the range of definitions of 'enforcement' under international law, including the one adopted here, see e.g., Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 5, text at footnote 18.

[3] By 'individuals' I mean natural persons and legal persons other than States. The term 'private persons' is sometimes used with the same meaning.

[4] As demonstrated later in this chapter, the legal responsibility of IOs for the breach of their obligations, both under international and domestic law, through conduct impacting individuals is often not adjudicated and enforced due to a lack of fora for individuals to bring claims against IOs — see section V below. See also

The foregoing question is examined through (a) considering whether domestic courts may lawfully deny immunity to IOs and exercise jurisdiction in situations where the claimant's fair trial rights are not upheld and (b) whether domestic court decisions, either those that deny immunity to IOs or those that do not deny immunity but signal their displeasure at the claimant's fair trial rights being breached, and regardless of their lawfulness under international law, nonetheless have the *effect* of triggering reactions from States and IOs that result in IOs' fair trial obligations being upheld.

The thesis establishes firstly that IOs bear obligations under international law to ensure fair trial rights to private persons affected by their conduct.[5] Secondly, it considers whether (a) the practice of domestic and international courts and tribunals or (b) the application of a different rule of international law renders the denial of immunity to IOs and the exercise of jurisdiction by domestic courts in claims against IOs lawful in situations where individuals' fair trial rights are not ensured.[6] Thirdly, even if there is no lawful basis for domestic courts to deny immunity to IOs in instances where the claimant's fair trial

e.g., Rishi Gulati, Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders (Cambridge University Press 2022), 2ff.

[5] This includes the obligation to provide a forum for the settlement of private law claims as enshrined in International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR), Article 14(1), European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR), Article 6(1) and American Convention on Human Rights (18 July 1978) 1144 UNTS 123 (ACHR), Article 8(1) as well as the obligation to provide effective remedies for the violation of rights enshrined in *inter alia* the respective human rights conventions, as enshrined in ICCPR Article 2(3), ECHR Article 13 and ACHR Article 25. The foregoing obligations are combined in, for instance, the Charter of Fundamental Rights of the European Union (14 December 2007) C 303/1, Article 47. These two obligations will be referred to collectively as 'fair trial obligations. See further, chapter 2 (nn 4-6).

[6] If the denial of immunity and the exercise of jurisdiction by domestic courts in claims against IOs is lawful, domestic courts may constitute a lawful forum for the settlement of claims against IOs, thus upholding individuals' fair trial rights and fulfilling IOs' fair trial obligations in the event that the IO abides by the order of the domestic court.

rights are not upheld, the thesis considers whether the decisions of domestic courts trigger reactions from States and IOs that result in IOs complying with their fair trial obligations.

The thesis makes two claims — (a) that the *practice* of domestic and international courts has not resulted in the immunity of IOs before domestic courts becoming subject to the satisfaction of the claimant's fair trial rights, though the application of the rules allowing for the suspension of treaty obligations on account of material breach and countermeasures may plausibly, but not conclusively, be employed to lawfully deny immunity to IOs where the claimant's fair trial rights have not been ensured; and (b) that even if there are no means to lawfully deny immunity to IOs due to the violation of the claimant's fair trial rights, the decisions of domestic courts in claims against IOs, including those that deny immunity to IOs and also those that do not deny immunity but signal to States and IOs the courts' displeasure at the claimant's fair trial rights not being upheld, may have the effect of generating reactions from States and IOs that result in IOs incrementally complying with their fair trial obligations.

If domestic court decisions result in increased compliance by IOs with their fair trial obligations, this would, in turn, result in (a) individuals' fair trial rights being increasingly upheld, (b) the obligations of States and IOs to ensure fair trial rights to individuals being discharged as well as (c) the responsibility of IOs for the breach of their other obligations under domestic and international law for conduct affecting individuals being increasingly adjudicated and enforced.

The thesis is situated in the context of a wide array of literature discussing the 'accountability' of IOs.[7] The term 'accountability' is not always clearly defined in relation to IOs,[8] but concerns, broadly, financial, administrative, legal and political checks and balances against the exercise of powers by IOs.[9] Whilst acknowledging the importance of broader checks and balances on the exercise of power by IOs, the claims of the thesis are firmly rooted in adjudicating and enforcing the *legal responsibility*[10] of IOs for the breach of their legal obligations, both under international law and domestic law, through the means of domestic courts promoting compliance with IOs' international obligations to ensure the fair trial rights of private persons.

IOs, defined as organisations created by agreement between two or more States or other IOs with organs that are independent of their members,[11] are capable of bearing rights

[7] E.g., Kristen Boon and Frederic Megret, 'New Approaches to the Accountability of International Organizations' (2019) 16 International Organizations Law Review; Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017); August Reinisch, 'To What Extent Can and Should National Courts Fill the Accountability Gap' (2014) 10 International Organizations Law Review 572; Kristina Daugirdas, 'Reputation and Accountability Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' [2019] International Organizations Law Review 11.

[8] For an exposition of the problem, see Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 2 ff.

[9] See e.g., International Law Association (ILA), Berlin Conference, Accountability of International Organisations, Final Report (2004), 5.

[10] I will use the term 'legal responsibility' to refer collectively to the responsibility of IOs for the breach of their international obligations and the liability of IOs for breaches of domestic law or the internal law of the IO. The phrases 'international responsibility' and 'liability' will be used respectively when referring to the consequences of the breach of international obligations and the breach of domestic law separately.

[11] In the author's view, the most compelling exposition of what amounts to an IO, which in turn is an international legal person, is found in the writings of Finn Seyersted. See Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend upon the Conventions Establishing Them' (1964) 34 Nordisk Tidsskrift for International Ret 3, 47ff. See also Articles on the responsibility of international organizations, with commentaries 2011 IIYBILC Part 2 ('ARIO'),

and obligations, both under domestic law[12] and under international law.[13] Consequently, they are capable of breaching their legal obligations, resulting in their liability under domestic law[14] or responsibility under international law.[15] However, the means for enforcing the legal responsibility of IOs often lie with the member States of the IO,[16] and for the reasons discussed in later sections,[17] States often do not take steps to enforce the legal responsibility of IOs. A solution that is often proposed for the enforcement of the legal responsibility of IOs for the breach of their obligations through conduct affecting private parties is for IOs themselves to create and strengthen means to settle disputes with private parties.[18] However, evidence suggests that IOs often do not create such means to

Article 2(a) and the commentary thereto; Henry G Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity* (5th ed., Martinus Nijhoff 2011) 985 ff.

[12] See e.g., August Reinisch, 'Accountability of International Organizations According to National Law' (2005) 36 Netherlands Yearbook of International Law 119, 124-138. With respect to the United Nations (UN), see also Legal Opinion prepared by the Office of Legal Affairs of the United Nations, 2001 UNJY 381.

[13] See e.g., *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) 1949 ICJ Rep 174, 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* 1980 ICJ Rep 73 [37].

[14] Chittharanjan Felix Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' (1991) 85 The American Journal of International Law 259, 259.

[15] See e.g., ARIO, Article 3. There is controversy as to whether the rules of the IO constitute international law with the result that their breach engages the IO's international responsibility, see ARIO Commentary to Article 10 [4-7] and the sources cited therein. The position taken in the ARIO is that breaches of obligations under the rules of the organisation 'are not always breaches of obligations under international law'. See ARIO Commentary to Article 10 [7]. For the purposes of this thesis, nothing turns on whether the breach of the rules of the IO results in international responsibility or liability akin to liability under domestic law.

[16] Philippa Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations?' (2014) 10 International Organizations Law Review 319, 327.

[17] See chapter 6, section I.

[18] See e.g., Emmanuel Gaillard and Isabelle Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass' (2002) 51 International and Comparative Law Quarterly 1, 4,11;

settle disputes or create means which lack the procedural and substantive safeguards to protect the fair trial rights of individuals.[19] Thus, the thesis examines whether and how domestic courts promote compliance by IOs of their obligations to ensure the fair trial rights of private parties, which in turn results in the increased adjudication and enforcement of the legal responsibility of IOs for the breach of their other obligations through conduct impacting individuals.

The remainder of the present chapter sets out the structure of the thesis (section II), discusses the scope of the thesis (section III) and the methodology adopted (section IV). Thereafter, the chapter discusses through the use of two factual scenarios, the problem of a lack of means to adjudicate and enforce the responsibility of IOs for the breach of their obligations through conduct impacting private parties (section V) and the sequence of events when a private party makes a claim before a domestic court, which could potentially result in a decision by the domestic court which induces compliance with IOs' fair trial obligations (section VI).

Philippa Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations?' (2014) 10 International Organizations Law Review 319, 329; Edward Chukwuemeke Okeke, *The Tension between the Jurisdictional Immunity of International Organizations and the Right of Access to Court* (Brill Nijhoff 2020) 51; Gian Luca Burci 'Jam v IFC's complications: the Pan-American Health Organization' EJIL: Talk, 4 January 2021 <https://www.ejiltalk.org/jam-v-ifcs-complications-the-pan-american-health-organization/> (accessed 16 September 2022); A different option is to hold member States responsible for the breach of the IO's obligations. See e.g., Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of Their Obligations Toward Third Parties' (1995) Institute of International Law – Yearbook, Volume 66- I; Anna Begemann, 'The Responsibility of States for Internationally Wrongful Acts Committed within the Framework of International Organizations' (Thesis, University of Oxford 2016).

[19] See further, section V below. See also e.g., United Nations, *Letter dated 25 November 2014 by Assistant Secretary-General Pedro Medrano* (2014) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=32377> (accessed 16 September 2022) [91], discussing cases where the UN had refused to create claims commissions for peacekeeping operations even when the host State had explicitly requested the same; Gulati (n 4), chapter 3.

II. STRUCTURE OF THE THESIS

The thesis makes three contributions to the existing scholarship and thus constitutes three parts. Part I concerns the obligations of IOs to ensure fair trial rights. This part includes the present chapter, which sets out the problem the thesis addresses, and chapter 2 which sets out the sources and content of the obligations of IOs to ensure fair trial rights, including the right of access to a forum for the settlement of disputes and the right to a remedy for the violation of rights guaranteed under international human rights law.

The sources and scope of IOs' obligations under international law, particularly whether and to what extent IOs are bound by general international law, remain contested. The thesis sets out the scope of the treaty obligation which applies to many IOs to create fora for the settlement of private law disputes as well as the basis and scope of the obligation of IOs under general international law to provide access to a forum for the settlement of disputes and to provide a remedy for the violation of such human rights law obligations which bind IOs.

Part II analyses the practice of international courts and domestic courts from twenty different jurisdictions spanning Europe, Africa, the Americas and Asia on the immunity of IOs and fair trial rights. It classifies the responses of domestic courts to the conflict between IO immunity and fair trial rights and analyses the legality under international law of decisions denying immunity to IOs on the basis of fair trial rights. If the denial of immunity to IOs in situations where the IO does not ensure the fair trial rights of the claimant is lawful, domestic courts may constitute lawful fora for adjudicating and enforcing the legal responsibility of IOs for the breach of their obligations.

Whether domestic court decisions denying IOs immunity on the basis of the violation of the claimant's fair trial rights are legal is addressed through examining (a) whether domestic court decisions, through constituting subsequent practice in the application of treaties and State practice and/or *opinio juris* in relation to customary international law, have carved out an exception to IOs' immunity in situations where the claimant's fair trial rights are not satisfied; (b) whether the application of a rule of normative hierarchy or a conflict rule can render a denial of immunity legal and (c) whether the application of rules allowing for suspension of treaty obligations on account of material breach and countermeasures can result in a denial of immunity being lawful.

Part II includes chapter 3 which assesses the decisions of international courts on IO immunity and fair trial rights, including in particular, the decisions of the European Court of Human Rights (ECtHR), chapter 4 which assesses the practice of domestic courts and whether these decisions have carved out an exception to IOs' immunity on the basis of fair trial rights, and chapter 5 which examines how conflict rules, rules of normative hierarchy, rules allowing for suspension of treaty obligations on account of material breach and countermeasures apply to the conflict between IO immunity and fair trial rights.

Part III concerns the manner in which domestic courts promote compliance with IOs' fair trial obligations by triggering reactions from States and IOs. Assuming that there is no clear legal basis under international law as it currently stands on which States can deny immunity to IOs on the basis of fair trial rights, this part considers how the decisions of domestic courts may nevertheless have an important impact on enforcing the obligations of IOs under international law. The argument is made that an effect of court decisions

denying immunity and engaging in lesser signalling measures[20] in claims against IOs may be to trigger a set of reactions by the State and/or IO that may lead to increased compliance with the fair trial obligations of IOs, including at times implementing the engaged but unimplemented responsibility of the IO for the breach of its obligations to ensure fair trial rights.[21]

Part III constitutes chapter 6, which engages in an analysis of several examples where domestic court decisions have triggered reactions from States and IOs, resulting in IOs complying with their fair trial obligations and chapter 7, the conclusion, which summarises the findings of the thesis.

III. THE SCOPE OF THE THESIS

The thesis concerns whether and how domestic court decisions promote compliance with IOs' fair trial obligations. It examines whether domestic courts themselves may constitute lawful fora for the adjudication and enforcement of the responsibility of IOs for the breach of their obligations or whether the decisions of domestic courts act as a catalyst in triggering a set of reactions from States and IOs which result in IOs taking steps to uphold their fair trial obligations. The thesis does not address the important question of the features and suitability of existing remedies available to private parties against IOs — the subject

[20] These are measures short of denying immunity which still signal to States and IOs that the claimant's fair trial obligations must be upheld. See chapter 5, section III.

[21] See chapter 2, section III.

of full- length work,[22] or the types of remedies that may be created for bringing claims against IOs.[23] The thesis limits itself to noting that private parties often do not have an appropriate forum to make claims against IOs as well as to determining the sources and content of the obligation of IOs to ensure fair trial rights. [24]

The thesis also does not engage with the question of the appropriate test for determining the extent of immunity for IOs, i.e., whether immunity *should* be subject to fair trial rights,[25] or whether the acts of IOs should be subject to judicial review by national courts and if so, on what basis.[26] The thesis merely determines whether, as a matter of *lex lata* the practice of domestic courts or the application of a different rule of international law renders the denial of immunity legal in situations where the claimant's fair trial rights are not upheld and whether, even if such a denial of immunity is not legal, domestic court decisions have an empirically verifiable extra-legal impact on IOs taking steps to comply with their fair trial obligations.

The thesis is based on the traditional sources of international law in the determination of whether domestic courts' denial of immunity to IOs in situations where

[22] See e.g., Karel Wellens, *Remedies Against International Organizations* (Cambridge University Press 2002); Ferstman (n 7). See also Gulati (n 4), chapter 3.

[23] Nico Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations' (2013) 10 International Organizations Law Review 588.

[24] See chapter 1 section V and chapter 2.

[25] Gaillard and Pingel-Lenuzza (n 18) 4.

[26] Reinisch, 'To What Extent Can and Should National Courts Fill the Accountability Gap' (n 7). On the latter point, see Gulati (n 4), chapter 5 arguing that in the absence of adequate alternative dispute settlement mechanisms created by IOs, domestic courts should exercise jurisdiction based on the principles of private international law including the rules on civil jurisdiction, applicable law and the recognition and enforcement of judgments.

the claimant's fair trial rights are not upheld is lawful. The claim that domestic court decisions have an extra-legal impact on promoting compliance with IOs' fair trial obligations is grounded on empirical evidence. Being concerned with the enforcement of an international legal obligation of IOs — that of ensuring the fair trial rights of private parties, through the means of domestic courts, the thesis does not engage with the claims of the 'Global Administrative Law' school.[27]

The claims of the thesis are subject to the fact that IOs are diverse institutions, both in terms of powers and functions and in terms of membership.[28] The rules on the immunity of IOs, for instance, vary based on such differences.[29] However, as evidenced by the subtitle of a leading textbook in international institutional law, there is unity within diversity.[30] With respect to the subject matter of this thesis, every IO employs individuals and is thus the subject of legal claims by employees. IOs also interact with individuals outside of the employment relationship, whether through large-scale peacekeeping operations, through funding development projects, through the procurement of goods and

[27] This branch of law is described as 'the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality', see Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 15; The term 'global' is said to be employed rather than 'international' to avoid implying that Global Administrative Law is part of *lex lata* or even *lex ferenda* within 'standard conceptions of international law', Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 European Journal of International Law 23, 25–26.

[28] For many examples, see e.g., Schermers and Blokker (n 11) para 22 ff.

[29] Webb (n 18) 325.

[30] Schermers and Blokker (n 11).

services or through motor vehicle accidents. Thus, all IOs are subject to claims through their interaction with individuals who are not employees of the IO.

It is the claim of this thesis that all IOs bear an obligation, based on the activities they perform, to ensure the fair trial rights of individuals.[31] Thus, subject to the distinctions set out in chapter 4,[32] the practice of domestic courts in claims against IOs applies to determining whether denying immunity on the basis of fair trial rights is lawful with respect to all IOs. Barring Article 103 of the UN Charter, the rules of international law assessed in chapter 5 similarly apply to the immunity of all IOs. The claim that domestic court decisions may have an extra-legal effect on inducing compliance with IO's fair trial obligations also applies to all IOs, but is subject to limitations, including based on the nature of the functions performed by the IO, to be discussed in later chapters.[33] Another important limitation to highlight at the outset is that the measures taken by IOs to comply with their fair trial obligations as a result of domestic court decisions may not always fully satisfy the obligations. They may only improve compliance with the IOs' fair trial obligations.[34]

[31] See chapter 2.

[32] See in particular, chapter 4, sections, IID, VA1 (b).

[33] See in detail, chapter 6, section III.

[34] For instance, the offer of arbitration may be too costly and therefore inaccessible to satisfy the fair trial rights of an individual. See Bruce C Rashkow, 'Immunity of the United Nations' (2014) 10 International Organizations Law Review 332, 337 See also chapter 6, section IIIC.

IV. METHODOLOGY

The thesis makes a doctrinal legal claim and an empirical claim. This section will briefly discuss two methodological issues — (a) the process adopted in researching domestic case law concerning the immunity of IOs and fair trial rights; and (b) the basis for the empirical claim made in chapter 6.

The research for the international law decisions concerning immunity and fair trial rights was straightforward due to the databases maintained by the respective courts and tribunals. Several keyword searches were conducted on the databases to bring up any relevant decisions. The research on domestic case law was more complicated. The starting point was published work citing decisions of domestic courts in claims against IOs.[35] However, the case law assessed in the academic literature is to a great extent European and North American.[36] An attempt is made to include cases from other jurisdictions in the analysis of domestic court practice in chapter 4. As such, word searches were conducted on case law databases in jurisdictions from Asia, Africa and South America in addition to

[35] E.g., August Reinisch, *International Organizations before National Courts* (Cambridge University Press 2000); Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar Publishing 2017); August Reinisch, The Privileges and Immunities of International Organizations in Domestic Courts (Oxford University Press 2013); Cedric Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends' (2010) 7 International Organizations Law Review 121.

[36] This is despite August Reinisch, The Privileges and Immunities of International Organizations in Domestic Courts (n 35) featuring some chapters on jurisdictions outside of Europe and the United States. A case digest published by the World Bank Legal Department in 1985 contains some decisions from outside Europe and North America. See A.N. Vorvink, M.C. Hakuta, 'Lawsuits Against International Organizations: Cases in National Courts involving Staff and Employment' (World Bank Legal Department 1985).

databases such as Oxford's International Law in Domestic Courts (ILDC) and databases containing case law from Europe and the United States.

Furthermore, requests were made from the registries of domestic courts for relevant decisions. Case records of decisions from courts in Colombia and Canada were obtained due to the cooperation of the respective registries. Requests were also made from colleagues from different jurisdictions to search for relevant decisions in case law databases of the respective jurisdictions, including those in vernacular languages. When accessing foreign language materials including those in Spanish, Dutch, French, German and Greek, translation assistance was relied on.

Whilst many claims are made against IOs before domestic courts and it is not possible to collate all such decisions, it appears from the cases surveyed that there are several *types* of domestic court decisions reflecting the different methods domestic courts may use to determine the conflict between IO immunity and fair trial rights. It is believed that all such types of decisions have been captured in the thesis' analysis.

Chapter 6 makes an empirical claim, that domestic court decisions may trigger States and IOs into taking measures to ensure that IOs comply with their fair trial obligations. This claim is made using several examples of domestic court decisions triggering reactions from States and IOs with the result that IOs create means for the settlement of disputes with private parties. The material in this section is based on documentary evidence contained in reports, statements, decisions and resolutions of States and IOs. The research was a process of reverse engineering — of identifying situations in which IOs had conducted major overhauls of their internal mechanisms for the settlement

of disputes or had created new methods for the settlement of disputes with private parties and examining the resolutions through which the decisions to do so had been taken. This was supplemented by searching the UN Juridical Yearbook and the Repertory of Practice of the UN to identify situations in which UN member States or UN bodies had reacted to domestic court decisions in claims against IOs.

Causality is methodologically difficult to prove. However, the material examined in chapter 6 suggests that explicit reference to domestic court decisions or an implicit concern about domestic courts denying immunity to IOs is often to be found in the resolutions and decisions of IOs creating or improving their internal dispute resolution mechanisms. Therefore, it is suggested that domestic court decisions have, at least on occasion, generated reactions from States and IOs so that IOs' fair trial obligations have been better enforced and individuals' fair trial rights have been better upheld.

The following sections in this chapter will illustrate the lack of means to adjudicate the responsibility of IOs for conduct impacting private parties and describe the process through which claims before domestic courts may promote compliance with IOs' fair trial obligations.

V. A Lack of Means to Adjudicate the Responsibility of IOs

A. Cholera in Haiti

Many recent works on the accountability of IOs base their analysis around the introduction of cholera to Haiti be UN peacekeepers in 2010.[37] It serves as a powerful illustration of the lack of means for individuals to bring claims against IOs for conduct affecting them.

In October 2010, a severe epidemic of cholera ravaged Haiti resulting in close to ten thousand deaths. The outbreak occurred shortly after the United Nations had deployed Nepalese soldiers to Haiti as part of the UN Stabilization Mission in Haiti (MINUSTAH). The Nepalese soldiers had not been screened for cholera prior to their deployment and were stationed at a base on the banks of the Meye tributary, which flows into the Artibonite river, the primary water source for tens of thousands of Haitians. From this base, the Nepalese soldiers allegedly discharged raw sewage and disposed of untreated human waste.[38]

The results of several studies on the outbreak pointed squarely to the UN Peacekeepers at the Mirebalais MINUSTAH facility as its source.[39] There is thus strong

[37] See e.g., Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law; Boon and Megret (n 6); Ricardo Pavoni, 'Choleric Notes on the Haiti Cholera Case' (*Questions of International Law*, 27 July 2015) <http://www.qil-qdi.org/choleric-notes-on-the-haiti-cholera-case/> accessed 16 September 2022; Rosa Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25 European Journal of International Law 239.

[38] *Georges v. the United Nations*, Petition for Relief filed on behalf of the Haiti Cholera victims, 3 November 2011 http://www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf (accessed 5 September 2022) [3].

[39] Alejando Cravioto et al, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' 4 May 2011; Daniele Lantagne et al, 'The Cholera Outbreak in Haiti: where and how did it begin?', Current Topics in Microbiology and Immunology, Vol. 379 (Berlin, Springer, 2013) 145-164.

evidence that the UN, through the introduction of its peacekeepers, was responsible[40] for the introduction of cholera to Haiti and thereby for the deaths of thousands of Haitians.

In 2011, the Institute for Justice and Democracy in Haiti filed a petition for relief on behalf of over 5000 victims claiming *inter alia* compensation for the UN's negligence.[41] The petition was filed under a standard clause in the Status of Forces Agreement between the UN and Haiti,[42] providing that a standing claims commission shall settle claims of a private law character. A standing claims commission as envisaged by section 55 of the Status of Forces Agreement between Haiti and the UN was, however, never established.[43] Additionally, in a brief letter in 2013, a full sixteen months following the petition, the UN Under-Secretary General for Legal Affairs stated that the claims were not receivable pursuant to section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN)[44] since the claims were not of a 'private law character' because their consideration 'would necessarily include a review of political and policy matters'.[45]

In a damning indictment of the UN's evasion of responsibility for the outbreak,

[40] 'Responsible' is used here in a factual sense as opposed to legal responsibility.

[41] *Georges* Petition [1].

[42] Agreement between the United Nations and the Government of Haiti concerning the Status of the United Nations Operations in Haiti (9 July 2004) 2271 UNTS 235, Section 55.

[43] *Georges* Petition [5].

[44] 13 UNTS 15 (13 Feb 1946). Section 29 requires the United Nations to provide for appropriate modes of settlement of disputes of a private law character to which it is a party.

[45] Letter of the United Nations Under-Secretary-General for Legal Affairs Patricia O'Brien concerning the Haiti cholera claims, 21 February 2013 <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> (accessed 3 May 2021). For a powerful critique of the UN's reasoning that the claims did not involve claims of a private law character, see Pavoni (n 37).

Phillip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, stated in 2016 that the Organisation's existing legal approach of simply abdicating responsibility is 'morally unconscionable, legally indefensible and politically self-defeating'.[46] Whilst in 2016, the UN Secretary General apologized to the Haitian people for the outbreak, outlined a strategy to combat cholera in Haiti and to provide benefits to the individuals and communities most directly affected, there was no admission of legal responsibility for the outbreak, no creation of means to hear claims for damages caused by the outbreak and no admission of an obligation to provide compensation.[47] This refusal to accept legal responsibility for the epidemic was accompanied by the UN consistently invoking its immunity when claims were brought on behalf of the victims before domestic courts.[48]

B. A Claim by an Employee for Unlawful Termination

A recent case decided by the Court of Appeal of Sri Lanka[49] concerned the alleged unlawful termination of the claimant's[50] employment by the Food and Agriculture Organization

[46] Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', 26 August 2016, A/71/40823 [3].

[47] UN General Assembly (UNGA), 'A New Approach to Cholera in Haiti: Report by the Secretary-General', 3 May 2017, A/71/620; Kristina Daugirdas, 'EJIL: Talk! – The United Nations' Efforts to Restore a Reputation Tarnished by Cholera' <https://www.ejiltalk.org/the-united-nations-efforts-to-restore-a-reputation-tarnished-by-cholera/#more-14812> (accessed 29 March 2018).

[48] See e.g., *Georges v. the United Nations* (Court of Appeal, 2nd Circuit, United States) No. 15-455 (2016) (*Georges*); *Georges v the United Nation* (District Court for the Southern District of New York, United States) 84 F. Supp. 3d 246 (2015). For a detailed chronology of the litigation, see 'Georges v United Nations: The Lawsuit against the UN for Cholera' http://www.ijdh.org/our-work/accountability/cholera-accountability/cholera-litigation/ (accessed 5 September 2022).

[49] *Palihawadana v Commissioner of Labour* (Court of Appeal Sri Lanka, 3 June 2021) CA Writ 370/2017.

[50] Throughout the thesis, I use the term 'claimant' to denote private persons who make claims against IOs before domestic courts. The nature of the claim may mean that the term 'claimant' may not be strictly

(FAO). The claimant employee, who was based in Sri Lanka, made a claim before the Sri Lankan Labour Commissioner and Labour Tribunal against the allegedly unlawful termination of employment. The FAO made no appearance before these fora but informed the Sri Lankan Ministry of Foreign Affairs through a *note verbal* that it was immune from the jurisdiction of Sri Lankan courts and tribunals.[51]

The Labour Tribunal heard the matter *ex parte*, decided the matter in favour of the employee and awarded her compensation. However, the employee could not enforce the decision since the Ministry of Foreign Affairs had informed the enforcing authority, the Labour Commissioner, that the order could not be enforced as the FAO enjoyed 'immunity from legal action'.[52]

The Sri Lankan Court of Appeal quashed the decision of the Labour Commissioner not to enforce the order of the Labour Tribunal on the basis that the Labour Commissioner had not satisfied himself independently that the FAO was immune from jurisdiction and enforcement.[53] The Court issued an order for the Commissioner to reconsider his decision according to law. Pertinently for the purposes of this thesis, the case brings to light several matters relating to enforcing the legal responsibility of IOs for breach of their obligations.

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accurate, as is the case here, where the party was making an application for judicial review under Article 140 of the Sri Lankan Constitution and should be properly referred to as a petitioner.

[51] It appears however that the Ministry of Foreign Affairs had conveyed to the Labour Tribunal that the immunity of the FAO did not extend to the termination of contracts of employment under the 'current status of international law and the practice pertaining to claims of immunity', *Palihawadana*, 3-4.

[52] Ibid, 6.

[53] There were many discrepancies with the agreements under which the FAO claimed immunity, as well as their incorporation into domestic law, see *Palihawadana*, 17ff.

Firstly, the employee, despite being aware of the barrier of the immunity of the FAO before domestic courts,[54] chose to pursue her claims before domestic courts anyway. This shows the limited ability of employees based in offices of IOs in developing countries to pursue claims against an IO before the IO's internal mechanisms overseas, most likely retaining foreign counsel.[55] Secondly, the approach of the FAO in this matter in merely asserting its immunity from jurisdiction[56] without addressing in any way the substantive grievance of the employee, suggests that asserting immunity appears to be the priority for the IO.[57] This was also the case with the Haiti Cholera claims, where the letter of the UN Under-Secretary General for Legal Affairs to the Director, Institute for Justice and Democracy in Haiti, simply dismissed the possibility of even a meeting to discuss the claims, whilst the UN asserted its immunity before domestic courts.[58] This unwillingness on the part of IOs to create means to hear and resolve claims against them, coupled with the reluctance of States to invoke the responsibility of IOs, results in the claims not being adjudicated and a remedy for a violation not being provided.

[54] She had in fact sought confirmation from the Ministry of Foreign Affairs that the immunity of the FAO did not extend to termination of employment contracts, *Palihawadana*, 4.

[55] See e.g. Administration of justice at the United Nations Report of the Internal Justice Council 15 July 2016 A/71/158 [139], stating that internal dispute resolution mechanisms within the UN may be inaccessible to 'lowly paid non-staff personnel in the field'; Cf. H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Yearbook of International Law 220 who states with respect to State immunity that a remedy within the foreign State may be costly and impracticable, nominal and incomplete.

[56] At times incorrectly or without reference to the scope of such immunities, see *Palihawadana*, 17 ff.

[57] On this, see further chapter 6, section IA.

[58] See Alston (n 46) [29].

C. A Systemic Problem with holding IOs Legally Responsible for Breaches of their Obligations

The above examples relate to two different types of claims against IOs. The Haiti claim was a claim under the domestic law of tort for acts of an IO affecting a large number of private persons. These are mass tort claims against IOs. In these claims, the obligations alleged to be violated under domestic tort law often mirror obligations under domestic and international human rights law.[59] The claim relating to the FAO, on the other hand, was an individual claim by an employee under a contract of employment, i.e., an individual contractual claim.[60] In both claims, the claimants could not access forums which could independently and impartially adjudicate their claims against the respective IOs. Thus, the factual situations related to each claim display a lack of appropriate means to adjudicate and enforce IOs' legal responsibility for the breach of their obligations under domestic law, the internal law of the IO and international law. Therefore, the legal responsibility of IOs for the breach of their obligations is not adjudicated impartially and independently and is not enforced through remedies such as restitution or compensation.

The lack of means to adjudicate IOs' legal responsibility for the breach of their obligations is for two main reasons. The first is that, as illustrated by the Haiti Cholera claims and to the extent that the employee had to resort to domestic courts, the FAO

[59] See e.g., *Mothers of Srebrenica v The Netherlands* (Supreme Court Netherlands 13 April 2012) 10/04437. English translation:https://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf (accessed 26 July 2022).

[60] For a classification of the types of claims by private persons against IOs, see Bruce C Rashkow, 'Immunity of the United Nations' (2014) 10 International Organizations Law Review 332, 336.

employment claim, IOs, for various reasons, often do not provide appropriate means for the settlement of disputes with private parties.[61] Consequently, they do not provide remedies for breaches of their obligations. The second reason is that IOs are generally immune from the jurisdiction of domestic courts. This is because of the obligation of member States under treaty and arguably under customary international law to grant IOs immunity from jurisdiction and execution.[62] The immunity of IOs before domestic courts results in private parties being unable to have their claims against IOs adjudicated by what is, in most jurisdictions, the most natural forum for a claimant to make a legal claim against a public or private entity.[63]

The following section will assess in more detail the available options for an individual to make a claim against an IO.

[61] See e.g., UN, Letter from Pedro Medrano (n 19). For a detailed analysis of this claim as well as the reasons for IOs not creating means to settle disputes with private parties, see chapter 6, section I.

[62] On the obligation of member States to grant immunity to IOs, see further chapter 4, section V. Several authors claim that there is an obligation, at least for member States to grant immunity to IOs under customary international law. See e.g., Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 91ff. Other authors contend that there is no such general obligation. See e.g., Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 98–99; Michael Wood, 'Do International Organizations Enjoy Immunity under Customary International Law Special Issue: Immunity of International Organizations' (2014) 10 International Organizations Law Review 287, 317. The obligation to grant immunity to IOs is, however, most often considered by domestic courts under treaty — see Cedric Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends' (2010) 7 International Organizations Law Review 121, 124. Some treaties provide for immunity for IOs from all forms of legal process, see e.g., CPIUN, Article 2. Others provide for functional immunity for IOs, e.g., UN Charter, Article 105. Other treaties provide for exceptions to the immunity of IOs for specific types of claims, see e.g., International Bank for Reconstruction and Development (IBRD) Articles of Agreement (entered into force 27 December 1945) 2 UNTS 134, Article VII. As demonstrated in chapter 4, the scope of the immunity of IOs under different treaties does not impact the decisions of domestic courts which consider whether IO immunity should be denied on the basis of the violation of the claimant's fair trial rights.

[63] Reinisch, 'To What Extent Can and Should National Courts Fill the Accountability Gap Special Issue' (n 6).

D. Options for the Individual to make Claims against IOs

1. The IO's internal mechanisms

An individual can bring claims before any internal mechanisms the IO has put in place for the resolution of disputes with private parties. This could include arbitration,[64] claims commissions,[65] or a tribunal established by the IO or the jurisdiction of which the IO has accepted.[66] However, as discussed above, and as will be more fully explored in chapter 6, IOs often do not create means for resolving disputes private persons. When IOs do create internal means to resolve disputes, such means may lack the procedural safeguards required to fulfil the IO's fair trial obligations.[67]

2. Domestic Courts

An individual may make a claim against an IO before domestic courts.[68] Ordinarily however, the immunity of IOs from the jurisdiction of domestic courts prevents individuals from having claims against IOs adjudicated on the merits before domestic courts.

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[64] E.g., The Agreement Between INTEPOL and the Government of the French Republic Regarding INTERPOL's headquarters in France <https://www.interpol.int/About-INTERPOL/Legal-materials/Fundamental-texts> (accessed 26.11.2018), Article 24 provides for arbitration in disputes with private parties.

[65] E.g., Haiti SOFA (n 42) [55].

[66] E.g., the UN Dispute Tribunal, the International Labour Organization (ILO) Administrative Tribunal.

[67] See in detail, Gulati (n 4), chapters 2 and 3. See also cases where the internal mechanism(s) of the IO were held not to satisfy the requirements of the State's obligation to grant access to court to individuals within its territory and subject to its jurisdiction - e.g., *Western European Union v Siedler* (Court of Cassation, Belgium) 21st December 2009, ILDC 1625 (BE 2009).

[68] *Barcelona Traction Light and Power Company Limited (Belgium/Spain)*, Judgment, Merits, Second Phase [1970] ICJ Rep 3 [78] 'Should the natural or legal persons on whose behalf [the State] is acting consider that

Though the rationale[69] for and a common formulation of IO immunity is functional, i.e., the immunity that is required for the performance of the IO's functions,[70] courts have often interpreted such functional immunity broadly, conferring virtually absolute immunity to IOs.[71] Neither the exceptions developed with respect to the immunity of States,[72] nor the treaty-based exceptions to diplomatic immunity[73] have been replicated with respect to IOs generally.[74]

Waiver of immunity before domestic courts

IOs have the discretion to waive their immunity before domestic courts. The rationale of the independent functioning of IOs underlies the fact that IOs are allowed to determine whether they will subject themselves to the jurisdiction of domestic courts through a waiver of their immunity.[75]

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their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress'.

[69] See e.g., Gaillard and Pingel-Lenuzza (n 18) 4–5.

[70] E.g., UN Charter, Article 105; The Protocol on Privileges and Immunities of the European Patent Organisation 1065 UNTS 500, Article 3.

[71] For an exhaustive overview of case law prior to 2000, see Reinisch, *International Organizations before National Courts* (n 35); For later cases, see Ryngaert (n 35); August Reinisch, *Challenging Acts of International Organizations before National Courts* (Oxford University Press 2010).

[72] For the content of these exceptions, see UN Convention on the Jurisdictional Immunities of States and their Property, UNGA A/RES/59/38, 44 ILM 801 (2005), Art. 10 *et seq.*

[73] Vienna Convention on Diplomatic Relations, 500 UNTS 95, Article 31.

[74] Ryngaert (n 35) 125; Webb (n 18) 326.

[75] Sam Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (Kluwer Law International 1995) 163.

One point of view suggests that when the United Nations was created, the expectation was that a waiver of immunity would be the norm rather than the exception. Writing in 1944, Wood stated that 'the national courts would seem to be the best as well as the natural forum for cases arising under a country's domestic law. Except where it is necessary for one of the purposes for which it is granted, the rule should be to waive immunity, and this will normally be the case with ordinary legal claims against the organization'.[76]

It has also been argued that a general obligation of IOs to cooperate with the host State and not stand in the way of the proper administration of justice can, in certain circumstances, compel the IO to waive its immunity.[77] Some immunity instruments explicitly require the waiver of immunity of the IO in particular circumstances. For instance, Article IV (1)(a) of Annex I to the Convention for the Establishment of a European Space Agency (ESA)[78] states that '(t)he Council has the duty to waive… immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency'.

In its Final Report, the International Law Association's Committee on the Accountability of International Organisations, echoing the approach in Article IV of the ESA Convention, recommended that Executive Heads of IOs should waive immunity if such a waiver is required by the proper administration of justice and would not prejudice the interests of the IO. In order to ensure that the legal responsibility of IOs is not left

[76] Hugh Wood, 'Legal Relations between Individuals and a World Organization of States' (1944) 30 Transactions of the Grotius Society 141, 162.7

[77] Muller (n 75) 163 footnote 37.

[78] (1297 UNTS 161).

unadjudicated, the Committee recommended that IOs should follow a restrictive interpretation of the situations where it considers a waiver would prejudice the interests of the IO.[79]

However, despite the thrust of these arguments towards more effective rules governing the waiver of immunity of IOs, actual practice indicates that IOs rarely ever waive their immunity before national courts.[80] Thus, domestic courts are normally unavailable to individuals to have claims against IOs heard on the merits.

3. Diplomatic Protection

If a right owed to a private person's State of nationality is violated by an IO's conduct towards the private person, the State may exercise diplomatic protection against the IO on behalf of the private person.[81] It is important to note here that it is not a private person's claim under domestic law, but rather a claim for breach of the IO's international obligations in its conduct towards the State's nationals that is being espoused.[82]

[79] 'Accountability of International Organizations' (International Law Association 2004) 48.

[80] See e.g., Gaillard and Pingel-Lenuzza (n 17) 2; Reinisch, *International Organizations before National Courts* (n 34) 265. This is not least due to the fact that the IO is given the discretion to determine whether waiver would prejudice the interests of the IO. See also 'Report of the Secretary-General: Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations' (24 April 1995) A/C.5/49/65, which states that the UN prefers to use either negotiations or small claims tribunals to respond to civil claims arising from peacekeeping operations without waiving its immunity.

[81] Judge Krylov noted the possibility of diplomatic protection against IOs in his dissenting opinion in *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion,1949 ICJ Rep. 174, (Dissenting opinion, Krylov) [219]: 'The majority of the Court has in view the functional protection of an agent of the United Nations Organization, even as against the national State of the agent. But it has not borne in mind, for example, the opposite-and possible-situation in which the said State may find it desirable and necessary to protect the agent against the acts of the Organization itself'.

[82] The responsibility invoked is for an injury caused by an *internationally wrongful act*. See ILC, Draft Articles on Diplomatic Protection with Commentaries II YBILC 2006, Part Two, Article 1; *Ahmadou Sadio*

Though States can bring claims against IOs through diplomatic channels,[83] or exceptionally before judicial or arbitral fora,[84] individuals do not, unless exceptionally provided for by treaty,[85] have standing to bring claims in their own name under international law.[86] IOs are generally not party to treaties which allow for individuals to bring claims against States under international law.[87] Thus, individuals can only hope that States will espouse their claims by means of diplomatic protection and bring them against IOs.

This process leaves much to be desired. Firstly, there is no guarantee that States will take up the individual's claims against the IO. Diplomatic protection is discretionary in

Diallo (Republic of Guinea/Democratic Republic of the Congo), Preliminary Objections, Judgment, 2007 ICJ Rep 582 [39].

[83] See e.g., Exchange of Letters Between the United Nations and Belgium Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (20 February 1965) 535 UNTS 197.

[84] For instance, before the International Tribunal for the Law of the Sea (ITLOS). The United Nations Convention on the Law of the Sea (16 November 1994) 1833 UNTS 396 (UNCLOS) allows IOs to be parties (Article 305(1)(f)) and as such also parties in contentious proceedings before ITLOS (Article 1(2)(2) in connection with Article 291(1) UNCLOS).

[85] E.g., human Rights treaties, bilateral and regional investment protection agreements, see Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries 2001 IIYBILC Part Two (ARSIWA), commentary to Article 33 [4].

[86] Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 120 ff.; Edwin M Borchard, 'The Access of Individuals to International Courts' (1930) 24 American Journal of International Law 359, *Barcelona Traction* [78].

[87] An exception, if implemented, is Article 6 of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] 2007/C 306/01 which provides that the EU 'shall accede' to the ECHR. See José Maria Beneyto, 'Accountability of International Organisations for Human Rights Violations' (Council of Europe, Committee on Legal Affairs and Human Rights) para 42.

nature[88] and States may choose not to exercise it for a variety of reasons.[89] The practice on diplomatic protection against IOs is particularly sparse.[90] Secondly, even if States do exercise diplomatic protection of its nationals against IOs, there is no guarantee that financial reparation, if any, will trickle down to the individuals that have suffered violations.[91]

4. A claim against the State

In the absence of methods to make claims against IOs, a private person affected by the conduct of an IO may invoke the responsibility of *the State*, the jurisdiction of which the person is subject to, for the failure to ensure their fair trial rights. This could be before domestic courts or before a forum made available through a human rights treaty, such as the ECtHR under the ECHR. Claims of this nature have not resulted in substantive relief to the claimants in any case to date.[92] In any event, any potential relief in such a claim would be against the State for the State's own failure to guarantee fair trial rights to the

[88] *Barcelona Traction* [79].

[89] These could include the lack of a monetary incentive to pursue the claim, maintaining good relations with the IO etc. With respect to IOs, one major factor may be access to aid, see Brenda K Kombo, 'Closing the 'Remedy Gap'- The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti' (2017) 5 Groningen Journal of International Law 115, 129.

[90] Some commentators claim there is no practice on this matter, see John Dugard, 'Diplomatic Protection', *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2021) para 78. An exception maybe the Exchange of Letters Between the United Nations and Belgium Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (n 84). See further, chapter 6, section I.

[91] Since the State is exercising its own right, there is no obligation to disburse any financial reparation amongst individuals affected. See e.g., *Administrative Decision No V*, Reports of International Arbitral Awards Vol VII 119, 152. Cf. Draft Articles on Diplomatic Protection, Article 19(c).

[92] See further chapter 3, section II.

individual. This does not provide the individual relief against the IO, unless, following the decision of the domestic court or the international human rights court against the State, the State pressurizes the IO to create remedies for disputes with third parties.[93]

Thus, in the event that IOs have not created appropriate means for the settlement of disputes with private parties, individuals are often left with no forum to have their claims against IOs adjudicated on the merits.

E. Consequences of the lack of fora to bring claims against IOs

The lack of fora for individuals to bring claims against IOs has several consequences. Firstly, this may result in the individual's fair trial rights, specifically the right of access to a forum for the determination of private law claims[94] and the right to a remedy for the violation of rights set out in international human rights conventions,[95] being violated. Secondly, States bear obligations under international human rights treaties and general international law to provide access to a forum for the settlement of private law claims and to provide a remedy for violations of rights to persons within its jurisdiction. These obligations of the State may also be violated. Thirdly, if, as is argued in this thesis[96] IOs themselves are bound by an obligation to ensure fair trial rights to individuals, this obligation may also be violated by the lack of means for individuals to make claims against

[93] See further chapter 6, section II.

[94] ICCPR Article 14(1); ECHR Art 6(1); See HRC General Comment 32, UN Doc CCPR/C/GC/32 (23 August 2007) [9]; *Golder v UK* (ECtHR) App No 4451/70 (21 February 1975) [28-36].

[95] ICCPR Article 2(3); ECHR Article 13; Charter of Fundamental Rights of the European Union, Art 47.

[96] See chapter 2.

IOs. Finally, and importantly, the responsibility of IOs for the breach of the obligations which are the subject matter of the private parties' claim remains unadjudicated, with the consequence that the legal responsibility of IOs for the breach of their obligations will remain unenforced.

VI. THE PROCESS BEFORE DOMESTIC COURTS

A. Conflicting obligations for the State in claims against IOs before domestic courts

As demonstrated in the examples of Haiti and the employment claim against the FAO, when IOs engage in conduct that impacts private persons, affected persons make claims against IOs. Since private persons do not, in the absence of a treaty providing for it, have standing to bring claims in their own name under international law,[97] and since there is no treaty providing for individuals to bring claims against IOs under international law, these claims are usually made under domestic law before domestic courts or under the internal law of the IO before mechanisms provided by IOs.

As discussed above, when individuals bring claims against IOs before domestic courts, the immunity of IOs from the jurisdiction of domestic courts means that ordinarily, domestic courts dismiss these claims without adjudicating the merits. The decisions of

[97] Cf e.g., *LaGrand* (*Germany/United States*) Judgment 200 ICJ Rep 466 [77]; ARSIWA, commentary to Article 33 [4].

domestic courts in these claims have largely been to uphold the immunity of IOs notwithstanding IOs not having created means to ensure the fair trial rights of individuals.[98]

However, when a private person brings a claim against an IO before a domestic court, the domestic court is faced with conflicting obligations.[99] These conflicting obligations are the obligation of the forum State to grant immunity to IOs on the one hand and the obligation of the State to ensure fair trial rights to persons within its jurisdiction on the other.[100] If the IO has not set up means to ensure fair trial rights, such as an administrative tribunal or arbitral panel, the domestic court is also faced with the fact that the IO has not fulfilled its obligations. These conflicting obligations have been made more pronounced by the decisions of international courts, particularly the ECtHR,[101] which has considered the presence of alternative means for protection of rights under the ECHR as a material factor in assessing whether the immunity of IOs is a proportionate restriction of the right of access to court under the ECHR.

[98] See chapter 4, sections II and V.

[99] A 'conflict' in this context includes: (1) an apparent conflict — which is a conflict that is avoidable, predominantly by means of interpretation; (2) a resolvable conflict —a conflict that cannot be avoided but can be resolved so that State Responsibility will not arise, by the application of a conflict rule or a rule of normative hierarchy (i.e., *jus cogens*) and (3) an irresolvable conflict — one which cannot be avoided or resolved and will result in State Responsibility by the State fulfilling one obligation in breach of the other. The wrongfulness of the breach may however be precluded by the application of a rule precluding the wrongfulness of the State's conduct. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 175; Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 72–75.

[100] See Singer (n 62) 96.

[101] See chapter 3, sections II and III.

Particularly following the decisions of the ECtHR in *Waite and Kennedy*[102] and *Beer and Regan*[103] some domestic courts have considered whether reasonable alternative means for the protection of the fair trial rights of individuals are available when granting immunity to IOs.[104] Some domestic courts have denied immunity to IOs on the basis that the IO had not created any such means[105] or that the means created were not adequate.[106] Other domestic courts, whilst not denying immunity, have resorted to signalling in some manner that means to settle disputes must be created in order for the fair trial rights of private persons to be upheld.[107]

It is the impact of these domestic court decisions on inducing compliance with IOs' fair trial obligations and thereby enhancing the adjudication and enforcement of the responsibility of IOs for the breach of their obligations that this thesis considers.

[102] *Waite and Kennedy v Germany* App No. 26083/94 (ECtHR, 18 February1999).

[103] *Beer and Regan v Germany* App No 28934/95 (ECtHR, 18 February1999).

[104] See chapter 4, section IIA.

[105] E.g., *Banque africaine de d´eveloppement v. M.A. Degboe*(Cour de Cassation, Chambre sociale France)132 Journal du droit international (2005) 1142.

[106] E.g., *Y v Banque des états de l'afrique centrale*(Cour de Cassation, France) ECLI: FR:CCASS:2017:SO02638.

[107] E.g., *Ochani vs WHO* (Delhi High Court, India) Oxford Reports on International Organizations (OXIO) 591.

B. The manner in which domestic courts induce compliance with IOs' fair trial obligations

There are two possible ways in which domestic court decisions can induce compliance with IOs' fair trial obligations. The first is by domestic courts denying IOs immunity and exercising jurisdiction in claims against IOs. If the denial of immunity to an IO is lawful and the domestic court constitutes a lawful forum for the settlement of claims against IOs, the claimant's fair trial rights are upheld, and the State's fair trial obligations are discharged. Moreover, in the event that the IO accepts the jurisdiction of the domestic court in the case at hand and/or complies with the order of the court, the IO's fair trial obligations are discharged and the responsibility of the IO for any breach of the obligation to ensure fair trial rights is implemented through cessation of the wrongful conduct.[108] It is in this context that the thesis will examine whether (a) the practice of domestic and international courts has carved out an exception to the obligation of States to grant immunity to IOs in situations where individuals' fair trial rights are not satisfied and (b) whether the application of other rules of international law — i.e., rules of normative hierarchy, conflict rules, rules allowing for the suspension of treaty obligations on account of material breach and the rules on countermeasures, render a denial of immunity to IOs, as well as the subsequent exercise of jurisdiction by domestic courts, lawful in situations where individuals' fair trial rights are not upheld.

[108] See further chapter 2, section III.

The second manner in which domestic court decisions may induce compliance with IOs' fair trial obligations falls outside the domain of legality and falls within the 'realm of the extra-legal.'[109] Domestic court decisions, even those that do not deny immunity to IOs but merely signal that the fair trial rights of individuals must be upheld,[110] may trigger reactions from States and IOs which result in IOs complying with their fair trial obligations by creating means for the settlement of disputes with private parties. The creation of such means may take place with respect to the particular claim in which the domestic court decision was made, or the domestic court decision may trigger reactions which ensure that the fair trial rights of private persons are upheld with respect to future claims. This manner in which domestic court decisions may induce compliance with IOs' fair trial obligations does not depend on the legality of the domestic court decision.

In the event that a domestic court decision triggers States and IOs into ensuring that the IO provides means for the settlement of the particular claim which was the subject of the domestic court decision, the decision would, in addition to inducing compliance with the fair trial obligations of the IO, also be implementing the responsibility of the IO for the breach of its fair trial obligations.[111] This is through cessation of the IO's wrongful conduct of not ensuring the fair trial rights of the claimant with respect to the particular claim in question. The increased compliance by IOs of the obligation to ensure fair trial rights to private parties in turn results in the legal responsibility of IOs for the breach of their other

[109] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 160ff.

[110] See chapter 5, section IV.

[111] See chapter 2, section III.

obligations under domestic and international law being increasingly adjudicated and enforced through remedies such as restitution and compensation.

Thus, in summary, domestic courts may induce compliance with the fair trial obligations by IOs by either acting as lawful fora for the adjudication of claims against IOs, or by triggering reactions from the executive branches of States and from IOs that result in IOs creating means for the settlement of disputes with private parties. If domestic court decisions induce compliance with the fair trial obligations of IOs, this would result in individuals' fair trial rights being upheld, the obligations of States and IOs to ensure fair trial rights to private parties being discharged and the responsibility of IOs for breach of their obligations under domestic and international law being increasingly adjudicated and enforced.

CHAPTER 2

THE FAIR TRIAL OBLIGATIONS OF INTERNATIONAL ORGANISATIONS

For decisions of domestic courts in claims against IOs to be a means of inducing compliance with the fair trial obligations of IOs, it must be demonstrated that IOs are bound by an international obligation to ensure fair trial rights to private persons.[1] The breach of this obligation, if attributable to the IO, will entail its international responsibility.[2] As discussed in chapter 1, the rights (and corresponding obligations) that come into conflict when an IO claims immunity before a domestic court[3] are the rights of the claimant to a fair trial, including the right of access to an independent and impartial forum for the determination of ones' rights and obligations,[4] and the right to a remedy.[5]

[1] As noted in chapter 1, the phrase 'fair trial rights/obligations' will be used as shorthand to encompass both the right/obligation of access to a forum and the right/obligation to a remedy. When each obligation is being referred to separately, they will be referred to as the right of access to a forum and the right to a remedy respectively. See text at (nn 4-7) below.

[2] ARIO, Article 4; also cf. ARSIWA, Article 2.

[3] For analysis of cases in which domestic courts have considered the impact on the right to a fair trial when an IO claims immunity, see chapter 4, sections II and III.

[4] ICCPR Article 14(1); ECHR Art 6(1); See HRC General Comment 32 (Right to equality before court and tribunals and to fair trial), UN Doc CCPR/C/GC/32 (23 August 2007) [9] ('HRC GC 32'); *Golder v United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) [28-36].

[5] ICCPR Article 2(3); ECHR Article 13; Charter of Fundamental Rights of the European Union, Art 47; for identification of the possible remedies in the context of human rights law, see Dinah Shelton, *Remedies in International Human Rights Law* (Third edition, Oxford University Press 2015) pt IV.

The right of access to a forum applies to rights and obligations of claimants in private law, whereas the right to a remedy applies to a violation of rights typically set out in human rights treaties – i.e., rights classified as public law rights in domestic law.[6] These rights are connected in that the right of access to a forum is one such public law right, the violation of which will trigger the right to a remedy.[7]

This chapter will establish that IOs are bound by 1) the obligation to provide private persons access to an independent and impartial forum for the determination of private law claims against the IO and 2) an obligation to provide a remedy for the violation of public law rights to which the IO is bound. Once it is established that IOs bear an international obligation to provide fair trial rights, it is relatively straightforward to establish that this obligation is breached by omission — by the failure to provide mechanisms that will satisfy the right to a forum and the right to a remedy, that this omission is attributable to the IO, and that its responsibility is engaged.

Section I discusses the obligation of IOs to ensure fair trial rights under treaty law. The formulation of the obligation that is most commonly used in many treaties mirrors the text found in the Convention on the Privileges and Immunities of the United Nations

[6] ICCPR Art 14(1), ECHR Art 6(1) and IACHR Art 8(1) enshrine an obligation to provide a fair hearing before a tribunal established by law in the determination of a person's civil rights and obligations under domestic law. This includes the obligation to provide access to court, see *Golder* [28-36]; HRC GC 32. ICCPR Art 2(3), ECHR Art 13 and IACHR Art 25 concern the obligation to provide effective remedies before national authorities for the violation of rights enshrined in *inter alia* the respective Conventions — these rights are what may be termed 'public law' rights in domestic law. The foregoing obligations are combined in, for instance, the Charter of Fundamental Rights of the European Union, Art 47. As discussed in section II G below, the obligation of the IO would extend to providing protection 'equivalent' to both these obligations of States.

[7] See HRC GC 32 [58] 'the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 [obligation to provide a fair hearing] has been violated'.

(CPIUN).[8] Thus, section I will focus on the interpretation of the obligation as set out in the CPIUN. Section II discusses the obligations of IOs to ensure fair trial rights under general international law. Section III briefly discusses how these obligations are breached by omission and how the omission is attributable to the IO before discussing in detail the content of IOs' international responsibility for the breach of their fair trial obligations.

I. THE OBLIGATION UNDER TREATY

IOs are bound by obligations under international agreements to which they are party.[9] Though IOs are not party to their constituent instruments, they are also bound by obligations thereunder.[10] This is due to the fact that it is the constituent document that creates the IO and sets out its rights and duties.[11]

IOs may also be bound by obligations under international agreements other than their constitutive instruments to which they are not party, but through which they derive rights.

[8] (13 February 1946) 1 UNTS 15.

[9] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Rep 73 [37]; *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, 1948 ICJ Rep 57, 64.

[10] See e.g., Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 12; see also Paul Reuter, Special Rapporteur on the question of treaties concluded between States and International Organizations and between two or more International Organizations 1982 I YBILC 26: 'An absurd question would then have to be asked: was an international organization a third party in relation to the instrument which had created it? Was the United Nations a third party in relation to the Charter?...in all systems of internal law, it was acknowledged that a corporation was not a third party in relation to the contract establishing it'.

[11] See *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion 1948 ICJ Rep 174, 180 where the ICJ stated that 'the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents…'.

For example, though the UN is not a party to the CPIUN, the ICJ found that the Convention gives rise to rights and obligations not only between State parties but also between each State party and the UN.[12]

Many agreements conferring immunity on IOs provide for an obligation on the part of the IO to provide means for the settlement of private law disputes.[13] This prompted the Special Rapporteur on the relations between States and IOs to state that '[this] obligation is enshrined in all existing headquarters agreements.'[14] Indeed, the obligation to provide means for the settlement of disputes is often considered the necessary corollary to granting immunity to IOs.[15]

[12] *Reparation*, 179. This also appears to be an exception to the rule on privity of treaties, enshrined in VCLT, Article 34 and also Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations 25 ILM 543 (1986) (not yet in force) ('VCLT-IO'), Article 34. Cf. Josef L Kunz, 'Privileges and Immunities of International Organizations' (1947) 41 American Journal of International Law 828, 848 stating, somewhat artificially. that the vote of approval by the UNGA was equivalent to ratification of the CPIUN by the UN.

[13] See e.g., UN Legislative Series, Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organisations ('Legislative Texts') Vol I ST./LEG/SER.B/10 (New York 1959), 201 (Interim Arrangement on Privileges and Immunities of the United Nations Concluded between the Secretary-General of the United Nations and the Swiss Federal Council 11 June 1946), 303 (Exchange of Letters constituting an Agreement between the United Nations and the Government of Egypt concerning the Status of the United Nations Emergency Force in Egypt 8 February 1957); Vol II ST./LEG/SER.B/11 (New York 1961), 178 (Agreement between the International Civil Aviation Organization and the Government of Egypt regarding Privileges, Immunities and Facilities in Egyptian Territory 27 August 1953), 343 (Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Headquarters of the International Atomic Energy Agency 11 December 1947). For further examples, see Legislative Texts Vol II, 284, 292, 295, 298, 305, 381, 386, 420.

[14] Leonardo Diaz-Gonzalez, Fourth report on relations between States and International Organizations (second part of the topic) A/CN.4/424, 1989 II YBILC (Part One), 161 [59].

[15] See e.g., Swiss Host State Act, Loi fédérale du 22 juin 2007 sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte, RS 192.12, section 28 of which requires the Federal Council to ensure that the beneficiary of immunity adopt appropriate measures with a view to the satisfactory settlement of disputes arising out of contracts to which the institutional beneficiary may be a party and of other private-law disputes.

A. The obligation under the CPIUN

The obligation to create means for the settlement of disputes appears in the 1946 CPIUN in the following formulation:

> The United Nations shall make provisions for appropriate modes of settlement of:
> (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.[16]

The same formulation appears *mutatis mutandis* in 1947 the Convention on the Privileges and Immunities of the Specialized Agencies (CPISA) [17] and many agreements to which diverse IOs are party.[18] This includes IOs such as the North Atlantic Treaty Organization (NATO)[19] and the Organization of African Unity (OAU)[20] which are external to the United Nations system.

[16] CPIUN, Art VIII, section 29(a).

[17] (21 Nov 1947) 33 UNTS 261, section 31. As of 2022, 130 States are parties to the Convention.

[18] E.g., United Nations Educational and Scientific and Cultural Organization (UNESCO) Headquarters Agreement (2 July 1954) 357 UNTS 3, Article 28; International Civil Aviation Organization Headquarters Agreement (14 April 1951) 96 UNTS 156, Article VII, section 30(a); Agreement between the Government of the Republic of Argentina and the Pan American Sanitary Bureau regarding the establishment of a zone office in the city of Buenos Aires, (21 August 1951) Legislative Texts Vol II, 290, Article 12(a); Agreement between the World Health Organization and the Government of India concerning the Privileges, Immunities and Facilities to be granted by the Government of India to the World health Organization (9 November 1949) 67 UNTS 44, Article XI, section 31(a).

[19] Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa) 20 September 1951, Article XXIV.

[20] General Convention on the Privileges and Immunities of the Organization of African Unity 1000 UNTS 393, Article IX(1).

The text of the CPIUN is the forerunner to these identically worded obligations which apply to different IOs under later treaties.[21] The following section will therefore examine the content of the obligation under the CPIUN and the CPISA, which will be relevant to the interpretation of the identically phrased obligation applicable to other IOs under other treaties.[22]

1. 'Appropriate modes' for the settlement of disputes

The use of the phrase 'appropriate modes of settlement' indicates that the obligation does not require specific means of settlement. The IO has a degree of discretion to determine what form the means of settlement will take.[23]

In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*[24] the UN Economic and Social Council requested the ICJ for an advisory opinion on the applicability of the CPIUN immunity provision relevant

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[21] The text of section 29 itself appears to be based on the text of a draft resolution on the status, immunities, and other facilities to be accorded to the ILO by Governments in 1945. See Wilfred Jenks, *International Immunities* (1961) 42.

[22] The interpretation of identically worded treaty provisions, particularly when the provision being interpreted is based on the provision being referred to, are relevant inter alia to the interpretation of the 'terms of the treaty in their context'. See e.g., Richard K Gardiner, *Treaty Interpretation* (Second edition, University Press 2017) 323 ff; Cf. George Nolte, First report on subsequent agreements and subsequent practice in relation to treaty interpretation, ILC 65th Session A/CN.4/660 [48]; Georges v UN (Court of Appeal for the Second Circuit, United States) 15-455-cv August 2015,14ff, providing reasons as to why similarly worded immunity provisions were in this instance not relevant.

[23] Kirsten Schmalenbach, 'Dispute Settlement (Article VIII Sections 29–30 General Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (OUP 2016) 535.

[24] *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion 1999 ICJ Rep 62 ('*Cumaraswamy*').

to experts to Mr Cumaraswamy, Special Rapporteur of the Commission on Human Rights, and on the corresponding legal obligations of Malaysia. In response to a query by Judge Vereshchetin on the legal remedies available to the Malaysian private plaintiffs in the event that the Court upheld the UN's position on the immunity of Mr Cumaraswamy, the UN legal counsel stated that 'the United Nations has implemented Section 29(a) by inserting into all commercial agreements into which it enters an arbitration clause pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules'.[25] With respect to non-contractual private law disputes, the legal counsel noted negotiation, failing which, conciliation or arbitration under the relevant UNCITRAL rules as modes provided for settlement.[26] The Counsel emphasized that the UNCITRAL rules were 'universally recognized to be fair and impartial'.[27]

The foregoing demonstrates that 'appropriate modes' for the settlement of disputes, in order to fulfil the obligation enshrined in Section 29 of the CPIUN, must be fair and impartial.[28] This is supported by the decisions of domestic courts, which generally require means for the settlement of disputes provided by an IO to be independent and impartial.[29]

[25] Ibid, Verbatim Record 10 December 1998, 9.

[26] Ibid, 10. Commercial insurance has also been accepted as an appropriate mode of dispute; see e.g., Memorandum of Understanding with exchange of letters between the UN and the Government of Italy of 23 November 1994, 1997 UNJYB 53, Article VI(3).

[27] *Cumaraswamy,* Verbatim Record 10 December 1998, 9,10.

[28] See also Schmalenbach (n 23) noting that negotiation, conciliation or internal claims review are appropriate modes for the settlement of disputes so long as they do not result in the UN being a judge in its own matter.

[29] See the cases cited in chapter 4, section IIA.

In the course of the proceedings in *Cumaraswamy*, the UN disputed that the obligation in Section 29 of the CPIUN required it to establish a permanent or standing dispute resolution mechanism for private law claims.[30] Malaysia accepted this proposition[31] stating that the needs of Article 29 would be met if the Secretary-General had made a formal, unilateral declaration that in respect of third-party claims, the UN would be prepared to go to arbitration.[32] Indeed, the ILO draft resolution which provided the basis for Article VIII Section 29 of the CPIUN provided for a standing tribunal, which the preparatory commission of the UN explicitly deleted from its draft text that became Section 29 of the CPIUN.[33] Thus, the obligation under section 29 of the CPIUN does not appear to require the creation of a standing dispute resolution mechanism for the settlement of disputes with private parties. What is required is that each claimant is provided with an impartial and independent means for the settlement of the particular claim against the IO.

It may be argued that the ICJ considered that the measures that the UN claimed to have taken pursuant to Section 29 of the CPIUN fulfilled the UN's obligation to provide means for the settlement of disputes when the Court stated that 'as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the

[30] *Cumaraswamy*, Verbatim Record 10 December 1998, 21.

[31] A change in position from Malaysia's earlier stance that the obligation 'is not on its face limited to the establishment of *ad hoc* settlement arrangements only after a particular dispute has arisen'. Ibid, Verbatim Record 8 December 1998, 35.

[32] Ibid, Verbatim Record 10 December 1998, 51.

[33] See Jenks (n 21) 44.

appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29'.[34]

2. Disputes of a 'private law character'

The key limitation in the obligation to provide modes for the settlement of disputes under the CPIUN is that it only applies to creating modes for the settlement of disputes arising out of contracts or other disputes of a 'private law character'.

None of the immunity agreements which the preparatory commission of the UN studied in the drafting of the CPIUN contained the phrase 'disputes of a private law character'.[35] The report of the preparatory commission does not disclose a reason for the choice of the phrase.[36] The *travaux préparatoires* of the identically worded provision in the CPISA states that 'it was observed that this provision applied to contracts and other matters incidental[37] to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions'.[38]

[34] *Cumaraswamy* [66].

[35] See Report of the Preparatory Commission of the UN PC/20, 20 December 1945, 61. The proposal of the ILO (n 22), referred only to disputes 'arising out of contracts'.

[36] Schmalenbach (n 23) 551. See also Handbook on the Legal Status, Privileges and Immunities of the United Nations ST/LEG/2 19 September 1952, 512 where there is only a general reference to the Secretary General settling claims of a private law character on behalf of the Organization.

[37] Emphasis in the original.

[38] W.E. Beckett, Final Report of Sub-Committee 1 of the Sixth Committee A/C.6/191 15 November 1947 [32].

There is reason to reject this reading of disputes of a 'private law character'. For one, the ordinary meaning of the phrase does not refer to a functional distinction between matters related to the main function(s) of an IO on the one hand and incidental matters on the other. The phrase relates rather to the character of the claim, as one governed by private law, which in domestic law would cover areas including contract, tort, property law etc., as opposed to, presumably, public law, the law governing the relationship between individuals and the State acting in a sovereign capacity.[39] In fact, the same paragraph of the aforementioned report goes on to state that '[t]he provision relates to disputes of such a character, that they might have come before municipal courts if the Agency had felt able to waive its immunity, but where the Agency had felt unable to do so'.[40] There is no reason to suppose that only disputes which are incidental to the performance of the IOs main function(s) would be brought before municipal courts. Indeed, private law claims under tort with respect to the main function of an IO have been brought before municipal courts as much as claims in relation to incidental matters.[41]

Secondly, the practice under section 29 also contradicts that the obligation applies only to incidental functions of the IO. For instance, in *Cumaraswamy* the UN Secretary General had determined that Mr Cumaraswamy was acting in his official capacity. Thus,

[39] For an elaboration of the distinction see Sompong Sucharitkul, Fourth report on jurisdictional immunities of States and their property 1982 II YILC (part one) 199, 209[41-43].

[40] Beckett (n 38) [32].

[41] See e.g., e.g., *Mothers of Srebrenica v The Netherlands* (Supreme Court Netherlands 13 April 2012) 10/04437. English translation:https://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf (accessed 26 July 2022); *Georges v UN* (n 22).

presumably, his actions fell within the constitutional functions of the UN. However, the UN stated during the proceedings before the ICJ that 'in the event that immunity is asserted, a claimant seeking a redress against the Organization *shall* be afforded an appropriate means of settlement'[42] and that '[t]he immunity of the United Nations, or its agents, does not leave a plaintiff without remedy'.[43] There was no reference to an exception for constitutional matters.

Moreover, in the report of the Secretary General titled 'Procedures in Place for the Implementation of Article VIII section 29, of the Convention on the Privileges and Immunities of the United Nations' made in response to a request from the General Assembly on the procedures implementing the obligation under section 29, the Secretary General provided information on procedures for the settlement of non-contractual private law claims including claims related to United Nations peace-keeping operations and claims related to operational activities for development.[44] The inclusion of claims under these two categories demonstrates that the obligation under Section 29 extends to private law claims related to the main functions of an IO.

In Status of Forces Agreements (SOFAs) which the UN enters into, disputes of a private law character are defined as '[t]hird-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to [the Mission].[45]

[42] *Cumaraswamy*, Verbatim Record, 10 December 1998, 10 (emphasis added).

[43] Ibid.

[44] A/C.5/49/65, 24 April 1995 [9],[24].

[45] See e.g., Agreement between the United Nations and the Government of Haiti concerning the Status of Forces of the United Nations Operation in Haiti (9 July 2004) 2271 UNTS 235 [54-55]

This is illustrative of the definition to be given to the phrase in section 29[46] and evinces that non – contractual private law disputes include all types of damages claims by private individuals and are not restricted to matters incidental to the main function(s) of the IO.[47]

What then is excluded by the reference to disputes of a private law character? Matters that relate to obligations of the IO under public international law, which are owed to States alone, will not constitute disputes of a private law character. Thus, a claim that the UN has violated the terms of a Security Council mandate, that it has violated human rights, or even a claim that the UN has not created means to settle disputes under Article VIII, Section 29 will not constitute disputes of a private law character and a claim regarding such a dispute will be capable of being made only by a State.[48] Therefore, crucially, the obligation under the text in the CPIUN only relates to the obligation to provide a forum, which applies to rights in private law, and not to the obligation to provide a remedy for violations of public law rights, an obligation that IOs owe to States.

As is the case with the distinction between private and public law generally, the distinction between claims of a private law character and those of a public law character will be difficult to make in certain borderline cases.[49] A claim in tort with respect to a peacekeeping operation carried out by the UN could potentially involve the review of the

[46] On the use of practice relating to other treaty provisions or practice of the parties relating to the subject matter generally being used in the interpretation of treaties, see Nolte (n 22) [48].

[47] Frederic Megret, 'La Responsabilité Des Nations Unies Aux Temps Du Cholera' (2013) 47 Revue Belge de Droit International 161, 169.

[48] Schmalenbach (n 23) 552; Georges (n 22) 16.

[49] Sucharitkul (n 39) [43].

performance of the mandate and other obligations owed by the IO at the international level.[50] It may be for this reason that in SOFAs, claims arising from operational necessity are explicitly excluded from the private law claims to which the dispute resolution mechanism in the SOFA applies.[51]

However, the practice of the UN in settling compensation claims in peacekeeping operations demonstrates that tort claims within a peacekeeping context have been considered as private law disputes to which the obligation to create modes for the settlement of disputes applies, subject to the exception of claims arising out of operational necessity.[52] Even the determination of whether a claim arises out of negligence or operational necessity is possible to be made solely on the principles of private law, without a strict scrutiny of the mandate of the mission.[53] Thus, private law claims in tort arising out of what could also potentially be a public law violation will still attract the obligation to create means to settle disputes. The fact an international obligation, which fits in the public

[50] See Letter of Under-Secretary-General for Legal Affairs Patricia O'Brien of 21 February 2013 concerning the Haiti cholera claims <http://opiniojuris.org/wp-content/ uploads/LettertoMr.BrianConcannon.pdf> (accessed 3 May 2021) which stated that claims by cholera victims in Haiti 'would necessarily include a review of political and policy matters' and thus fall outside of the scope of Art. VIII Section 29 CPIUN.

[51] Haiti SOFA (n 45) [54-55].

[52] Procedures in Place (n 44) [16-20]; see also Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals 535 UNTS 199.

[53] Schmalenbach (n 23) 552,553 This has led to the criticism of the decision of the UN to reject the claims by Haitian victims of Cholera on the basis that the claims involved a review of political and policy matters, see Philip Alston, Report of the Special Rapporteur on extreme poverty and human rights (26 August 2016) UN Doc A/71/40823 [28,29]; Ricardo Pavoni, 'Choleric Notes on the Haiti Cholera Case' (*Questions of International Law*, 27 July 2015) <http://www.qil-qdi.org/choleric-notes-on-the-haiti-cholera-case/> accessed 16 September 2022.

law domain, has been violated does not *ipso facto* mean that a claim for damages by a private party resulting from such action loses its private law character.[54]

Some scholarship claims that the CPIUN's obligation to create modes for the settlement of private law disputes does not cover employment disputes due to the fact that such disputes are governed by Staff Regulations and Rules and are therefore not strictly private law claims.[55] The Preparatory Commission of the UN did recommend the creation of an administrative tribunal for employment disputes in addition to the recommendation of the text of Article VIII Section 29 of the CPIUN.[56] Perhaps more importantly, the ICJ did not mention Article VIII Section 29 when determining the legality of the UN Administrative Tribunal in *Effect of Awards*.[57]

The UN has however stated in its report on procedures in place for the implementation of Article VIII Section 29 that as regards staff members who present complaints relating to the terms of their employment, the Staff Regulations and Rules set forth the internal dispute resolution procedures that are available to consider such complaints.[58] Thus, it appears that if an independent basis for the creation of dispute

[54] See e.g., Report of the Secretary General, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations A/51/389 20 September 1996 [16] where the Secretary General refers to 'liability in compensation for violations of international humanitarian law committed by members of United Nations forces'.

[55] E.g., RH Harpignies, 'Settlement of Disputes of a Private Law Character to Which the United Nations Is a Party - A Case in Point: The Arbitral Award of 24 September 1969 in Re Starways Ltd. v. the United Nations' (1971) 7 Revue Belge de Droit International 451, 452.

[56] See Report Preparatory Commission (n 35), 94 [74].

[57] *Effect of Awards of Compensation made by the UN Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep 47, 57.

[58] Procedures in Place (n 44) [24].

resolution procedures for employment disputes does not exist based on treaty or statute, the IO would have an obligation to create such means under the obligation in Section 29 of the CPIUN and any obligation which is similarly worded.[59] The Memorandum accompanying the ILO proposals which significantly influenced the CPIUN preparatory committee acknowledged that the Administrative Tribunal of the League of Nations had jurisdiction over employment disputes but that if this forum should cease to be available 'it would be necessary to make equivalent arrangements'.[60]

3. Conclusions on the obligation under the CPIUN

As noted above,[61] the formulation of the obligation to create modes of disputes settlement in the CPIUN has been reproduced in many immunity agreements. Thus, the interpretation of the CPIUN provision discussed above has a relevance beyond the CPIUN and the CPISA.

The appropriate means required under the CPIUN need not be a permanently constituted tribunal and need not fit a particular format but must be fair and impartial.

Most importantly however, the obligation to create means to settle disputes is limited to disputes of a private law character. This means that only disputes governed by private law in a domestic context will trigger the obligation to create modes for the settlement of disputes. Public law matters such as human rights violations and violations of obligations

[59] Cf. Schmalenbach (n 23) 530 arguing that the proper basis for the provision of settlement methods for staff disputes is Article VII section 29.

[60] Cited in Jenks (n 21) 42.

[61] See text at (nn 17 - 21).

owed by the IO to States under public international law will not trigger the treaty obligation. Thus, the obligation to create modes for the settlement of disputes under the CPIUN only extends to the obligation to provide a forum in civil claims, corresponding to Article 6(1) of the ECHR and Article 14(1) of the ICCPR and not to the obligation to provide a remedy for rights violations under Article 13 of the ECHR and Article 2(3) of the ICCPR.

Despite this limitation, the treaty obligation to create modes of dispute settlement applies to all types of private law disputes, even when they relate to the constitutional functions of the IO. In *Cumaraswamy*, legal counsel for the UN, answering a question posed by the court, expressed the view that ' the immunity accorded to the United Nations by Article II of the Convention on the Privileges and Immunities of the United Nations, *is offset* by an obligation in Article VIII to make remedies available to private parties who might otherwise be harmed by the immunity of the Organization and its agents'.[62] This indicates that the objective of the obligation under CPIUN Article VIII Section 29 is to ensure that the effect of the immunity of the IO before domestic courts is neutralized. The legal counsel went on to state that '[w]hat an assertion of the United Nations immunity does is to ensure that the claim will not be adjudicated by national courts but by independent arbitrators pursuant to rules collectively agreed upon by the international community, that is the UNCITRAL Rules'.[63] Thus, the purpose of CPIUN Section 29 appears to be to internationalize claims between the UN and third parties, most importantly so that they may not be adjudicated by domestic courts. This is also the view taken of the

[62] *Cumaraswamy*, Verbatim Record, 10 December 1998, 8 (emphasis added).

[63] Ibid, 11.

provision by the ICJ.[64] Since the purpose of the provision is to offset the impact of immunity but yet to prevent domestic courts adjudicating claims between individuals and IOs, it stands to reason that the obligation applies widely within the area of private law disputes.

B. Treaties with different formulations of the obligation

Even if the text is not identical to section 29 CPIUN, many IO agreements contain a provision providing for means to settle private law disputes which is similar in substance to Section 29 CPIUN. For instance, the headquarters agreement of the Organization of American States provides that 'the Organization shall make provisions for appropriate modes of settlement of disputes for which jurisdiction would exist against a foreign government under…the United States Foreign Sovereign Immunities Act of 1976' (FSIA).[65] The relevant sections of the FSIA provide for exceptions to State immunity for claims arising out of commercial activities and for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act of the State in question.[66] Thus, the scope of the obligation to provide means to settle disputes is broadly similar to that under the CPIUN.

INTERPOL's headquarters agreement with France provides that '[u]nless the Parties in the dispute decide otherwise, any dispute between the Organization and a private party

[64] *Cumaraswamy* [66].

[65] Headquarters Agreement between the Organization of American States and the Government of the United States of America (Washington, 14 May 1992), Article VII(1).

[66] Foreign Sovereign Immunities Act (United States) 28 U.S. Code Chapter 97, [1605]. Cf. *Jam v IFC* No. 17–1011 (27 February 2019).

shall be settled in accordance with the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration'.[67] This provision does not seem to limit the obligation to disputes of a private law nature.

The UN's status of mission agreements and SOFAs provide for the settlement of private law disputes by a 'standing claims commission to be established for that purpose'.[68] Since these are agreements entered into by the UN, which is under the obligation under section 29 of the CPIUN, they could be considered ways through which the obligation under section 29 of the CPIUN is fulfilled. Though the text of the relevant SOFAs is clear that standing claims commissions must be established for the settlement of third-party claims during a peacekeeping operation,[69] UN Missions and host states have not set up standing claims commissions under the relevant agreements. [70] The UN claims instead to have met the obligation to settle private law disputes in SOFAs by means of internal local claims review boards established by the respective Missions.[71]

[67] Agreement between the International Criminal Police Organization and the Government of the French Republic regarding INTERPOL's Headquarters and its Privileges and Immunities in France (Paris 24 April 2008), Article 24(1).

[68] Draft Model Status of Forces Agreement between the United Nations and Host Countries (annexed to the report of the Secretary General on model status of forces agreement for peacekeeping operations) 9 October 1990 UN DocA/45/594, Article 53. Later SOFAs such as that between the UN and Haiti signed in 2004 provide that only claims which cannot be settled through internal procedures of the UN shall be settled by a standing claims commission. See Haiti SOFA (n 45) [54-55].

[69] The Report of the Secretary General accepts this position, Procedures in place (n 44) [16].

[70] Procedures in place (n 44) [17]. As noted in chapter 1, The UN has in fact refused to set up claims commissions even when explicitly requested to do so by the host State. See United Nations, *Letter dated 25 November 2014 by Assistant Secretary-General Pedro Medrano* (2014) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=32377> (accessed 16 September 2022) [91].

[71] Procedures in place (n 44) [17].

SOFAs entered into by the EU contain different formulations of the obligation to provide means to settle disputes. The formulation in the SOFA between the EU and Mali for instance is that claims for property damage not resulting from operational necessity and for death or injury to persons are required to be settled amicably, failing which, by a claims commission by common agreement, failing which claims above a monetary limit are to be settled by arbitration whilst those below the limit are to be settled by diplomatic means. [72]

Other SOFAs entered into by the EU exclude the EU's liability for third party claims almost entirely: claims for damage to property arising out of operational necessity are excluded, claims which do not fall within this category are required to be settled by diplomatic means and if any legal proceedings are instituted for death, injury or damage to property not arising from operational necessity, the State is required to appear and to pay any compensation due, with the possibility of reimbursement.[73] Whilst the obligation to provide a forum is, in the latter case, delegated entirely to the State, the agreement still recognizes an obligation on the part of the IO to provide such forum. The manner in which that obligation is discharged is by delegating the obligation to the host State.[74]

[72] Agreement between the European Union and the Republic of Mali on the status in the Republic of Mali of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) OJ L 106 (16.4.2013) 1, Article 15(1)-(4).

[73] E.g., Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta OJ L 10, (15.1.2009) 29, Article 13.

[74] See also the text of the Standard Basic Assistance Agreement between [the recipient Government] and the UNDP < https://www.iaea.org/sites/default/files/18/07/sbaa.pdf > accessed 4 February 2022, Article X(2) which states that the host State shall be responsible for dealing with and holding the IO harmless in respect of third-party claims, unless the IO agrees that such claims arise from the negligence or willful misconduct of the IO.

Though the treaty formulations of the obligation to provide a forum for the settlement of disputes is different to the CPIUN in the above treaties, with the exception of the INTERPOL Agreement, the other agreements refer to the settlement of claims of damage to life and property, i.e., disputes of a private law character. The obligation to create means for the settlement of disputes under treaty provisions applicable to IOs is thus usually limited to provide a forum for the settlement of private law disputes.

In addition to specific treaty provisions such as those referred to above, it is arguable that the obligation to create means to settle disputes may also arise through a general obligation of IOs to respect human rights in their constituent instruments.[75] For instance, the UN's obligation to create means to settle disputes may be grounded on the Charter provisions that require the UN to promote universal respect for and observance of human rights.[76] In such an instance, the treaty obligation to ensure fair trial rights may arise for the IO through an interpretation of the constitutive instrument, without the need for a specific treaty obligation to provide means to settle disputes with private parties. However, not many IOs' constituent instruments include express provisions to promote human rights.

[75] 'Accountability of International Organisations' (International Law Association 2004) 209 at note 145.

[76] E.g., UN Charter, Articles 1(1), 55(3). The duty of the UNSC to act in accordance with the purposes and principles of the UN is enshrined in Article 24(2). See also *Lockerbie (Provisional Measures)* [1992] ICJ Rep 3 (Weeramantry dissent) 61 stating that the duty of the UNSC under Article 24(2) is an imperative duty (not, on this point, conflicting with the majority which held only that that the obligations of the parties under Article 25 of the Charter *prima facie* extends to the decision contained in resolution 748 (1992)).

C. Treaties without an obligation to create means to settle disputes

Though several agreements relating to IOs contain an obligation to create means to settle disputes, mostly in the formulation to be found in the CPIUN, it cannot be said that there is a treaty obligation to create means to settle disputes incumbent on all IOs.

The constituent instruments or immunities agreements of several IOs do not contain any provision requiring the creation of means to settle disputes. The agreements of the international financial institutions are a notable example. Most agreements relating to international financial institutions provide for a limited form of immunity. They state that actions may be brought against the institution only in a court of competent jurisdiction in the territories of a member in which the bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.[77] Perhaps due to the fact that the immunity conferred on the relevant organization is not absolute, there is no provision corresponding to section 29 of the CPIUN providing for the settlement of disputes with private parties. Indeed, when the World Bank was engaging in a review process of its internal mechanisms to settle staff disputes, it claimed to be doing so voluntarily.[78]

[77] See e.g., IBRD Articles of Agreement (entered into force 27 December 1945) 2 UNTS 134, Article VII, section 3; Articles of Agreement of the International Finance Corporation (entered into force 20 July 1956) 264 UNTS 117, Article VI, section 3.

[78] Robert A Gorman, 'The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank' (2004) 25 Comparative Labor Law & Policy Journal 423, 425 Robert Gorman is a former President, founding member and longest-serving judge in the history of the World Bank Administrative Tribunal.

Some agreements relating to international financial institutions provide for absolute immunity before domestic courts[79] or make exceptions to immunity only for claims brought by creditors[80] and still do not contain a provision requiring the provision of means to settle disputes. The external review panel of the International Monetary Fund's (IMF) dispute resolution system stated that it is not a treaty obligation, but the independence of the Fund that gives rise to a corollary obligation for the Fund to establish internal laws that reflect broad principles of employment law among its member States and of international administrative law.[81]

It is not only the agreements relating to international financial institutions which do not contain an obligation to create means to settle disputes. The agreements of certain IOs created under the auspices of the European Union, for instance, do not contain such an obligation. An example is the Protocol on Privileges and Immunities of the European Patent Organisation. The Protocol provides for immunity from jurisdiction for the IO within the scope of its official activities except in the case of waiver, in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor

[79] See e.g., Articles of Agreement of the International Monetary Fund (entered into force 27 December 1945) 2 UNTS 39.

[80] E.g., Articles of Agreement of the Asian Development Bank (entered into force 22 August 1966) 571 UNTS 123, Articles of Agreement of the African Development Bank (entered into force 10 September 1964) 510 UNTS 3 and the Articles of Agreement of Caribbean Development Bank (entered into force 26 January 1970).

[81] Review of the International Monetary Fund's Dispute Resolution System (27 November 2001) https://www.imf.org/external/hrd/dr/112701.pdf (accessed 16.11.2021)

vehicle belonging to the IO and in the case of the enforcement of an arbitral award against the IO.[82]

The Protocol provides that the President of the European Patent Office has the duty to waive immunity where he considers that immunity prevents the normal course of justice and that it is possible to dispense with immunity without prejudicing the interests of the Organisation.[83] However, there is no obligation for the IO to create means to settle disputes with private parties, there being only provision for any contracting State to submit any dispute concerning the Organisation to an international arbitral tribunal.[84]

D. Conclusions on the treaty obligation for IOs to provide fair trial rights

The foregoing demonstrates that though many IOs are under a treaty obligation to create means to settle disputes, predominantly in the form set out in the CPIUN or some variation thereof, not all IOs are under such an obligation in the treaties that they are bound by.[85]

Where IOs are under a treaty obligation to create means to settle disputes, the obligation commonly only applies with respect to disputes of a private law character. Thus, the obligation of IOs to create means to settle disputes under treaty corresponds only to the obligation of States to provide a forum for the determination of private rights and

[82] The Protocol on Privileges and Immunities of the European Patent Organisation 1065 UNTS 500, Article 3.

[83] Ibid, Article 19(2).

[84] Ibid, Article 23(1).

[85] Cf August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7 Chinese Journal of International Law 285, 289.

obligations and not to the obligation to provide a remedy. Therefore, if all IOs are under an obligation to ensure fair trial rights to private persons including the right to a forum and the right to a remedy, this obligation has to be grounded in general international law.

II. THE OBLIGATION TO ENSURE FAIR TRIAL RIGHTS UNDER GENERAL INTERNATIONAL LAW

A. The right of access to a forum and the right to a remedy form part of general international law[86]

Whilst there is some authority for the proposition that the right to a fair trial including the right of access to a forum and the right to a remedy constitutes a *jus cogens* norm,[87] this characterization is exceptional.[88] It is unlikely that the right satisfies the criteria of a norm

[86] I take general international law to mean universally applicable customary international law and general principles of law. See e.g., Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413, 436–7; There are other views of what is meant by general international law. See e.g, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (Oxford University Press) 4 who use the term also to include provisions of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application.

[87] Examples of judicial recognition of the right to a fair trial as *jus cogens* include *Kadi* (Court of First Instance of the European Communities) ('CFIEU') Case T-315/01 (2005) [231, 233]; *Cabrera v Comisión Técnica Mixta de Salto Grande* (Supreme Court Argentina) 305 Fallos de la Corte Suprema 2150 (5 December 1983) [11]; *Goiburu v Paraguay* Inter-American Court of Human Rights (Judgment, September 22 2006) [131]; multiple dissenting opinions of the same court by Judge Cancado Trindade, see Cançado Trindade, 'The Right of Access to Justice in the Inter- American System of Human Rights Protection' (2007) 17 Italian Yearbook of International Law 7, 23–4; *In the Matter of El Sayed* (Special Tribunal for Lebanon) Order Assigning the Matter to a Pre – Trial Judge, CH/PRES/2010/01 (15 April 2010).

[88] The right does not appear in the Commentary to Article 53 of the Vienna Convention on the Law of Treaties, 1966 II YILC 247-249; nor on the list of norms that are 'clearly accepted and recognized' as peremptory as per the International Law Commission, ARSIWA Commentary, 2001 II YILC Part 2, 85 [5],112–13 [4–6]; most recently the right does not appear in the non-exhaustive list of peremptory norms contained in the annex to the draft conclusions on peremptory norms of general international law (*jus cogens*),

'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.[89]

The right of access to a forum, the right to a remedy, and the corresponding obligations of States to ensure these rights are nevertheless part of general international law.[90] Several courts have held that the right of access to a forum forms part of general international law. In *Golder*, the ECtHR described this right as 'one of the universally recognised fundamental principles of law'.[91] In *Kadi*, the Court of First Instance of the European Communities (CFIEU) used the International Court of Justice's language of 'intransgressible principles of international customary law'[92] in classing the right to be heard as one against which Resolutions of the United Nations Security Council may be reviewed.[93] Administrative Tribunals set up by IOs have also recognized the right of access

adopted by the ILC on first reading, UNGA, Official Records, Seventy-fourth Session, Supplement No.10 (A/7410), 208.

[89] VCLT, Article 53. See also (n103) below.

[90] The case law and scholarship are divided (or unclear) on whether the rights form part of customary international law or general principles of law. However, for the purpose of the argument to follow, nothing turns on which of these two sources the rights fall under. For a detailed examination of whether human rights obligations should be classified as custom or general principles, see Olivier De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law International Responsibility' in Jan Wouters (ed), *Accountability for Human Rights Violations by International Organizations* (Intersentia 2011) 16ff.

[91] *Golder v UK* App No 4451/70 (ECtHR, 21 February 1975) [35].

[92] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226 [79].

[93] *Kadi* (CFI) (n87) [231, 233].

to a forum as a part of general international law.[94] This view is also supported by scholarship.[95]

The right to a remedy has also been recognized as part of general international law. In *The Factory at Chorzow*, the Permanent Court of International Justice ('PCIJ') famously stated that 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form…and there is no necessity for this to be stated in the convention itself'.[96] More recently, in *Aloeboetoe v Suriname* the IACtHR stated that Article 63(1) of the American Convention on Human Rights on the right to a remedy 'codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law'.[97] This view is supported by scholarship.[98]

With respect to both the aforementioned rights, their consistent inclusion in international and regional human rights instruments since the Universal Declaration of Human Rights and in many national constitutions arguably provides the State practice and

[94] See e.g., *Rubio* v. *Universal Postal Union* (ILO Administrative Tribunal) (10 July 1997) Judgment No. 1644 [12] 'refusal to entertain [the applicant's] case would be a denial of due process and contrary to general principles, to the Universal Declaration of Human Rights and to the American Convention on Human Rights'.

[95] See e.g., Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 Journal of International & Comparative Law 287, 345–346, particularly the sources cited at note 239; Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2020) 14ff; Daniel D Bradlow, 'Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?' (2017) 31 Temple International and Comparative Law Journal 45, 60.

[96] *The Factory at Chorzow* (Germany/Poland) (Jurisdiction) PCIJ Series A No 9 (26 July 1927), 21.

[97] *Aloeboetoe v Suriname* IACHR Series C no 15 (10 September 1993) [43].

[98] See e.g., Shelton (n 5) 238; Reinisch (n 85) 287; 'Accountability of International Organisations' (n 75) 208–209.

opinio juris for the rights to constitute a part of customary international law.[99] Some scholars also argue that the rights are part of customary international law from their historical evolution from the customary international law rules on denial of justice to aliens[100] whilst others go as far as claiming that fair trial rights form part of a corpus of fundamental human rights norms which rank even higher than *jus dispositivum* though not *jus cogens*.[101] The ILA Final Report on the Accountability of International Organisations concluded that the right to a remedy, which it took to include the right to a forum and the right to a substantive remedy, 'may be seen as a norm of customary international law', 'is widely considered to be a general principle of law' and that non- State parties should be able to look for mechanisms including the right of access to a forum and the right to a remedy when their rights have been affected in their dealings with IOs.[102]

[99] Francesco Francioni, *Access to Justice as a Human Right* (Oxford University Press 2007) 2; Bradlow (n 95) 60–61.

[100] Francioni (n 99) 10 Restatement (Third) of the Foreign Relations Law of the United States (1986) § 711, Reporter's Note 1, Comment A.

[101] Antonios Tzanakopoulos 'Collective Security and Human Rights' in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 66.

[102] 'Accountability of International Organisations' (n 75) 208.

B. IOs are bound by general international law in the absence of States explicitly making particular rules of general international law inapplicable to the IO

General international law that does not amount to *jus cogens*[103] is *jus dispositivum* and States creating an IO may, *prima facie*,[104] contract out of its application to an IO they create.[105] This contracting out will only apply *inter se* between the State parties to the treaty creating the IO and will not extend to relations between the IO and non-member States.[106] Furthermore, the contracting out must be explicit in the constituent instrument, in the absence of which general international law will be deemed to apply to the IO.[107] This is due to the principle that deviations by States from general international law must not be presumed.[108] Therefore, absent evidence to the contrary in the constituent instrument, IOs must be considered to be bound by general international law.

[103] IOs are bound by *jus cogens* norms, see e.g., ARIO, Articles 26, 41, 42; ARIO Commentary 58 [5]. But the right to a fair trial is not a *jus cogens* norm, see text at (nn 87-89) above.

[104] For an exception, see section IIE below.

[105] Cf. *North Sea Continental Shelf* 1969 ICJ Rep 3, 43, [72]; Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the ILC A/CN.4/L.682 (13 April 2006) [79] ('Fragmentation Report').

[106] The result would otherwise be in contravention of the rule that treaties cannot alter the rights and obligations of third States without their consent, VCLT Article 34. See e.g., K Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325, 347.

[107] Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 International and Comparative Law Quarterly 309, 320; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 72.

[108] *Elettronica Sicula S.p.A* (USA/Italy) 1989 ICJ Rep 15, 31 [50] ('ELSI').

IOs however do not have the capacity to perform certain functions that States perform, due *inter alia* to the fact that they do not exercise sovereign control over territory.[109] Whatever obligations IOs do not have the capacity to perform do not bind them.[110] For instance, positive obligations to criminalise particular types of conduct[111] will not be applicable to IOs, which do not exercise prescriptive jurisdiction in the manner that States do. It is possible to reach the conclusion that IOs are not bound by obligations that they do not have the capacity to bear through interpreting the constituent treaty of an IO. It would be absurd to interpret the constituent instrument as providing for IOs to be bound by obligations that they clearly do not have the capacity to fulfil.

It must however be the case that obligations under general international law apply to IOs as a default position with necessary exceptions being made through an interpretation of the constituent document and not *vice versa* — that is, specific evidence is not required to hold that IOs are bound by general international law.

C. IOs are bound by general international law obligations relevant to their functions and acts

Even if one rejects the proposition that all general international law binds IOs except for obligations that they clearly do not have the capacity to bear and those which have been

[109] Finn Seyersted, 'United Nations Forces: Some Legal Problems' (1961) 37 British Yearbook of International Law 351, 452–453.

[110] E.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 68.

[111] E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, Article 2.

explicitly made inapplicable to IOs by States, there is strong authority for the proposition that IOs are bound by obligations that are relevant to their functions and acts.[112] An obligation 'relevant' to an act or function of an IO could be considered to be any obligation that a State is bound by when performing the same act or function.[113]

This section will establish: 1) that IOs are bound by obligations relevant to their functions and acts regardless of whether the act is *intra vires* or *ultra vires*, 2) why IOs are bound by obligations relevant to their acts and 3) that the right to a fair trial constitutes a relevant obligation.

1. IOs are bound by obligations relevant to their acts, regardless of whether the act is *intra vires* or *ultra vires*

In the *Reparation* case, the ICJ held that not only the rights, but also the duties of an IO must depend on its purposes and functions,[114] as well as that the UN's members, 'by entrusting certain functions to it, *with the attendant* duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.[115] This reflects the view that States have conferred functions on IOs along with the obligations

[112] By 'functions' I mean activities of IOs explicitly or implicitly assigned to them by their constitutive instruments whilst by 'acts' I mean actions of IOs, whether or not they are within the competence of the IO as per the constitutive instrument. See Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011) 69.

[113] M Arsanjani, 'Claims against International Organisations: Quis Custodiet Ipsos Custodes?' (1980) 7 Yale Journal of World Public Order 131, 132; Gerhard Thallinger, 'Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council' (2007) 67 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 1016, 1019–20.

[114] *Reparation*, 180.

[115] Ibid, 179 (emphasis added).

relevant to those functions. The proposition that IOs are bound by obligations relevant to their functions also finds support in scholarship.[116]

Importantly however, IOs' obligations are not limited to those that directly correspond to the powers and functions explicitly authorized by their constitutive instrument.[117] This is for several reasons. Firstly, IOs may well perform acts that are outside of the functions specified in the constituent instrument. These acts are capable of causing damage to States and private persons, even though such acts may later be found to be *ultra vires*. Secondly, IOs' powers are not static. They continue to evolve through practice, as illustrated, for instance, by the evolution of the voting procedures of the UNSC.[118] They also evolve through interpretation, as evidenced by the doctrine of implied powers.[119]

Therefore, what is crucial for an obligation to bind an IO is not that it corresponds to the IO's powers and functions as explicitly specified in its constituent instrument, but that the obligation is relevant to the acts actually performed by the IO. As long as an IO actually performs an act, it will be bound by the obligations relevant to such an act. It is irrelevant whether such acts may be *intra vires* or *ultra vires* the powers of the IO.[120] Seyersted, for

[116] Clapham (n 110) 67–68; Cf Felice Morgenstern, *Legal Problems of International Organizations* (Grotius 1986) 32; De Schutter (n 90) n 68.

[117] See Daugirdas (n 106) 366 ff; Cf ARIO Article 8.

[118] E.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, 1971 ICJ Rep 16, 22 [22-23] ('Namibia').

[119] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion 1996 ICJ Rep 66 [25]; *Reparation*, 182 - 183.

[120] Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend upon the Conventions Establishing Them' (1964) 34 Nordisk Tidsskrift for International Ret 3, 55.

instance, notes that 'intergovernmental organizations enter automatically into the rights and obligations under general international law to the extent that their nature and acts call for the application of such rights and obligations'.[121]

To illustrate, an international financial institution such as the IMF will usually not be bound by obligations relating to the use of force, including the prohibition of the use of force[122] and the obligation to bring to an end the serious breach of a peremptory norm caused by a use of force[123] since such obligations do not relate to the functions of the IMF.[124] However, if the IMF used its considerable resources to purchase weapons and ammunition, or if the control that the IMF exercises over a country to which it is providing a bailout extended to the control of the country's armed forces, it may well find itself bound by the obligations relating to the use of force because it now performs acts, which make the obligations relevant to the IMF.

[121] ibid.

[122] A variation of the argument made in this section is that IOs are always bound by prohibitive obligations such as the prohibition on the use of force, even if they do not perform acts which make the prohibition relevant to it. Thus, the IMF would always be bound by the prohibition on the use of force though it would not be bound by positive obligations such as the obligation to bring to an end the serious breach of a peremptory norm caused by a use of force, unless it performed acts which make the obligation relevant to it. Nothing turns on whether an IO is always bound by a prohibitive obligation or is only bound by it when it performs an act which makes the obligation relevant to it since the prohibitive obligation will only be of consequence when an act is performed that renders it relevant. Cf. Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 European Journal of International Law 1133, 1144–45.

[123] ARSIWA Article 41.

[124] IMF Articles of Agreement (n79), Article 1.

2. Why are IOs bound by obligations relevant to their acts?

The reason that IOs are bound by obligations relevant to their acts is because States cannot be presumed to have conferred[125] powers on IOs without making IOs subject to the obligations that States are bound by when performing the same acts.[126] It would, as Verdirame suggests, be extremely disruptive to the international legal order to have entities that have the capacity to act on the international plane without the concomitant obligations.[127] This militates against interpreting constituent instruments as not providing for IOs to be bound by obligations that States are bound by when performing the same acts and functions.

States may also be prohibited by domestic law from conferring power to IOs without the attendant obligations.[128] It would be, as Sarooshi states in the context of arguing that domestic public law principles apply to IOs which exercise conferred powers of government, 'to dispense with, by the stroke of a pen, the limitations on governmental tyranny that peoples have fought hard to win within their domestic polity' if a State were to confer capacities on IOs without the limitations that constrain the exercise of powers of

[125] Following Sarooshi, I use 'conferral of powers' as an umbrella phrase that includes (a) delegation of powers, in the sense of a conferral of power whilst retaining parallel power with the State and (b)transfer of power which is a conferral without retaining the power to act in parallel Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) ch 3.

[126] Arsanjani (n 113) 132.

[127] Verdirame (n 112) 71.

[128] See In re application of finsche Handelsgesellschaft ('Solange II') (Federal Constitutional Court, Germany) B VerfGE 37, 271 translated in (1987) 3 Common Market Law Reports 225.

States.[129] Whilst the prohibitions in domestic law do not, unless such prohibitions constitute general principles of international law, effect the conferral of capacities to IOs under international law, they do strengthen the presumption that States do not confer capacities on IOs without the relevant obligations.

That States cannot be presumed to have conferred capacities on IOs without the relevant obligations is put beyond doubt by the fact that States themselves continue to be responsible under international law in relation to the field within which powers have been conferred to IOs.[130] If, as held by the ECtHR, States continue to be responsible for human rights violations within the areas of competence transferred to IOs[131] or for the act of transferring powers to the IO itself without the relevant safeguards,[132] there is every reason to assume that States have conferred powers on IOs along with the relevant obligations. Thus, even if States were able to lawfully create IOs unbound by relevant general international law,[133] they must not be presumed to have done so.[134]

The foregoing argument is sometimes characterised as IOs being bound by general international law because States cannot transfer to IOs more power than they have; i.e.,

[129] Sarooshi (n 125) 14.

[130] De Schutter (n 90) 10-11,19ff; ARIO Article 28; Solange II.

[131] E.g., *Waite and Kennedy v Germany* App No. 26083/94 (ECtHR, 18 February1999) [67]; Cf. HRC, General Comment No. 26: Continuity of obligations (8 December 1997) CCPR/C/21/Rev.1/Add.8/Rev.1 [4-5].

[132] E.g., *Gasparini v Italy and Belgium* (Admissibility) App No 10750/03 (ECtHR, 12 May 2009).

[133] On which see section IIE below.

[134] ELSI [50]; Henry G Schermers, 'Les bases juridiques de I'action ides organisations internationales' in René-Jean Dupuy (ed), *Manuel sur les organisations internationales - A handbook on international organizations* ([2nd edition], Brill 1998) 401.

nemo plus juris transferre potest quam ipse habet.[135] This argument is sound with respect to *jus cogens* obligations due to their non-derogable nature and perhaps with respect to human rights obligations, which are of an *erga omnes* character and the beneficiaries of which are individuals.[136] But it does not apply to all general international law since *jus dispositivum* can be contracted out of *inter se*. States can therefore contract out of certain *inter se* obligations when creating an IO and make such obligations inapplicable to the IO with respect to other member States, despite the fact that the obligation applies to the States themselves.[137]

Therefore, an inability to transfer greater powers or lesser obligations than member States possess is not a conceptually sound basis for grounding the obligations of IOs under general international law. With respect to *jus dispositivum*, it is not a legal incapacity to transfer lesser obligations than States themselves have, but the argument that States cannot be presumed to have conferred on IOs the capacity to act on an international plane without being bound by relevant general international law that is determinative to IOs being bound.[138]

[135] *Namibia* (Fitzmaurice dissent) [65].

[136] See Section IIE below.

[137] Daugirdas (n 106) 344. As noted before however, such contracting out must be explicit in the constituent instrument or other treaty relating to the IO.

[138] Cf De Schutter (n 90) 13 who argues that the doctrine that States cannot transfer more power to IOs than they have is defensible in theory, but unworkable in practice with respect to an IO with evolving membership.

3. The obligation to provide a fair trial is an obligation relevant to IOs

States become bound by human rights obligations when they exercise jurisdiction over persons.[139] Jurisdiction is primarily territorial but not exclusively so. Jurisdiction also extends to the exercise of factual control over individuals. For instance, with respect to the ICCPR, the Human Rights Committee states that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party.[140] The ECtHR has held that jurisdiction for the purposes of the ECHR extends to situations where a States' agents exercise authority and control over persons extra-territorially as well as when a State exercises powers of government extra – territorially.[141]

Thus, the crucial factor which results in persons falling within the jurisdiction of a State extra-territorially is that the State exercises authority and control over persons, often to the exclusion of the control of the territorial State. When IOs exercise control over private persons in a manner similar to States, such persons fall within the jurisdiction of the IO, triggering the applicability of human rights obligations on the part of the IO towards those individuals.[142] Such an application of human rights obligations to IOs is in

[139] See e.g., ICCPR, Article 2(1); ECHR, Article 1.

[140] HRC General Comment 32 (Right to equality before court and tribunals and to fair trial), UN Doc CCPR/C/GC/32 23 August 2007 [10].

[141] E.g., *Al-Skeini and Others v. the United Kingdom* [GC] App no. 55721/07 (ECtHR 2011) [134,135].

[142] Clyde Eagleton, *International Organization and the Law of Responsibility [Electronic Resource]* (Brill 1951) 358; Thallinger (n 113) 1020; Cf. Klabbers (n 122) 1149.

accordance with the requirement that the protection afforded by human rights be effective.[143]

When IOs interact with individuals, they exercise control over them in the manner that territorial States or States exercising extra – territorial jurisdiction over individuals do. This is because IOs interact with individuals in a 'sovereign' capacity,[144] in the sense that in its interactions with individuals, it is not subject to the jurisdiction of any other entity.[145] This may be contrasted with interactions between private persons which are subject to the legislative, adjudicative and enforcement jurisdiction of the territorial State. When IOs interact with individuals in a sovereign capacity, not subject to the adjudicative and enforcement jurisdiction of the territorial State, the individuals fall within the jurisdiction of the IO, which triggers the human rights obligations to grant a fair trial on the part of the IO.

[143] E.g., *Waite* [67].

[144] The notion of a sovereign is used in the manner used in Seyersted (n 120) 48 note 112- 'Sovereign' is used in the present study, not in a restrictive territorial sense, but broadly as meaning legally independent (i. e. not subject to the jurisdiction) of any other organized community except the participating physical or legal persons acting jointly through the organs of the Organization, State or other organized community concerned'; See also HLA Hart, *The Concept of Law* (Third edition, University Press 2012) ch IV.

[145] An IO is only subject to the decisions of the member States as a collective, acting as an organ of the IO. The manner in which member States impact the IO will depend on its Constitution, much like how the different organs of government impact the functions of the State under the State's internal constitutional arrangements, without affecting the State's sovereign status. Unless the IO is very clearly acting only as a proxy for one State and binding only States and not itself with its actions, i.e., if it does not show the requisite independence for separate legal personality, it acts in a sovereign capacity. See Seyersted (n 120) 47ff; See also H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Yearbook of International Law 220 who states that 'the State always acts as a public person. It cannot act otherwise. In a real sense all acts jure gestionis are acts jure imperii'.

That private persons are within the jurisdiction of an IO is clear where IOs exercise powers of government, such as when the UN engages in the administration of territory.[146] In such a situation, IOs exercise jurisdiction over persons subject to the territorial administration in the same manner as a territorial State. Therefore, it is bound by all the obligations the State is bound by when administering territory, including the human rights obligations to provide a forum and a remedy.[147]

However, the fair trial obligations of an IO are not limited to instances of the IO exercising governmental functions such as the administration of territory, but also apply when the relationship between the IO and private persons is governed by private law such as contract or tort law.

In employment contracts, individuals who contract with an IO are usually subject to an employment law regime found in the Staff Regulations of IOs, to the exclusion of the legislative control of the territorial state. The IO is also immune from the jurisdiction of the territorial State's domestic courts and is immune from enforcement. Thus, the IO is not subject to the adjudicative or enforcement jurisdiction of the territorial State. Therefore, even in employment contracts, IOs exercise authority and control over individuals to the

[146] See Karel Wellens, *Remedies Against International Organizations* (Cambridge University Press 2002) 20.

[147] In the context of administration of territory and peacekeeping, IOs have accepted human rights obligations under general international law. See e.g., UNSC Res 1244/1999 (10 June 1999) art 11(j) where the UNSC listed amongst the responsibilities of the UN Mission in Kosovo (UNMIK) the promotion and protection of human rights; European Union Rule of Law Mission in Kosovo (Human Rights Review Panel Rules of Procedure (January 2013) [5].

exclusion of the jurisdiction of the territorial State, triggering an obligation to provide fair trial rights.

The same applies for non-employment related contracts IOs conclude. Though the applicable law to a contract could be domestic law, the choice of law is a matter within the parties' discretion.[148] Moreover, even if the applicable law is domestic law, the IO is still immune from the adjudicative and enforcement jurisdiction of the territorial State with respect to any contract governed by domestic law, immunity being distinct from the question of applicable law.[149]

With respect to tort, the IO is not exempt from the prescriptive jurisdiction of the territorial State as its actions will be subject to the domestic law on tort. However, given the IO's immunity from jurisdiction and enforcement, the IO is still outside the territorial State's control with respect to the right of access to a forum and the right to a remedy. The IO therefore interacts with private parties in a sovereign capacity with respect to these rights and the private persons are within the control of the IO as far as the right to a fair trial is concerned.

Therefore, whenever IOs interact with private persons, their immunity from jurisdiction and enforcement means that IOs are not subject to the control of the territorial State. IOs therefore exercise control over individuals with respect to their fair trial rights in the manner that States do. The persons involved in the interaction with the IO thus fall within the jurisdiction of the IO with respect to their fair trial rights. This control triggers

[148] 'Accountability of International Organisations' (n 75) 190.

[149] See e.g., *Jurisdictional Immunities of the State* (Germany/Italy) Judgment 2012 ICJ Rep 99 [58].

the application of the obligation to provide a fair hearing and to provide a remedy, as with States which exercise control over private persons' fair trial rights.

Thus, due to the immunity of the IO from jurisdiction and execution, the IO always interacts with private persons to the exclusion of the control of the territorial State with respect to fair trial rights.[150] For this reason, the obligation of the IO to provide a hearing and a remedy are not only relevant when the IO conducts purely governmental functions such as the administration of territory, but also when the IO conducts activities which may be categorized as private law activities. These include activities such as concluding both employment and non- employment contracts and committing torts.

D. IOs are bound by obligations which aid the fulfilment of the IO's mandate

Another manner in which general international law obligations may become relevant to an IO and therefore binding, is when the obligations are required for the effective fulfilment of an IO's mandate. The rationale underlying this argument too is that States must be presumed to have transferred to IOs the obligations that are required for or assist the effective fulfilment of its mandate.

In *Effect of Awards*, the ICJ found that the UNGA had not overstepped its proper powers in creating the UNAT on the basis that it would:

[150] The fact that this control has been ceded to the IO however, as noted earlier, does not rid the State of its own obligations towards private persons. See text at (nn 130 - 132).

> 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 Organization 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.[151]

The Court implied the UN's *power* to create a tribunal on the basis that it would be inconsistent with a purpose of the UN not to afford such a remedy. If it were inconsistent with the purposes of the UN not to afford a remedy to staff members, the obligation to 'afford a judicial or arbitral remedy' must, by necessary implication, be incumbent upon the UN, on the basis of its mandate. By extension, it could be argued that the ability to perform an IO's functions more effectively by adhering to an obligation may suffice to make an obligation relevant to an IO's mandate, and thus binding on the IO.

When determining the existence of implied powers, the ICJ has been guided by whether the power implied would promote the efficiency of the IO in fulfilling its purpose.[152] In *Effect of Awards*, the ICJ held that 'the power to establish a tribunal…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

[151] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion [1954] ICJ Rep 47.

[152] Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 European Journal of International Law 437, 444; Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals* (Brill 1980) 430; Contra Peter HF Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff 1994) 82–83 arguing that the Court adopted a stricter approach in determining implied powers.

integrity.'[153] In *Reparation* the ICJ held that '[t]he functions of the Organization are of such a character that they could not be *effectively discharged*' if the capacity to bring claims were not implied.[154] If effectiveness results in powers being implied, it is plausible to argue that obligations which promote effectiveness in fulfilling an IO's mandate must be binding on IOs.[155] This is for the reason that it is reasonable to presume that States intended IOs to be bound by obligations that allow the IO to perform the functions conferred by States more effectively.

Fulfilling the obligation to provide a forum and provide a remedy may aid an IO to fulfil its mandate more effectively. Whilst this is obvious with respect to IOs with a mandate to promote human rights,[156] it is also true for IOs whose mandates do not explicitly concern the promotion of human rights. Whatever the IO's mandate, the fulfilment of the obligation will prevent IOs' immunities being challenged before domestic courts on the basis that the claimant has no forum before which to bring claims.[157] Whilst such challenges to immunity will not always be successful, in the absence of alternative means to settle disputes domestic courts find it increasingly difficult to simply dismiss these

[153] *Effect of Awards,* 14 (emphasis added).

[154] *Reparation*, 180 (emphasis added).

[155] Wellens (n 146) 25; Bardo Fassbender, 'A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations' (2006) 3 International Organizations Law Review 437, 469.

[156] E.g., Articles 1(1), 55(3) of the UN Charter.

[157] See e.g., Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights' A/71/40823, 2 where the Special Rapporteur notes that denial of a remedy by IOs results in calls to deny immunity.

suits.[158] Even if immunity is not denied, the claims draw attention to the deficiencies in dispute resolution within the IO which may, through adverse publicity, hamper the IO's efficient fulfilment of its functions.[159] Thus, adhering to the obligation to provide a fair hearing and remedies may allow an IO to prevent claims before domestic courts and fulfil its functions more efficiently. As Blokker states, 'functional necessity is not only the raison d'etre of the rules of immunity for [IOs], but also the rationale for ensuring they have adequate accountability regimes. [160]

Thus, adherence to the obligation to ensure fair trial rights aids the fulfilment of the IO's mandate. It is reasonable to presume therefore, that States intended the IO to be bound by the obligation.

E. Obligations under general international law from which States cannot deviate

IOs may be bound by obligations to ensure fair trial rights due to their nature as obligations of which the beneficiaries are individuals.[161]

[158] See the case law discussed at chapter 4, section II.

[159] Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 European Journal of International Law 991, 1005 stating that the likelihood that an action will be dismissed hardly makes it pointless and that such actions call attention to the facts of the case and spur further transnational discourse.

[160] See Niels Blokker, 'Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges' in Luca Ferro, Nicolas Angelet and Tom Ruys (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 200.

[161]Linosalexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 European Journal of International Law 1127, 1132.

The beneficiaries of human rights obligations such as the obligation to provide a hearing and a remedy are individuals. These obligations cannot be reduced to 'synallagmatic bargains between States'.[162] It may be that the content of the obligations are such that deviation from them to the detriment of the beneficiaries is precluded.[163] Moreover, human rights treaties provide for limited instances in which the rights enshrined therein can be derogated from.[164] Whilst the right to a hearing and the right to a remedy are not listed in human rights treaties as non-derogable rights, they may only be derogated from in the narrow instances which permit derogation, which as per the ICCPR is '[i]n time of public emergency which threatens the life of the nation'.[165] Thus, States may be precluded from creating IOs which are not bound by fair trial obligations.

Furthermore, obligations under human rights treaties are owed by States parties to all other parties to human rights treaties, i.e., they are *erga omnes partes* obligations.[166] Therefore, quite apart from the fact that States cannot be presumed to have conferred capacities on IOs without the corresponding obligations, it may be that States are not allowed to create an IO by treaty which is not subject to these obligations, unless all parties

[162] James Crawford, *Multilateral Rights and Obligations in International Law* (Brill 2007) 448; K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status' (1988) 35 Netherlands International Law Review 273, 281.

[163] Fragmentation Report [108]; Cf. Sicilianos (n 161) 1132.

[164] E.g. ICCPR, Article 4, ECHR, Article 15.

[165] ICCPR, Article 4(1).

[166] Cf. *Questions relating to the Obligation to Prosecute or Extradite (Belgium/Senegal)*, Judgment, 2012 ICJ Rep, 442 [68]; ARSIWA Commentary, 126 [6] ; Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in Ole Kristian Fauchald and André Nollkaemper (eds), *Unity or Fragmentation of International Law—The Role of International and National Tribunals* (Hart 2012) s VI; Fragmentation Report [109].

to the human rights treaty are also party to the treaty creating the IO. Any attempt to deviate from human rights norms by creating an IO that is not bound by them, may be prohibited by the rules enshrined in Articles 41 and 58 of the VCLT which prohibit the modification and suspension of multilateral treaties by certain parties only to the detriment of other parties to the treaty.[167] Though there is controversy as to whether the permissive portions of Articles 41 and 58 of the VCLT amount to customary international law, it is clear that the prohibition on suspending or modifying treaties to the detriment of the rights and obligations of other parties is a codification of customary law.[168]

F. IOs Have Accepted that they are Bound by Human Rights Norms

IOs perform institutional acts which may create obligations binding on IOs as unilateral acts.[169] There are several examples of institutional acts whereby different IOs have accepted being bound by obligations under general international law including the obligation to provide a hearing and a remedy.

The UN has stated that the rules of IHL are applicable to its forces in situations of armed conflict where they are actively engaged as combatants, to the extent and for the

[167] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 324–326.

[168] See e.g., Anne Rigaux and Denys Simon, 'Amendment and Modification of Treaties, Art.41 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 994; Mari-Pierre Lanfranchi, 'Termination and Suspension of the Operation of Treaties, Art.58 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1314.

[169] *Nuclear Tests Cases (Australia/France; New Zealand/France)* 1974 ICJ Rep 253 [44-46]; Verdirame (n 112) 82.

duration of their engagement.[170] As noted above, in the context of administration of territory and peacekeeping, IOs have accepted human rights obligations under general international law.[171] The UN expressly mentions the obligation to promote, protect and respect human rights in its policy on police in peacekeeping operations and special political missions.[172] With respect to the right of access to a forum and the right to a remedy, several administrative tribunals created by IOs have accepted that IOs are bound by 'general principles of law' including the right to a remedy.[173]

Some IOs make the argument that general international law does not apply to them as their constituent instruments are *lex specialis* with respect to general international law. According to the IMF 'when an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a "peremptory norm" (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities…. vis-à-vis all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization's responsibility is concerned'.[174]

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[170] UN Secretariat, 'Observance by United Nations Forces of International Humanitarian Law' ST/SGB/1999/13 (6 August 1999) Chapter I [3].

[171] (n 147).

[172] UN Department of Peacekeeping Operations/Department of Field Support, 'United Nations Police in Peacekeeping Operations and Special Political Missions' (1 February 2014) [31].

[173] E.g., *Cohen v. Secretary-General of the United Nations* No. 2011-UNAT-131(8 July 2011) 2011 UNJY 452; *Mendaro* v. *IBRD* 1985 World Bank Administrative Tribunal Reports Judgment No. 26, 9.

[174] See ILC, 'Responsibility of International Organizations: Comments and observations received from International Organizations' (1 May 2007) A/CN.4/.582, 5.

If this statement means that IOs are only bound by *jus cogens*, conventional obligations and the IO's charter, this is plainly incorrect based on the preceding analysis. However, if the statement is interpreted to mean only that the charters of IOs constitute *lex specialis* and that general international law does not apply if it is displaced by the constituent instrument, then the statement may, subject to human rights obligations that do not allow for deviation,[175] be consistent with the application to IOs of obligations that correspond to their acts including the right to a hearing and to a remedy. *Lex specialis* is presumed to align with general international law unless States have made clear the intention to diverge from it.[176]

For the reasons set out above, IOs are bound by an obligation under general international law to provide a hearing in private law disputes and to provide a remedy for violations of public law obligations that IOs are bound by. Indeed, the ILA in its Final Report on the Accountability of International Organizations specifically concluded that the right of access and the right to a remedy apply to IOs as a general principle of law and a basic human rights standard.[177] This conclusion was also reached by the Parliamentary Assembly of the Council of Europe[178] and finds support in scholarship.[179]

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[175] Section IIE above.

[176] Daugirdas (n 106) 348.

[177] 'Accountability of International Organisations' (n 75) 208.

[178] Parliamentary Assembly, Council of Europe 'Accountability of international organisations for human rights violations' Resolution 1979 31 January 2014[1]; José Maria Beneyto, 'Accountability of International Organisations for Human Rights Violations' (Council of Europe, Committee on Legal Affairs and Human Rights 2013) para 19.

[179] E.g. Clapham (n 110) 67 at footnote 33; De Schutter (n 90) 19.

G. The content of IOs' obligation to provide means to settle disputes under general international law

The obligation of IOs to provide fair trial rights under general international law entails both the procedural obligation to provide access to a forum for the settlement of private law disputes[180] and the obligation to provide a substantive remedy for a violation of rights that the IO is bound to ensure.[181]

With respect to both obligations, the practice of the ECtHR,[182] the European Commission on Human Rights ('ECmHR') [183] as well as domestic courts[184] suggests that States will be responsible for the breach of the obligations in respect of areas of competence transferred to IOs where the IO does not provide equivalent protection to that provided by the respective human rights convention. 'Equivalent' has been held to mean 'comparable' and not 'identical'.[185] Thus, if the assumption is that States would not transfer powers to IOs in a manner that would entail the State's responsibility, the obligation of IOs to provide fair trial rights would require it to provide a comparable forum or remedy to that which States are required to provide in similar circumstances.

[180] Article 14(1) ICCPR; Article 6(1) ECHR.

[181] Article 2(3) ICCPR, Article 13 ECHR Shelton (n 5) 14,15 see also (n 4,5) above.

[182] E.g., *Bosphorus v Ireland* App No 45036/98 (ECtHR, 30 June 2005) [155-156].

[183] E.g., *M & Co. v. Federal Republic of Germany*, App No 13258/77 (ECmHR, 9 February 1990).

[184] E.g., *Solange II*.

[185] *Bosphorus* [155].

With respect to the obligation to provide a forum, an IO which exercises governmental functions, such as the administration of territory or peacekeeping functions, may be bound by the obligation to provide a judicial forum for the settlement of disputes in the manner that States are bound. However, when IOs are not engaged in such governmental functions, other means may suffice. Means such as administrative tribunals in employment disputes and arbitration in contractual disputes have been held to satisfy IOs' obligation to provide means to settle disputes where governmental functions were not involved.[186] For instance, in *Groupement d'Entreprises Fougerolle et consorts c. CERN*, the Swiss Federal Tribunal found that by agreeing to an arbitral procedure, the CERN had complied with its obligation to offer alternative mechanisms to resolve private law disputes.[187]

The decisions of domestic and international courts highlight some salient features of mechanisms which satisfy the requirements of equivalent protection of the right to a forum.[188] These include impartiality, a right to be heard, independence and the ability to provide a binding decision.[189] The ICJ in reviewing the decisions given by the UN and ILO

[186] *Waite* [69]; *Beer and Regan v Germany* App No 28934/95 (ECtHR, 18 February1999) [21-30,59], see also the cases cited at hapter 4, section IIA.

[187] (1992) BGE 118 Ib 562, 568 [2b].

[188] For an overview of the case law, see Brief of Amicus Curiae Daniel Bradlow in *Jam v IFC* (18 August 2016) 15, see also, Chapter 4, section IIA.

[189] See e.g. *Siedler v Western European Union*, Appeal Judgment ILDC 53 (BE 2003); Fassbender (n 155) 476 ff.; Kristina Daugirdas and Sachi Schuricht, 'Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies', *AIIB Yearbook of International Law*, vol 3 (Brill Nijhoff) 77ff.

Administrative Tribunals[190] has stated that the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision are fundamental aspects of the right to a fair trial, the non-protection of which would be a fundamental error in procedure which results in a failure of justice by the Tribunal.[191]

The manner in which the UN has claimed to satisfy its treaty obligation to provide means to settle disputes under section 29 of the CPIUN[192] is also instructive as to the requirements for the fulfilment of the obligation under general international law, the UN being bound by both the treaty obligation and general international law.[193] Importantly, it appears that the obligation to provide a forum does not require the creation of a standing

[190] The Annex to the Statute of the International Labour Organization Administrative Tribunal (9 October 1946), Article XII allows the Executive Board of an IO that has made the appropriate declaration under the Statute to refer the validity of a decision of the Tribunal to the ICJ for an Advisory Opinion; Article 11 of the Statute of the UN Administrative Tribunal as amended by UNGA Resolution 957 (X) of 8 November 1955 allowed a party aggrieved by the decision of the Administrative Tribunal to apply to a Committee on the Review of Administrative Tribunal Judgments, which in turn could request an Advisory Opinion from the ICJ.

[191] E.g., *Application for Review of Judgement No. 158 of the United Nations Administrative* Tribunal (Advisory Opinion) 1973 ICJ Rep 166 [92]; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) 2012 ICJ Rep 2012 10 [44].

[192] See text accompanying (nn25 -33) above.

[193] Cf. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/United States) (Merits) 1986 ICJ Rep 14 [177].

forum prior to a dispute arising, but requires the provision of an appropriate forum to the private claimant with respect to the particular claim.[194]

With respect to the obligation to provide remedies, IOs are bound to provide a remedy for the violation of those public law rights which IOs must ensure.[195] The requirements of the obligation to provide a remedy are less exacting than the obligation to provide a forum.[196] Even States, as the bearers of the obligation to provide a remedy under international human rights instruments, are not required to provide judicial remedies for all types of rights violations.[197] Similarly, the obligation of IOs to provide remedies will depend on variables such as the right alleged to be violated, the context of the claim, the expected remedial outcome and the category of claimant.[198] As Wellens points out '[i]n some areas the institution of an ombudsman may be appropriate, while other areas may call for the establishment of an Inspection Panel or a Commission of Inquiry, followed by resorting to quasi-judicial or judicial organs possessing the power to issue binding decisions addressed to the [IO]'.[199]

[194] See *Groupement d'Entreprises*; *Cumaraswamy* Verbatim Record, 10 December 1998, 21, 51; see also text at (nn30-33).

[195] No claims are made on what particular public law obligations other than the right to a fair trial IOs are bound by. However, it follows from the reasoning above that IOs will be bound by such human rights obligations that correspond to their acts. See section IIC.

[196] See e.g., *Silver v the United Kingdom* (ECtHR, 25 March 1983) [110].

[197] See e.g., Ibid [113].

[198] Wellens (n 146) 170. See also e.g., *Chahal v the United Kingdom* (ECtHR) 15 November 1996 [150-51].

[199] ibid 170.

The remedy provided however must ensure certain procedural guarantees such as that the parties are treated equally.[200] Moreover, the remedy provided must be effective. This means that in the case of a formal remedy, the mechanism should be independent of the IO and that the remedy also has to be enforceable, without being limited to mere advice or recommendations to the IO.[201]

Thus, the obligation of IOs to provide a forum requires IOs to provide protection equivalent to that which States are required to provide under human rights instruments. This requires that certain fundamental procedural safeguards such as independence and impartiality are respected within the forum created by IOs. Similarly, the obligation to provide a remedy requires IOs to provide equivalent remedies to States for violations of public law obligations that bind IOs. This includes that the remedies must be effective and enforceable.

III. The Content of the Responsibility for the Breach of the Obligation to Ensure Fair Trial Rights

Since IOs are under an international obligation to ensure fair trial rights, they are responsible for a breach of this obligation insofar as the breach is attributable to it.[202] The

[200] ibid 38.

[201] 'Accountability of International Organisations' (n 75) 209.

[202] ARIO Article 3; *Cumaraswamy* [66].

obligation may be breached by IOs by omission[203] — either by a failure to provide any forum or remedy at all or by the existence of deficiencies in the means provided.[204] The attribution of the failure to create such means would be straightforward, as the omission, the failure to provide a forum or to provide a remedy, is clearly that of the IO.[205]

This section sets out the content of the international responsibility of the IO for a failure to ensure fair trial rights. Setting out the content of the responsibility will aid the assessment of whether domestic court decisions trigger compliance with the obligation of IOs to ensure fair trial rights including the implementation of the responsibility of IOs for the failure to ensure such rights.[206]

The content of international responsibility consists the new legal relationship which arises upon the commission of an internationally wrongful act.[207] This new legal relationship arises as an objective matter upon the occurrence of a breach and is not dependent on the invocation of responsibility by the injured entity or any other entity entitled to invoke responsibility.[208] The core legal consequences of an internationally

[203] ARIO Article 4.

[204] See e.g., *Perez v Germany* (Admissibility) App No 1552108 (ECtHR, 6th January 2015) [65,66] where the ECtHR stated that the deficiencies raised by the Applicant with respect to the UNAT raised 'an issue under Article 6(1) of the Convention'.

[205] However, the State may also be responsible for the omission if it has, for instance, directed and controlled the IO in the failure to ensure fair trial rights or coerced it into the omission. See ARIO, Part Five.

[206] See Chapter 6 Section II. 'Implementation' of responsibility has the meaning in Part Three of the ARSIWA, i.e., 'giving effect to the obligations of cessation and reparation which arise for a responsible State…by virtue of its commission of an internationally wrongful act'. ARSIWA Commentary, 116 – introduction to Part Three.

[207] ARSIWA Commentary to Part Two, 86[1].

[208] ARSIWA Commentary 88[3].

wrongful act[209] are the obligations of the responsible entity to cease the wrongful conduct[210] and to make full reparation for the damage caused by the breach.[211]

The responsibility of an IO for the failure to ensure the fair trial rights of private parties entails the secondary obligations to cease the unlawful conduct,[212] and to make full reparation for the damage caused by the breach.[213] Through cessation, implementation of the responsibility of an IO also touches upon the primary obligation to provide fair trial rights, even if only indirectly.[214]

A. The obligation of cessation

1. The content of the obligation

The obligation of IOs to ensure fair trial rights including the obligations to provide access to a forum for the settlement of private law claims and to provide an effective remedy for public law violations, is breached by omission, i.e., by the failure to provide a forum and a remedy. For as long as an IO does not provide a private party means to ensure fair trial rights, its conduct remains not in conformity with the obligation. The failure of the IO is

[209] ARSIWA Commentary 87[2].

[210] ARSIWA, Article 30(a); ARIO Article 30(a).

[211] ARSIWA Article 31; ARIO Article 31.

[212] ARSIWA, Article 30(1).

[213] *Factory at Chorzów* (Jurisdiction), 21; ARIO Articles 3, 31.

[214] Cf. ARIO Commentary Article 30, 55-56[2].

therefore a continuing wrongful act[215] and the IO is under an obligation to cease the wrongful conduct.[216] The obligation to cease the wrongful conduct in the case of a failure to ensure fair trial rights requires precisely the fulfilment of the obligation – the provision of means to ensure fair trial rights in respect of the claim and the private person to whom the right has not been ensured.

An example of the cessation of the wrongful act of the failure to provide access to a forum for the settlement of claims is provided in *Starways Ltd v the United Nations*.[217] In a tort claim by a private entity against the UN for the destruction of an aircraft, the UN entered into an arbitration agreement five years after the claim was made.[218] The eventual arbitration agreement could be characterised as the UN's cessation of the wrongful act of not providing a forum for the settlement of the claim, which overlaps with its primary obligation and the continued duty of performance of the obligation notwithstanding the breach.

The waiver of immunity before a domestic court will also, by making available the domestic court to the litigant, discharge the IO's obligation to provide access to a forum for the settlement of disputes and cease the wrongful conduct of not providing a forum.[219]

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[215] ARSIWA Article 14(2); ARIO Article 12(2); ARSIWA Commentary 60[3].

[216] See ARSIWA Commentary 88[2] stating that cessation is relevant to all wrongful acts extending in time 'regardless of whether the conduct of a State is an action or an omission'.

[217]1969 UNJY 233.

[218] 1969 UNJY 233; Harpignies (n 55).

[219] The very basis of the obligation to create means to settle dispute is to 'offset' the immunity accorded to IOs before domestic courts, *Cumaraswamy*, Verbatim Record 10 December 1998, 8.

Importantly, the IO must provide access to a forum to the particular litigant if it is to cease its wrongful act of the failure to ensure fair trial rights in respect of a private person. This is due to the fact that the obligation of the IO is not to create standing fora for the settlement of disputes, but to provide means for the settlement of each disputes.[220]

An example of an IO ceasing the wrongful act of failing to provide a remedy is provided in a case concerning an accident involving a UNICEF-operated vehicle. In a Note to the Permanent Representative of the Member State concerned, the UN Legal Counsel 'regret[ted] the delay' in settling the case and stated that UNICEF has decided to settle the claim on the basis of the award given to the victim's family by the domestic courts. This was, as per the Legal Counsel, 'in keeping with UNICEF's obligations under article VIII, section 29, of the [CPIUN]'.[221] UNICEF's acceptance of the remedy provided by the domestic court amounted to ceasing its continuing unlawful act of failing to provide a forum for the settlement of the dispute and of providing a remedy with respect to the claim.[222]

2. Is cessation the same as the primary obligation?

If the content of the secondary obligation of cessation mirrors precisely the content of the primary obligation to provide fair trial rights, a question arises whether cessation is really nothing more than a manifestation of the continued duty of performance of the primary

[220] See text accompanying (nn30-33).

[221] 1992 UNJY 473.

[222] For other examples, see the settlement of claims for damages arising from the operations of the United Nations Force in the Republic of the Congo 1965 UNJY 39-42, 1966 UNJY 39-40, 1967 UNJY 77-78; the settlement of a claim for non-consensual use of premises by the UN Mission in Liberia 2010 UNJY 521.

obligation.[223] The obligation of cessation may simply be an obligation to fulfil an entity's obligations 'as they were before the illegal act, and as they remain'. [224] This is the position taken by the ILC in its Commentary to the ARIO.[225]

The ARSIWA Commentary however considers cessation to be 'more than simply a function of the duty to comply with the primary obligation'.[226] The reason appears to be that cessation arises only in the event of a breach and therefore depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies.[227] The continued duty of performance on the other hand exists independent of and unaffected by the breach.[228]

In practice, the ICJ has treated the continued duty of performance as separate from the obligation of cessation.[229] As has been pointed out in the literature, the distinction the

[223]ARSIWA Article 29, ARIO Article 28, ARSIWA Commentary 88[2].

[224] Christian Dominice 'Observations on the rights of a State that is the victim of an internationally wrongful act' Droit international 2, Institut des Hautes Etudes Internationales, Paris, 1982 1,27, cited in *Rainbow Warrior*, UNRIAA, vol. XX (Sales No.E/F.93.V.3) 215 (1990) [113].

[225] ARIO Commentary 55[2] 'Although a claim [for cessation] would refer to the breach, what would actually be sought is compliance with the obligation under the primary rule. This is not a new obligation that arises as a consequence of the wrongful act'.

[226]ARSIWA Commentary 89[6].

[227] ARSIWA Commentary 89[6].

[228] ARSIWA Commentary 87[2].

[229] See e.g. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep 136 [149], referring to Israel's continued duty of performance of the obligations it has breached including the obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law, while at [150-151] the court refers to the obligation of cessation including ceasing the works of construction of the wall, dismantling parts of the wall in occupied Palestinian territory and repealing the legislative and regulatory acts adopted with a view to construction of the wall.

ICJ makes appears to be that the obligation of cessation targets the specific wrongful conduct that has resulted in the breach whereas the continued duty of performance refers to the entire content of the primary obligation.[230]

With respect to breaches of international obligations by positive acts then, the obligation of cessation may have a different content to the continued duty of performance. This is due to the fact that the positive act may result in consequences which have to be ceased which differ in content to the relevant primary obligation. With respect to omissions however, the cessation of the wrongful conduct would necessarily involve performing the relevant obligation insofar as it has not been performed. Therefore, in the case of an omission, as in the case of a failure to ensure fair trial rights, the obligation of cessation is identical to the continued duty of performance.[231] There is no way to cease the wrongful conduct of failing to ensure fair trial rights than to provide means to ensure fair trial rights. Thus, with respect to the breach of the obligation to ensure fair trial rights by omission, the implementation of the responsibility of an IO to cease the wrongful conduct necessarily results in the fulfilment of the primary obligation.

[230] Tzanakopoulos (n 107) 142.

[231] See also Frank Latty, 'Actions and Omissions' in James Crawford and Alain Pellet (eds), *The Law of International Responsibility* (2010) 362 who states that with respect to omissions, the obligation of cessation (and restitution) has the same content as the primary obligation whereas with respect to breaches involving positive conduct, the obligation of cessation takes a different form to the obligation breached.

B. The obligation of reparation

As per the *Factory at Chorzow* case, reparation requires the responsible State, as far as possible, to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[232]

In a situation of a failure to ensure fair trial rights, the consequences of the wrongful act would be that the third party concerned does not have access to a forum for the settlement of private law disputes or is not provided with a remedy for an established public law violation. The 'wiping out' of the consequences of this internationally wrongful act would involve precisely the creation of such means and the provision of a remedy, with adequate compensation for the delay in fulfilling the obligation. Thus, with respect to the failure to ensure fair trial rights by omission, reparation too involves the same conduct as cessation and the continued duty of performance with the added component of compensation for delay.[233]

The material and/or moral damage suffered by the claimant as a result of delay on the part of the IO to discharge its obligation to provide means to settle disputes can be factored into the remedy provided should the claim prove to be well founded. For instance, in *Teixeira v. Secretary-General of the United Nations*[234] the UNAT held that the refusal

[232] *Factory at Chorzów*, Merits, Judgment No. 13 [1928] PCIJ Series A No. 17 29, 47; ARSIWA Commentary 91[3].

[233] As noted in the Commentary to the ARSIWA, the result of cessation may be indistinguishable from reparation, particularly restitution. ARSIWA Commentary 89[7], *Rainbow Warrior*, 112; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 465.

[234] UNAT Judgment No. 230 14 October 1977.

of the UN Secretary General to recognize the competence of the UN Joint Appeals Board with respect to the applicant's claim and the refusal to establish the machinery for arbitration had caused injury to the applicant by impeding for a long time the settlement of the dispute. The UNAT therefore awarded compensation for the injury thus sustained, even whilst referring the dispute to the appropriate forum.

Thus, the implementation of the responsibility of the IO for the failure to discharge its fair trial obligations, i.e., the cessation of the wrongful conduct and reparation for the breach involves the creation of means to ensure the fair trial obligations of the private partie(s) with respect to whom the obligations were breached.

The inquiry of this thesis is into the impact of domestic court decisions on inducing compliance with the fair trial obligations of IOs, including triggering reactions from States and IOs which result in the creation by IOs of means to settle disputes with private parties for *future* claims. Thus, the inquiry is not limited to situations where the responsibility of the IO for the failure to ensure fair trial rights is implemented by a domestic court decision prompting the cessation of the breach *in the particular case at hand* by either constituting a lawful forum to hear the claim or triggering the creation of means to uphold the fair trial rights of the parties in the particular claim before the domestic court.

IV. INTERIM CONCLUSION

The foregoing has demonstrated that many IOs bear a treaty obligation to create means to settle private law disputes, and that all IOs are bound by an obligation under general international law to provide access to a forum for the settlement of private law disputes and

to provide a remedy for the violation of the public law rights of private parties that IOs are bound to ensure. The content of these fair trial obligations is not identical but is equivalent to the obligations of States in similar contexts.

An IO is responsible for a breach of these obligations which is attributable to it. The responsibility of the IO will entail the cessation of the wrongful conduct and providing reparation for the breach. Both of these secondary obligations are fulfilled by the provision by the IO of means to settle disputes with the particular private parties and by the provision of a remedy for established breaches, i.e., by the fulfilment of the primary obligation to ensure fair trial rights. With respect to the obligation to provide a forum, this may occur through the IO providing a forum such as arbitration or a different independent mechanism created by the IO for the adjudication of the private dispute or by the IO waiving immunity before the domestic court. With respect to the obligation to provide a remedy, the responsibility of the IO will be implemented by the IO providing an effective remedy for the established public law violation, usually pursuant to an independent and impartial mechanism to determine a suitable remedy.

The following section of the thesis, part II, which includes chapters 3, 4 and 5, will turn to the manner in which international and domestic courts have responded to the immunity of IOs before domestic courts in the context of the obligation of States to ensure fair trial rights and the international responsibility of IOs for their failure to ensure fair trial rights to private parties. The chapters will consider whether the practice of courts has rendered a denial of immunity lawful in a situation where the IO has breached its obligation to ensure fair trial rights, or whether other rules of international law may operate to render

a denial of IO immunity lawful in such a situation, resulting in domestic courts becoming a lawful forum for the settlement of disputes between IOs and private parties.

PART II

THE PRACTICE OF DOMESTIC AND INTERNATIONAL COURTS

CHAPTER 3

INTERNATIONAL COURTS' RESPONSE TO IO IMMUNITY AND THE RIGHT TO A FAIR TRIAL

This thesis concerns the role of domestic courts in inducing compliance by IOs with their obligations to ensure fair trial rights to private parties, including, at times, triggering the implementation of the responsibility of IOs for the failure to ensure fair trial rights. Increased compliance with fair trial obligations in turn results in the adjudication and enforcement of the responsibility of IOs for breaches of their obligations under domestic and international law. As discussed in chapter 1, it is the immunity of IOs that prevents domestic courts from hearing claims against IOs and consequently acting as a forum for the settlement of claims by private parties against IOs.

However, several factors may provide the legal and normative impetus for domestic courts to go beyond simply granting immunity to the IO when a claim is brought against an IO before a domestic court. One of these factors is that the immunity of IOs conflicts with the obligation of the forum State to provide fair trial rights to persons within its jurisdiction and that in the absence of alternative means for the adjudication of disputes created by the IO, the private party may have no appropriate forum whatsoever for her claim to be heard. Another reason could be decisions from international courts and tribunals, particularly courts such as the ECtHR whose decisions are binding on the States parties they are addressed to, which make IO immunity in some way dependant on the protection of fair trial rights by the IO.

The focus of chapters 3 and 4 is to determine how international and domestic courts have responded to the conflict between immunity and fair trial rights, in the context also of the IO's obligation to ensure fair trial rights. This practice is useful for two reasons for the purposes of the thesis. Firstly, it helps to determine whether the practice of international and domestic courts has created situations in which the obligation to grant IOs immunity under treaty law and under customary international law (CIL),[1] if such an obligation does indeed exist under CIL,[2] do not apply due to the violation of the claimant's fair trial rights. If a set of circumstances where immunity does not apply based on the right to a fair trial has been carved out by practice, similar to the *jure gestionis* exception to State immunity, there is a legal basis for domestic courts to deny immunity and exercise jurisdiction over IOs, thereby ceasing the breach and implementing the responsibility of IOs for the failure to ensure fair trial rights.

Secondly, an examination of the practice helps ascertain the methods short of denying IOs immunity that courts adopt to address the conflict between IO immunity and the obligation of States to ensure fair trial rights. These include various signalling measures directed towards States and IOs, indicating that IOs must create means for the settlement of disputes with private parties. As examined in chapter 6, these signalling measures may

[1] In relation to the definition adopted for general international law in chapter 2, see chapter 2 (n 199), CIL is taken only to include universally applicable rules of customary law and to exclude general principles of law.

[2] For the reasons set out in chapter 4 section VB, also discussed in the literature, see e.g. Michael Wood, 'Do International Organizations Enjoy Immunity under Customary International Law Special Issue: Immunity of International Organizations' (2014) 10 International Organizations Law Review 287, the view taken here is that there is no rule under CIL requiring States to grant immunity to IOs. However, assuming that there is an obligation under CIL for States to grant immunity to IOs, the thesis assesses whether domestic court decisions have carved out an exception to such a rule on the basis of fair trial rights.

induce compliance by IOs with their obligation to ensure fair trial rights to private parties, even when courts do not deny immunity to IOs.

This chapter examines the practice of international courts and tribunals on the immunities of IOs and the right to a fair trial. The decisions of international courts and tribunals are important to examining whether domestic court decisions can enforce the obligations of IOs to ensure fair trial rights. Firstly, as more fully examined in section I below, international court decisions are a subsidiary means for the determination of rules of international law.[2A] International courts apply and make statements concerning the obligations of States to grant IOs immunity and the obligations of States and IOs to ensure fair trial rights. Thus, the practice of international courts is relevant in assessing whether practice has carved out an exception to the rules requiring the grant of immunity to IOs before domestic courts under international law.

Secondly, the decisions of international courts can influence the decisions of domestic courts in claims against IOs. As will be seen in chapter 4, domestic court decisions have adopted the reasoning of international court decisions. In particular, the ECtHR decision in *Waite and Kennedy* as well as the decision of the ICJ in *Jurisdictional Immunities* have had a significant impact on the decisions of domestic courts in claims against IOs. The decisions of international courts in claims challenging acts of States which implement decisions of the UN Security Council are also important in that they are analogous to claims concerning IO immunity and fair trial rights — the former category of decisions consider an obligation of the State towards the IO on the one hand (the obligation

[2A] ICJ Statute, Article 38(1)(d).

to implement the IOs' decision) and a human rights obligation of the State on the other (this could be fair trial obligations or a different human rights obligation), similar to decisions that consider the obligation of the State to grant immunity to the IO with the obligations of the State to ensure fair trial rights to individuals. The reasoning adopted by international tribunals in the former category of cases could well be used by domestic courts in claims against IOs.

Thirdly, international court decisions on immunity, whether it be State or IO immunity, and fair trial rights, including the decisions of the ECtHR, the ICJ, and the Human Rights Committee on this question, most often stem from a domestic court decision either upholding the State/IO's immunity or denying the same. Thus, in these cases, the international court decision is, essentially, an extension of the domestic court decision on immunity and fair trial rights.

Section I sketches how the practice of international courts is relevant to assessing the legality of denials of immunity in situations where fair trial obligations are breached. The European Court of Human Rights (ECtHR) is the international judicial forum that has explicitly addressed and contributed to the practice on the question of IO immunity and the claimant's right to a fair trial. Section II, which forms the majority of this chapter, will be devoted to examining the practice of the ECtHR. Section III briefly examines the practice of other international courts and tribunals - the ICJ, the UN Human Rights Committee and the courts of the European Union - on IO immunities and fair trial rights as well as the related question of the obligation of States to abide by decisions of IOs, particularly the obligation to abide by decisions of the UN Security Council Resolutions under Article 25

of the UN Charter and the compatibility of measures implementing such obligations with fair trial rights. Section IV concludes the chapter with an assessment of the impact of the decisions of domestic and international courts on the rule requiring States to grant immunity to IOs under treaty and under CIL.

I. THE RELEVANCE OF THE PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS

The practice of international courts and tribunals constitutes a subsidiary means for the determination of rules of international law under Article 38(1)(d) of the ICJ statute.[3] Thus, in examining whether judicial practice has made the obligation to grant immunity inapplicable in situations where the right to a fair trial is not satisfied, international judicial practice plays a subsidiary role.

Moreover, the conflict between the obligations of States to grant IOs immunity and the obligations of States to afford persons the right to a fair trial does not impact international courts in the same way that it does domestic courts.

When confronted with a claim against an IO, domestic courts have to contend with the fact that the aforementioned obligations of the State of which the domestic court is an organ may conflict with each other, potentially resulting in State responsibility in case of the

[3] Though the decisions of national courts constitute State practice and/or *opinion juris* for the determination of CIL, the decisions of international courts, not being the practice of States, do not. See e.g., ILC, Draft conclusions on Identification of customary international law 2018 IIYILC, Part 2, Conclusion 4(3) ,6(2),10(2),13(1).

breach of one obligation by upholding the other. Thus, as more fully explored in chapter 4, a decision of a domestic court denying immunity on the basis of the violation of the claimant's fair trial rights may, in the absence of evidence to the contrary, be interpreted to mean that the court considers that the State's obligation to grant immunity to IOs is subject to the claimant's fair trial rights.[3A]

Conversely, the jurisdiction of the ECtHR, which is the international court that has had to determine the specific claim that the grant of immunity to an IO by a domestic court violates a State's fair trial obligations, is limited to matters concerning the interpretation and application of the ECHR itself. [4] Thus, whilst whether the State has an obligation to grant immunity to the IO under international law is part of the ECtHR's test to determine whether the State's limitation of fair trial rights under the ECHR by granting immunity follows a legitimate aim, the ECtHR only considers the State's obligation to grant immunity for the purposes of interpreting and applying the ECHR.[5] The Court itself is not subject to that obligation. Therefore, in determining the claim, the Court need not be concerned with the fact that the State may have to violate its immunity obligation to uphold

[3A] See chapter 4, text at (n 27).

[4] ECHR, Article 32.

[5] Article 31(3)(c) VCLT requires other rules of international law applicable between the parties to be taken into account in the interpretation of treaties. Many authors support the view that Article 31(3)(c) refers to rules applicable between *all* parties to the treaty. See e.g., Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 The International and Comparative Law Quarterly 279, 315; Ulf Linderfalk, 'Who Are "The Parties"? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited' (2008) 55 Netherlands International Law Review 343, 346. See also e.g., *EC - Measures Affecting the Approval and Marketing of Biotech Products* (World Trade Organization Panel) WT/DS291-293/INTERIM [7.68 – 7.70]. Contra Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 261. ILC, 'Report of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (finalized by M Koskenniemi) (2006) (A/CN.4/L.682) ('ILC Fragmentation Report') [471-472].

its fair trial obligations under the ECHR. The upshot is that the decisions of the ECtHR do not necessarily speak to whether the obligation of States to grant IOs immunity has been violated when it makes a determination on the violation of the right to a fair trial under the ECHR by the grant of immunity.

An important impact of the decisions of international courts and tribunals however is that they can push domestic courts into adopting their arguments. The force that the obligation of the *State* to ensure fair trial rights to persons within its jurisdiction exerts on domestic courts' willingness to engage with the question whether immunity may be granted to IOs is fortified by decisions of international courts on fair trial rights and the immunity of IOs. As has been noted in the literature[6] and as will be seen in chapter 4, the jurisprudence of the ECtHR, particularly the decisions in *Waite and Kennedy* and *Beer and Regan*, has had a significant impact on domestic court decisions in States parties to the ECHR.

Furthermore, as will be examined in chapter 6, the decisions of international courts on immunity and fair trial rights, which often stem from domestic court decisions or can have an impact on how domestic courts decide claims concerning immunity and fair trial rights, can also exert pressure on States and IOs to ensure that the IO creates means for the protection of fair trial rights, thereby contributing to IOs complying with their obligation to ensure fair trial rights.

[6] See e.g., R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 106; August Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013).

II THE EUROPEAN COURT OF HUMAN RIGHTS

In the early decisions of the European Commission of Human Rights (ECmHR), the Commission did not consider the immunity of IOs as even so much as engaging the right to a fair trial under the ECHR. In *Ary Spaans v Netherlands*[7] the ECmHR held that it is in accordance with international law that States confer immunities to IOs, in this case, the Iran – US Claims Tribunal, and that such a restriction of national sovereignty in order to facilitate the workings of an international body 'did not give rise to an issue under the Convention'.[8] This demonstrates the view that IO immunity takes the claim outside the adjudicative jurisdiction of the State concerned, thereby not engaging the State's obligation to ensure fair trial rights under the ECHR.[9]

A. Waite and Kennedy and Beer and Regan

1. The right to a fair trial is engaged by the immunity of IOs

The approach of the ECtHR changed in *Waite and Kennedy v Germany*[10] and *Beer and Regan v Germany*.[11] In these cases, the ECtHR proposed to 'proceed on the basis that

[7] App No 12516/86, (ECmHR,12 December1988) (Spaans).

[8] Ibid [119].

[9] Jan Klabbers and Åsa Wallendahl, *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 142.

[10] App No. 26083/94 (ECtHR,18 February1999).

[11]App No 28934/95 (ECtHR, 18 February1999). The two cases were near identical in reasoning. Thus, a reference to *Waite and Kennedy* hereafter will be a reference to both cases.

[Article 6(1)][12] was applicable to the present case' on the grounds that Germany did not dispute that the labour court proceedings instituted by the applicants involved the determination of their civil rights and obligations and that the parties' arguments before the ECHR were directed to the issue of compliance with Article 6(1).[13]

The court also held that where States establish IOs and attribute to them certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. Importantly, the court invoked the object and purpose of the ECHR, stating that it would be contrary to the object and purpose if contracting States were absolved from their responsibility under the Convention in relation to the field of activity covered by attribution of competences to IOs.[14]

The change in approach to the issue of whether immunities granted to IOs under international law engage Article 6(1) may be attributed to the line of reasoning developed by the European Commission in cases such as *Dyer v. United Kingdom*.[15] In *Dyer* the Commission reasoned that to allow a State Party to remove from the jurisdiction of their courts certain classes of civil action and confer immunities from liability on certain groups without the possibility of control by Convention organs would result in there being no

[12] Article 6(1) of the ECHR reads '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. This has been held to include the right of access to court, see *Golder v. United Kingdom* App No 4451/70 (ECtHR, 21 February 1975) [35].

[13] Ibid *Waite* [49].

[14] Ibid [67].

[15]App. No. 10475/83, (ECmHR, 19 October 1984) 242 (Dyer); See also August Reinisch, 'Waite and Kennedy v. Germany' (1999) 93 American Journal of International Law 913, 936.

protection against the danger of the exercise of arbitrary power. Underlying this line of thinking appears to be the court's emphasis on the object and purpose of the Convention as granting rights that are practical and effective and not theoretical and illusory.[16]

2. Whether IO immunity is a proportionate limitation of fair trial rights

Once the court established that the right of access to court is engaged by the grant of immunities to IOs, it addressed the question whether IO immunity is a permissible limitation of the right. The decision in *Waite and Kennedy* followed the court's established jurisprudence to assess whether a limitation on the right of access to court was in accordance with the ECHR.[17] The relevant principles are as follows: the right of access to court is not absolute and maybe subject to limitations permitted by implication. Though the contracting States enjoy a certain margin of appreciation in this respect, the court makes the final decision as to the observance of the Convention's requirements. As such, the limitation must not restrict or reduce the access left to the individual so that the very essence of the right is impaired. The limitation must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought

[16] See e.g., *Waite* [67], *Mothers* [139(d)]. For the role of teleological interpretation in the jurisprudence of the Court see Lucius Caflisch and Antônio Cançado Trindade, 'Les Conventions Américaine et Européenne Des Droits de l'Homme et Le Droit International Général' 108 Revue Générale de Droit International Public 5, 11–12; ILC, Fragmentation Report [130 - 131] and the references therein.

[17] See e.g., *Ashingdane v* UK App No 8225/78 (ECtHR, 28 May 1985) [57], *Osman v UK* App No 23452/94 (ECtHR, 28 October 1998) [147].

to be achieved.[18] Thus, the three requirements for a limitation to be permissible are a legitimate aim, proportionality and that the very essence of the right is not impaired.

The Court found that the immunity of IOs pursues a legitimate aim — that of ensuring the proper functioning of IOs free from unilateral interference by individual governments.[19] It then proceeded to assessing the proportionality of IO immunity as a limitation of the right of access to a court, presumably subsuming the question of whether the limitation impaired the very essence of the right under the proportionality analysis.[20]

The Court determined that proportionality requires the court to assess the limitation on Article 6(1) of the ECHR in the particular circumstances of the case[21] and crucially, held that a 'material factor' in determining whether the grant of immunity from domestic jurisdiction to the IO, the European Space Agency (ESA) in this case, is permissible under the Convention is whether 'the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[22]

3 The source of the alternative remedies test

The availability of alternative remedies as a material factor in assessing the proportionality of immunity as a restriction on the right of access to court appears to proceed from the

[18] See e.g., *Waite* [59]; *Cudak v Lithuania* [GC] App No 15869/02 (ECtHR, 23 March 2010) [55], *Sabeh El Leil v* France [App No 34869/05 (ECtHR, 29 June 2011) [47].

[19] *Waite* [63].

[20] Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publihsers 2010) 17.

[21] *Waite* [64].

[22] ibid [68].

European Commission on Human Rights' decision in *Waite and Kennedy.*[23] The Commission, referring to its decision in *Melchers*,[24] held that 'the impediment to bringing litigation before the German courts, namely the immunity of the ESA from German jurisdiction, is only permissible under the Convention if there is an equivalent legal protection' within the organization.[25] It buttressed this conclusion by recalling the object and purpose of the Convention, which, as an instrument for the protection of individuals, required that its provisions be interpreted so as to make its safeguards practical and effective.[26]

The Commission's decision in *Waite* introduced the equivalent protection test, i.e., the requirement that States ensure that there is equivalent legal protection of Convention rights within an IO when transferring powers to the IO,[27] to the context of granting immunity to IOs before domestic courts. The test of equivalent protection itself draws its inspiration from the Solánge jurisprudence of the German Constitutional Court, where the German courts held that they had jurisdiction over acts of community organs only so long as (in German, solánge) the ECJ did not provide equivalent human rights protection.[28]

[23] *Waite and Kennedy v. Germany*, App No 26083/94 (ECmHR, 2nd December 1997) (*Waite, Comm.*)

[24] *M & Co. v. Federal Republic of Germany*, App No 13258/77 (ECmHR, 9 February 1990) (*Melchers*).

[25] *Waite, Commission* [74].

[26] ibid.

[27] First used by the Commission in *Melchers* in the context of the responsibility of member States of the European Community for implementing the acts of the Community. See *Melchers*, 7.

[28] The Court has used the *Solange* argument in its *Solange II* formulation, See *Solange II* In re application of finsche Handelsgesellschaft, Federal Constitutional Court, B VerfGE 37, 271, translated in 3 Common Market Law Reports. 225 (1987), See Reinisch (n 15) 936; Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 113.; Antonios Tzanakopoulos, The Solange Argument as a Justification for Disobeying the Security Council in

Thus, the Commission's decision in *Waite* applied a variation of the *Solange* argument to the context of granting immunity to IOs before domestic courts whilst the ECtHR in turn adopted this test when it considered the presence of reasonable alternative means to protect rights under the ECHR to be a material factor in determining whether IO immunity was a proportionate limitation of the right of access to court.

4. The application of the alternative remedies test

Two further points warrant attention with respect to the reasonable alternative means test established in *Waite*. The first is that the 'equivalent protection' language in the ECmHR's decision changes to 'reasonable alternative means' in the ECtHR's decision. It is also only a 'material factor' in assessing the proportionality of the restriction that reasonable alternative means were available to the claimants to protect their rights under the Convention. It is therefore plausible under this test that granting the IO immunity would be proportionate even in the absence of alternative remedies.[29] The language of the Commission when referring to equivalent protection was more absolute – immunity is 'only permissible' under the Convention if there is equivalent legal protection.[30]

The other point of note is the level of scrutiny into the alternative means of protecting the right of access to court. The application concerned the grant of immunity to the ESA by German courts in an employment dispute. The ECHR considered that the ESA Appeals

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the Kadi Judgments, available at http://ssrn.com/abstract=2364764 (accessed 02.10.2017) 7.

[29] Nicolas Angelet and Alexandra Weerts, 'Les Immunités Des Organisations Internationales Face a 1 Article 6 de La Convention Européenne Des Droits de 1'homme' [2007] Journal de Droit International 3, para 35.

[30] *Waite, Commission* [74].

Board and recourse to litigation against the company that hired the applicants constituted reasonable alternative means to protect the litigants' Convention rights.[31] It has been questioned whether a remedy against another party, the company in this instance, can be considered a reasonable alternative means to protect rights under the Convention.[32] The Court also did not examine the substantive law of or the procedure before the ESA Appeals Board, merely stating that whether the applicants fell within the ESA's jurisdiction was a question for the Appeals Board to decide.[33]

It is interesting to note that the Commission in fact explicitly acknowledged that the applicants did not have a remedy within the legal regime of the ESA to argue the specific claim that they had brought before the German courts - that a contract between them and the ESA was assumed to have been concluded pursuant to the German Provision of Labour Act.[34] Therefore, the Commission concluded that the applicants did not receive protection within the ESA that could be regarded as equivalent to the German Labour courts.[35] However, given that the applicant's claim was based on legislation enacted for the German labour market, the Commission held that it cannot apply the test of proportionality in such a way as to force an IO to be a party to domestic litigation on a question of employment

[31] *Waite* [69], [70], [73].

[32] See Cedric Ryngaert, 'Belgium' in Reinisch (n 6) 62.

[33] *Waite* [69].

[34] *Waite, Commission* [79].

[35] Ibid [79] 'It is true that the procedures under the legal regime of the European Space Agency did not provide the applicants with a remedy to argue before a court that an employment contract between them and the European Space Agency was assumed by law to have been concluded, pursuant to the German Provision of Labour Act. They did not, therefore, receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts.'

governed by domestic law.[36] Thus, for the Commission, the fact that the applicant was seeking to enforce a particular right available under domestic law and not one that was generally available in employment relations appears to have been material in determining that the grant of immunity was not disproportionate.

Similarly, the ECtHR, after stating that the applicants had recourse to the ESA Appeals Tribunal and to redress against the firms that hired them under German labour legislation, followed the Commission's reasoning and stated that 'bearing in mind the legitimate aim of immunities of IOs the test of proportionality cannot be applied in such a way as to compel an IO to submit itself to national litigation *in relation to employment conditions prescribed under national labour law'*.[37]

It appears, therefore, that the fact that an IO cannot be subjected to national litigation under specific conditions prescribed under domestic law was key to the ECtHR finding in *Waite* that the alternative means available to the claimants satisfied the right of access to court under the ECHR. Further, the court did not examine whether such alternative means provided equivalent protection in terms of adequate procedural safeguards or whether substantively, the civil rights and obligations in question were protected to an equivalent extent by the alternative forum.[38]

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[36] Ibid [80].

[37] *Waite* [72] references omitted; emphasis added.

[38] If the applicable law was not German labour law, the claimants simply did not have the 'civil right' which they claimed did not receive the protection of the Article 6(1) guarantees. However, if the alternative forums before the IO did not (procedurally) provide protection equivalent to that of the Convention, there is nothing that should have prevented national courts from adjudicating the claim on the basis of the internal law of the IO. See Reinisch (n 15) footnote 38.

5 Conclusions on *Waite and Kennedy*

In conclusion, the crucial step taken in *Waite* with respect to the immunity of IOs and in turn, the adjudication of the responsibility of IOs for breaches of domestic and international law is the determination that States continue to be responsible under the ECHR for the obligation to provide fair trial rights in relation to competences conferred on IOs. Thus, the immunity of the IO would no longer *ipso facto* relieve the State of the obligation to provide fair trial rights to persons within its jurisdiction. The presence of alternative means to ensure the rights of parties under the Convention would be material to determine whether granting an IO immunity from jurisdiction constituted a proportionate limitation of a litigant's right of access to court. However, in the application of the test, the ECHR was quick to hold that the remedies available to the litigants against different parties satisfied the requirement of reasonable alternative means for the protection of rights under the Convention. This appeared to be due at least in part to the fact that the rights that the litigants were claiming were particular to German labour law.

B. Other employment cases

The jurisprudence of the ECtHR in employment cases following *Waite* confirms the consideration of reasonable alternative means in assessing the proportionality of IO immunity as a limitation of the right of access to court.

1. AL v Italy

One of the first cases on IO immunity to be heard by the ECtHR after *Waite* was the case of *A.L. v Italy*.[39] In this case, which concerned NATO's Undersea Research Centre, the court went further than *Waite* in that it provided specific reasons as to why NATO's internal appeals procedure was a reasonable alternative remedy, resulting in NATO's immunity from Italian jurisdiction being consistent with the right to a fair trial under the ECHR.[40]

2. Chapman v Belgium

In *Chapman v Belgium*,[41] the applicant complained that a decision of the Brussels Employment Appeals Tribunal upholding the immunity of NATO in an employment dispute violated his right of access to court. The ECtHR followed *Waite* and held that the matter came within Belgium's jurisdiction for the purposes of the ECHR as it was an organ of the Belgian State, i.e., its courts, which had taken the impugned decision.[42] The court applied the test for limitations of the right of access to court as set out in *Waite.*[43] Whilst the court did not itself go into the adequacy of the procedure before the NATO Appeals Board, the Brussels Employment Appeal Tribunal had found that the procedure constituted a reasonable alternative means of redress for the purposes of the right of access to court.[44]

[39] App No 41387/98 (ECtHR, 11 May 2000).

[40] Ibid, 5.

[41] (Admissibility) App No 39619/06 (ECtHR, 5 March 2013).

[42] Ibid [44].

[43] Ibid [45].

[44] Ibid [52].

The ECtHR limited itself to stating that it found nothing arbitrary in this decision.[45] Though the applicant had complained of deficiencies in the procedure before the NATO Appeals Board, she had not made a claim before the Board due to the belief that she fell outside of it as a former staff member.[46] The ECtHR found that the applicant could not claim that the shortcomings she attributed to the procedure would have prevented her from enjoying adequate safeguards for the purposes of Article 6(1) without availing herself of the procedure. Thus, whilst the ECtHR in *Chapman* was faced with a claimant who argued that the alternative means of redress provided by the NATO Appeals Board did not satisfy the requirements of Article 6(1), it did not go into this question itself, as the applicant had not availed herself of the remedy.

3. Klausecker v. Germany

Klausecker v. Germany[47] concerned a decision of the European Patent Office (EPO) to reject the applicant's application for employment on the basis of a medical report. The applicant claimed that the German Constitutional Court's refusal to hear his complaint violated his right to have access to a tribunal to protect his civil right not to be discriminated against on the basis of his disability.[48] He also claimed that the EPO internal procedures for dispute settlement did not satisfy the requirements of Article 6(1) and that Germany

[45] Ibid [53].

[46] Ibid [54].

[47] (Admissibility) App No 415/07 (ECtHR, 6 January 2015).

[48] Ibid [41].

was to be held responsible for the transfer of powers to the EPO without ensuring that it provided equivalent protection to the Convention.

The Court noted that the applicant's complaint was not heard on the merits by any tribunal or body and held that, given the importance in a democratic society of the right to fair trial of which the right of access to court is an essential part, it was decisive whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention.[49] The Court went on to find that the alternative means of redress provided by the EPO, an offer of arbitration in light of the fact that the ILO Administrative Tribunal did not have jurisdiction, satisfied the requirements of Article 6(1) and that the grant of immunity by German courts was thus proportionate.[50]

The case is notable for the change in language from reasonable alternative means being a 'material factor' in the determination of whether IO immunity constituted a proportionate restriction of the right of access to court, to alternative means being considered a 'decisive factor' in the circumstances of the case. The Court however found that reasonable alternative means were present in this case since the ILO administrative tribunal had noted its lack of jurisdiction and in light of the resulting 'legal vacuum', had recommended to the EPO to offer arbitration or waive its immunity.[51] The EPO had accordingly offered to conclude a concrete contract of arbitration, an offer that the applicant had refused.

[49] Ibid [69].

[50] Ibid [76].

[51] Ibid [70,71].

The ECtHR also examined the substantive rules and procedure that would be adopted before the arbitral tribunal. It considered that determining the case on the basis of the rules which the ILO administrative tribunal would have applied had it had jurisdiction to determine the case – the European Patent Convention, the EPO's Service Regulations and the general principles of labour law as established by the ILO Administrative Tribunal, as well as the offer to consider specific proposals concerning the procedure made by the applicant – gave the applicant a reasonable opportunity to have his complaint heard.[52] Particularly in light of the fact that it was common ground that the ILO Administrative Tribunal had declared to protect fundamental rights, the ECtHR did not consider that the application of the rules that would have applied before the ILO administrative tribunal had it had jurisdiction, made the procedure an unreasonable alternative.

4. Perez v Germany

In *Perez v Germany,*[53] the ECtHR went so far as to recognize that given the deficiencies in the UN's internal mechanisms brought to light by the claimant, the German courts may well have denied the UN's immunity if the claim had been brought before German courts.

The applicant claimed that the proceedings regarding her dismissal from the UNDP before the UN internal appeal bodies and the UN Administrative Tribunal (UNAT) had been characterized by manifest procedural, substantive and practical deficiencies which violated her right to a fair trial and that Germany must be held responsible for these

[52] Ibid [74].

[53] (Admissibility) App No 1552108 (ECtHR, 6th January 2015).

deficient procedures as it had failed to ensure that the UN had an internal dispute settlement procedure protecting her fundamental rights in a manner equivalent to ECHR standards. The applicant further argued that Germany, by granting the UN immunity from jurisdiction, had failed to guarantee her access to a fair and public hearing.[54] This was despite the applicant not having brought her claim before German courts.

The ECtHR noted that the deficiencies in the internal mechanisms of the UN complained of by the applicant, if proved to be true, 'raise an issue under Article 6(1) of the Convention'.[55] These complaints included that she did not have an oral hearing at any stage of the proceedings despite the fact that there were issues of credibility and contested facts, that she did not have access to all the documents produced by the UNDP to the UNAT and that the UNAT had limited jurisdiction in wrongful termination cases as the Secretary–General could choose to pay compensation instead of reinstating the applicant. The court noted that these shortcomings were confirmed by a panel of independent experts set up by the Secretary General in the report of the Redesign Panel on the United Nations System of Administration of Justice of July 2006.[56] The court stated that in the circumstances, the applicant must be considered to have complained before the court in a substantiated manner that there had been a structural deficiency in the legal protection within the UN in respect of employment disputes at the relevant time.[57] However, it left open the question of

[54] Ibid [47].

[55] Ibid [65].

[56] Ibid [65].

[57] Ibid [66].

Germany's responsibility *ratione personae* for these deficiencies and made its decision on the basis of the exhaustion of local remedies.[58]

The applicant had never gone before the German domestic courts, taking the view that the immunity of the UN would be upheld and that she had no prospect of success. However, the Court reasoned that given the serious deficiencies in the UN procedure, the German courts may well have denied immunity and exercised jurisdiction on the basis of the German Basic Law if the applicant claimed in a substantiated manner that the level of protection offered by the internal procedures of the UN was manifestly below the level required by the German Constitution.[59] The court further stated that a complaint to the Federal Constitutional Court was the only means for the respondent State to have knowledge of and redress the fundamental rights violations alleged by the applicant prior to her application to the ECtHR. It therefore found that a complaint to the Federal Constitutional Court was, in general, an effective remedy which the applicant had to exhaust.[60]

Subject to the caveat that the application was rejected on grounds of admissibility and the ECtHR's dicta is therefore *obiter*, the decision is important due to the acknowledgement by the Court that the shortcomings alleged by the claimant in the internal system of justice within the UN in labour disputes, if proven to be true 'raise an issue under

[58] Ibid [66] To such extent the court's statements with respect to IO immunity and access to court must be considered *obiter dicta*.

[59] Ibid [82-85].

[60] Ibid [88].

Article 6(1) of the Convention'. Having stated in its decision in *Gasparini*[61] that a State would be responsible for the transfer of powers to an IO, even if it had not intervened in the IO's actions, if there is a manifest deficiency in the protection of rights before the IO, the Court was confronted with a set of deficiencies in the dispute resolution procedure before the UN which were acknowledged by the UN's own independent review. The Court suggested that German courts may well have denied immunity to the UN in view of the deficiencies in the protection afforded by the UN. However, the ECtHR did not have to consider whether to hold Germany responsible for a violation of the ECHR since the applicant had not made her claim before German courts and had thus not exhausted local remedies.

5. Kokashvili v. Georgia

In *Kokashvili v. Georgia*,[62] the District Court of Vake-Saburtalo in Georgia had in a judgment dated 12 June 2002[63] held that the Organization for Security and Cooperation in Europe (OSCE) did not enjoy immunity in respect of labour disputes with local staff. The Georgian court had thereupon exercised jurisdiction over the labour dispute of the applicant with the OSCE, found that the OSCE had unlawfully terminated the applicant's employment and ordered the OSCE to reinstate the applicant and pay her compensation.[64] The applicant had thereafter been refused enforcement of the judgment pursuant to a *note-*

[61] *Gasparini v Italy and Belgium* (Application no 10750/03 ECtHR Section II 12 May 2009).

[62] (Admissibility) App No 21110/03 (ECtHR, 1 December 2015).

[63] Interestingly, this is soon after the *Waite and Kennedy* decision of the ECtHR.

[64] *Kokashvil*i [11].

verbale issued to the Georgian Ministry of Foreign Affairs by the OSCE Vienna Office requesting that the Ministry ensure that no execution measures are taken against the OSCE pursuant to 'a decision wrongly made by the court'.[65] The applicant claimed before the ECtHR that the refusal of enforcement measures violated her right of access to a court and right to a remedy under the ECHR.

A chamber of the ECtHR found that the limitation of the right of access to court of the applicant by the Georgian authorities' refusal to execute the judgment followed a legitimate aim — that of respecting the immunity of the OSCE - and was proportionate due to the availability of reasonable alternative means within the OSCE for the applicant to have made her claim. These means included the OSCE's Internal Review Board and then, if need be, its quasi-judicial body, the Panel of Adjudicators. The applicant had not pursued these remedies. Thus, even where a judgment had been issued by the domestic court denying immunity to the OSCE, the refusal by the State's authorities to enforce the judgment on account of the immunity of the OSCE did not, as per the ECtHR, violate the applicant's right to a fair trial as enshrined in the ECHR. This was due to the presence of reasonable alternative means for the protection of rights under the Convention within the OSCE.

C. Cases that concerned 'governmental functions': *Mothers of Srebrenica*

The foregoing cases concerned employment disputes between the IO and the respective applicants. The approach of the ECtHR to IO immunity as a limitation of the right of access

[65] Ibid [14].

to court has been different when the claim before the domestic court was a mass tort claim in respect of governmental functions carried out by the IO.

In *Mothers of Srebrenica*[66] the applicants claimed that their right of access to court under Article 6(1) of the ECHR was violated by the Dutch court's grant of immunity to the United Nations for the acts and omissions of the UN peace keeping force during the Srebrenica massacre.[67]

In setting out the principles applicable to the case, the court made explicit reference to the principle of systemic integration, i.e., that the ECHR should so far as possible be interpreted in harmony with other rules of international law of which it forms part. The ECtHR had not explicitly referred to the principle of systemic integration in its previous decisions on IO immunity as a limitation on the right of access to court, all of which were employment cases.[68]

The Court further stressed that States are assumed not to derogate from their previous obligations when creating new obligations[69] and that two diverging commitments must be harmonized as far as possible so that they produce effects that are fully in accordance with

[66] *Stichting Mothers of Srebrenica v the Netherlands* (Admissibility) App No 65542/12 (ECtHR, 11 June 2013).

[67] The Court made it clear that the issue before it was not responsibility for the Srebrenica massacre but purely whether the Netherlands violated the applicant's right of access to court by granting the UN immunity from domestic jurisdiction. Ibid [137].

[68] It was only in *Kokashvili*, which post-dated *Mothers of Srebrenica* that the ECtHR referred to systemic integration in a decision in a claim that IO immunity violated the right of access to court in an employment dispute.

[69] Both the UN Charter, which enshrines the UN's immunity in Article 105, and the CPIUN predate the ECHR.

existing law.[70] The court held that IO immunity was a generally recognized rule of public international law which cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court.[71] The ECtHR appeared in this case to adopt a presumption that IO immunity is a proportionate restriction of the right of access to a court, in contrast to the employment cases where the court had actively assessed whether IO immunity was a proportionate restriction. The presumption IO immunity is a proportionate restriction of the right of access to a court is similar to the manner in which the ECtHR treats State immunity.[72]

Importantly, the Court noted that the present case is different to the other cases that have come before the court concerning IOs as 'at the heart of it lies a dispute between the applicant and the UN based on the use of its powers under Chapter VII of the Charter'.[73] The Court referenced the relationship between Article 103 of the UN Charter and the Convention as set out in its decision in *Al-Jedda*[74]– that UNSC resolutions will be interpreted consistently with human rights obligations unless specific wording to the contrary exists.[75] However, the court did not rely expressly on this presumption and held that given the importance of operations under Chapter VII to the UN's mission of securing international peace and security, the Convention cannot be interpreted in such a manner

[70] *Mothers* [139(g)].

[71] *Mothers* [139(f)].

[72] e.g., *Al- Adsani v UK* [GC] App No 35763/97 (ECtHR, 21 November 2001) [56].

[73] *Mothers* [152].

[74] *Al-Jedda v UK* App No 27021/08 (ECtHR, 7 July 2011).

[75] *Mothers* (n 66) [145].

which would subject the acts and omissions of the UN Security Council to domestic courts without the accord of the United Nations.

With respect to the 'reasonable alternative means' test set out in *Waite and Kennedy*, the Court stated explicitly that no such alternative means existed either in Netherlands domestic law or the law of the United Nations.[76] The Court stated however that it does not follow that 'in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to court'.[77] It supported this statement by reference to the judgment of the ICJ in *Germany v Italy*.[78]

The approach of the ECtHR in *Mothers* was notably different to that in the employment cases. The ECtHR seemed to suggest that in the context of challenges to the acts of the UN acting under Chapter VII of the UN Charter, the nature of the act challenged meant that granting immunity to the UN, even in the absence of reasonable alternative remedies for the protection of rights under the ECHR, was a proportionate limitation of the right to a fair trial.

D. Cases challenging domestic implementing acts of decisions of IOs

A different category of cases which are analogous to those concerning the immunity of IOs and the right of access to court are cases which challenge States' domestic measures implementing the decisions of IOs for incompatibility with human rights, including the

[76] *Mothers* [163].

[77] *Mothers* [164].

[78] *Jurisdictional Immunities of the State* (Germany/Italy), Judgment 2012 ICJ Rep 99.

right to a fair trial. These decisions are analogous to decisions which consider whether the grant of immunity to IOs is a breach of the fair trial obligations of States because they also confront the Court with an apparent conflict between the obligations of the State towards an IO - in this case, the obligation to implement the decision of the IO - and the obligations of the State to ensure individual rights.

1. The presumption of consistency with ECHR obligations in the event that there is equivalent protection within the IO

In *Bosphorus*,[79] the applicant contended that Ireland's impounding of the applicant's aircraft on the basis of UNSC Resolution 820 and Regulation 990/93 of the European Community, which required States to impound all aircraft in their territories in which a majority or a controlling interest is held by an entity operating from the Former Yugoslav Republic (FRY), breached the applicant's right to peaceful enjoyment of his possessions under Article 1 Protocol 1 of the ECHR. The case brought to light the potential conflict between the obligations of the State towards the UNSC and the EU on the one hand and the obligations of the State to protect persons' right to property on the other.

The ECtHR found that the interest pursued by the seizure of the aircraft, compliance with Ireland's legal obligations flowing from its membership of the European Union was a legitimate interest of considerable weight.[80] Importantly for present purposes, the ECtHR endorsed the propositions that States are not prohibited from transferring power to IOs to

[79] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* App No 45036/98 (ECtHR, 30 June 2005).

[80] Ibid [150].

pursue cooperation within certain fields of activity and that the IO itself was not responsible under the ECHR for the exercise of such transferred powers insofar as the IO was not a party to the ECHR.[81] The Court however reiterated the position[82] that States are not completely absolved from their responsibility under the Convention for powers transferred to IOs and that State action taken in compliance with legal obligations stemming from the membership of IOs would be in accordance with the Convention so long as the relevant IO is 'considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.[83] If such equivalent protection is considered to be provided by the IO, there will arise a presumption that a State has not departed from its Convention obligations when it does no more than implement legal obligations flowing from its membership of the IO.[84] This presumption can be rebutted if in the particular circumstances of the case, the protection afforded was manifestly deficient.[85] In the circumstances of the case, the ECtHR found that the protection provided under EU law was equivalent to the protection provided by the Convention and that there was no manifest deficiency in the present case.

[81] Ibid [152], citing *Matthews v. the United Kingdom*, App no. 24833/94, (ECHR 1999) [32]; *M & Co* (n 29), 144.

[82] See e.g., *Waite* [67].

[83] *Bosphorus* [154].

[84] Ibid [155].

[85] Ibid [156].

Thus, as per the ECtHR, whenever an implementing act by a State of a decision of an IO is challenged by individuals, the State must demonstrate that there is equivalent protection of Convention rights within the IO, *both substantively and procedurally*, and that there is no manifest deficiency of these protections in the circumstances of the case.

2. Cases which contended that the right to a fair trial had been violated by a State implementing a decision of an IO

Of particular relevance to the response of the ECtHR to the immunity of IOs and the right to a fair trial is where a State's implementation of an IO decision is challenged as violating the right to a fair trial. This is of course due to the fact that the implementing measure by the State is pursuant to an obligation to carry out the decision of the IO, analogous to the obligation to grant immunity to an IO.

Nada v. Switzerland[86] concerned the conformity with *inter alia* Article 8[87] and 13[88] of the Convention of measures taken by Switzerland against the applicant as part of domestic implementing measures of the sanctions regime under UNSC Resolution 1390. Already the court had held in *Al-Jedda*[89] that there was an interpretative presumption that UNSC Resolutions did not intend to impose obligations on States to breach fundamental human rights.[90] In *Nada*, the ECtHR found that the presumption was rebutted since

[86] *Nada v Switzerland* App No 10593/08 (ECtHR, 12 September 2012).

[87] The right to respect for private and family life.

[88] The right to a remedy for rights violations.

[89] *Al-Jedda* (n 74).

[90] Ibid [102].

Resolution 1390 expressly required States to prevent individuals on the United Nations list from entering into or transiting through their territory.[91]

Even so, the ECtHR found that Switzerland enjoyed *some* latitude, which was 'admittedly limited but nevertheless real', in implementing Resolution 1390.[92] Thereafter, referring to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms, the ECtHR held that Switzerland should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation.[93] Since it had failed to do so, the interference with the applicant's rights under Article 8 of the Convention was not proportionate and there was a violation of Article 8 of the Convention.[94] Furthermore, the Court found a violation of Article 13 of the Convention on the grounds that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged.[95]

The judgment demonstrates that the ECtHR is not only willing to interpret Security Council Resolutions in conformity with Convention obligations as in *Al-Jedda* but that it

[91] *Nada* [172].

[92] Ibid [180]. Note however the joint concurring opinion of Judges Bratza, Nicolaou, and Yudkivska where they held that Switzerland was not afforded latitude in implementing the UN Security Council Resolutions but that Article 8 was nonetheless violated as Switzerland had failed to take any, or any sufficient, measures to safeguard the applicant's Convention rights within the constraints set by those Resolutions.

[93] Ibid [196].

[94] Ibid [199].

[95] Ibid [213, 214].

is also willing to hold the State responsible for the violation of human rights obligations including fair trial obligations, where it can find any latitude in the obligations of the State under the relevant UNSC Resolution.[96] The joint concurring opinion of Judges Bratza, Nicolaou, and Yudkivska, held that there was no latitude to the State under the Resolution, but that the State could have taken measures to mitigate the effect of the sanctions regime, including, importantly, attempting to bring about a change in the sanctions regime against the applicant so as to secure so far as possible his Convention rights.[97]

In *Al-Dulimi Montana Management Inc. v Switzerland* [98] the applicants contended that the refusal of the Swiss Federal Court to examine their allegations concerning the procedure followed for the confiscation of their assets under the sanctions procedure in UNSC Resolution 1483 violated their rights under Article 6(1) of the ECHR. The case differed to *Nada* in that what was being challenged was not the substance of the measures taken to implement the UNSC Resolution, but the refusal of the Swiss courts to examine the applicant's complaints in relation to the measures taken against him.[99] Thus, the case shows a closer affinity to cases challenging the grant of immunity to IOs as a violation of fair trial rights.

[96] See Ibid [177, 178] where the terms 'necessary' and 'where appropriate' in the UNSC Resolutions were considered as affording national authorities some flexibility in implementing the Resolution.

[97] See joint concurring opinion of Judges Bratza, Nicolaou, and Yudkivska [9-12].

[98] *Al-Dulimi and Montana Management Inc. v Switzerland* App No 5809/08 (ECtHR, 21 June 2016).

[99] *Al Dulimi* [143].

The Court noted that there was nothing in the text of the relevant UNSC Resolutions[100] that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the Resolutions.[101] The Court held that where a resolution does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness in the implementation of the Resolution can be avoided.[102] Therefore, the court noted that Switzerland was not faced with a conflict of obligations between the ECHR on the one hand and UNSC Resolution 1483 on the other, at least in so far as Article 6(1) of the Convention is concerned. The fact that there was no conflict of obligations in this instance meant that the court need not apply the equivalent protection test to determine whether there was equivalent protection of private persons' rights within the IO.[103]

As regards the substance of the sanctions on persons listed under the UNSC Resolution – the freezing of the assets and property of senior officials of the former Iraqi regime, the ECtHR took the view that the choice fell within the role of the UN Security Council as the ultimate political decision-maker in this field and that the Swiss courts were

[100] The other relevant Resolution being UNSC Resolution 1518 (2003) which entrusted to a specially constituted Sanctions Committee the task of identifying the persons concerned and adding their names to the relevant lists.

[101] *Al Dulimi* [143].

[102] Ibid [146].

[103] Ibid [149].

unable to rule on their appropriateness. However, the Swiss authorities had a duty to ensure that the listing was not arbitrary, and the Swiss courts could accordingly review any listing measure for arbitrariness.[104] Due to the fact that the applicants had not been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the sanctions lists had been arbitrary, the ECtHR held that Switzerland had violated Article 6(1) of the Convention.[105]

This case demonstrates once again the ECtHR's willingness to go to great lengths to interpret obligations towards IOs — the UN under Article 25 of the UN Charter in the above instances - consistently with the obligation of States to provide fair trial rights to private parties. Though the sanctions regime in *Al -Dulimi* left no room for discretion to the State authorities, the Court insisted that it allowed for Switzerland to review the listing measures, at least for arbitrariness. This is in spite of the fact that the listing is done by a specially constituted Sanctions Committee under Resolution 1518.

E. Cases challenging decisions of IOs directly before the ECtHR

Another category of cases that are related to IOs and fair trial rights is where applicants challenged decisions of IOs' internal dispute resolution mechanisms *directly* before the ECtHR. In the decisions of *Boivi*n[106] and *Connolly*,[107] the ECtHR dismissed such applications on the basis that there was no State action involved in the challenged

[104] [150]

[105] [151].

[106] *Boivin v. 34 Member States of the Council of Europe* App No 73250/01 (ECtHR, 9th September 2008).

[107] *Connolly v 15 Member States of the European Union* App No 73274/01 (ECtHR, 9th December 2008).

conduct. However, in *Gasparini,*[108] the ECtHR jettisoned the requirement of State conduct in applications challenging decisions of IOs' internal mechanisms, holding that an allegation of a structural lacuna in the mechanisms within IOs was sufficient to implicate the State party to the ECHR. This is due to the fact that the transfer of powers to the IO itself required the State to ensure that there was equivalent protection within the IO for the transfer to be in accordance with Convention rights.[109] The Court thereafter applied the equivalent protection test and examined whether the protection provided by the IO was manifestly deficient in the circumstances of the case.[110] The requirement of a manifest deficiency is a high threshold which was not held to have been crossed in *Gasparini,* nor in any case to date before the ECtHR.[111]

F. Conclusions on the case law of the ECtHR

It is clear that in employment disputes, the ECtHR considers it at least material, and even decisive that reasonable alternative means are available for the protection of ECHR rights in order for the grant of immunity to an IO to be a proportionate limitation of the right of access to court. As will be seen in chapter 4, this has resulted in domestic courts in Europe routinely applying this test to determine whether to grant immunity to an IO. The substance of the test as applied by the ECtHR however is such that any available forum or remedy

[108] *Gasparini* (n 61).

[109] See text at (n 61) above.

[110] For a detailed exposition of the test adopted, see Cedric Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 International and Comparative Law Quarterly 997.

[111] See Cedric Ryngaert, 'Belgium' in Reinisch (n 6) 70ff.

within the IO will satisfy the alternative remedies test, insofar as such alternative remedies do not demonstrate any manifest irregularities, as was the case with the UN's internal dispute resolution mechanisms in *Perez*. In employment cases where the applicant has directly challenged a decision of an IO internal mechanism without recourse to domestic courts, the ECtHR has considered whether the protection afforded by the IO was manifestly deficient. However, this requirement may be even more difficult to satisfy than the lack of reasonable alternative remedies.[112]

With respect to governmental functions, however, particularly action taken by the UNSC under Chapter VII of the Charter, the ECtHR has held that the grant of immunity is proportionate, even when there were no alternative remedies available to the claimants. However, in cases concerning the implementation by States of decisions taken by the UNSC, the Court has attempted to interpret the obligation of the State to abide by the IO decision consistently with the State's obligation to ensure rights under the ECHR.[113] Thus, even when the relevant UNSC Resolutions did not provide for latitude, as was the case in *Nada* and *Al-Dulimi*, the ECtHR has found that States violated fair trial rights by not taking the limited steps that were allowed under the UNSC Resolutions, such as reviewing the listing of the applicants for arbitrariness. This line of reasoning has not been applied by the ECtHR to claims challenging the grant of immunity to IOs. However, the reasoning could

[112] ibid 71.

[113] The ECtHR has avoided determining whether obligations owed by States to the UN take priority over obligations owed under the ECHR by virtue of Article 103 of the UN Charter. On this, see generally, Marko Milanović and Tatjana Papić, 'As Bad as It Gets: The European Court of Human Right's Behrami and Saramati Decison and General International Law' (2009) 58 International and Comparative Law Quarterly 267.

plausibly be applied to challenges to the grant of immunity to IOs for governmental functions, through for example the Court requiring the State to take measures within the IO to ensure fair trial rights, in order for the grant of immunity to be a proportionate limitation of fair trial rights. Though such a decision has not yet been made by the ECtHR in a case challenging the grant of immunity to an IO by a domestic court as a breach of fair trial rights, the concurring opinion of Judges Bratza et al in *Nada* suggested that Switzerland's breach of fair trial rights lay in not pushing for reform of the sanctions regime within the UN.

III Other International Court and Tribunals

As mentioned at the outset of this chapter, the ECtHR is the only international court that has directly dealt with the question of the compatibility of IO immunity with fair trial rights. Other international courts, however, have considered matters relating to IO immunity and matters relating to the fair trial rights of individuals vis-à-vis IOs separately. Additionally, as will be examined in chapter 4, the decision of the ICJ in *Jurisdictional Immunities* has influenced the decisions of domestic courts in claims against IOs. Thus, the decisions of international courts other than the ECtHR may be relevant practice in ascertaining the content of the obligations of States to grant immunity to IOs and the obligations of States and IOs to ensure fair trial rights to private persons, and consequentially, whether there may be an exception to the former obligation where the latter is not ensured. Thus, the decisions can be relevant practice in examining whether domestic courts may deny IOs immunity on the basis of the breach of the claimant's fair trial rights.

This section will examine the jurisprudence of the ICJ, the UN Human Rights Committee and the courts of the European Union on these matters.

A. The International Court of Justice

While the ICJ has not dealt with the question of immunity of IOs and the right of individuals to a fair trial, it has addressed matters related to the immunity of UN officials in its advisory opinions in *Cumaraswamy*[114] and *Mazilu*.[115]

The *Cumaraswamy* Advisory opinion was dealt with in Chapter 2.[116] For present purposes, it is sufficient to recall that the ICJ held that when domestic courts are seised with a case in which the immunity of a UN official is at issue, the domestic court must be immediately notified of any finding by the UN Secretary General on the applicability of immunity to that official and that such finding must be given 'the greatest weight'.[117] This cryptic finding[118] is limited to the immunity of UN officials and not to the immunity of the organization itself. The ICJ did hold that the question of immunity from legal process is distinct from any question of the responsibility of the UN and that any question of the responsibility of the UN must be dealt with not by national courts but by appropriate means

[114] *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion 1999 ICJ Rep 62 ('*Cumaraswamy*').

[115] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* Advisory Opinion 1989 ICJ Rep 177.

[116] See Chapter 2, text accompanying (nn 24-34).

[117] *Cumaraswamy* (n 114) [61].

[118] Peter HF Bekker, 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. Advisory Opinion' (1999) 93 American Journal of International Law 913, 919.

for the settlement of disputes created under Article VIII, section 29 of the CPIUN.[119] However, this does not address a situation where appropriate means for the settlement of disputes do not exist.

Mazilu dealt only with the applicability of Article VI Section 22 of the CPIUN, which concerns the immunity of Experts on UN Missions, to Mr Mazilu, a special rapporteur of a Sub Commission created under the Human Rights Commission. There was no reference to the immunity of the IO itself or to fair trial rights.

The ICJ has also made several findings on the obligation of IOs to ensure fair trial rights, though these findings have been unrelated to the immunity of IOs. As referred to in Chapter 2, in *Effect of Awards*, the ICJ held that the UN had an implied power to create an administrative tribunal on the basis that it would be inconsistent with the aim of the UN Charter to promote freedom and justice for individuals were it not to afford a remedy to its employees.[120] Thus, in holding that the UN was within its powers to create an administrative tribunal, the ICJ underscored the obligation of the UN to provide a remedy to persons within its control. The ICJ also held that an award of the Administrative Tribunal and the expenditure related thereto 'arises out of obligations already incurred by the Organization' and that 'to this extent the General Assembly has no alternative but to honour

[119] *Cumaraswamy* (n 114) [66].

[120] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion [1954] ICJ Rep 47, 57.

these engagements'.[121] Moreover, as noted in Chapter 2,[122] the ICJ in reviewing judgments of administrative tribunals of IOs has held that certain fundamental features of the right to a fair trial apply to such tribunals and that a failure to protect these constitutes a fundamental error in procedure which results in a failure of justice by the tribunal.[123]

Perhaps the closest case before the ICJ to cases considering the grant of immunity to IOs by domestic courts against individual fair trial rights is *Germany v Italy*.[124] The ICJ held here that '[t]he Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress'.[125] Though this case relates to State immunity, it has been used on multiple occasions to support decisions upholding IO immunity in the absence of alternative remedies in cases involving governmental functions.[126]

Thus, though the ICJ jurisprudence to date says nothing directly relevant to the immunity of IOs in the context of the fair trial rights of individuals, the finding in *Germany*

[121] *Effect of Awards* (n 120), 59; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* Advisory Opinion, 1962 ICJ Rep 151, 169.

[122] Chapter 2 (nn 188-189).

[123] E.g., *Application for Review of Judgement No. 158 of the United Nations Administrative* Tribunal (Advisory Opinion) 1973 ICJ Rep 166 [92].

[124] *Jurisdictional Immunities of the State* (Germany/Italy) Judgment 2012 ICJ Rep 99.

[125] Ibid [101].

[126] See *Mothers* [164]; *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, (Supreme Court Netherlands 13th April 2012) LJN:BW1999 [4.3.14]; See also Lorna McGregor, 'State Immunity and Human Rights Is There a Future after *Germany v. Italy*?' (2013) 11 Journal of International Criminal Justice 125, 134–35.

v Italy that State immunity is not dependant on the availability of alternative means of redress may be the ICJ's most telling contribution to the law relating to IO immunity and fair trial rights.[127]

B. The Human Rights Committee

The UN Human Rights Committee (UNHRC) has not dealt with the question of the immunity of IOs as a potential breach of the right to a fair trial. The Committee has however heard an application on State immunity as a violation of the right to a forum and the right to a remedy. In *Schremelis et al v Greece*[128] the Committee held that the refusal of the Greek authorities to enforce a judgment of the Greek courts relating to the Distomo massacre[129] on account of Germany's sovereign immunity did not violate the applicant's fair trial rights under Article 14(1) and Article 2(3) of the ICCPR. The Committee was less than clear about the reasons for its determination, but the likely reason was that the limitation of fair trial rights was justified on account of it being pursuant to respecting a rule of international law requiring the grant of sovereign immunity to Germany.[130]

In *H. v. The Netherlands*[131] the Human Rights Committee rejected as inadmissible a complaint that the internal means for the settlement of staff disputes within the European

[127] For the argument that paragraph 101 of *Germany v Italy* would jeopardize the doctrine of equivalent protection under the jurisprudent of the ECtHR, See Bianchi, 'On Certainty', EJIL:talk! 16 February 2012 < https://www.ejiltalk.org/on-certainty/> (accessed 8 September 2022).

[128] (UNHRC) Admissibility, 21 October 2008, CCPR/C/94/D/1507/2006.

[129] The massacre perpetrated by the German occupation forces in Distomo, Greece, in June 1944.

[130] *Sechremelis* [10.5].

[131] (UNHRC) Admissibility CCPR/C/OP/2 at 70 (1990) 8 April 1987.

Patent Organization violated the applicant's right to a fair trial and the right to remedy. This was on the basis that the conduct complained of, the decision of the President of the EPO on the complainant's appeal and the procedure adopted by the Internal Appeal Committee of the EPO, 'did not come within the jurisdiction of the Netherlands or any other party to the [ICCPR]'.[132]

In *Sayadi and Vinck v. Belgium*[133] the UNHRC examined Belgium's national implementation of the sanctions regime established by the Security Council in Resolution 1267 (1999). The UNHRC held that the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the ICCPR, regardless of the source of the obligations implemented by the State party.[134] Thus, the Committee declared as admissible, a complaint challenging domestic measures taken pursuant to a States' obligations under UNSC Resolutions. The UNHRC found that the complainant's fair trial rights under Article 14(1) of the ICCPR and right to a remedy under Article 2(3) were not violated since the complainant had sued the State before the Brussels Court of First Instance and obtained an order from the court requiring the State to submit a de-listing request to the Sanctions Committee.[135] This suggests that the UNHRC did not consider the right to a fair trial as inapplicable merely because the alleged conduct was taken pursuant to an obligation owed by the State under international law, specifically

[132] Ibid [5].

[133] (UNHRC) Admissibility CCPR/C/89/D/1472/2006 22 October 2008.

[134] Ibid [7.2].

[135] Ibid [10.9].

under the UN Charter.[136] It was due to the availability of a remedy against the State, an application before the domestic courts, and the fact that an order was obtained from the first instance court that the complainant's fair trial rights were not violated.

C. Courts of the European Union

Several decisions of the courts of the European Union, particularly the well documented Kadi cases,[137] address the compatibility of State measures taken in pursuance of decisions of the UNSC with fair trial rights. These cases are similar to the cases before the ECtHR which challenge domestic implementing measures of Security Council decisions for incompatibility with fair trial rights.

In *Kadi I*, the Court of First Instance of the European Communities (CFI) determined that Article 103 of the UN Charter meant that the court could not review the measures taken pursuant to UNSC Resolutions for compatibility with human rights, except for human rights that had the character of *jus cogens* norms.[138] The CFI famously took a broad view of what constitutes *jus cogens* norms, including the right to be heard and the right to judicial review within *jus cogens*.[139] The court considered however that the right to be heard as

[136] *Contra Sechremelis* (n 128).

[137] E.g., Devika Hovell, 'Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts' (2016) 79 Modern Law Review 147.

[138] (EC CFI) Case T-315/01 21 September 2005 [185ff, 231].

[139] Ibid [233].

enshrined in human rights instruments contained inherent limitations including, importantly for present purposes, the immunity of IOs.[140]

The Court of Justice of the European Union (CJEU) overturned this decision, holding that the Community measures taken pursuant to UNSC Resolutions must be reviewed for compatibility with human rights since the EU was an autonomous legal order.[141] The CJEU held that the 'immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations…relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty'.[142] Thereafter, it held that the contested regulations violated *inter alia* the right to a remedy and were to be annulled. In *Kadi II*[143] and subsequent case law,[144] the Courts of the European Union have confirmed that in the adoption of restrictive measures against individuals pursuant to decisions of UN Sanctions Committees set up under UNSC Chapter VII Resolutions, States must ensure the fair trial rights of individuals.

[140] Ibid [287,288].

[141] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (CJEU) joined cases C-402/05 P and C-415/05 3 September 2008. This corresponds to domestic court decisions determining the conflict between IO immunity and fair trial rights based on domestic law. See chapter 4 section I B.

[142] Ibid [300].

[143] *Commission and Others v. Kadi* (CJEU) Joined Cases C-584/10 P, C-593/10 P and C-595/10 P 18 July 2013.

[144] E.g., *Užsienio reikalų ministerija and Finansinių nusikaltimų tyrimo tarnyba v. Peftiev and Others* (CJEU) case C-314/13 12 June 2014.

The upshot of these cases is that there is no immunity from judicial review before EU courts for compliance with fundamental rights protected under EU law, for measures taken by States and the EU institutions pursuant to decisions of the UNSC Sanctions Committees. If measures taken by States pursuant to decisions of the UNSC are reviewable for conformity with fundamental rights including fair trial rights, it may be, as per the EU courts, that the grant of immunity to IOs by States pursuant to an obligation owed to an IO may also be subject to the claimant's fair trial obligations being fulfilled.

IV Interim Conclusion: Impact of the decisions of international courts and tribunals

In employment disputes, the ECtHR has a settled line of jurisprudence that the presence of reasonable alternative means to protect rights under the ECHR is a material or even decisive factor in determining whether the grant of immunity to an IO is a proportionate limitation of the right to a fair trial. In cases where the decisions of internal dispute settlement mechanisms of IOs have been challenged directly before the ECtHR, the Court has held that the State would be in breach of fair trial rights under the ECHR in the event of a manifest deficiency in the protection of rights within the IO. This jurisprudence with respect to employment disputes does not appear to be contradicted by any other international court or tribunal.[145]

[145] The only exception being perhaps the CFI's holding in *Kadi* that the right to be heard is subject to limitations including the immunity of IOs, which did not distinguish between immunity for employment disputes and governmental functions. See (n 140) above.

In reviewing the decisions of administrative tribunals of IOs, the ICJ has held that the absence of fair trial guarantees will constitute a fundamental error in the procedure followed by the tribunal, rendering the decision of the tribunal liable to be declared invalid. This however says nothing about whether States' obligation to grant immunity to an IO may be conditioned by the satisfaction of fair trial guarantees by the internal dispute resolution mechanisms of IOs.

The jurisprudence before the ECtHR on the immunity of IOs for governmental functions is limited to the decision in *Mothers of Srebrenica*. In this case, the ECtHR followed the decision of the ICJ on State immunity in *Germany v Italy* to hold that as far as the UN's action under Chapter VII of the UN Charter is concerned, the absence of alternative means for the settlement of disputes does not *ipso facto* render a grant of immunity to the UN a disproportionate limitation of the right to a fair trial. The only other decision of an international court or tribunal that addressed the question of the immunity of IOs and fair trial rights in the context of governmental functions exercised by an IO is the decision of the CFI of the EU in *Kadi I*, which held that the right to be heard is subject to inherent limitations including the immunity of IOs. In subsequently overturning this decision, the CJEU did not refer to the impact of the immunity of IOs on fair trial rights.

A matter that may be considered analogous to the immunity of IOs and fair trial rights are cases where States' measures implementing the decisions of IOs, particularly the decisions of the UNSC, are challenged on the basis that they violate the right to a fair trial. In cases challenging measures implementing the decisions of Sanctions Committees appointed under UNSC Resolutions, the ECtHR has attempted to interpret States'

obligations under the relevant UNSC Resolutions consistently with its obligations under the ECHR. In the cases in question,[146] the ECtHR has held that the relevant UNSC Resolutions afforded some latitude to the State in respect of fair trial rights. Where States had not used this latitude to ensure fair trial guarantees, the State was held to be in breach of its obligations under the ECHR.

By interpreting the obligations under the relevant UNSC Resolutions harmoniously with the obligation to ensure fair trial rights, the ECtHR has avoided determining whether Article 103 of the UN Charter results in the obligation of States to accept and carry out decisions of the UNSC under Article 25 of the UN Charter prevailing over fair trial obligations under the ECHR. These decisions perhaps indicate that the ECtHR may be willing to interpret the obligation to grant immunity to IOs, even where the IO exercises governmental functions, consistently with fair trial rights under the ECHR. This may require for instance, the State to take measures to ensure that there are reasonable alternative means for the protection of the claimant's fair trial rights within the IO if the grant of immunity to the IO is to be a proportionate restriction of fair trial rights under the ECHR. However, the ECtHR has not decided a case concerning the grant of immunity to IOs in this manner though in *Al – Dulimi* the Court held that the refusal of the Swiss Federal Court to review the impugned listing measures by the UNSC Sanctions Committee for arbitrariness violated the claimant's right to a fair trial.[147]

[146] See section IID 2 above.

[147] The basis for the Swiss Federal Courts' refusal to review the listing measures was the primacy of the obligation to abide by the decision of the UNSC and not the immunity of the UN. See *Al – Dulimi* [131].

The UNHRC too has reviewed implementing measures of UNSC decisions for compatibility with ICCPR fair trial right, finding no breach in circumstances where the State's domestic court entertained an application challenging the implementing measures and gave an order requiring the State to submit a de-listing request to the Sanctions Committee. However, the EU courts have held that State implementing measures of UNSC Resolutions are not immune from review for compliance with fair trial rights under EU law. The courts have annulled implementing measures of decisions of the UNSC on the basis that they violate fair trial rights as protected under EU law.[148]

Thus, it appears that all of the international courts and tribunals examined in this chapter are willing to consider whether measures implementing decisions of IOs, even those of the UNSC, are compatible with fair trial guarantees. The ECtHR decision in *Mothers* demonstrates however, that such review has not as yet been applied to cases challenging the grant of immunity to IOs with respect to governmental functions performed by the IO.

Despite this body of case law from international courts and tribunals, it cannot be said that the practice has changed the law relating to the immunity of IOs such that States are only obliged to grant immunity in situations where fair trial rights are guaranteed. This is since, as noted in section I in this chapter, the practice of international courts and tribunals are a subsidiary means of determining the rules of international law and are not State practice and/or *opinio juris* that determines the content of customary international

[148] See section IIIC above.

law nor subsequent practice indicating the agreement of the parties in the application of a treaty.

Moreover, the decisions of all international courts and tribunals other than the ICJ which has plenary jurisdiction, only concern the question whether the obligation of the State under the treaty under which the relevant court has jurisdiction has been violated by a grant of immunity to an IO or an act taken pursuant to a different obligation owed to an IO. Thus, any decisions of the ECtHR, the ECJ and the UNHRC which hold that the grant of immunity to an IO or actions taken pursuant to a different obligation of the State towards the IO are subject to fair trial rights, say nothing of the impact of those decisions on the obligation of the State towards the IO.[149]

The key impact of the decisions of international courts and tribunals then is the impact that they have on domestic court decisions which do constitute State practice/*opinion juris* with respect to custom or subsequent practice in the application of a treaty. The decisions of international courts and tribunals may empower and at times compel domestic courts to assert jurisdiction over IOs in the absence of alternative remedies. The domestic case law on IO immunities and fair trial rights, particularly whether these decisions have carved out an exception to IO immunity in situations where fair trial rights are not ensured will be assessed in chapter 4.

At another level, international decisions on IO immunity and fair trial rights may directly induce compliance by IOs with their obligation to ensure fair trial rights to private

[149] Subject to the application of Article 31(3)(c) of the VCLT. See (n 5) above.

persons. The decisions may signal to IOs that they need to put in place alternative remedies, such as the offer of arbitration in *Klausecker*,[150] if domestic courts are not to assert jurisdiction over them. The decisions may also communicate to States that they should push IOs to create alternative means for the settlement of disputes with private parties if States themselves are not to be held in violation of their obligations under human rights instruments.[151] This particular impact of both international and domestic court decisions will be assessed in chapter 6.

[150] See section IIB 3 above.

[151] See in particular chapter 6, section IIB.

CHAPTER 4

CREATING AN EXCEPTION TO THE IMMUNITY OF IOS WHEN FAIR TRIAL RIGHTS ARE NOT SATISFIED: THE PRACTICE BEFORE DOMESTIC COURTS

As discussed in chapter 1, there is a conflict[1] between the obligation of the forum State to grant immunity to an IO and the obligation of the State to afford fair trial rights to persons within its jurisdiction when a person brings a claim against an IO before the State's domestic courts. This is because the obligation of States to grant immunity to IOs, which is predominantly based on treaty law, is not *prima facie* conditional on the fulfilment of the claimant's fair trial rights.

There are different ways in which domestic courts can avoid or resolve this conflict. These are:

1. To avoid the conflict by interpreting the two obligations harmoniously

[1] As set out in chapter 1 (n 101), a 'conflict' in this context includes: (1) an apparent conflict — which is a conflict that is avoidable, predominantly by means of interpretation; (2) a resolvable conflict —a conflict that cannot be avoided but can be resolved so that State Responsibility will not arise, by the application of a conflict rule or a rule of normative hierarchy (i.e., jus cogens) and (3) an irresolvable conflict — one which cannot be avoided or resolved and will result in State Responsibility by the State fulfilling one obligation in breach of the other. The wrongfulness of the breach may however be precluded by the application of a rule precluding the wrongfulness of the State's conduct. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 175; Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 72–75.

2. To resolve the conflict by applying either a rule of normative hierarchy, i.e., *jus cogens* or a conflict rule such as Article 103 of the UN Charter, *lex specialis* or *lex posterior*.

3. To determine that the conflict is irresolvable and rule in favour of one obligation in breach of the other. Here, a rule such as the suspension of treaty obligations on account of a prior material breach or a circumstance precluding wrongfulness may operate to prevent the wrongfulness of such breach.

This chapter analyses the practice of domestic courts in claims against IOs, categorising decisions based on the method of addressing the conflict between IO immunity and fair trial rights. The chapter will then examine whether this practice has created an exception[2] to the rule requiring States to grant IOs immunity under treaty law and under customary international law (CIL), if indeed such a rule exists under CIL, where the claimant's right to a fair trial is not ensured. Chapter 5 will then discuss whether (1) a rule of normative hierarchy or a conflict rule can be correctly applied to resolve the conflict and (2) the rule suspending treaty obligations on account of material breach or countermeasures may be applied to lawfully deny immunity to IOs and exercise jurisdiction in claims against them.

[2] An 'exception' to immunity is simply a situation in which the rule of immunity precluding the exercise of jurisdiction is not engaged at all – i.e., a return to the general rule that a State may exercise adjudicative jurisdiction on its territory. See Eleni Methymaki and Antonios Tzanakopoulos, 'Freedom with Their Exception: Jurisdiction and Immunity as Rule and Exception', *Exceptions in International Law* (Oxford University Press 2020) 226.

Section I discusses why domestic court decisions, even those that rely exclusively on domestic law, are relevant to determining whether there is an exception to the obligation of States to grant immunity to IOs where the right to a fair trial is not satisfied. Section II examines domestic court decisions which avoid the conflict between IO immunity and the right to a fair trial by making the obligation to grant immunity conditional on the presence of alternative means to settle disputes (Section IIA), by considering immunity as satisfying the right to a fair trial even when no alternative means are provided (Section IIB), and by explicitly or implicitly avoiding the conflict on the basis of a criterion other than the right to a fair trial, i.e., by claiming *inter alia* that immunity is limited, has been waived or by holding that the claim is admissible against a different party (Section IIC).

Section III examines cases which adopt a rule of normative hierarchy or a different conflict rule to resolve the conflict, section IV discusses cases which explicitly refer to the obligations of IOs when addressing the conflict and section VA analyses whether the practice evidences that IO immunity does not apply under treaty law where the right to a fair trial is not satisfied whilst section VB examines the same question with respect to CIL.

I. THE IMPORTANCE OF DOMESTIC COURT DECISIONS

A. Domestic court decisions as subsequent practice in the interpretation of treaties or as State practice or *opinio juris* in the formation of CIL

Unlike the international courts and tribunals considered in chapter 3, the jurisdiction of which, apart from the ICJ, were limited to matters concerning the interpretation and

application of the respective treaties under which the courts have jurisdiction, domestic courts are directly faced with the conflicting obligations of the State to ensure fair trial rights under human rights law on the one hand and to grant IOs immunity on the other.

With respect to the obligation to grant immunity under treaty, the starting point is that an interpretation of the immunity conferring treaty provision in terms of Article 31(1) of the VCLT will not result in the obligation to grant immunity being conditional on the claimant's right to a fair trial being satisfied. Domestic court decisions may however render such an interpretation possible by constituting subsequent practice in the application of the immunity conferring treaty which establishes the agreement of the parties regarding its interpretation as specified under VCLT Article 31(3)(b).[3] In this context, it is important to remember that IOs themselves are not party to many instruments that carry immunity provisions, such as constitutive instruments or immunity treaties like the CPIUN, despite deriving rights and obligations under them.[4] Therefore, the agreement of the IO is not required for practice to amount to subsequent practice in the application of the treaty which establishes the agreement of the parties.

Domestic court decisions which do not 'establish the agreement of the parties regarding [the treaty's] interpretation' in terms of VCLT Article 31(3)(b) may be relevant as other subsequent practice in the application of the treaty as a supplementary means of

[3] See ILC, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report of the ILC Seventieth Session A/73/10, Chapter IV, commentary draft conclusion 4[18]; Antonios Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation', *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016) 94.

[4] Cf *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174,179 where the ICJ held with respect to the CPIUN that 'the Convention creates rights and duties between each of the signatories and the Organization'.

interpretation under article 32 of the VCLT.[5] Domestic court decisions may also be supplementary means of interpreting the contents of treaties under Article 38(1)(d) of the Statute of the International Court of Justice.[6] As held by the ICJ in *Status of South West Africa*[7] 'interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument'.[8]

With respect to CIL, domestic judicial decisions constitute State practice[9] and/or *opinio juris*[10] for purposes of the identification of any rule of CIL that requires States to grant immunity to IOs and its scope.[11] Moreover, domestic decisions (and legislation) constitute '[S]tate practice of particular significance'[12] in the context of immunity, where the question is precisely whether there is a right to exercise domestic jurisdiction. Thus, whether there is a rule requiring States to grant IOs immunity under CIL and whether in

[5] See II YBILC 1964 (A/5809), 203–204, commentary draft article 69 [13]; ILC, Subsequent Agreements (n 3), commentary conclusion 4[23-35].

[6] Charter of the United Nations and Statute of the International Court of Justice 1945, 1 UNTS 16, Statute of the Court, Article 38(1)(d).

[7] Advisory Opinion, [1950] ICJ Rep 128.

[8] Ibid 135-136.

[9] See e.g., Michael Wood, Second report on identification of customary international law 22 May 2014 A/CN.4/672, 22-24.

[10] E.g., Wood (n 9), 55.

[11] Subject of course to the particularities of the decision concerned including the manner in which CIL is treated within domestic law, see Wood (n 9) text at nn114,115. For an exposition of the debate on whether particular conduct constitutes practice or *opinio juris*, see e.g. Jrg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 European Journal of International Law 523, 525ff.

[12] *Jurisdictional Immunities of the State* (Germany/Italy) Judgment 2012 ICJ Rep 99[55].

turn, there is an exception to such a rule on the basis of the right to a fair trial will be determined in large part through the State practice and *opinio juris* constituted through domestic court decisions.

B. Domestic court decisions based on domestic law

Some domestic courts consider the international obligations of the State to provide a fair trial and to grant immunity to the IO when faced with a claim against an IO. Other courts rely entirely on fair trial guarantees and the conferral of immunity to the IO under domestic law. Provisions of domestic law do not exempt a State from an international obligation to grant immunity to an IO and a denial of immunity based on domestic law may well be in breach of international law and entail State responsibility.[13] However, the decisions that rely on domestic law are important in assessing whether domestic court decisions have created an exception to immunity where fair trial rights are not fulfilled.

Firstly, decisions that rely on domestic law are subsequent practice with respect to treaties and State practice and/or *opinio juris* with respect to CIL in the same way as domestic decisions that rely on international law. In the absence of the court acknowledging that it is breaching international law by applying domestic law in the case at hand,[14] it must be presumed that the court is of the view that its decision is consistent with international law.[15] In *Jurisdictional Immunities*, it was specifically domestic

[13] See ARSIWA, Articles 3, 32; VCLT Art 27.

[14] For an acknowledgment that the State would be so breaching international law, see e.g., *Jam v IFC* (Supreme Court, United States) 27 February 2019 No. 17–1011 (Justice Breyer dissent) [16].

[15] The opposite of the 'Charming Betsy' Canon, *Murray v. Schooner Charming Betsy* 6 U.S. (2 Cranch) 64, 118 (1804) whereby domestic law is interpreted as far as possible, in a manner consistent with international law. For the application of the canon in a case relating to IO immunity see *Northwest Atlantic Fisheries*

legislation and domestic decisions applying *inter alia* domestic law that the ICJ surveyed in identifying the CIL of State immunity.[16] Thus, the fact that domestic courts rely on domestic law is no barrier to considering their decisions as subsequent practice in relation to treaties and State practice/*opinio juris* in relation to the formation of CIL.

Secondly, the content of the obligation to provide a fair trial under domestic constitutions or legislation, which is the obligation against which the grant of immunity is considered, is often based on and is similar in content to the right to a fair trial under international law. Thus, the reference to the domestic constitutional or statutory guarantee of fair trial rights does not detract from the fact that in substance, it is the internationally protected norm as well that is being deployed against the obligation to grant immunity.[17]

Thirdly, a different kind of impact of domestic court decisions is noted by Tzanakopoulos.[18] Domestic court decisions based on domestic law denying IOs immunity may force the executive branch of the State to translate the legal argument of the court based on domestic law to international law terms. This is so as to avoid being held in breach of the State's international obligations. This is precisely what Malaysia had to do when the decision of its domestic court regarding the immunity from jurisdiction of a UN Special

Organization v Amaratunga (Court of Appeal Nova Scotia, Canada) 2011 NSCA 73 [75-76]. See also Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 1, 37–38 stating that 'a claim that States are entitled to act in a particular way can be inferred from the fact that they do act in that way'.

[16] *Jurisdictional Immunities* [70-71] (domestic legislation), [72] domestic court decisions.

[17] Antonios Tzanakopoulos, 'Collective Security and Human Rights', *Hierarchy in International Law* (University Press 2012) 67–68 text at nn159-164, referring also to the UN High Commissioner for Human Rights enlisting court decisions based on domestic law as practice regarding the international protection of human rights.

[18] ibid 67.

Rapporteur was subject to advisory proceedings before the ICJ.[19] This has the effect of explicitly internationalising the practice of the domestic court based on domestic law.[20]

II. AVOIDING THE CONFLICT BETWEEN IO IMMUNITY AND THE RIGHT TO A FAIR TRIAL

The conflict between immunity and fair trial rights may be avoided by interpreting away any conflict between the norms, i.e., by interpreting the norms harmoniously. The conflict may also be avoided by relying on a different norm which either limits the scope of the obligation to grant immunity, such as the norm that immunity only applies to governmental functions, or addresses the substance of the right to a fair trial, such as the argument that the claim is admissible against a different party.

One method of harmoniously interpreting IO immunity and the right to a fair trial is to interpret immunity as satisfying the right to a fair trial conditionally, i.e., if reasonable alternative means for the settlement of disputes are available. This is a strong application of the test in *Waite and Kennedy*[21] which only held that the provision of reasonable alternative means is a 'material factor' when considering whether IO immunity was a proportionate restriction of the right to a fair trial.[22]

[19] *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion 1999 ICJ Rep 62.

[20] On this particular impact of domestic court decisions, see further chapter 6 sections I and II.

[21] App No. 26083/94 (ECtHR,18 February1999). See chapter 3 Section IIA.

[22] *Waite* [67].

The second method is the reverse — to interpret immunity as satisfying the right to a fair trial unconditionally, i.e., to interpret immunity as either not conflicting with or as a proportionate restriction of the right to a fair trial, even when reasonable alternative means are not available.

A. Harmonising IO immunity and the right to a fair trial through the requirement of alternative means for the settlement of disputes

Cases that make the grant of immunity to an IO dependent in some manner on the availability of reasonable alternative means of redress[23]– particularly those that deny immunity on this basis, can, *prima facie*, be seen either as instances where (1) the conflict between IO immunity and fair trial rights is avoided by interpreting immunity restrictively – i.e., as subject to alternative remedies, or (2) as cases that simply give precedence to the right to a fair trial, resulting in the breach of the obligation to grant immunity.

Some courts explicitly state that they consider the State's obligation to grant immunity to be limited to situations where fair trial rights are upheld by the provision of reasonable alternative remedies.[24] Other courts imply this by using language such as '[the right to a fair trial] *prevents the successful invocation* of immunity from jurisdiction'.[25] Yet others say nothing of the impact of the requirement of reasonable alternative means of

[23] Whether as a precondition or a material factor in assessing the proportionality of immunity as a limitation of fair trial rights.

[24] E.g., *ACP Group v BD* (Court of Cassation Belgium) ILDC1576(BE2009); *Duhalde v Organización Panamericana de la Salud* (Supreme Court Argentina) 322 Fallos de la Corte Suprema 1905 (31 August 1999) [10] stating that States could not agree in favour of according the organization an absolute immunity from jurisdiction to the detriment of fair trial rights.

[25] See e.g., *X v ESA* (Supreme Court Netherlands) ECLI:NL:HR:2015[3.5.3].

redress on the State's obligation to grant an IO immunity, simply asking themselves the question whether the grant of immunity is a proportionate restriction of the right to a fair trial.[26]

The cases which make immunity dependant on the availability of alternative means of redress will be regarded as decisions in which the conflict is *avoided* by interpreting the obligation to grant immunity restrictively – i.e., as subject to alternative remedies. This is because, as examined above in the context of domestic court decisions based on domestic law, it is reasonable to assume that a court is of the view that it is acting consistently with the State's international obligations to grant immunity if it does not explicitly state that it is violating them.[27]

1. Domestic courts in Europe

Interpreting IO immunity and the right to a fair trial harmoniously with reference to the availability of alternative remedies had been adopted by domestic courts in Europe from before the ECtHR decision in *Waite and Kennedy*. In *Hetzel v. Eurocontrol*[28] the German Constitutional Court held that Eurocontrol's immunity did not violate the rule of law principle contained in the German Constitution because the ILO Administrative Tribunal provided an adequate alternative remedy. In *Spaans v Iran-US Claims Tribunal*,[29] the

[26] E.g., *EPO v SUEPO* (Supreme Court Netherlands, 20 January 2017) 15/02186[4.3]. Similar to *Waite* before the ECtHR. See Chapter 3 Section IIA.

[27] Cf *Jam* (Breyer dissent), 14; Akehurst (n 15) 37–38.

[28] (Federal Constitutional Court, Second Chamber, Germany) 10 November 1981, BVerfG 59.

[29] (1987) 18 NYIL 357 [3.3.2 -3.3.6].

Dutch Supreme Court, though not considering this a precondition for the grant of immunity, referred to the fact that the Tribunal provided a special procedure for settling employment disputes in upholding the Tribunal's immunity.[30] In line with its pioneering role in restricting the immunity of States under international law,[31] Greek courts had noted the need for alternative means to settle disputes to negate the adverse impact of immunity[32] and Italian courts had consistently considered the need for alternative remedies to satisfy access to court rights under the Italian Constitution.[33]

Following *Waite and Kennedy*, domestic courts in Europe have routinely applied the reasonable alternative remedies test to determine whether granting immunity to the IO is a proportionate restriction of the right of access to court in *employment disputes*.[34] The intensity of the review of the alternative remedy offered by the IO has varied.[35] Some courts have, to varying degrees, engaged in a review of the features of the alternative remedies available to the litigant and have either denied or upheld immunity based on whether the

[30] Cf also *Eckhardt v Eurocontrol* (No2) (District Court Maastricht Netherlands) 94 ILR 331, 338 considering the Administrative Tribunal of the ILO to be sufficiently accessible to the Plaintiff.

[31] See *Soviet Republic (Immunity in Greece) Case* (Court of Athens 1928 No. 1681) 4 ILR 172.

[32] (Single member court of first instance of Chania, Greece) 142/1990, (Court of Appeal of Crete, Greece) 479/1991, cited in August Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013) 136.

[33] E.g. *Maida v Administration for International Assistance* 23 ILR 510; *ICEM v Di Banella Schirone* 77 ILR 572; *FAO v Colagrossi* 101 ILR 385.

[34] Conversely, the test has not been applied in cases involving Chapter VII action under the UN Charter, in cases involving immunity from prosecution and cases related to the operations of NATO, see section IIB below.

[35] R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 105.

remedies contained attributes such as impartiality and independence.[36] Other courts did not have to engage in a qualitative assessment in order to deny immunity as the IO had not provided any remedy at all.[37] A lighter review of the alternative remedies available to the litigant is found in some cases, where the right to a fair trial is found to be satisfied insofar as some form of alternative remedy is available[38] including when the remedy available was

[36] E.g.,*Western European Union v Siedler* (Court of Cassation Belgium 21 December 2009) ILDC1625(BE 2009) denying immunity on the basis that the dispute settlement mechanism within the IO did not meet qualitative due process criteria – particularly independence; *Supreme Site Services GMBH v Allied Joint Force Command Headquarters Brunssum and others* (Limburg District Court Netherlands) ECLI:NL:RBLIM:2017:1002 holding that the alternative processes did not conform to the standards of independence, impartiality and equality of arms required by a reasonable alternative means of protecting rights[4.36] (Overturned by the Court of Appeal 's-Hertogenbosch); *SUEPO v EPO* (Court of Appeal of The Hague 17 February 2015) Case 200.141.812-01 holding that the protection within the EPO of the right to collective negotiation and collective action guaranteed by the ECHR is 'manifestly deficient'[3.7,3.8] (overturned by the Supreme Court); Judgment of the Labour Court Brussels (14 November 2016) (F.)15/8395/A-holding after a detailed review that the internal appeal procedure within the IO was independent and impartial[21]; *Y v Banque des états de l'afrique centrale* (Cour de Cassation France) ECLI:FR:CCASS:2017:SO02638 holding that the headquarters agreement did not provide for a remedy with guarantees of impartiality and fairness; *Nacci v Bari Institute of the International Center for Advanced Mediterranean Agronomic Studies* (Court of Cassation Italy 1994) RDI 837 holding that the internal appeals commission of the IO was independent and impartial; *Pistelli v European University Institute* (Court of Cassation, Italy) ILDC 297(IT2005) holding that EUI' s selection of the members of the Appeals Commission from a list prepared by international judicial bodies and the power of the EUI High Council (but not of the private claimant) to designate the Court of Justice of the European Union as the body competent to adjudicate the dispute in lieu of the Appeals Commission, were sufficient to demonstrate the independence and impartiality of the Appeals Commission.

[37] E.g., *ACP v Lutchmaya* (Court of Cassation, Belgium) ILDC1573(BE2009); *ACP v BD* (Court of Cassation, Belgium) ILDC 1576 (BE 2009) (both cases concerned immunity from execution, but the courts held that immunity from execution impacted the right to a fair trial in the same way as immunity from jurisdiction); *Banque africaine de d´eveloppement v. M.A. Degboe* (Cour de Cassation, Chambre sociale, France)132 Journal du droit international (2005) 1142 – the plaintiff couldn't access the bank's administrative tribunal as it was set up after his dismissal. The court held that the lack of a remedy was contrary to 'ordre public international'; *Y v Banque des états de l'afrique centrale* (Cour de Cassation, France) ECLI:FR:CCASS:2017:SO02638 – plaintiff had no remedy as he could not access the arbitration procedure set up by the IO since this required the IO to waive its immunity, which it had not done.

[38] See *ENE v ESA* (Brussels Court of Appeals, Belgium) ILDC1729(BE2011)[17-24] finding that canvassing the Belgian member within the ESA, the ombudsman whose recommendation was non-binding and the possibility of claims against other parties were reasonable alternative remedies; *Construction de systèmes de réfrigération v Ligue des Etats arabe*s (Cour de Cassation, France 14 Oct 2009) No08-14978 bulletin des arrêts des chambres civiles 2009, I, no 206 holding that alternative remedies existed for executing the judgment and that immunity of execution must be upheld; *Stavrinou v United Nations* (Supreme Court, Cyprus) ILDC929(CY1992) the right of access to courts as protected by the Cypriot Constitution was not

against a party other than the IO.[39] Generally, recourse to arbitration[40] and to bespoke tribunals such as the ILO Administrative Tribunal[41] have been considered reasonable alternative remedies.

2. Domestic courts outside Europe

The approach of interpreting the grant of immunity to an IO as consistent with fair trial rights only where alternative remedies are provided has not been used extensively outside of Europe.[42] The limited exceptions include two Argentinian decisions which have regarded the right to a fair trial in the Argentine Constitution satisfied by the alternative remedies available to the plaintiff[43] as well as the decision of the Nova Scotia Supreme Court in *Amaratunga v Northwest Atlantic Fisheries Organization* (NAFO).[44] In the latter

violated due to the presence of the mechanism internal to UNFICYP for settling disputes with its local personnel.

[39] E.g, *Charles X v Bank of Central African States* (Cour de cassation, France 25 May 2016) No.15-18.646– where the court held that since the claimant could invoke the responsibility of the State, the right to a fair trial was not violated by granting immunity.

[40] E.g., *Consortium X. v. Swiss Federal Government* (Conseil federal, Switzerland) ILDC344(CH2004) – where the Swiss Federal Supreme Court, though not explicitly stating that the absolute immunity traditionally afforded by Swiss courts to IOs was conditioned on alternative remedies being available, stated that the exclusion of access to a court is corrected by recourse to arbitration 'L'exclusion de tout contrôle juridictionnel étatique est donc corrigée par le recours à un tribunal arbitral' [4.1]; cf *Maida v Administration for International Assistance* 23 ILR 510 which found that arbitration generally satisfies the Italian Constitutional guarantee of access to court but that in this instance, the procedure adopted was defective.

[41] E.g., Eckhardt ,383, *HB, EP and KS* (District Court, The Hague, Netherlands) (2004) 35 NYIL 453, 457, *B v. EPO* (Federal Constitutional Court, Germany 3 July 2006) 2BvR1458/03.

[42] See the cases cited under section IIB.

[43] *Fibraca Constructora v Comisión Técnica Mixta de Salto Grande* (Corte Suprema, Argentina) Fallos 316:1669 [3] – finding that the provision for arbitration satisfied the right to a fair trial; *Duhalde v. Pan American Health Organization* – an administrative body to review claims and an appeal from the decision of this body to the ILO Administrative Tribunal constituted reasonable alternative means.

[44] 2010 NSSC 346.

case the Court held that NAFO was not entitled to immunity by relying on the rule of statutory construction that the legislature is presumed to respect international law. The Court held that it would require a clear legislative intent to adopt an interpretation of the NAFO immunity Order that would be inconsistent with the right to a fair trial under the ICCPR.[45]

The Kenyan Court of Appeal in *African Development Bank v Beatrice Agnes Acholla*[46] upheld the absolute immunity of the IO, but stated that the limitation of access to domestic courts brought about through IO immunity is 'remedied by the fact that there are internal dispute resolution mechanisms through which an employee can agitate claims against [the IO]'.[47]

B. Interpreting immunity as consistent with the right to a fair trial without conditions

Another means of interpreting IO immunity and the right to a fair trial harmoniously is to consider IO immunity to be a proportionate restriction of the right to a fair trial, even in the absence of alternative remedies.

Some cases do not mention the right to a fair trial at all when granting immunity to IOs. As domestic courts would be expected to state explicitly where the right to a fair trial is violated by the grant of immunity, these cases can reasonably be categorized as cases

[45] Ibid [75,76]. This decision was however overturned on appeal and as such does not represent the practice of Canada, see section IIB.

[46] (Court of Appeal, Nairobi, Kenya) 2015 SCC OnLine Ken 1726, 3 July 2015.

[47] Ibid, 8.

where the immunity of the IO was considered to be consistent with the right to a fair trial even without the presence of alternative remedies. Many such cases pre-date *Waite and Kennedy*.[48] Others concerned immunity from jurisdiction for matters other than private law disputes, for instance, criminal cases.[49]

1. Domestic courts outside Europe

Many decisions which seem to implicitly assume that the grant of immunity is consistent with the right to a fair trial are from outside Europe. In the United States, cases concerning IO immunity have predominantly concerned whether immunity under the International Organizations Immunities Act (IOIA) is restricted to *acta jure imperii* in the same manner as State immunity under the US Foreign Sovereign Immunities Act (FSIA).[50] Some US decisions, however, make reference to alternative remedies. In *Mendaro*,[51] the DC Circuit Court of Appeals noted several deficiencies in the Administrative Tribunal of the World

[48] See e.g. *Wenack v United Nations* 23 ILR 509 where in an accident claim, the Supreme Court of New York held that 'immunity remains a political rather than a legal question and the extent of it is for the Department of State rather than the courts'; *Lakomy v Multinational Force and Observers* (Court of Cassation Italy) (2001) RDIPP 423 where the court upheld immunity in a claim for unfair dismissal on the basis of functional immunity without referring to alternative remedies; and a post – *Waite* decision, *Allasio v Germany, IOM and others* (Tribunal of Turin Italy) 20 October 2009 No 7137, where the court upheld the functional immunity of the IOM in a breach of contract claim without reference to alternative remedies.

[49] E.g., *Greenpeace v Euratom* (Supreme Court Netherlands) ILDC838(NL2007), a case concerning immunity from criminal jurisdiction, where the Dutch Supreme Court upheld Euratom's immunity without considering alternative remedies as the activity concerned was immediately connected with the performance of Euratom's functions.

[50] E.g., *Atkinson v Inter-American Development Bank* (DC Circuit Court of Appeal, US) ILDC1766 (US1998) holding that immunity was not limited as in the FSIA; *OSS Nokalva, Inc v ESA* (3rd Circuit Court of Appeal, US) ILDC1580(US 2010) holding that immunity was limited; finally resolved by the Supreme Court in *Jam v IFC* (n 14). A number of cases also consider whether immunity under the IOIA has been waived by a clause conferring a more limited form of immunity to the IO under an Agreement with the IO, e.g., *Lutcher SA Celulose e Papel v Inter-American Development Bank* (DC Circuit Court of Appeal US) 127U.S. App.D.C.238 (1967).

[51] *Mendaro v. The World Bank* (DC Circuit Court of Appeal, US) 717 F.2d 610 (1983).

Bank including that it had not been created at the time Mendaro's grievance occurred, was only vested with limited retroactive jurisdiction and was not explicitly authorized to resolve claims based on sexual harassment and discrimination. The court sympathized with Mendaro but held that 'employee dissatisfaction with the efficacy of the administrative remedy' is insufficient to dissolve the immunity of IOs.[52]

In several US cases, challenges to IO immunity based on the right to a fair trial under Article 14 of the ICCPR have been rejected on the basis that the ICCPR is not self-executing in the US.[53] These cases appear not to have considered whether fair trial rights and corresponding obligations for the State exist under CIL and whether these obligations could be breached by granting immunity. In recent US cases in which immunity was challenged directly based on the right to a fair trial under the US Constitution, US courts have upheld immunity stating categorically that immunities, generally, do not breach the right to a fair trial.[54]

The grant of IO immunity despite the absence of alternative remedies is also seen in Indian decisions. In *Ochani vs World Health Organization* (WHO)[55] the Delhi High Court upheld the immunity of the WHO without considering its impact on the right to a fair trial. The court referred to India's commitments to afford the WHO immunity under the CPISA,

[52] Ibid, footnote 41.

[53] See e.g., *Veiga v World Meteorological Organization* (Court of Appeal 2nd Circuit, US) 2010 WL 726518 *Bisson v United Nations* (11th February 2008) ILDC 889(US 2008) [25].

[54] *Georges v. The United Nations* (2nd Circuit Court of Appeal, US) 15- 455- cv, fn 61 ('*Georges* CA'); *Brzak v UN* (2nd Circuit Court of Appeal, US) 08-2799-cv, 114 stating that 'the plaintiffs' argument does little more than question why immunities in general should exist'.

[55] *Ochani vs WHO* (Delhi High Court, India) OXIO 591.

the Agreement between the WHO and the government of India[56] as well as the notification issued by the Government of India extending the United Nations (Privileges & Immunities) Act [57] to the WHO. The 'conjoint' effect of the aforementioned provisions, as per the court, was that the WHO enjoyed immunity from every legal process except in so far as it has expressly waived its immunity.[58]

Although the court upheld the absolute immunity of the IO and said nothing of immunity affecting the State's obligation to ensure fair trial rights, it nonetheless requested the government 'on the premise of equity and natural justice'[59] coupled with the contractual nature of the suit, to settle the matter amicably and have the grievance of the plaintiff redressed.

In *Jayakody v International Water Management Institute* (IWMI), a Sri Lankan Labour Tribunal denied the IWMI immunity *inter alia* on the basis that the charter of the IO cannot 'supersede the fundamental rights of a citizen'.[60] The Supreme Court overturned this decision without reference to the right to a fair trial on the basis that immunity had

[56] Host Agreement between the World Health Organization and India A2/51(9 November 1949). Article IV Section 5.

[57] No 46 of 1947.

[58] *Ochani* [15].

[59] *Ochani* [17].

[60] (Kaduwela Labour Tribunal, Sri Lanka 18 December 2009), cited in *IWMI v Jayakody* (Supreme Court Sri Lanka 25 March 2014) SC Appeal 11/2011.

been conferred in accordance with the procedure stipulated in the Diplomatic Privileges Act.[61]

Several decisions of African courts grant immunity to IOs without considering the presence of alternative remedies. In *African Development Bank v. Blueline Enterprises Ltd*[62] the Tanzanian Court of Appeal conclusively rejected the argument that the African Development Bank was entitled only to the restrictive immunity that States are entitled to under CIL, but made no reference to the availability of alternative remedies when deciding that '[the Bank] has been granted absolute immunity from all forms of legal process in all cases arising out of the exercise of its lending powers'.[63] In *Killeen v International Centre of Insect Physiology and Ecology*[64] the Nairobi High Court held that an employment contract 'fell squarely within' the operations for which immunities were necessary and upheld immunity without considering the presence of alternative remedies.[65]

Some courts explicitly hold that immunity does not engage the right to a fair trial since immunity falls outside the scope of the right. In *Northwest Atlantic Fisheries Organization v Amaratunga*,[66] the Nova Scotia Court of Appeal (NSCA) overturned the

[61] *IWMI v. Jayakody* Ibid. Though this may be due to the fact that the appeal was on the limited point whether the procedure for granting IOs immunity under domestic law had been followed.

[62] (Court of Appeal at Dar es Salaam, Tanzania) Civil Appeal No 111 of 2009, 28 December 2011.

[63] Ibid, 30. This is despite citing a seminar paper by August Reinisch, titled 'Immunity of International Organizations and Alternative Remedies against the United Nations' to distinguish between State and IO immunity at p 19.

[64] ILDC 77 (KE 2005) 27th May 2005.

[65] Ibid [9].

[66] *Northwest Atlantic Fisheries Organization* v *Amaratunga* (Court of Appeal Nova Scotia, Canada) 2011 NSCA 73

decision of the Nova Scotia Supreme Court that immunity had to be interpreted consistently with the right to a fair trial under the ICCPR. The Court reasoned that interpreting immunity conferring legislation consistently with the ICCPR cannot deny immunity in circumstances where 'it clearly exists'.[67] The judge did express hope, however, that such immunity would 'not translate to no remedy at all'.[68]

The Supreme Court of Canada held with the NSCA.[69] It distinguished the European case law relied upon by the intervening Canadian Civil Liberties Association, on the basis that those cases arose under the distinct legal context of the ECHR.[70] It further held that ICCPR Article 14 created rights of a 'procedural nature', by which it meant that the Article did not create a stand-alone right to make a claim, and was only applicable 'if and when a hearing is held'.[71] It further quoted the Human Rights Committee General Comment on Article 14 to hold that an immunity deriving from international law will not violate Article 14.[72] The Court noted that the lack of a forum for the appellant to seek a remedy was an 'inevitable result' of the grant of immunity.[73]

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[67] Ibid [73]. The Court had already found that the employment claim in question would affect the Organization's functions, and thus, that immunity applied.

[68] Ibid [74].

[69] [2013] 3 SCR 866 ('*Amaratunga* SC') 'the absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity' [60].

[70] Ibid.

[71] Ibid [62,63].

[72] HRC, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32 August 23 2007 [18].

[73] *Amaratunga* SC [63].

2. Domestic courts in Europe

Domestic courts in Europe too have on occasion upheld immunity in cases where no alternative remedies were available. This is based on the reasoning that IO immunity is an exception to the right to a fair trial that both follows a legitimate aim and is proportionate. The structure of this argument is familiar from the ECtHR's jurisprudence on State immunity. The ECtHR holds that granting sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law and that the restriction on the right of access to court is this thus not disproportionate.[74]

In the early case of *Manderlier*[75] the Civil Tribunal of Brussels recognized that the UN had not set up means to settle disputes under Section 29 of the General Convention and that there was no independent and impartial forum before which the plaintiff could bring the present claim.[76] Yet, the court decided that the immunity of the UN is 'unconditional', 'binding and of full force'[77] 'however inconvenient may be its results for litigants'.[78] The court brushed aside the right to a fair hearing in the UDHR on the basis that the UDHR is not binding and held that Article 6 of the ECHR 'cannot be applied to

[74] Most recently, see *Ndayegamiye-Mporamazina v. Switzerland* (Chamber) App. No 16874/12 (ECtHR, 5 February 2019).

[75] *Manderlier c. Organisation des Nations Unies and État Belge* (Ministre des Affaires Étrangères) 45 ILR 446.

[76] Ibid 451.

[77] Ibid 448.

[78] Ibid 452.

and imposed on the UN'.[79] The Court was patently asking the incorrect question (it is the fact that Belgium was bound by the ECHR that was material) and thus its conclusions on the effect of the UN's immunity on Belgium's obligation to ensure the right to a fair trial under international law are not obvious. However, the absence of any reference to Belgium being in breach of its obligation to provide a fair trial by granting immunity to the UN in a situation where no alternative forum existed indicates that the court viewed immunity as not breaching the obligation to grant a fair trial.[80]

In *NML Capital v Bank for International Settlements and Debt Enforcement* (BIS)[81] the Swiss Federal Tribunal held that the absolute immunity from enforcement of the BIS followed a legitimate aim and was a proportionate restriction of the right to a fair trial though no alternative remedies existed.[82] The Court relied on the statement in *Waite and Kennedy* that applying the reasonable alternative means test could not lead to an IO being subject to domestic laws, and emphasized that the BIS' function, which was to act as an 'international hub for central banks', would be thwarted if the Swiss courts were to decide on the BIS's immunity.[83] As has been noted in the scholarship, the reason for upholding immunity in spite of a lack of alternative remedies may have been that the case concerned

[79] Ibid 452.

[80] The Court stated that the principles of the UDHR are already contained in the Belgian Constitution. Thus, at least insofar as the right to a fair trial in domestic law is concerned, the court explicitly gave precedence to the immunity of the UN.

[81] (Federal Supreme Court, Switzerland) ILDC1547(CH 2010).

[82] The only option was for NML to apply to the Swiss government for assistance – the Court did not view this as a reasonable alternative remedy Ibid [4.5].

[83] Ibid [4.5]; See analysis by Thore Neumann, ILDC1547(CH2010) H6.

assets deposited with BIS by the central bank of Argentina.[84] The immunity of the BIS was therefore intricately linked to the sovereign immunity of Argentina, though Argentina was not a party to the dispute.

In *Allied Joint Force Command Headquarters (JFCB) v Supreme Site Service GmbH*[85] the Court of Appeal 's-Hertogenbosch overturned the Limburg district courts' decision[86] and held that the JFCB enjoyed absolute immunity regardless of whether reasonable alternative means existed for the claimant.[87] The Court referred to the ECtHR's reasoning in *Stitching Mothers v Srebrenica*[88] that the absence of alternative remedies does not *ipso facto* violate the right of access to court. The reference to *Mothers of Srebrenica* may be explained by the claim arising from a contract for the purchase of fuel for military activities. The Court however went on to conduct a reasonable alternative remedies analysis and hold that the possibility of claims against the host State and other remedies constitute reasonable alternative means.

In the *Mothers of Srebrenica* case before the Supreme Court of Netherlands,[89] the Court relied predominantly on Article 103 of the UN Charter to uphold the immunity of

[84] Anne Peters and Thore Neumann, 'Switzerland' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013) 264.

[85] ECLI:NL:GHSHE:2019:4464.

[86] *Supreme Site Services GMBH* (n 36).

[87] *JFCB* [6.7.9.1].

[88] *Stichting Mothers of Srebrenica v the Netherlands* (Admissibility) App No 65542/12 (ECtHR, 11 June 2013).

[89] *Mothers of Srebrenica v The Netherlands* (Supreme Court Netherlands 13 April 2012) 10/04437. English translation:https://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf (accessed 26 July 2022).

the UN.[90] However, whilst noting the differences between State and IO immunity, the Court also relied on the ICJ decision in *Germany v. Italy*[91] to hold that the immunity was not conditional on the existence of alternative means of redress.[92]

C. Avoidance of the conflict using a criterion other than fair trial rights

1. Avoiding the conflict by exercising jurisdiction on a basis other than fair trial rights

When confronted with a claim against an IO, domestic courts at times limit immunity based on criteria other than the right to a fair trial. Some of these decisions explicitly allude to the tension between immunity and fair trial rights before proceeding to limit immunity on a basis other than fair trial rights and thereby avoiding the conflict.[93] Other decisions do not explicitly allude to the impact of immunity on fair trial rights. However, the tension between granting IOs immunity and the fair trial rights of claimants is at times implicit in the court's decision. For instance, in *Amitabha Mitra*, the court, without making express reference to fair trial rights, expressed displeasure at the IO not appearing before it and then used a basis other than fair trial rights to ensure that the merits of the claim were

[90] See Section IIIC below.

[91] *Jurisdictional Immunities* [101].

[92] *Mothers* (Supreme Court) [4.3.14]. This realized the concern of some commentators that paragraph 101 of *Germany v Italy* would jeopardize the doctrine of equivalent protection. See Bianchi, 'On Certainty', EJILtalk! 16 February 2012 2012 < https://www.ejiltalk.org/on-certainty/> (accessed 8 September 2022).

[93] E.g., *EPO v Stichting Restaurant De La Tour* (Hague Court of Appeal, Netherlands 21 June 2011) ECLI:NL:GHSGR:2011:BR0188; Case 479/1991 (Crete Court of Appeal, Greece) (n 32).

heard.[94] Even in decisions with no explicit reference or implicit allusion to fair trial rights, the *effect* of limiting immunity is to avoid the conflict between immunity and fair trial rights. Thus, these cases can be meaningfully categorised as different means by which courts avoid the conflict between IO immunity and fair trial rights.

Examples of courts limiting immunity on criteria other than fair trial rights include decisions denying immunity on the basis that immunity is not functionally necessary for the claim in question[95] or that immunity only applies to official activities of the IO,[96] that immunity applies only to public or governmental functions and not to commercial

[94] *Amitabha Mitra v. The State of West Bengal & Others*. (High Court of Judicature Calcutta, India) W.P.7154(W) (2011).

[95] E.g., *EPO v Stichting Restaurant De La Tour* (Hague Court of Appeal, Netherlands 21 June 2011) ECLI:NL:GHSGR:2011:BR018 (see text at nn 102 – 105 below); *Interside v. Ministerio de Agricultura y Secretaría Ejecutiva del Convenio Andrés Bello* (Sala de lo Contencioso Administrativo del Consejo de Estado, Colombia) decision of March 26 2009, where the Council of State of Colombia denied immunity to the defendant IO on the basis that a dispute arising out of the administration of agricultural subsidies fell outside its mandate, which was restricted to educational and cultural purposes. The registry of the Colombian Council of State was kind enough to forward to the author a copy of the original judgment.

[96] In *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank* ILDC 1283 (KE 1999) the Nairobi Court of Appeal held that the defendant bank operated outside its mandate and objectives when it acted as a private bank and thus was not immune from jurisdiction; in *Hendrik Resodikromo v Organization for the Prohibition of Chemical Weapons* (OPCW) (District Court of The Hague, Netherlands 7 November 2005) 2007 UNJY 505 where the court denied the OPCW immunity from jurisdiction on the basis that 'diplomatic interests' did not play a role in the employment claim at issue. The Court of Appeal did not overturn the decision on jurisdictional immunity but held that the interest of the claimant in *enforcing* his judgment must give way to the obligation of the State to guarantee immunity from execution to OPCW. Court of Appeal of The Hague, 15 March 2007 ECLI:NL:GHSGR:2007:BA2778 [6].

activities,[97] that immunity has been waived,[98] and also some less common approaches such as based on the State not being party to the relevant immunity treaty,[99] that the treaty is not in force[100] or is not self- executing within the domestic legal order.[101]

An example of a court explicitly referring to the right to a fair trial and then avoiding the conflict between immunity and fair trial rights by limiting immunity based on the functions of the IO is *EPO v Stichting Restaurant De La Tour*.[102] The Hague Court of Appeal determined that a catering contract was not 'strictly necessary' for the purpose of the EPO.[103] The court then linked this finding to the right of access to court, holding that

[97] E.g., *Bank Bumiputra Malaysia BHD v International Tin Council and another*, (High Court, Malaysia) 80 ILR 240 where the Malaysian High Court, whilst holding that the ITC's immunity agreement with the UK did not give it immunity in Malaysia, resorted to the restrictive doctrine of State immunity to hold that the ITC had no immunity for the commercial transaction in question under CIL; *Kazadi v Southern African Development Community*, (Industrial Court, Gaborone, Botswana) [2014] 2 BLR 536 (IC) 24 September 2014 where the Court denied immunity to the IO on the basis that the claim did not involve governmental functions; *Istituto agronomico mediterraneo di Bari v. Anelli* (Corte di Cassazione Italy 7 November 2000) No. 1150 where the Italian Corte di Cassazione denied immunity to the Institute on the basis that the employee in question was performing only peripheral activities which have no bearing on the public function of the IO; *Jam* (n 14) held that under the US International Organisations Immunities Act, IOs only enjoy the restrictive immunity that foreign governments enjoy under the Foreign Sovereign Immunities Act. However, the court emphasised that the IOIA provided only default rules -— the charter of an IO could always depart from them by specifying a different level of immunity which, for example, covered any commercial activities.

[98] E.g., *Lutcher SA Celulose e Papel v Inter-American Development Bank* (Court of Appeal DC Circuit US) 127U.S. App.D.C.238 (1967); *The World Food Programme v Emile and others* (High Court South Gauteng, Johannesburg, South Africa) 13927/2010, 10 October 2011.

[99] *Economic Community of West African States v. Bank of Credit and Commerce International* (1993)113 ILR 472.

[100] *Arabische Liga v TM, Appeal judgment* (Court of Cassation, Belgium) ILDC42(BE2001).

[101] *Rodriguez, et al. v. Pan American Health Organization* (D.C. District Court, US) 502 F.Supp.3d 200 (2020), Sections 2(a), (b).

[102] (Court of Appeal of The Hague Netherlands 21 June 2011) ECLI:NL:GHSGR:2011:BR0188.

[103] As per Article 3(1) of the Protocol on Privileges and Immunities of the European Patent Organisation 1065 UNTS 255 (7 October 1977), the EPO shall have immunity from jurisdiction in respect of its official activities. Article 3(4) defines 'official activities' as those that are 'strictly necessary' for the EPO's administrative and technical operation.

the limitation of the right of access to court by granting immunity in respect of a contract which was not strictly necessary for the purposes of the EPO was disproportionate.[104] The Court affirmed the District Court judgment denying immunity to the EPO and even ordered the EPO to pay costs.[105]

Another example of a court explicitly referring to the right to a fair trial whilst limiting immunity on a different basis is a decision of the Court of Appeal of Crete.[106] Here, the Court determined that an employment action is *jure gestionis* and within its jurisdiction. The Court was thus satisfied that any access to court considerations were satisfied.[107]

Other decisions avoid the conflict between immunity and fair trial rights by adjudicating the merits of the claim by exercising jurisdiction over a different party. In contrast to the cases discussed above where the court considers the right to a fair trial satisfied since an alternative remedy exists against a party other than the IO,[108] the court in the present type of decision actually exercises jurisdiction over a party other than the IO and adjudicates the merits of the claim through such party.

[104] *EPO v Stichting Restaurant* [14].

[105] Ibid [16].

[106] (Court of Appeal Crete 479/1991). Cited in Reinisch (n 32) 137.

[107] ibid. The court however dismissed the appeal on the basis that the appellant had not first availed herself of the internal procedure within the IO.

[108] See text at (n 39).

This approach is exemplified in the Indian case of *Amitabha Mitra v. The State of West Bengal & Others*.[109] Here the United Nations Office for Project Services (UNOPS) claimed immunity in a writ application against an award of a tender. The court indicated in no uncertain terms its displeasure at UNOPS not appearing before it[110] and held that the writ petition is maintainable against the Indian State since UNOPS was merely acting as a procurement agent for the State in this transaction. Therefore, the court determined that it was 'not essential' for it to hold that the writ petition is maintainable against UNOPS.

Despite not making a determination on whether the immunity of UNOPS meant that the court was precluded from exercising its writ jurisdiction against UNOPS, the Court extensively reviewed the decision to award the tender in question and directed that the State communicate to the UNOPS that the awardee had not fulfilled certain preconditions of the award, as well as holding that 'UNOPS… in turn is expected to enquire and investigate into the matter [and if it appears that there is any misrepresentation on the part of the awardee] that UNOPS would immediately cancel the said contract and initiate action in accordance with law against the [awardee]'. This decision, in substance though not in form, orders the IO to comply with the Courts' direction through the State.

Another approach is to use provisions of domestic law which set out the procedure for granting immunity to avoid the conflict. In *Palihawadana v Commissioner of Labour*,[111] the Sri Lankan Court of Appeal noted that immunity is a tool to deprive an

[109] (n 88).

[110] Ibid 'In spite of our repeated notice Respondent No.8 chose not to appear and the learned Counsel appearing on behalf of the Respondent No.7 submitted that the Respondent No.8 claims immunity'.

[111](Court of Appeal, Sri Lanka 3 June 2021) CA Writ 370/2017.

aggrieved party of their right of access to courts and that therefore, it could not be presumed that the legislature intended to grant an IO immunity unless the procedure for granting immunity set out by statute was followed. Importantly, the Court also referred to Article XVI of the Constitution of the FAO which states that '[e]ach Member nation undertakes, *insofar as possible under its constitutional procedure*, to accord to the Organisation all immunities'.[112] The Court therefore quashed the decision of the Labour Commissioner to afford immunity to the FAO in the absence of a proclamation granting immunity as envisaged by statute.[113]

2. Avoiding the conflict by refusing to exercise jurisdiction on a basis other than immunity

Criteria not based on the right to a fair trial or IO immunity have also been used with the effect that the conflict is avoided by the court not exercising jurisdiction over the claim. In *Reddy v International Crops Research Institute* (ICRISAT),[114] the Indian Supreme Court determined that the relief sought by the petitioner[115] was not available against the ICRISAT

[112] Constitution of the Food and Agriculture Organization 16 October 1945 (Quebec) https://www.fao.org/3/mp046e/mp046e.pdf (accessed 5 December 2021) (emphasis added). Thus, the reference to the compatibility of the grant of immunity under Sri Lankan law had a basis in international law.

[113] However, in *IWMI* (n 59) the Supreme Court held that immunity is applicable when a proclamation is made granting immunity without considering the alternative remedies available.

[114] (Supreme Court India) (2003) 4 SCC 225.

[115] A writ of Mandamus under Article 226 of the Constitution of India, compelling the ICRISAT to frame rules for the service conditions of its staff in accordance with the Agreement between the government of India and the Ford Foundation.

as a matter of domestic law.[116] Therefore, the court did not have to determine 'the further questions whether [ICRISAT] could or should have been granted immunity or whether the immunity debarred remedies under Article 226'.[117]

D. Conclusions on conflict avoidance

Based on the foregoing, one can conclude that even before the ECtHR decisions in *Waite and Kennedy* and *Beer and Regan*, domestic courts in Europe displayed concern regarding the fair trial rights of the claimant. But following the aforementioned ECtHR decisions, domestic courts in Europe have consistently made IO immunity conditional on the presence of alternative means for the settlement of disputes in employment matters and with limited exceptions,[118] in other private law disputes. It is only the intensity of the review of the alternative remedies provided by the IO that has varied between different courts.

The cases considered demonstrate however that courts in Europe sometimes uphold IO immunity as a proportionate restriction of the right to a fair trial, even in the absence of alternative remedies. Apart from pre-*Waite and Kennedy* cases such as *Manderlier*, these cases have concerned subject matter that could be considered governmental in nature if exercised by a State,[119] as well as matters such as immunity from criminal jurisdiction.

[116] This was since ICRISAT was not a 'State or other authority' as defined in the Constitution, was not a statutory body and does not perform a public function or discharge a statutory duty. *Reddy* [25,26,28].

[117] Ibid [24]. This reasoning was followed in by the Delhi High Court in a writ application against the United Nations, 2019 (5) ADR 718.

[118] E.g., *JCFB v Supreme Site Services*.

[119] Whilst *JCFB v Supreme Site Services* and *NML Capital v Bank for International Settlements and Debt Enforcement* concerned strictly private law disputes under contract, they concerned what would, for a State, be categorized as governmental functions.

Thus, one could conclude that before domestic courts in Europe, there is a consistent practice of reading down immunity so that it is only afforded if reasonable alternative means of redress are provided, in employment disputes and other disputes of a private law character. Additionally, European courts have demonstrated a hesitancy to apply the requirement for alternative remedies when the private law dispute under contract or tort concerns governmental functions such as military operations. This is consistent with the jurisprudence of the ECtHR in *Mothers of Srebrenica*.[120]

With some limited exceptions,[121] courts outside Europe have not read the obligation to grant IOs immunities as limited to instances where reasonable alternative means are provided, even in private law disputes. Particularly the recent US cases, as well as the Indian, Sri Lankan, Tanzanian and Kenyan cases discussed demonstrate a trend of not considering the presence of alternative remedies determinative or even material in deciding whether to uphold immunity.[122] However, courts outside Europe appear to use different methods to address the conflict between IO immunity and the right to a fair trial. These courts sometimes limit immunity on a different basis such as compliance with the procedure for granting immunity under domestic law, at times exercise jurisdiction against a different party and thereby indirectly require the IO to comply with its order or request the State to intervene to address the claim.

[120] See chapter 3, section IIC.

[121] See section IIA 2.

[122] This is also reflected in the Malaysian High Court decision *Bank Bumiputra Malaysia BHD v International Tin Council and another* which only considered that immunity was not available for commercial activities and did not rely on fair trial rights.

III. THE USE OF A RULE OF HIERARCHY OR A CONFLICT RULE TO RESOLVE THE CONFLICT

Some courts use a rule of normative hierarchy, i.e., *jus cogens*, or conflict rules such as Article 103 of the UN Charter, *lex posterior* and *lex specialis* to resolve the conflict between IO immunity and the right to a fair trial.

A. Jus cogens

A line of decisions in Argentina have resolved the conflict between immunity and the right to a fair trial with reference to rules of normative hierarchy.

In *Cabrera v Comisión Técnica Mixta de Salto Grande*[123] two judges of the Supreme Court of Argentina, in an opinion accepted by the whole court, declared that Article 4 of the immunity Agreement between Argentina and the Comisión Técnica Mixta de Salto Grande was void *ab intio* under Article 53 of the VCLT. This was because in the absence of alternative remedies, immunity conflicted with the right to a fair trial, which the court considered to be a peremptory norm of international law.[124]

This position has been followed by Argentinian courts, though subsequent cases have not found that the right of access to court was violated due to the presence of alternative remedies.[125] The *Cabrera* court does not however engage in an analysis of why the right

[123] (5 December 1983) 305 Fallos de la Corte Suprema 2150.

[124] Ibid[11]; Pavoni (n 35) 99.

[125] In *Fibraca Constructora v Comisión Técnica Mixta de Salto Grande* (7 July 1993) 316 Fallos de la Corte Suprema 1669, 4 the court held that *Cabrera* did not apply, only since a denial of justice was prevented by the constitution of an arbitral tribunal; an international jurisdiction accepted by Argentina and to which the

to a fair trial constitutes a *jus cogens* norm.[126] Such a characterisation is exceptional to say the least,[127] and does not appear to have been used as a basis to deny IO immunity elsewhere.[128]

B. Lex Priori and Lex Posterior

Several courts have held that immunities conferred by treaties which States entered into prior to the entry into force of treaties containing the right to a fair trial (specifically the ECHR), and which former treaty has a larger number of States parties than are party to the human rights treaties, are not affected by the right to fair trial under human rights treaties.

parties had voluntarily submitted. In *Duhalde v Organización Panamericana de la Salud—Organización Mundial de la Salud—Oficina Sanitaria Panamericana*, D.73.XXXIV, 322 Fallos de la Corte Suprema 1905 (31 August 1999) the court cited *Cabrera* and held that the validity of immunity clauses must be conditional on alternative remedies being available, lest it results in the violation of a *jus cogens* norm, at [VIII]. It however upheld immunity on the basis that the procedures for the resolution of staff disputes in the Pan American Health Organisation and the World Health Organisation, particularly the ability to appeal to the ILO Administrative Tribunal, preserved the right of access to court, [XII].

[126] Pavoni (n 35) 99.

[127] Examples appear to be limited to the Inter-American Court of Human Rights case of *Goiburu v Paraguay*, (judgment of September 22, 2006) [131], multiple dissenting opinions of the same court by Judge Cancado Trindade, see Cançado Trindade, 'The Right of Access to Justice in the Inter- American System of Human Rights Protection' (2007) 17 Italian YIL 7, 23–4, an Order of the Special Tribunal for Lebanon, *In the Matter of El Sayed*, Order Assigning the Matter to a Pre – Trial Judge, CH/PRES/2010/01 (15 April 2010) and the decision of the CFIEU in *Kadi*, Case T-315/01 21 September 2005 [233], see Chapter 3 Section IIIC. The right does not appear in the text of the draft conclusions on peremptory norms of general international law (jus cogens), adopted by the ILC on first reading, UNGA, Official Records, Seventy-fourth Session, Supplement No. 10 (A/7410),142 ff, nor in the indicative list contained in the annex, 208.

[128] Cf. *Allasio v Germany, International Organization for Migration and others* (Tribunal of Turin, Italy) No 7137 (20 October 2009) where the court upheld immunity as what was being challenged was a breach of contract and not the violation of a *jus cogens* norm.

In *Entico*[129] The English Commercial Court held that the 1947 CPISA cannot be read down 'in order to take account of the provisions of the subsequent ECHR, a treaty which is binding upon only a minority of the parties to the 1947 Convention.[130]

Similarly, in *Mothers of Srebrenica*,[131] the Dutch District court held that that since the UN was established before the entry into force of the ECHR, there could be no question of a limitation of the protection of rights under the ECHR by the transfer of powers to the UN. The court distinguished *Waite and Kennedy* on the basis that the ESA was established in 1980, well after the coming into force of the ECHR.[132]

However, the Court of Appeal of the Hague in *Mothers of Srebrenica*[133] disagreed with the District Court that the existence of the UN prior to the entry into force of the ECHR meant that the State had no obligation to provide the guarantees under the ECHR with respect to the UN.[134] The Court held that particularly in the case of IOs like the UN, that presumably will continue to exist for a long time, the foregoing reasoning would mean that part of the rights guaranteed by the ECHR would be barred from application almost

[129] (Commercial Court, High Court of Justice United Kingdom) [2008] EWHC 531.

[130] Ibid [18].

[131] *Stichting Mothers of Srebrenica v Netherlands*, (District Ct The Hague Netherlands 10 July 2008) LJN: BD6795.

[132] Ibid [5.24].

[133] *Mothers of Srebrenica* (Court of Appeal The Hague Netherlands) 200.022.151/01. (Unofficial English translation available at http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf) (Retrieved 30.08.2018).

[134] Ibid [5.4].

permanently.[135] This reasoning was not adopted by the Supreme Court which instead decided the case based on Article 103 of the UN Charter.[136]

In *Lutchmaya* before the Belgian Court of Cassation,[137] the claimant invoked the *Lex Posterior* rule and argued that the headquarters agreement between Belgium and the ACP should be regarded as a subsequent and special law, derogating from the ECHR.[138] The Court however did not pronounce on this argument, but denied immunity on the basis that the headquarters agreement had not come into force within the domestic legal system at the time the enforcement order was published.[139]

C. Article 103 of the UN Charter

The Dutch Supreme Court in *Mothers of Srebrenica* resolved the conflict between the UN's immunity and the right to a fair trial based on Article 103 of the UN Charter. The Court held that the reasonable alternative means test is not applicable to the UN's immunity since the obligation to grant the UN immunity prevailed over conflicting obligations under other international treaties by virtue of the operation of Article 103 of the UN Charter.[140] As

[135] Ibid. Note also that the ECtHR has been inconsistent in its approach to the impact of the ECHR on obligations entered into prior to the entry into force of the ECHR. Compare *Behrami and Behrami and Saramati v France* [GC] (Admissibility) App Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007) [147] and *Slivenko v Latvia* (Admissibility) App No 48321/99 (ECtHR, 23 January 2002). See also Fragmentation Report [246-249].

[136] See section IIIC below.

[137] *Lutchmaya* (Cassation) (n 37).

[138] Ibid [20].

[139] Ibid [39].

[140] *Mothers* (Supreme Court) [4.3.6].

noted above,[141] the court also supported the proposition that immunity is not subject to the presence of alternative remedies by referring to the ICJ decision in *Germany v. Italy*.[142] It is noteworthy that in employment cases against the UN, courts have not considered that Article 103 of the UN Charter has the effect that the UN's immunity prevails over obligations under international treaties.[143]

D. One norm taking precedence over the other

Some cases note that the immunity of the IO as provided for by the headquarters agreement or other treaty is absolute and that it is incompatible with the right to a fair trial. The court then makes a decision on whether one obligation of the State takes precedence over the other, without explicit reference to normative hierarchy or a conflict rule.

In *Lutchmaya v General Secretariat of the ACP Group*[144] before the Brussels Court of Appeal, the Court held that the obligation to grant immunity to ACP was absolute,[145] yet that the grant of immunity in this case was incompatible with the right to a fair trial since there were no adequate alternative remedies available.[146] The Court then held that the fair trial rights under the ECHR should take *precedence* over immunity, evidently on the

[141] See text at (n 133).

[142] *Jursidictional Immunities* [101].

[143] See e.g., *Perez v Germany* (Admissibility) App No 1552108 (ECtHR, 6th January 2015).

[144] (Brussels Court of Appeal Belgium) ILDC1363(BE 2003).

[145] Ibid [29].

[146] Ibid [42] 'Le secrétariat A.C.P. n'apporte cependant aucun élément probant démontrant le rôle juridictionnel de ce Conseil, ni le fait qu'il présente le cas échéant toutes les conditions et garanties que supposent le droit d'accès à un juge'.

basis that the ECHR was an international treaty and the Agreement between Belgium and the ACP, internalized in the Belgian legal system, was an internal norm, in the event of conflict between which, the ECHR should take precedence.[147]

The Court's reasoning was incorrect as both norms are international norms and accordingly was not endorsed by the Court of Cassation, which instead ruled that immunity was conditional on the availability of alternative remedies.[148] The Court of Appeal decision however demonstrates a manner of resolving the conflict by giving precedence to one norm, this is usually the human rights norm, to the detriment of the other, without resorting to a rule of normative hierarchy.[149]

This manner of addressing the conflict between immunity and fair trial rights may be distinguished from decisions which avoid the conflict by harmoniously interpreting the two norms. In the latter type of decision, the courts do not breach one norm to uphold the other, or at least that is the presumption in the absence of explicit statement to the contrary. It is the former which is the focus of this section.

[147] Ibid [35]'En cas de conflit entre une norme de la C.E.D.H. ayant des effets directs dans l'ordre interne et une norme interne, le juge doit donner la primauté à la norme du Traité, même si la norme interne lui est postérieure'.

[148] *Lutchmaya* (Cassation) [41].

[149] See Tzanakopoulos (n 17) 69 arguing that the practice of domestic courts in preferring human rights obligations over Security Council measures may establish the right to a fair trial as occupying a hierarchically superior position to the rest of international law, though they may not have reached the level of jus cogens.

IV. CASES THAT REFER TO THE OBLIGATIONS OF THE IO

The cases discussed in sections IIA and IIB were cases which determined whether the State's obligation to grant immunity to an IO was conditional on alternative remedies being available to the claimant. These cases did not however, make explicit [150] reference to the *obligation of the IO* to ensure fair trial rights or to refrain from abusing its immunity.

The present section discusses cases which refer explicitly to the IO's obligations in determining the conflict between the obligation of the State to grant immunity and the right of claimants to a fair trial. These cases can either be interpreted as instances of the court interpreting the obligation of the State to grant immunity consistently with the right to a fair trial (similar to the cases in section IIA) by expressly relying on the obligation of the IO to create means to settle disputes or they could be instances of the court relying on the failure of the IO to fulfil its own obligations in order to make the obligation of the State to grant immunity inapplicable or to preclude the wrongfulness of denying immunity.

A. Decisions which refer to the obligation of the IO to create means to settle disputes

Some courts explicitly refer to the IO's obligation to provide means to settle disputes when determining whether to uphold a plea of immunity.

[150] For a discussion on how these cases implicitly reinforce the obligation on the part of the IO to ensure fair trial rights see chapter 5, section IV.

In *Pichon-Duverger v Permanent Court of Arbitration*[151] (PCA), the Headquarters Agreement between the PCA and the Netherlands provided for absolute immunity. However, the Court relied on the failure of the PCA to fulfil its obligation to 'make provision for appropriate methods of settlement of…disputes arising out of contracts' as per the Headquarters Agreement[152] to hold that the purpose of the parties to the agreement had not been fulfilled and that *therefore*, the lack of a remedy to the plaintiff violated the right to a fair trial.

The Court viewed the IO's obligation to create means to settle disputes as part of the scheme of granting the IO immunity. Since the IO's obligation had not been fulfilled, granting immunity would be a violation of the plaintiff's right to a fair trial. It also appears that the Court used the non-fulfilment of the treaty obligation on the part of the IO to counter the argument that according immunity in terms of international law, i.e., as required by the headquarters agreement, would not violate the right to a fair trial.[153]

Similarly, in *Consortium X* the Swiss Federal Supreme Court held that the right to a fair trial was meant to be satisfied precisely through the fulfilment of CERN's obligation to create means to settle disputes.[154] Several Italian cases also explicitly relied on the IO's obligation to create alternative means to settle disputes in awarding immunity.[155]

[151] (District Court, The Hague, Netherlands 27 June 2002) no 262987/02-3417.

[152] Agreement concerning the Headquarters of the Permanent Court of Arbitration (1999) 2304 UNTS 41068 (PCA Headquarters Agreement), Article 16(1).

[153] Cf. E.g., *Entico* [26].

[154] *Consortium X* (n 40).

[155] See e.g., *FAO v Colagrossi* (n 33).

In *UNESCO v. Boulois*, the French Court of Appeal withheld immunity from UNESCO, deciding that immunity from jurisdiction should not be a means to escape from the principle of *pacta sunt servanda*, which in that case required UNESCO to appoint an arbitrator as per the arbitration clause in the contract it had entered with the claimant.[156]

In *Drago v International Plant Genetic Resources Institute* (IPGRI)[157] the Italian Court of Cassation held that the appeals committee of the IPGRI could not be seen as independent and impartial and that the IPGRI had therefore not fulfilled its obligation to provide means to settle disputes as per the headquarters agreement with Italy. The Court then held that the immunity clause in the headquarters agreement was therefore inapplicable.[158] This may be read as holding that the satisfaction of the obligation to provide alternative means was a prerequisite to the grant of immunity, or else that the court was invoking the failure of the IO to perform its obligations under the headquarters agreement as a ground for suspending the operation of the immunity clause in the headquarters agreement.[159]

Decisions which rely on the IO's obligation to create means to settle disputes to deny immunity are not limited to Europe. Though the decision in *Cabrera* turned on the characterisation of the right to a fair trial as a *jus cogens* norm,[160] the Court also referred

[156] *UNESCO v. Boulois* (Cour d'appel, Paris, France) 1998 XXIV Yearbook Commercial Arbitration 294.

[157] *Drago v IPGRI* (Court of Cassation, Italy) ILDC827(IT 2007).

[158] Ibid [6.8] 'ha impedito l'operatività della previsione dell'immunità'.

[159] Cf Pavoni (n 35) 106.

[160] See section IIIA above.

to the obligation of IOs to establish procedures for the resolution of private law disputes and held that the obligation evidences a limit to States' ability to grant immunity to IOs under international law.[161] The Court presumably meant that States could only grant IO's immunity if the obligation to establish dispute resolution procedures was fulfilled.

In *Entico* however, the English Commercial High Court,[162] held that there is nothing in the CPISA which makes the enjoyment of immunity dependent upon the IO's compliance with the obligation to create means for the settlement of disputes.

Similarly, US cases have categorically rejected arguments that the obligation of the IO to grant alternative means of dispute settlement constitutes a condition precedent to the grant of immunity. In *Sadikoglu* the District Court of New York court held that nothing in Article VIII section 29 of the CPIUN 'refers to or limits the UN's absolute grant of immunity as defined in Article II —expressly or otherwise'.[163]

In *Georges v United Nations*,[164] the plaintiffs invoked the post ratification practice of the UN to argue that article VIII section 29 of the CPIUN constituted a condition

[161] *Cabrera* [9] 'Aunque tales estipulaciones no son específicamente aplicables al caso de autos, evidencian un claro límite a la facultad de convenir internacionalmente la exención jurisdiccional, en congruencia con diversos documentos internacionales que garantizan una suficiente y adecuada tutela de los derechos involucrados en las mencionadas controversias'.

[162] *Entico* [17-18, 22].

[163] *Sadikoglu v United Nations Development Programme*, (Trial court, Southern District of New York, US) 2011 WL 4953994 (SDNY 2011), 14 October 2011, 10. This position was followed in *Brzak* (n 54) ,112 where the Court rejected the plaintiff's argument that the inadequacy of the UN's dispute resolution mechanism stripped the UN of its immunity, on the ground that this argument ignores the 'express waiver' requirement of the CPIUN immunity provision. See also *Georges v United Nations* (District Court of New York, US) 84 F. Supp. 3d where the Court dismissed the plaint stating that 'no party contends that the UN has expressly waived its immunity', at 249.

[164] (Court of Appeal for the Second Circuit, US) 15- 455- cv August 2015.

precedent to the grant of immunity under Article II, section 2. The plaintiffs relied on the UN's statement before the ICJ in *Cumaraswamy*[165] that the UN's immunity 'does not leave a plaintiff without remedy [because] . . . in the event that immunity is asserted, a claimant seeking redress against the Organization shall be afforded an appropriate means of settlement [under section 29]'.[166]

The Court rejected this argument. It held that the UN's statement only indicated that the UN views the obligation under section 29 as 'more than merely aspirational'—as 'obligatory and perhaps enforceable' but not that it is a condition precedent to immunity.[167] The Court also rejected the argument that the interpretation of foreign (i.e., European) courts meant that the fulfilment of section 29 CPIUN was a condition precedent to the provision of immunity. It held that the decisions the plaintiff was relying on were either interpreting different treaties[168] or relying on domestic law.[169] Even when the text of the agreement being interpreted was the same as the CPIUN, the Court held that the context was different since the treaties being interpreted were bilateral treaties.[170]

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

[166] Quoting Verbatim Record, *Cumaraswamy* (10 December 1998).

[167] *Georges* CA, 14.

[168] *UNESCO v. Boulois* (Cour d'Appel Paris France June 19 1998); *Drago v. IPGRI*, and *Maida v Administration for International Assistance* (n 40), see plaintiff's appeal brief dated 27 May 2015 available at <http://www.ijdh.org/wp-content/uploads/2014/12/47-Brief-filed-on-behalf-of-appellants1.pdf> (accessed 29.05.2020), 32.

[169] *Stavrinou* (n 38).

[170] E.g., *UNESCO v Boulois*, which referred to the Agreement between France and UNESCO, 357 UNTS 3 (Signed 2 July 1954).

US courts have also rejected the argument that the failure to fulfil the obligation to create means to settle disputes constitutes a waiver of immunity. In both *Brzak*[171] and *Bisson*,[172] suits brought against the UN by employees for sexual harassment and injury respectively, the plaintiffs claimed that the failure of the UN to provide appropriate modes of settlement of disputes as per Article VIII section 29(a) of the CPIUN amounted to a waiver of the UN's immunity.[173]

In both cases, the argument was rejected. The courts held that even if the UN's internal redress mechanisms were inadequate, this did not amount to an *express* waiver of immunity as was required by the CPIUN.[174] Express waivers were held not to be capable of being inferred by conduct. Accepting the plaintiff's argument, the Court held, would simply read out the word 'expressly' from Article II section 2 of the CPIUN.[175]

US courts have however left open the argument that the failure to create means to settle disputes constitutes a material breach of the agreement between the State and the IO which could potentially justify the non-performance of obligations under the treaty by the State. The plaintiffs in *Georges* made the argument that Article VIII section 29 was material to the CPIUN as a whole and that the UN's material breach meant that it is no

[171] *Brzak v United Nations* (n 54).

[172] *Bisson v United Nations* (11th February 2008) ILDC 889 (US 2008).

[173] In *Bisson* the plaintiff based this claim explicitly on the holding in *Lutcher* (n 98) that treaty provisions can themselves amount to a waiver of immunity, *Bisson* [12].

[174] *Brzak*112; *Bisson* [12].

[175] See also *Sadikoglu*, 10, confirming *Brzak* on this point.

longer entitled to the performance of duties under it, including the grant of immunity.[176] The Court did not determine the merits of this matter as it held that the plaintiffs did not have standing to raise this claim. It relied on the proposition that absent express language creating privately enforceable rights, individuals have no standing to raise the violation of international law as an issue.[177] It was only in defence, if at all, that the individual could invoke the material breach of a treaty to which it was not a party.[178] However, the Court left open the position that immunity may be denied as a suspension of the treaty obligation to grant immunity on account of the IO's material breach by failing to provide means to settle disputes.[179]

B. Decisions which refer to the abuse of immunity

Another obligation of the IO that domestic courts have expressly resorted to in addressing the conflict between IO immunity and fair trial rights is the obligation of the IO not to 'abuse' its immunity.

US cases have adopted abuse as a criterion under which immunity may be denied.[180] However what constitutes abuse has not been clearly defined in the IOIA nor in US case law. In *Mendaro*, the Court held that 'to the extent widespread disregard of employees'

[176] *Georges* (CA) at fn 49,50.

[177] Ibid, fn 51,53.

[178] Citing Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, International Law at Home: Enforcing Treaties in U.S. Courts', 37 Yale Journal of International Law (2012) 51, 84.

[179] On which see chapter 5, section IIA.

[180] The US IOIA allows for revocation of immunity by the Executive in the event of abuse by the IO. IOIA 22 US Code [288].

contract rights indicates that an IO is abusing its immunity from judicial process a revocation of immunity under section 1 of the [IOIA] could be justified'.[181] Since in *Mendaro,* the Court held that IO immunity from the jurisdiction of member States for employment disputes was part of CIL, this suggests that the court was of the view that a revocation of immunity under the IOIA in the event of abuse was permissible under CIL. It also could be that the court considered that the wrongfulness of the breach of the obligation to grant immunity could be precluded in the event of 'abuse' by the IO of its immunity.

The reasoning in *Mendaro* resonates with the views of the US Supreme Court in *Jam*, where even Justice Breyer's dissent, which took the view that the majority's decision — that immunity may be denied on the same bases as for sovereign immunity under the FSIA - may result in the violation of the US' international obligations to IOs under treaty, did not consider this to be the case for the revocation of IO immunity in the event of abuse.[182]

In *NML v BIS*[183] however, the Swiss Federal Supreme Court upheld the decision of the Supervisory Authority which held that it was not the role of the domestic court to determine whether the IO had abused its immunity.

[181] *Mendaro,* fn41.

[182] See *Jam,* (Breyer dissent), 16.

[183] (n 81).

V. IS THERE AN EXCEPTION TO IO IMMUNITY ON THE BASIS OF THE RIGHT TO A FAIR TRIAL?

A. IO Immunity under Treaty

In the vast majority of the cases discussed above, it was a treaty obligation of the State to grant immunity to the IO that was considered by courts.[184] This demonstrates that IO immunity is largely based on treaty provisions.[185] What is the impact of domestic court jurisprudence on the interpretation of the treaty provisions conferring IOs immunity? Has the practice of domestic courts generated enough subsequent practice in the application of immunity conferring treaties such that the treaty provisions conferring IOs immunity are to be interpreted as subject to fair trial rights?

1. Preliminary considerations

Before delving into the question proper, a few preliminaries must be considered.

[184] For exceptions, see section VB below.

[185] Cf Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation' (2013) 14 Melbourne Journal of International Law 149, 164 stating that since IO immunity is usually governed by an agreement on privileges or immunities or a headquarters agreement, domestic courts do not need to look further.

(a) Denial of immunity as an 'exception' to immunity vs not engaging the immunity provision

Firstly, as noted above[186] with respect to IO immunity under treaty, nothing turns on whether the practice of not granting immunity unless the right to a fair trial is satisfied is characterised as an 'exception' to immunity from jurisdiction or as a situation in which the treaty provision conferring immunity is not engaged in the first place.

Whilst the evidentiary burden of proving a new exception to a treaty or CIL norm that currently has an accepted content, i.e., the *modification* of a norm, may, arguably, be different to proving that the norm was never engaged in the first place,[187] the exception vs 'not engaged' dichotomy is of no consequence in the interpretation of a treaty norm conferring immunity (and for that matter any treaty norm).[188] The interpretation of an immunity clause in a treaty is simply an exercise in determining its scope of application with reference to the rules of treaty interpretation, regardless of whether one characterises areas to which the treaty norm does not apply as an exception or as falling outside the scope of the norm.[189] The effect of an exception is the same as that of not engaging the rule, the primary rule simply becomes inapplicable to the situations to which the exception

[186] See text at (n 2).

[187] On the distinction between subsequent practice in the interpretation of treaties and their modification, see Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 138; With respect to CIL, see Katie A Johnston, 'The Nature and Context of Rules and the Identification of Customary International Law' (2021) 32 European Journal of International Law 1167, 1175.

[188] See Methymaki and Tzanakopoulos (n 2) 225, 239 stating with respect to the burden of proof of the rules of State immunity that "their characterization as rules or exceptions is essentially of no consequence'.

[189] As noted by the ILC in the 1966 Commentary to what became the VCLT, treaty interpretation is a 'single combined operation' 1966 II YILC, 219-220 [8].

applies.[190] Therefore, in the following, the reference to an 'exception' to immunity will simply mean a situation to which the rule requiring the grant of immunity to IOs does not apply, i.e., a return to the rule that the domestic courts of a State may exercise jurisdiction in a claim against an IO, provided that jurisdiction otherwise exists.[191]

(b)The practice of denying immunity under different treaty provisions

The practice examined above on IO immunity before domestic courts does not engage one immunity conferring treaty, but many different treaties conferring IOs immunity from jurisdiction. Some of these treaties are multilateral treaties between States to which the relevant IO(s) are not party, but under which they may derive rights and obligations.[192] Others are bilateral agreements between a host State and an IO.[193] Some Agreements confer absolute immunity from jurisdiction[194] whilst others confer limited immunities.[195]

With such a wide variety of treaties under consideration, it is not possible, nor perhaps is it useful, to engage in an examination of practice with respect to each treaty separately to determine whether each immunity clause in each treaty has been interpreted

[190] See Methymaki and Tzanakopoulos (n 2) 225, 227 stating that 'where an exception operates, the primary norm from which the exception carves out certain situations is not engaged at all'.

[191] On the bases of jurisdiction generally see, e.g., Bernard Oxman, 'Jurisdiction of States', *Max Planck Encyclopedias of International Law* para 10ff.

[192] Examples include the CPIUN, CPISA and the Constituent Instruments of IOs. See *Reparation* (n5), 179.

[193] The main examples being the many headquarters agreements between States and IOs. E.g., Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Adopted 31 Oct 1947) A/RES/169(II).

[194] E.g., CPIUN, Article 2.

[195] E.g., IBRD Articles of Agreement (entered into force 27 December 1945) 2 UNTS 134, Article VII.

so that immunity does not apply when fair trial rights are not satisfied. What is possible however, is to consider domestic courts' interpretation of the treaty formulations conferring IOs immunity from jurisdiction in general and to assess whether these decisions constitute subsequent practice which establishes the agreement of the parties regarding the interpretation of immunity conferring treaty provisions as per Article 31(3)(b) of the VCLT[196] or as other subsequent practice in the application of immunity conferring treaty provisions as a supplementary means of interpretation under article 32 of the VCLT.[197]

Two considerations support this exercise of considering the practice of interpreting immunity conferring treaty formulations generally in order to assess whether there is subsequent practice establishing the agreement of the parties regarding the interpretation of these treaty provisions.

The first consideration is that though there is no explicit basis in the rules on treaty interpretation to consider the interpretation of identical or similarly worded treaty provisions when interpreting a treaty, subsequent practice related to other treaty provisions can be relevant to determining the ordinary meaning of the terms of a treaty, the context of the treaty and its object and purpose. This is particularly so if the language of the treaty provisions is identical or similar.[198]

[196] Domestic court decisions consist an important element of subsequent practice regarding the interpretation of the treaty. See ILC, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report of the ILC Seventieth Session A/73/10, Chapter IV, commentary conclusion 4[18]; Tzanakopoulos (n 3) 94.

[197] See II YBILC 1964 (A/5809), 203–204, commentary draft article 69[13]; ILC, Subsequent Agreements, commentary conclusion 4[23-35].

[198] On this point, see also chapter 2, section IA.

Practice relating to a different treaty norm or regarding the subject matter generally have been used by courts and tribunals to determine the ordinary meaning of the terms in the provision being interpreted. In *Nuclear Weapons* the ICJ used the general practice of States to determine the ordinary meaning of 'poison or poisonous weapons' under Hague Convention IV and the Geneva Protocol of 1925.[199] The UN Tribunal of the Law of the Sea considered as relevant the practice of the parties under the Convention for the Conservation of Southern Bluefin Tuna of 1993 in determining whether the parties had complied with their obligations under the UN Convention on the Law of the Sea.[200]

Moreover, as noted by the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 'interpretation of a treaty is not confined to the interpretation of the text of its specific terms but also encompasses the "terms of the treaty in their context"'.[201] Practice in relation to the interpretation of other immunity conferring treaty provisions establishes the context within which the immunity conferring provision in consideration is situated.[202]

[199] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 248 [55].

[200] *Southern Bluefin Tuna Cases* (New Zealand/Japan; Australia/Japan) (Provisional Measures, Order of 27 August 1999), ITLOS Case Nos. 3 and 4 [50].

[201] See George Nolte, First report on subsequent agreements and subsequent practice in relation to treaty interpretation, ILC 65th Session A/CN.4/660 [48].

[202] For e.g., in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion 1969 ICJ Rep 150, 167ff the ICJ used practice in relation to other treaty provisions in interpreting the context in which the term 'the largest ship-owning nations' in Article 28(a) of the Convention for Establishment of Inter-Governmental Maritime Consultative Organization was used.

The practice relating to the interpretation of identically or similarly worded immunity provisions is important also in determining the object and purpose of the treaty as well as intention of the parties when entering into the treaty.[203]

A second reason for considering the practice relating to immunity conferring treaty provisions generally is that there is no treaty formulation which confers immunity expressly subject to fair trial rights. Whilst some immunity provisions such as those in the CPIUN and the CPISA confer immunity from suit from every process apart from where the IO has waived its immunity, other immunity provisions confer immunity for limited subject matter such as for official activities,[204] or create exceptions to immunity for particular types of claims.[205] The reading in of a limitation to immunity based on the right to a fair trial, therefore, is a process which is not reflected in the text of the treaties itself. Thus, the practice of subjecting IO immunity to the right to a fair trial, insofar as it is practiced with respect to all types of immunity conferring treaty provisions without

[203] Cf. *Georges* CA,14ff, providing reasons as to why similarly worded immunity provisions were in this instance not relevant. See also *Case concerning the draft agreement relating to the creation of the European Economic Area between the Community and the countries of the European Free Trade Association* ECJ, Opinion 1/91 (1991), ECR I-609[54] 'when a question of interpretation of provisions of the agreement which are identical in substance to the provisions of the Community Treaties arises in a case pending before a court or tribunal of an EFTA State, the court or tribunal may, if it considers this necessary, ask the Court of Justice to express itself on the question'.

[204] E.g., The Protocol on Privileges and Immunities of the European Patent Organisation 1065 UNTS 500, Article 31.

[205] The immunity provisions in Agreements with International Development Banks usually state that actions may be brought against the bank only in a court of competent jurisdiction in the territories of a member in which the bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities, e.g., see IBRD Articles of Agreement (n 195).

exception,[206] may be meaningfully classified as a practice of interpreting immunity conferring treaty provisions in general terms.[207]

If the relevant domestic court practice does not establish the agreement of the parties as per VCLT Article 31(3)(b), the practice may still be relevant as other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32 of the VCLT.[208]

(c)The practice of addressing the conflict on a basis different to fair trial rights

The cases where immunity is restricted on a basis other than the right to a fair trial, i.e., the cases discussed at section IIC, may not be directly relevant to establish that treaty provisions conferring immunity to IOs are conditional on fair trial rights. However, as stated above, the practice of limiting immunity on a basis other than the right to a fair trial may be relevant to the extent that the limitation of immunity (on such other basis) demonstrates a concern of the court regarding the tension between granting immunity and protecting fair trial rights.

[206] The cases assessed above show no evidence that the particular treaty formulation, as opposed to the subject matter of the claim itself, has any impact on whether or not immunity is made subject to the right to a fair trial. See section IID above.

[207] The general observations on immunity conferring treaties is of course subject to the caveat that individual treaties may demonstrate particular practice that results in a different interpretation of the immunity conferring provision in the treaty in question.

[208] See II YBILC 1964 (A/5809),203–204, commentary draft article 69[13]; ILC, Subsequent Agreements, commentary conclusion 4[23-35].

2. The practice required under VCLT Article31(3)(b)

Article 31(3)(b) of the VCLT states that 'there shall be taken into account together with the context… any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[209]

In his Commentary, Sinclair states that subsequent practice under Article 31(3)(b) means the 'concordant subsequent practice common to all the parties'.[210] However, it is clear that the practice need not be actively engaged in by all the parties, it need only *establish the agreement* of the parties regarding the interpretation of the treaty.[211] Thus, the relevant subsequent practice can be acquiesced in by parties to the agreement without actively engaging in the practice themselves.[212] Some decisions of international courts and tribunals evince a liberal approach in considering subsequent practice as establishing the

[209] The original term used by the ILC in draft Article 27 was subsequent practice which established the '*understanding*' of the parties regarding the interpretation of a treaty. The change to 'agreement of the parties' was related to 'drafting only'. See Official Records of the United Nations Conference on the Law of Treaties … (A/CONF.39/11) thirty-first meeting, 19 April 1968, 169 [59].

[210] Sinclair (n 187) 138.

[211] 1966 IIYBILC A/6309/Rev.1, 222[15] '[The Commission] considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice…'.

[212] *Temple of Preah Vihear (Cambodia/Thailand)* 1962 ICJ Rep 6, 23; *Namibia* 1971 ICJ Rep 22, 31. In the latter case, the ICJ considered the practice of the Security Council members to be 'generally accepted' by the members of the Organisation, presumably by acquiescence; Robert Kolb, 'La modification d'un traité par la pratique subséquente des parties. note sur l'affaire relative au régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France' (2004) 1 Revue Suisse de Droit International et de Droit Européen 9, 19ff, particularly at 22 'le tribunal ne dit pas qu'il y a eu un accord subséquent; il dit qu'il y a eu des attitudes qui ont un 'effet équivalent' à un consentement proprement dit et qui font droit entre les parties'. See also *Air Services Agreement* 1965 69 RGDIP 189, 249; ILC Subsequent Agreements Conclusion 10(2).

agreement of the parties.[213] For instance, in *Temple of Preah Vihear*, the ICJ specifically relied on the acquiescence of the Thai authorities with respect to Cambodia's claim over the temple, even in the face of some contrary practice on the part of the Thai Government.[214] Moreover, inconsistent subsequent practice has at times been interpreted by international courts and tribunals as allowing a discretion for the parties in the application of the treaty provision.[215] However, at other times, courts have been reluctant to find the agreement of the parties in subsequent practice, particularly when there is some contrary practice.[216]

As Kolb notes after a review of the practice, the situations in which courts and tribunals have had to interpret whether subsequent practice establishes the agreement of the parties have not been clear cut situations of a consistent practice being adopted by all parties. The relevant practice is often sporadic, inconsistent and leaves room for discretion to the interpreter.[217]

[213] E.g., Kolb ibid, 18 stating with respect to modification of a treaty by subsequent practice that 'La jurisprudence des tribunaux et cours internationaux a admis avec une certaine libéralité la possibilité de modifier informellement un traité par la pratique subséquente'.

[214] *Temple of Preah Vihear*, 23, 32, 33.

[215] For instance, the ECtHR has held that diverse or non-uniform practice may indicate that the contracting parties to the ECHR enjoy a wide margin of appreciation in complying with their obligations, e.g., *Lautsi and Others v. Italy*, Application No. 30814/06 (ECtHR 18 March 2011) [61]; *Rights of Nationals of the United States of America in Morocco (France/USA)* 1952 ICJ Rep 176, 211 where the ICJ held that inconsistent practice by the customs authorities meant that the Article under consideration did not lay down a strict rule on the point in dispute; ILC Subsequent Agreements, 76 [4].

[216] E.g., *German External Debts* Award of 16 May 1980, UNRIAA, vol. XIX, part III 67, 103-104 [31].

[217] Kolb (n 212) 24; ILC, Subsuequent Agreements, 76 [6].

3. Application of the standard to the practice on IO immunity

As noted above, there is a large amount of practice before domestic courts in Europe interpreting treaty provisions granting immunity to IOs as conditional on reasonable alternative means being provided by the IO. This is the case in private law, particularly employment, disputes.[218]

This practice relates to different kinds of immunity granting treaty provisions – both those that afford absolute immunity[219] and those that afford some form of limited immunity.[220] Whilst some decisions hold that States parties to immunity treaties could not have agreed to granting absolute immunity to the detriment of fair trial rights when entering into the treaties[221] other decisions rely on the obligation of the IO to create means to settle disputes in order to interpret the immunity granting provision as subject to the IO fulfilling this obligation.[222]

However, this practice of interpreting immunity provisions as subject to fair trial rights in private law disputes has only been followed exceptionally outside Europe.[223] Some decisions from domestic courts outside the Council of Europe States have explicitly

[218] Section IIA.

[219] E.g., *Drago v IPGRI*.

[220] E.g., *ACP Group v BD*.

[221] E.g., Ibid, A4.

[222] E.g., *Pichon-Duverger v Permanent Court of Arbitration*.

[223] Section IIB.

pointed out that the practice of limiting IO immunity on the basis of fair trial rights applies only in the context of the ECHR.[224]

There are several examples of domestic courts outside Europe evidencing concern for fair trial rights[225] and using means other than the right to a fair trial to limit the impact of immunity, ostensibly due to concerns about the right to a fair trial.[226] However, these decisions cannot be considered practice in support of the proposition that immunity provisions are subject to fair trial rights. If at all, this practice manifests that courts are not comfortable making immunity conferring treaty provisions conditional on the availability of alternative remedies but find means other than interpreting the immunity conferring provision as subject to fair trial rights in order to assuage the court's concern regarding upholding the right to a fair trial.

Furthermore, insofar as IOs are party to immunity treaties,[227] IOs have generally contested that immunity provisions are subject to fair trial rights.[228] Though IOs have at times taken pains to demonstrate that reasonable alternative means for the settlement of

[224] See e.g., *Georges* CA, 14ff; *Amaratunga* (SC) [62,63].

[225] E.g., *Ochani vs WHO*.

[226] E.g., *FAO v Commissioner of Labour*.

[227] This is the case most notably with Headquarters Agreements.

[228] E.g., *ACP Group v BD* F6.

disputes are available,[229] this cannot be considered as agreeing that alternative remedies are a prerequisite for the grant of immunity.[230]

Thus, one cannot state, with respect to immunity conferring treaties in general, that there is subsequent practice 'establishing the agreement of the parties' that the immunity provisions are subject to fair trial rights. This is, in general terms, clear with respect to immunity treaties to which IOs are party. But even with respect to agreements to which IOs are not party, it is difficult to establish that there is subsequent practice establishing the agreement of the States parties that immunity conferring treaty provisions are subject to fair trial rights, even in private law disputes. This is due to the European practice not taking hold and at times being explicitly rejected outside of Europe.

Given that the practice is concentrated in domestic courts of Council of Europe states, there may be subsequent practice amongst States parties to the ECHR that immunity provisions are subject to the right of access to court under Article 6(1) of the ECHR in private law disputes. This would 'establish the agreement of the parties' only with respect to immunity agreements between States parties to the ECHR.[231] With respect to immunity agreements to which non-council of Europe States are party, the practice of interpreting

[229] See e.g., *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion, 1999 ICJ Rep 62 Verbatim Record (Dec. 10 1998); *E v T* case no C/18260/2005-4, (Cour civile de la Cour de Justice de Genève, Cour d'appel, Switzerland) cited in Reinisch (n 32), 246, where the IO gave an assurance that the claimant's claim would be heard.

[230] E.g., *Georges* CA,14 interpreting the UN's statements in *Cumaraswamy* that reasonable alternative means to settle disputes were available as 'not in any way' suggesting that the provision of remedies was a condition precedent to immunity.

[231] For e.g. The General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 002) (10 September 1952).

immunity conferring treaty provisions as subject to fair trial rights would only constitute 'other subsequent practice' to be taken into account under Article 32 of the VCLT.

The case is even clearer with respect to disputes which are not clearly of a private law character, where even European courts have not held that immunity provisions are subject to fair trial rights. Whilst the ECtHR in *Mothers of Srebrenica* explicitly stated that the absence of alternative remedies does not *ipso facto* violate the right of access to court in a case concerning enforcement action under Chapter VII of the UN Charter, European domestic courts have held that immunity is applicable despite the absence of alternative remedies in cases concerning subject matter such as fuel contracts for military operations[232] and assets deposited with the IO by a Central Bank.[233] US Courts have categorically rejected the argument that alternative remedies are a condition precedent to the immunity of the UN under the CPIUN, not only in employment disputes, but also in claims against the UN for death and personal injury by victims of Cholera in Haiti.[234]

Thus, the inevitable conclusion is that the practice of domestic courts interpreting immunity conferring treaty provisions as subject to reasonable alternative means for the settlement of disputes, though extensive in Europe, has not, in general terms, established the agreement of the parties regarding the interpretation of immunity conferring treaty

[232] *Allied Joint Force Command Headquarters (JFCB) v Supreme Site Service GmbH*.

[233] *NML Capital v Bank for International Settlements and Debt Enforcement*.

[234] *Georges* CA. Whilst the UN viewed these claims as not falling within 'private law disputes' for the purposes of Article 29 of the CPIUN, many commentators including UN Special Rapporteurs were of the view that the claims were simply private law tort claims. See Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights' A/71/40823,11 [34]. Frederic Megret, 'La Responsabilité Des Nations Unies Aux Temps Du Cholera' (2013) 47 Revue Belge de Droit International 161, 161.

provisions. The practice is relevant as 'other subsequent practice' to be taken into account under Article 32 of the VCLT. But it is not possible to state that the practice has resulted in an exception to treaty provisions conferring IOs immunity on the basis of fair trial rights.

B. IO immunity under CIL

For domestic court decisions to carve out an exception to a CIL rule requiring States to grant immunity to IOs, such a rule must exist in CIL in the first place.[235] The two-element test for the identification of CIL as set out in the *North Sea Continental Shelf* cases is that: for custom to be established there must be acts that 'amount to a settled practice … carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[236] Although there must be a certain consistency in the practice,[237] 'absolutely rigorous conformity' is not required, and the practice need not have lasted any particular length of time.[238] Thus, for the establishment of a customary rule that States have an obligation to grant immunity to IOs, there must be State practice, in the present context domestic court decisions, which is reasonably consistent and widespread along with the requisite *opinio juris*.

[235] For a recent treatment of this question, see Fernando Lusa Bordin, 'To What Immunities Are International Organizations Entitled under General International Law? Thoughts on Jam v IFC and the "Default Rules" of IO Immunity' Questions of International Law 72 (2020) 5-28. See also the discussion in chapter 1, section VC.

[236] *North Sea Continental Shelf, (Germany/Denmark, Germany/Netherlands)*, Judgment,1969 ICJ Rep 3 [77].

[237] *Fisheries (United Kingdom/Norway)*, Judgment, 1951 ICJ Rep 116, 138.

[238] *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua/US*), Judgment, 1986 ICJ Rep 14 [186] *North Sea*, [74].

Of the cases surveyed, some cases explicitly deny an obligation to grant IOs immunity under CIL.[239] A majority of cases consider the obligation of the State to grant immunity to an IO under treaty law[240] or under domestic law.[241] The fact that courts resort to treaty provisions however does not necessarily mean that there is no CIL on the subject.[242] Applying treaty law may be because a treaty provision is readily available and constitutes *lex specialis* as much as due to the view that there is no immunity under CIL.

Only a few decisions explicitly state that there is a CIL obligation on States to grant immunity to IOs. Dutch courts have followed the decision of the Dutch Supreme Court in *Spaans*[243] to hold that 'it follows from unwritten international law that an IO, at least in the State on whose territory [the IO] is established with the consent of the government of that State, is entitled to immunity from jurisdiction'.[244] Italian courts[245] and some German courts[246] have also held that there is a CIL obligation to grant immunity to IOs.

[239] E.g., *Amaratunga* (SC) [29].

[240] E.g., *Ochani v WHO*; *ACP v Lutchmaya*.

[241] E.g., *Jayakody v IWMI*.

[242] Cf. *Case concerning Military and Paramilitary Activities in and against* Nicaragua, Jurisdiction and Admissibility 1984 ICJ Rep 424 [73].

[243] *Spaans v Iran-US Claims Tribunal*.

[244] *JFCB v Supreme Site Service GmbH* [6.7].

[245] See e.g., *Allasio* [2].

[246] E.g. *X v Western European Union* (Amtsgericht Bonn, Germany) 23 August 1961, mdr (1962).

In *Mendaro* the Court considered that there is CIL on immunity for IOs from the jurisdiction of member States for employment disputes.[247] *Mendaro* also held that 'to the extent widespread disregard of employees' contract rights indicates that an international organization is abusing its immunity from judicial process a revocation of immunity under section 1 of the [IOIA] could be justified'.[248] This suggests that the Court was of the view that a revocation of immunity under the IOIA in the event of abuse was permissible under CIL. Some courts, such as the Malaysian High Court in *Bank Bumiputra v ITC*, having decided that the transaction in question is commercial in nature, simply state that IO immunity under CIL does not extend to commercial activities.[249]

The foregoing is only a small sample of cases on the question of IO immunity under CIL, but it indicates that the practice on whether there is an obligation for States to grant immunity to IOs and the scope of such obligation is inconsistent.[250] Therefore, the present survey seems to support Michael Wood's conclusion in 2014 that 'it cannot be said that there is a "general practice accepted as law" establishing a customary rule of immunity' for IOs.[251]

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[247] *Mendaro*, text accompanying footnotes 34-38. See also Restatement (Third) of the Foreign Relations Law of the United States part IV, chapter 6, subchapter b, introductory note ('an organization may also enjoy basic privileges and immunities vis-à-vis non-member states under customary law').

[248] Ibid.

[249] *Bank Bumiputra Malaysia BHD v International Tin Council and another*.

[250] See also Reinisch (n 32) 8.

[251] Michael Wood, 'Do International Organizations Enjoy Immunity under Customary International Law Special Issue: Immunity of International Organizations' (2014) 10 International Organizations Law Review 287, 317.

In any case, even if there were such a rule of CIL requiring States to grant immunity to IOs, there does not appear to be any practice to suggest that the obligation is dependent on the claimant's fair trial rights being ensured.

VI. INTERIM CONCLUSION

The purpose of chapters 3 and 4 has been to ascertain whether the practice of international and domestic courts has resulted in the obligation of States to grant immunity to IOs becoming conditional on the IO ensuring the fair trial rights of private parties. If the obligation to grant immunity is so conditional on fair trial rights, domestic courts may lawfully deny immunity to IOs when fair trial rights are not ensured and thus, (a) induce compliance with the fair trial obligations of IOs, (b) implement the responsibility of IOs for the failure to ensure fair trial rights by providing a forum for the settlement of disputes against IOs, thereby ceasing the wrongful conduct of the IO and (c) enforce the legal responsibility of IOs for violations of their domestic and international obligations through remedies provided through domestic courts. This is subject of course to the IO accepting the domestic court's jurisdiction and abiding by the decision.[252]

The outcome of the survey of practice has been that the practice of international and domestic courts is not of sufficient consistency to constitute subsequent practice which establish the agreement of the parties to immunity conferring treaties that the treaty obligation is subject to fair trial rights. With respect to CIL, whilst the practice does not

[252] See further Chapter 2 IIIC.

demonstrate consistent acceptance by domestic courts of a rule under CIL requiring the grant of immunity to IOs, to the extent that such a rule is accepted, the practice does not evidence that it is subject to the IO ensuring the fair trial rights of private parties. The rule rather seems to be subject to the same exception for *acta jure gestionis* that State immunity is subject to.[253]

The next chapter will consider whether different rules of international law, which are not based on the prevalence and volume of practice by States and IOs can resolve the conflict between IO immunity and fair trial rights, such that the legal responsibility of IOs for the breach of their obligations are enforced through domestic courts exercising jurisdiction lawfully in claims against IOs. Thus, chapter 5 will consider (a) whether the conflict between IO immunity and the right to a fair trial can be accommodated within a conflict rule or a rule of normative hierarchy so that the conflict is resolved without the breach of one of the two norms and (b) if the conflict is irresolvable, whether a denial of immunity by a domestic court can be correctly analysed as the suspension of performance of the State's obligations under the treaty that confers immunity on account of a prior material breach by the IO or alternatively, whether the wrongfulness of the State's denial of immunity to an IO can be precluded as it constitutes a lawful countermeasure.

[253] *Bank Bumiputra v ITC; Mendaro*.

CHAPTER 5

RESOLVING THE CONFLICT ON THE BASIS OF CONFLICT RULES, SUSPENSION OF TREATY OBLIGATIONS ON ACCOUNT OF MATERIAL BREACH AND COUNTERMEASURES

Having considered whether the practice of international and domestic courts has rendered the denial of immunity to IOs legal in instances where fair trial rights are not satisfied, this chapter will examine whether the denial of IO immunity based on fair trial rights can be legal through the application of other rules of international law. Section I briefly examines whether the application of a conflict rule or a rule of normative hierarchy can render denying immunity legal. The bulk of the chapter is devoted to whether the conflict between IO immunity and fair trial rights can be resolved by the application of the rule allowing for suspension of treaty obligations on account of material breach (Section IIA) or whether countermeasures may resolve the conflict (Section IIB). Thereafter, as a segue into chapter 6 which will consider this question in detail, section III will examine the impact of domestic court decisions in reinforcing the obligations of IOs to ensure fair trial rights and in inducing compliance with this obligation.

I. CAN THE CONFLICT BETWEEN IO IMMUNITY AND THE RIGHT TO A FAIR TRIAL BE ACCOMMODATED WITHIN A CONFLICT RULE OR A RULE OF NORMATIVE HIERARCHY?[1]

A. Jus Cogens

As discussed in chapter 4, there are some domestic court decisions which resolve the conflict between IO immunity and fair trial rights on the basis that the right to a fair trial constitutes a *jus cogens* norm.[2]

However, as noted in chapters 2[3] and 4[4], the characterisation of the right to a fair trial as a *jus cogens* norm is exceptional. It is unlikely that the right satisfies the criterion of a norm 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.[5] Thus, it appears that courts cannot use rules of normative hierarchy to resolve the conflict between IO immunity and fair trial rights.

[1] Whilst *jus cogens* is a rule of normative hierarchy, the view taken here is that rules such as *lex specialis*, *lex posterior*, *lex priori* and even Article 103 of the UN Charter do not denote a hierarchy of norms but operate in particular situations to resolve conflicts between norms; ergo, they are conflict rules. For a detailed discussion, see Antonios Tzanakopoulos, 'Collective Security and Human Rights', *Hierarchy in International Law* (Oxford University Press 2012) 44-46,63ff.

[2] See chapter 4 Section IIIA. This includes the line of decisions of the Argentine Supreme Court stemming from *Cabrera v Comisión Técnica Mixta de Salto Grande* (7 July 1993) 316 Fallos de la Corte Suprema 1669.

[3] Chapter 2, text accompanying (nn 87-89).

[4] Chapter 4, text accompanying (nn 127-128).

[5] VCLT, Article 53.

B. Conflict Rules

Chapters 3 and 4 also discussed practice which addresses the conflict between IO immunity and fair trial rights on the basis of conflict rules such as *lex priori, lex posterior* and Article 103 of the UN Charter.[6]

1. *Lex Priori and Lex Posterior*

As described in chapter 4,[7] some decisions which assess the temporal connection between an immunity conferring treaty and a treaty ensuring fair trial rights suggest that the protections in human rights treaties concluded later than treaties granting immunity to IOs are subject to the immunity provisions in the formerly concluded treaty. To recap briefly, in *Entico* the English Commercial Court held that the immunity provisions of the CPISA cannot be read down to take account of the provisions of the subsequent ECHR, which is binding upon only a minority of the parties to the CPISA.[8] Similarly, in the Netherlands District Court decision in *Mothers of Srebrenica*, the Court held that since the UN was established before the entry into force of the ECHR, there could be no question of a limitation of the protection of rights under the ECHR by the transfer of powers to the UN.[9] This reasoning was however contradicted by the Netherlands Court of Appeal.[10]

[6] Chapter 4, sections IIIB and C.

[7] Chapter 4, section IIIB.

[8] [2008] EWHC 531 [18].

[9] (District Court, The Hague, Netherlands 10 July 2008) LJN: BD6795.

[10] *Mothers of Srebrenica* (Court of Appeal, The Hague Netherlands) 200.022.151/01. See chapter 4, section IIIB.

Conversely, there is the interpretative rule employed by the Belgian Court of Cassation in *ACP v BD*[11] that a State party to the ECHR could not have acceded to a later treaty conferring immunity to an IO, intending the immunity of the IO to be absolute. This reasoning also underpins the jurisprudence of the ECtHR which holds that parties to the ECHR 'retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention'[12] This interpretive rule relies on the fact that the treaty guaranteeing fair trial rights is temporally prior to the treaty granting immunity to an IO to hold that States must have intended the latter to be subject to the former.

The temporal order of treaties may be used as above in the process of interpreting the relevant treaties in line with the rules enshrined in Article 31 and 32 of the VCLT, i.e., to determine the ordinary meaning of the words in the treaty within their context, in light of the treaty's object and purpose. However, the practice of employing the temporal order of treaties in claims against IOs is not consistent.[13] Contrary to the immediately preceding practice which adopts the *lex priori derogat lex posterior* rule as an interpretative device,[14] several decisions interpret a former immunity treaty to be consistent with a later human

[11] (Court of Cassation Belgium) ILDC 1576 (BE 2009) [30].

[12] E.g., *Bosphorus v Ireland* App No 45036/98 (ECtHR, 30 June 2005) [154].

[13] In fact, even the ECtHR has been inconsistent in its approach to the impact of the ECHR on obligations entered into prior to the entry into force of the ECHR. See chapter 4, section IIIB.

[14] Possibly also conditioned by the *lex specialis* rule. See R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 79 at fn 39–42.

rights treaty.[15] Moreover, some courts have explicitly denied the effect of the *lex posterior* rule with respect to IO immunity and fair trial rights.[16]

Furthermore, it may be that conflict rules such as *lex priori*, and *lex posterior* are structurally incapable of being applied to resolve the conflict between IO immunity and fair trial rights. A requirement for these conflict rules to operate is a parity of parties between the treaties.[17] However, obligations under human rights treaties are owed by States parties to all other parties to human rights treaties, i.e., they are *erga omnes partes* obligations.[18] Thus, unless all the parties to the human rights treaty are also party to the immunity conferring treaty, *lex priori* and *lex posterior* may not be applied without breaching the prohibition against affecting the rights of the parties to the human rights treaty who are not party to the immunity conferring treaty.[19] Moreover, though the principle that these conflict rules must apply to treaties concerning the same subject matter[20] has not been applied strictly,[21] the rules are presumptions as to the intention of the parties and can apply only when there is some sense that the parties considered both treaties to be linked

[15] E.g., *Perez v Germany* (Admissibility) App No 1552108 (ECtHR, 6th January 2015); *Mothers of Srebrenica* (Court of Appeal); *AL v Italy* App No 41387/98 (ECtHR, 11 May 2000).

[16] See *ACP v Lutchmaya* (Court of Cassation, Belgium) ILDC1573(BE2009).

[17] See e.g., VCLT, Article 30(3), (4).

[18] See Chapter 2, Section IIE.

[19] Cf. VCLT Articles 41, 58. See also chapter 2 at (nn 165,166).

[20] See e.g., Article 30 VCLT.

[21] See e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC - Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006) [23]; [254].

in some way, or as the ILC puts it 'part of the same concerted effort'.[22] It is not clear that treaties concerning IO immunity and human rights treaties evince a coherent flow of the intention of the parties to the treaties.[23]

2. *Lex Specialis*

The practice examined in chapter 4 does not evidence decisions which explicitly adopt *lex specialis* to determine the conflict between IO immunity and fair trial rights. However, cases which give precedence to a human rights treaty by making IO immunity conditional on the presence of alternative means of redress[24] or cases which conversely consider IO immunity to be a proportionate limitation on the right to a fair trial[25] may be interpreted as decisions which consider the human rights treaty and the immunity treaty as *lex specialis* respectively.

These two lines of decisions may be manifestations of the two types of *lex specialis* as described by the ILC; one where the specific rule (i.e., arguably the rule requiring the grant of immunity from jurisdiction) should be read and understood within the confines of the general standard (the obligation to grant a fair trial)[26] and the other where instead of the

[22] Ibid [255].

[23] Cf. Pavoni (n 14) 78; See also Marko Milanović and Tatjana Papić, 'As Bad as It Gets: The European Court of Human Right's Behrami and Saramati Decison and General International Law' (2009) 58 International and Comparative Law Quarterly 267, n 199.

[24] Chapter 4, section IIA. This includes the jurisprudence of the ECtHR which gives priority to the ECHR as against subsequent transfers of powers to IOs e.g., *Bospohoros* [145]. See Pavoni (n 14) 79.

[25] Chapter 4, section IIB.

[26] Fragmentation Report [56].

general rule, the specific exception applies.[27] The inconsistency in which formulation of *lex specialis* applies to IO immunity and fair trial rights is compounded by the fact that what is general and particular itself is relative[28] and that the *lex specialis* nature of a treaty lies 'in the eye of the beholder'.[29] Academic writing also differs on whether IO immunity or a different obligation owed to an IO on the one hand or the obligation to grant a fair trial on the other constitutes *lex specialis*.[30] Thus, it cannot be said on the basis of practice or doctrine that *lex specialis* decisively determines the conflict between IO immunity and fair trial rights.

3. Article 103 of the UN Charter

As examined in chapter 4, the Netherlands Supreme Court decision in *Mothers of Srebrenica*[31] determined the conflict between IO immunity and fair trial rights based on Article 103 of the UN Charter.[32] Even the ECtHR decision in *Mothers of Srebrenica* contained undertones of Article 103 of the UN Charter in the Court's decision to uphold

[27] Ibid [57].

[28] M Akehurst, 'The Hierarchy of the Sources of International Law' (1976) 47 British Yearbook of International Law 273, 273.

[29] Pavoni (n 14) n 43.

[30] Compare Nicolas Angelet and Alexandra Weerts, 'Les Immunités Des Organisations Internationales Face a 1 Article 6 de La Convention Européenne Des Droits de 1'homme' [2007] Journal de Droit International 3, 24 and Tzanakopoulos (n 1) 66.

[31] *Mothers of Srebrenica v The Netherlands* (Supreme Court Netherlands 13 April 2012) 10/04437.

[32] See chapter 4, section IIIC.

the Dutch courts' decision to grant immunity to the UN in spite of the lack of alternative means of redress.[33]

However, in employment cases against the UN, courts have used the reasonable alternative means test, in spite of Article 103 of the UN Charter.[34] Moreover, courts of the European Union have held that decisions taken under Chapter VII of the UN Charter which received the priority conferred by Article 103 of the UN Charter are subject to fair trial rights.[35]

Thus, practice is not consistent on whether Article 103 of the UN Charter definitively elevates the immunity of IOs over the fair trial obligations of States. It appears from a consideration of the practice as a whole, particularly also the cases where immunity was considered not to be dependent on alternative means of redress for governmental functions performed by IOs other than the UN,[36] that it is the nature of the functions performed by the IO as opposed to Article 103 of the UN Charter that determines the conflict in favour of IO immunity. Furthermore, several reasons are provided in the literature as to why Article 103 of the UN Charter cannot be said to prioritise obligations under the UN Charter over human rights norms, even those that do not amount to *jus cogens*.[37] Most importantly, it is doubtful that Article 103 of the Charter gives obligations

[33] See chapter 3, section IIC.

[34] See e.g., *Perez v. Germany*.

[35] See Chapter 3, Section IIIC.

[36] See the cases cited at chapter 3 section IIB 2. E.g., *NML Capital v Bank for International Settlements and Debt Enforcement* (BIS), Federal Supreme Court Switzerland) ILDC1547(CH 2010).

[37] See the reasons provided in Tzanakopoulos (n 1) 63ff.

under the UN Charter, including the obligation to grant the UN immunity, priority over general international law.[38]

Thus, Article 103 of the Charter, in addition to applying only to the immunity of the UN, does not in doctrine or practice appear to resolve the conflict between IO immunity and fair trial rights determinatively.

C. Conclusions on conflict rules and rules of normative hierarchy

It is clear that *jus cogens* does not resolve the conflict between IO immunity and fair trial rights in favour of fair trial rights, allowing domestic courts to lawfully exercise jurisdiction over IOs.

Though there is some practice on adopting conflict rules to determine the conflict between IO immunity and fair trial rights one way or the other, this practice is not consistent. Nor can rules such as *lex posterior* be applied to the conflict due to the structural requirements for the application of the rule. The *lex specialis* rule when applied to the conflict is subjective, allowing the conflict to be determined either way and, on the basis of practice and doctrine, Article 103 of the UN Charter also does not resolve the conflict decisively. Thus, it cannot be said that conflict rules or rules of normative hierarchy can be employed to resolve the conflict between IO immunity and fair trial rights. In any case, conflict rules and *jus cogens* do not provide a basis for domestic courts to lawfully exercise jurisdiction over IOs and thereby induce compliance with IOs fair trial obligations

[38] ibid 65. See particularly the discussion at footnotes 149-153.

including implementing the responsibility of IOs for the breach of their fair trial obligations.

II. THE DENIAL OF IMMUNITY AS THE SUSPENSION OF A TREATY ON ACCOUNT OF A MATERIAL BREACH OR AS A COUNTERMEASURE

The practice demonstrates that courts recognize the possibility of denying IOs immunity on the basis of the failure of the IO to fulfil its obligation to create means to settle disputes and, predominantly in the US, on the basis of 'abuse of immunity' by the IO.[39] 'Abuse of immunity' has not been defined by the courts, but it is reasonable to presume that, in this context, it would include a violation of the obligation to create means for the settlement of disputes and to provide a remedy in circumstances where the IO enjoys immunity from jurisdiction.

Two possible legal justifications for denial of immunity on the basis of a failure by the IO to create means to settle disputes are 1) since immunity is conferred by treaty and since the obligation of the IO to create means to settle disputes is also usually set out in the treaty, that the obligation to grant immunity can be suspended due to the material breach occasioned by the failure of the IO to create means to settle disputes and 2) that the wrongfulness of the denial of immunity is precluded as the latter is a lawful countermeasure taken in response to the breach by the IO of the obligation to ensure fair trial rights.

[39] See chapter 4, sections IIIA and B.

A. Suspension of the obligation to grant immunity due to material breach of the treaty conferring immunity

Articles 60(1) and 60(2) of the VCLT provide that a party to a bilateral treaty or a specially affected party to multilateral treaty may terminate or suspend the operation of the treaty as against the defaulting party in the event of a material breach of the treaty. These rules are also part of customary international law.[40]

1. The requirement of a 'material breach'

The first condition for suspension on account of material breach is that the defaulting party must have committed a 'material breach'. Article 60(3) defines a material breach as 'a repudiation of the treaty not sanctioned by the present articles' or 'the violation of a provision which is essential to the accomplishment of the object and purpose of the treaty'. Since there is no repudiation of the treaty[41] when an IO fails to fulfil its obligation to create means to settle disputes, it is the latter provision that is applicable.

A provision imposing an obligation on an IO to create means to settle disputes is a provision which is essential to fulfil the object and purpose of a treaty regulating the privileges and immunities of an IO. As held by several courts[42] and as reflected in domestic

[40] Bruno Simma and Christian J Tams, 'Termination and Suspension of the Operation of Treaties, Art.60 1969 Vienna Convention' in Olivier Corten (ed), *The Vienna Conventions on the Law of Treaties: a commentary* (Oxford University Press 2011) 1355ff.

[41] The VCLT does not define 'repudiation' However the drafting history evinces that it was meant to encompass all means by which a party intends to relieve itself from its obligations under a treaty, ibid 16. See also *Namibia* 1971 ICJ Rep 16 [95]; Cf Fitzmaurice dissent 1971 ICJ Rep, Annex [6].

[42] E.g., *Cumaraswamy* [66]; *Consortium X. v. Swiss Federal Government* (Conseil federal, Switzerland) ILDC344(CH2004).

legislation,[43] it is the obligation of the IO to create means to settle disputes that 'offsets' the immunity of IOs,[44] and allows for immunity to be granted without violating the right to a fair trial.[45] If the IO does not create means to settle disputes, the State may well be in violation of its obligation to provide a fair trial to persons within its jurisdiction. Thus, the provision requiring IOs to create means to settle disputes is a provision that is material to the 'accomplishment of the object and purpose of the treaty',[46] to grant privileges and immunities to IOs without breaching the fair trial rights and individuals and the corresponding obligations of States.

Another factor that makes the provision requiring the creation of means to settle disputes a material provision is the structure of immunity conferring treaties. Immunity conferring treaties such as the CPIUN contain several provisions detailing the immunities and privileges to be afforded to the IO itself, its officials, property, archives, experts etc.[47] In contrast, the provision requiring the creation of means to settle disputes is the sole provision which deals with the obligations of the IO to provide alternative remedies with

[43] Swiss Host State Act Loi fédérale du 22 juin 2007 sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte, RS 192.12, section 28 which requires the Federal Council to ensure that the beneficiary of immunity adopt appropriate measures with a view to the satisfactory settlement of: a. disputes arising out of contracts to which the institutional beneficiary may be a party and of other private-law disputes; b. disputes involving staff of the institutional beneficiary who enjoy immunity by reason of their official capacity, unless that immunity is waived.

[44] *Cumaraswamy* , Verbatim Record 10 December 1998, 8.

[45] See also Diaz-Gonzalez, Fourth report on relations between States and international organizations (second part of the topic) A/CN.4/424, (1989) IIYBILC (Part One), 161[59], who states that although the adverse impact of IO immunity on fair trial rights seems excessive, 'it is expressly limited by the obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in which they may become involved. This obligation is enshrined in all existing headquarters agreements…'.

[46] VCLT, Article 60(3).

[47] See e.g., CPIUN, Articles II – VI.

respect to all these different types of immunity. The provision is usually in two limbs and includes the obligation to create means for the settlement of disputes to which the IO is a party[48] and the obligation to create means to settle disputes involving any official, who by virtue of her official position, enjoys immunity.[49] The position of the provision in the scheme of the treaty as the provision that sets out the obligations of the IO with respect to all its different forms of immunity makes it a material provision.

Moreover, the importance of the rights at stake in a situation where the IO does not fulfil its obligation to create means to settle disputes, the fair trial rights of individuals, also renders the provision enshrining the obligation one that is essential to fulfil the object and purpose of the immunity-conferring treaty.

2. Being 'a specially affected party'

In the case of a bilateral treaty, for instance a headquarters agreement between the State and an IO, the *prima facie*[50] ability of the State to suspend the operation of the treaty in whole or in part under Article 60(1) is straightforward. The IO, having failed to fulfil the essential obligation of providing means for the settlement of disputes, has committed a material breach of the treaty, allowing for the State to suspend the operation of the immunity-conferring treaty provision and to exercise jurisdiction over the IO.

[48] E.g., CPIUN, Article VIII, section 29 (a).

[49] E.g., CPIUN, Article VIII, section 29 (b).

[50] Subject to the substantive and procedural requirements discussed *infra.*

In a multilateral treaty such as the CPIUN, the situation is different. In the event of a breach by the IO,[51] the States parties can by unanimous agreement suspend the operation of the treaty in whole or in part.[52] If there is no such unanimous agreement, then a State party must be 'specially affected' in order to suspend the operation of the treaty in whole or in part between itself and the IO.[53]

The Commentary to what became Article 60 of the VCLT says little regarding what constitutes a specially affected State.[54] However, the wording of the provision suggests that to be specially affected, the State must have an interest in the performance of the obligation violated that goes beyond the general interest of the parties that the obligations under the treaty are respected.[55] It appears reasonable to conclude that a breach of an obligation of a bilateralisable or reciprocal nature in a multilateral treaty will render a party specially affected if there is a breach of such an obligation with respect to itself.[56]

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[51] Though the UN is not party to the CPIUN, it is uncontroversial that the UN acquires rights and obligations under it. Therefore, a State should be able to respond to a breach by the UN. See *Reparation*, 178.

[52] VCLT Article 60(2)(a).

[53] Article 60(2)(b). Since immunity conferring treaties are not of an integral or interdependent nature (see n 56) below, Article 60(2)(c) is not applicable.

[54] 1966 IIYBILC 187, 255[7] merely restates the text of Article 60(2)(b).

[55] Simma and Tams (n 40) 1364.

[56] Bruno Simma, *From Bilateralism to Community Interest in International Law [Electronic Resource]* (Brill 1997) 351[102]. For the classification of multilateral treaties as those containing reciprocal obligations, interdependent obligations and treaties of a law-making character, see G. Fitzmaurice, Second Report on the Law of Treaties A/CN.4/107 II YBILC 16,31. Sir Humphrey Waldock rejected this classification, providing for 'any other party' to suspend a treaty on occasion of a material breach of any kind of treaty, see draft Article 20(4)(a) 1963 IIYILC,73. However, following criticism from States, the classification between different types of obligations was arguably reintroduced in the text of Article 60(2)(a),(b) and(c) see 1966 IIYILC, Annex,17. Thus, 'specially affected state' could simply be shorthand for Fitzmaurice's initial rule that a state could refuse performance in their relations with the defaulting party of treaty obligations of a mutual and reciprocal nature.

In a multilateral treaty providing for immunity to IOs and providing for an obligation on the part of the IO to create means to settle disputes, the obligations are bilateralisable between each State party and the IO. Thus, when the IO does not create means for the settlement of disputes, each state party can be considered to be specially affected insofar as persons within its jurisdiction do not have a forum for the settlement of their claims. Moreover, when such claims are brought before domestic courts, upholding the immunity of the IO with the result that the State is in breach of its fair trial obligations would potentially result in the State being specially affected by the IO's breach.

3. Other substantive requirements

There are several other substantive requirements that need to be fulfilled for a State to be able to suspend the operation of a treaty on account of a material breach under Article 60. These include that the suspending State has not itself brought about the breach,[57] that the breach has not been acquiesced to[58] and arguably that the response must be proportionate to the breach.[59]

[57] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 1997 ICJ Rep,7, 67[110].

[58] VCLT Article 45(b); *ICAO Council* (India/Pakistan), ICJ, Counter Memorial of Pakistan 29 February 1972, 385[43].

[59] There is no reference to proportionality in Article 60 and there is some practice to the effect that proportionality does not apply to suspensions for material breach. See ICAO Council (India/Pakistan), ICJ, Reply of India, 17 April 1972[50]. Some authors argue that the requirement of proportionality is inbuilt into the requirement of a 'material' breach. See Mohammed M Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff 1996) 120. However, there appears to be evidence to suggest that proportionality, in the sense that the intensity of the response must not be out of proportion to the breach, is generally applicable to all reactions to breaches of international law, including the rights of parties under Article 60. Willem Riphagen, Preliminary Report on State Responsibility, 1980 IIYBILC, 112[27]. See also Linos-Alexander Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 European Journal of International Law 341, 358.

The concept of proportionality, particularly with respect to reactions to breaches of international law is notoriously fluid.[60] In general terms however, it cannot be said that the denial of immunity and the exercise of jurisdiction by domestic courts is a disproportionate reaction to the breach of the obligation to create means to settle disputes. The denial of immunity provides claimants with a forum to hear their claims and addresses precisely the rights violation — the violation of the right to a fair trial, that the breach of the obligation to provide means to settle disputes has occasioned. The denial of immunity is reversible to the extent that (a) the State can refrain from enforcing the judgment if the IO complies with its fair trial obligations and (b) the domestic court can resume granting immunity when the IO has ceased its wrongful conduct by creating appropriate means to settle disputes.[61] Thus, the intensity of the response is not out of proportion to the breach.

4. Procedural requirements

A formidable obstacle to the argument that denial of immunity can be justified as a response to the material breach occasioned by the failure of the IO to create means to settle disputes is the procedural requirements set out in Article 65 of the VCLT.

Article 60(1) and 60(2)(b) of the VCLT state that a material breach by one of the parties entitles the other party to a bilateral treaty or a specially affected party to a multilateral treaty to 'invoke [the breach] as a ground for suspending the operation of the treaty in whole or in part'. This is in contrast to Article 60(2)(a) which allows the non-

[60] Sicilianos (n 59) 357.

[61] On this, see the example of Italian courts and the immunity of the FAO, chapter 6, section IIB 2.

offending parties to a multilateral treaty by unanimous agreement to 'suspend the operation of the treaty' and not merely invoke it as a ground for suspension in the event of a material breach. Since Article 60(2)(b) only provides for invoking material breach as a ground for suspension, the actual suspension, as per the scheme codified in the VCLT, will take effect when the procedure for suspension set out in Articles 65 - 67 is followed.[62]

Article 65 states that a party which *inter alia* invokes a ground for 'suspending [the treaty's] operation' must notify the other party of the claim and that the measure may be carried out if no objection is raised within a period of three months. If an objection is raised, the parties must seek a solution through the means set out in Article 33 of the UN Charter. The notification under Article 65 must be in writing (VCLT Article 67(1)) and any act suspending the operation of a multilateral treaty under Article 65(2) or (3) shall be carried out through an instrument communicated to the other parties to the treaty (Article 67(2)).[63]

The obstacle to analysing the practice of denying immunity as a suspension of the obligation to grant immunity in response to the IO's breach of the obligation to create means to settle disputes is that domestic courts' denial of immunity is not preceded by a formal notification as required by VCLT Article 65. It is difficult to characterise any part of the practice of domestic courts denying immunity as the State providing a written notification of its intention to suspend the treaty providing for immunity. While one could

[62] Simma and Tams (n 40) 1375[67].

[63] It is unlikely that the specifics of Article 65 – 67 of the VCLT constitute CIL. However, the requirement for notification prior to suspension on account of material breach likely constitutes CIL. See text at (nn 67ff below).

perhaps argue that the service of summons, court documents and proceedings constitute such notification, such an argument seems strained and, it is submitted, is not sustainable.

The only means for the argument that a denial of immunity is a response to a material breach of the treaty by the IO under Article 60 of the VCLT to hold, then, is if the procedural requirements in Articles 65-67 are not mandatory, if they do not form part of a parallel CIL rule allowing for suspension of treaty obligations on account of material breach, or if the failure to adhere to the requirements does not, in all instances, render the measure suspending the treaty obligation unlawful.

There is some authority for the proposition that the procedural requirements are mandatory for the lawful suspension of a treaty obligation, at least within the VCLT regime. Article 42(2) VCLT states that the suspension of the operation of a treaty 'can only take place as a result of the application of the provisions of the treaty or of the present Convention'. Sir Gerald Fitzmaurice in his Second Report on the Law of Treaties stated that 'any purported termination, suspension, or withdrawal whatsoever, that does not conform with these requirements…is invalid and inoperative and does not constitute or give rise to termination or suspension'.[64]

In his separate opinion in *Application of the Interim Accord of 13 September 1995*[65] Judge Simma opined against letting reactions to lesser breaches 'off the leash set up by

[64] Fitzmaurice, Second Report, 22-23.

[65] (The Former Yugoslav Republic of Macedonia/Greece) 2011 ICJ Rep 695.

Article 60, particularly its procedural conditions',[66] thereby implying that the procedural conditions are mandatory.

However, it appears that in practice, the procedural conditions for the suspension of treaties set out in the VCLT have not been considered indispensable. The principle behind the rule in Article 60, as recognized by the ICJ in *Namibia*,[67] is 'that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship'.[68] The ICJ recognized the foregoing as a 'fundamental principle'[69] and then proceeded to regard General Assembly resolution 2145(XXI) 'as the exercise of the right to terminate' the South West Africa Mandate without referring specifically to the fulfilment of any procedural requirements.[70] This suggests that the fundamental principle recognized by the Court is part of customary international law or is a general principle of law, without the procedural obligations under Article 65-67 of the VCLT. This reading is also supported by eminent authority. Judge Anzilotti has stated that the principle *inadimplenti non est adimplendum* is 'so just, so equitable, so universally recognized' and that it is 'one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its

[66] Ibid, 705 [22].

[67] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, 1971 ICJ Rep 16.

[68] Ibid [91].

[69] Ibid.

[70] Ibid [92].

Statute'.[71] There is no evidence that this general principle is conditioned by the procedural requirements.[72]

However, in *Gabcikovo*, the ICJ held that 'Articles 65 to 67…if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith'.[73] It could well be that the precise conditions set out in Articles 65-67 of the VCLT are not part of custom, but that custom requires some form of notification to be given prior to suspending a treaty on occasion of material breach in order that the process is not abused.

The procedural requirements under Article 65(1) refer to 'suspending [the treaty's] operation' and omit the phrase 'in whole or in part' which is found in Article 60 VCLT. This has led some scholars to argue the procedural requirements in Article 65(1) apply only to cases of suspending the entire treaty and not to suspension of individual provisions or parts of the treaty.[74] However, while the text of the provision as well as the ILC Commentary to what became Article 65 of the VCLT appear to refer to the suspension of the treaty as a whole,[75] it is difficult, as a matter of principle, to draw a distinction between the arbitrary suspension of a provision in a treaty to the detriment of the other party and

[71] *Diversion of Water from the Meuse* Judgment, 1937, PCIJ Series A/B No. 70,50 (dissenting opinion Judge Anzilotti).

[72] See e.g., FL Kirgis, 'Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties' (1989) 22 Cornell international law journal 549, n 6 who states that is unlikely that definite time limits represent custom, though the principle of peaceful dispute settlement reflected in articles 65-68 does. See also *Diversion of Water* (Separate Opinion Judge Hudson), 77.

[73] *Gabcikovo* [109].

[74] Kirgis (n 72) 558.

[75] E.g., 1966 IIYBILC 187, 262[1].

the suspension of the entire treaty. The obligation to carry out treaty obligations in good faith, if it does indeed underly the procedural obligations which are codified in Article 65,[76] would militate against being able to suspend parts of treaties without following the procedural safeguards, just as much as suspending entire treaties.

It is therefore difficult to conclude that no procedural requirements form part of the customary rule allowing for suspension of treaties in whole or in part in the event of material breach, or that the procedural rules are not mandatory, whether one is applying the rule in Article 60 VCLT or the customary regime that mirrors it.

There are however some situations in which failure to adhere to the procedural requirements will not nullify the suspension of a treaty provision in response to a material breach. VCLT Article 65(5) provides that 'without prejudice to article 45,[77] the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification *in answer to another party claiming performance of the treaty* or alleging its violation'. The Commentary to what became Article 65(5) of the VCLT provides that 'a State might well not have invoked the ground in question before being confronted with a complaint…it would seem right that a mere failure to have made a prior notification should not prevent a party from making it in answer to a demand for performance of the treaty or to a complaint alleging its violation'.[78]

[76] *Gabcikovo* [109].

[77] Which addresses *inter alia* with the loss of the right to suspend the treaty due to acquiescence.

[78] 1966 IIYBILC 187, 263.

Thus, it would appear that the procedural requirements are not mandatory when responding to a party claiming the performance of the treaty or in defence to a claim that the treaty has been violated.[79]

In *Application of the Interim Accord of 13 September 1995*[80] Greece relied on Article 65(5) of the VCLT and argued that if a State is suspending part of a treaty 'in answer to another party . . . alleging its violation', *ex ante* notice is not required.[81]

The Court held that 'that the Respondent has failed to establish that the action which it took…was a response to the breach of Article [X] approximately four years earlier.[82] The Court did not rely on Greece's obvious failure to fulfil the procedural requirements under Article 65 of the VCLT but appeared to suggest that the requirement is that Greece demonstrate that the action was 'a response' to the FYRM's breach. While it may be that proving that a State's action was a response to the material breach is only one of several conditions that need to be fulfilled in order to successfully invoke a suspension of treaty obligation under VCLT Article 60, the Court's silence on Greece's stated position that *ex ante* notice is not required in a situation of responding to a claim for performance of the treaty or an allegation of breach is noteworthy.

[79] See also *Interim Accord of 13 September 1995*, ICJ, Rejoinder Greece, 27 October 2010, 194[8.19] referring to Article 65(5) as the 'shield face' of the response to treaty breaches under the law of treaties, as opposed to the 'sword face' of Article 60(1).

[80] (The Former Yugoslav Republic of Macedonia('FYRM')/Greece) 2011 ICJ Rep 644.

[81] Ibid [118]. This was different to Greece's argument that its alleged breach was justified by the principle of *exceptio non adimpleti contractus* which was independent of Article 60 and, as per Greece's position, contained no procedural requirements, ibid [115].

[82] Ibid [163].

The Court's decision may be interpreted to mean that a party adopting the argument that a treaty has been suspended on account of material breach as a defence, i.e., in response to a party alleging the treaty's violation, need demonstrate only that its actions were taken as a response to the material breach.[83] This reading is consistent with the text of Article 65(5) of the VCLT and the commentary thereto, which requires the State only to 'make the notification *in answer to* another party…alleging its violation'.[84] The requirement of notification therefore, remains, but the requirement for prior notification is dispensed with, with notification being allowed in response to the claim. When invoked as a defence under Article 65(5), the State concerned, in accordance with the fundamental principle of *inadimplenti non est adimplendum* is allowed to suspend, at the very least, obligations related to the obligations breached by the other party.[85]

The case of denying an IO immunity when a claim against an IO is brought before a domestic court can be characterized as a situation in which the IO claims the performance of the treaty. When a claim against an IO is before a domestic court, the IO makes an application to the court, either in person or through the executive branch of the state, requesting the court to give effect to its immunity from jurisdiction. The IO is, therefore, 'claiming the performance of the treaty' as required by Article 65(5) of the VCLT. In such a circumstance, the domestic court's decision that immunity is denied due to the failure of

[83] Cf, Ibid, Separate opinion of Judge Simma [4], which notes that proof that Greece's actions were a response to the Applicant's prior breaches could possibly give rise to the justifications pleaded, including that of suspension due to material breach.

[84] 1966 IIYBILC, 263 [8].

[85] See, Rejoinder, Greece [8.21].

the IO to create means to settle disputes, or even the domestic court's holding that immunity is denied as no reasonable alternative means are available, can be construed as a notification to the IO that the immunity conferring treaty is being suspended due to material breach on the part of the IO.

With respect to the requirement that the domestic court's action be a 'response to the [IO's] breach,[86] domestic courts explicitly refer to the failure of the IO to create means to settle disputes in some cases, and in others the fact that the denial of immunity is a response to the IO's breach is manifest by the reference to the lack of alternative means to settle disputes. Thus, the requirement that the action of the domestic court is a reaction to the prior material breach by the IO is satisfied.

Moreover, the response of the domestic court, to exercise jurisdiction and therefore create a forum before which the individual can have her claim heard on the merits, directly addresses the consequence of the breach on the part of the IO – that the individual's right of access to court as an element of the right to a fair trial is violated. Thus, the denial of immunity is the suspension or denial of an obligation related to that breached by the IO.

Thus, when employed as an answer to another party claiming performance of the treaty, the denial of immunity by domestic courts could, potentially, be justified as a suspension of the immunity-conferring treaty provision in response to the material breach of the IO in failing to create means to settle disputes.

[86] *Interim Accord* [163].

B. Countermeasures

The wrongfulness of the breach of the State's obligation to grant immunity could be precluded if the denial of immunity is a lawful countermeasure.

1. The Difference between suspension due to material breach and countermeasures

Though the *effect* of characterizing a denial of immunity as a countermeasure may appear similar to characterizing a denial of immunity as a response to a material breach – the wrongfulness of the denial thereby being precluded – the two are clearly very different.[87] While both the suspension of a treaty due to material breach and countermeasures are actions taken in response to internationally wrongful conduct, the former is a primary rule with respect to the law of treaties whilst the latter falls within the secondary rules of state responsibility.[88] Whilst the former results in suspension of the primary obligation under the treaty, in the latter case, the primary obligation is unaffected and it is only the wrongfulness of the breach and therefore the secondary obligations of cessation and reparation for the responsive breach that are affected.[89]

The requirements for characterizing an otherwise wrongful act as a countermeasure are also different to characterizing the act as a response to a material breach of a treaty

[87] See *Interim Accord* Separate Opinion Simma, 704 [20] 'Article 60 has nothing to do with State responsibility, and State responsibility has nothing to do with the maxim *inadimplenti non est adimplendum*… they may "look alike" for practical purposes while being subjected to a different legal regime'.

[88] ARSIWA Commentary, Introduction Part Two, 86[1].

[89] ARSIWA Commentary Introduction Part 3 Chapter II, 128[4].

under Article 60 of the VCLT. For instance, the breach giving rise to countermeasures need not be 'material' and the procedural restrictions for countermeasures are not as strict as those for the application of Article 60 of the VCLT.[90]

There is some scholarly support for the view that the regime put in place by Article 60 of the VCLT is exclusive and prohibits reliance on countermeasures to preclude the wrongfulness of a breach of a treaty, at least with respect to non-material breaches of a treaty.[91] This view is however contradicted by Article 73 of the VCLT, which excludes State Responsibility from the scope of the VCLT and has been contradicted by the decisions of international courts and tribunals, which have applied the law of countermeasures to treaty violations.[92] A State can therefore resort either to suspending the performance of treaty obligations under Article 60 of the VCLT or to countermeasures in the event of a breach by another party.[93]

2. Conditions for the taking of countermeasures

If taken, countermeasures must be in response to a previous internationally wrongful act of another State and must be directed against that State in order to induce it to comply with its secondary obligations of cessation and reparation.[94] Since countermeasures are directed

[90] See James Crawford, Third Report on State Responsibility, A/CN.4/507/Add.3 [355-60].

[91] See e.g., DW Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 Virginia journal of international law 295, 372ff.

[92] E.g., *Air Services Agreement* 18 RIAA, 443 [81-82]; *Gabčíkovo* [47].

[93] *Interim Accord* [163,164] considering the two justifications separately.

[94] *Gabcikovo*[83], ARSIWA,49(1).

at compliance with secondary obligations, the effects of the countermeasure must be reversible.[95]

The requirement of proportionality is key in the legal regime governing countermeasures.[96] The effects of a countermeasure must be commensurate with the injury suffered, taking account of the gravity of the internationally wrongful act and the rights in question.[97]

Moreover, there are procedural requirements that need to be fulfilled in the taking of lawful countermeasures. The injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it and must notify the responsible State of any decision to take countermeasures and offer to negotiate.[98] It is only in cases of urgency that the notification requirement may be dispensed with.[99]

3. Application of the conditions to the denial of immunity

The measure of denying immunity in response to the IO's failure to create means to settle disputes is directed against the responsible IO and is reversible.[100] Domestic courts do not

[95] *Gabcikovo* [87]; ARSIWA, Article 49(2), (3). The measure(s) must be terminated when the secondary obligations are complied with, ARSIWA, Article 53.

[96] *Air Services* [83].

[97] *Gabcikovo* [85]; ARSIWA, Article 51.

[98] *Gabcikovo* [84]; ARSIWA, Article 52(1).

[99] ARSIWA, Article 52(2).

[100] The domestic court can apply the IO's immunity in any claims following the cessation of the internationally wrongful act by the IO.

explicitly state that the denial of immunity is in order to induce the IO to cease its wrongful conduct. However, the denial of immunity has the effect of inducing compliance with the IO's secondary obligations.[101] The reasoning of the domestic court is that it is denying immunity as the right to a fair trial is violated since there are no reasonable means available to the claimant to have her claim adjudicated.[102] This measure sends a message to the IO that it needs to cease its wrongful conduct, i.e., that it needs to create means for the settlement of disputes in order to prevent domestic courts denying their immunity.[103] Thus, the action of domestic courts in denying immunity can be said to be directed towards inducing the IO to satisfy its secondary obligations.[104]

With respect to the requirement of proportionality, much the same reasoning as for suspending the treaty provision on account of material breach applies.[105] The ARSIWA states that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[106] The internationally wrongful act of the IO in not creating means for the settlement of disputes

[101] See e.g., Jan Klabbers, 'Self-Control: International Organisations and the Quest for Accountability' in Malcolm Evans (ed), *The International Responsibility of the European Union : European and International Perspectives* (Hart Publishing 2013) 83 stating that the World Bank established its Administrative Tribunal in 1980 in response to the Mendaro suit before US Courts. For the opposite, that denial of a remedy by IOs results in calls to deny immunity, see Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights' A/71/40823, 2.

[102] See cases cited in chapter 4, section IIA.

[103] Klabbers (n 101) 83 stating that the Waite and Kennedy case of the ECtHR has resulted in administrative tribunals being seen as essential elements in IOs, without which the IO has a serious 'legitimacy deficit'.

[104] In addition to also promoting future compliance with the obligation by the IO.

[105] See text at (n 60).

[106] ARSIWA, Article 51.

results in the violation of individual's right to a fair trial. Thus, the consequences of the internationally wrongful act of the IO are grave, resulting in the violation of rights that are of fundamental importance.[107] The domestic court's measure of denying immunity fills precisely the void created by the IO's breach by exercising jurisdiction and creating a forum for the claim to be heard. Thus, the denial of immunity is a 'reciprocal countermeasure' which directly corresponds to the obligation breached.[108]

As with suspending a treaty obligation conferring immunity on account of a material breach, the procedural conditions for the taking of countermeasures pose a significant challenge to characterizing a denial of immunity as a lawful countermeasure. In order to deny IO immunity as a countermeasure, a State would be required to call upon the IO to discontinue its wrongful conduct of not creating means to settle disputes as well as to notify the IO of a decision to take countermeasures and offer to negotiate.

In the cases considered in chapter 4, there is no express calling upon the IO to cease the wrongful conduct nor an offer to negotiate prior to a domestic court denying immunity. However, the procedural conditions set out in the ARSIWA find their basis in the decision in the *Air Services Agreement* arbitration,[109] where the Tribunal was concerned not so much with the form of the notice, as with the principle that countermeasures should be

[107] See *Air Services* [83] 'in the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach'.

[108] Though reciprocity is not a requirement under the ARSIWA, a countermeasure is more likely to be proportionate if it is reciprocal, ARSIWA Commentary,129 (5); *Air Services* [83].

[109] ARSIWA Commentary, 136[3].

'accompanied by a genuine effort at resolving the dispute'.[110] Indeed, the ILC Commentary to the ARSIWA states that 'the principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response.'[111] Thus, it seems that the key factor is the effort to resolve the dispute without leading to a further reaction and thereby an escalation of the conflict. The fact that the form of the notice is not critical is confirmed by the fact that the ARSIWA Commentary also states that in the case of negotiations between the parties leading up to the taking of countermeasures 'the injured State will already have notified the responsible State…and it will not have to do it again in order to comply with [the procedural requirement]'.[112]

With this objective in mind, it could be argued, admittedly employing some *ex post facto* rationalization, that there is a process of negotiation and communication between the IO and the domestic court when a claim against the IO is brought before the domestic court. Firstly, the claim against the IO before the domestic court itself constitutes a form of notice to the IO that its immunity is being considered by an organ of the State. This notice is reinforced by the court serving notice on the IO, which may be characterized as an invitation to the IO to negotiate.[113] The IO is informed that the claimant is relying on the

[110] *Air Services* [91].

[111] ARSIWA Commentary, 136[4].

[112] ARSIWA Commentary, 136[4].

[113] Cf. *Ochani vs WHO* Delhi High Court, OXIO 591 where the court expressly indicated its displeasure at the IO not appearing before it.

failure of the IO to create means to settle disputes and that the court would consider this argument. It could also be argued that the body of case law, particularly before domestic courts in Europe, that IO immunity will be denied in the event that there are no reasonable alternative means to settle disputes constitutes notice to the IO that the domestic court may well deny immunity in the event that the IO does not cease its wrongful conduct.

Secondly, in the course of the argument, the domestic court may fulfil the requirement of calling upon the IO to fulfil its obligations. In *E v T*[114] the domestic court explicitly requested an undertaking from the IO that it will hear the claimant's claim in order to uphold its immunity. In the Indian case of *Amitabha Mitra*[115] the court notified the IO to appear before it, expressed displeasure at the IO not heeding the notice and went on to expressly call upon the IO, through the State of West Bengal which had appeared before the court, to provide the requisite remedy to the Claimant by applying the conditions of contract. In *Ochani*[116] the court requested the government to intervene on behalf of the claimant before the IO to have his grievance redressed. All these instances could be characterised, without stretching the argument to breaking point, as satisfying the requirement of negotiation prior to the taking of countermeasures referred to in the ARSIWA Commentary[117] as well as that of calling upon the IO to fulfil its obligations and offering to negotiate.

[114] (Cour civile de la Cour de Justice de Genève, Cour d'appel, Switzerland), case C/18260/2005-4.

[115] (High Court of Judicature, Calcutta, India) W.P.7154 (W) (2011).

[116] *Ochani vs WHO* (Delhi High Court) (n 113).

[117] ARSIWA Commentary 136[4].

Finally, the judgment itself constitutes the notice of the decision to deny immunity and exercise jurisdiction as a countermeasure. It may also be that the judgment is a notification of the intention to exercise enforcement jurisdiction and provide a remedy if the IO is found liable in the substantive claim.

Thus, if there are no particular requirements of form for the notice given, and the principle underlying the notice requirement is considered, it is plausible that domestic courts do fulfil the requirement that IOs must be called upon to cease their wrongful conduct and are provided notice of the decision to take countermeasures along with an offer to negotiate.

C. Conclusions on suspension in response to material breach and countermeasures

Suspension on account of the material breach of the IO and countermeasures represent the most plausible legal characterizations of the denial of IO immunity by domestic courts. It is probable that a domestic court's denial of immunity could be characterized as a suspension of treaty obligations on account of material breach or a lawful countermeasure and that domestic courts may explicitly resort to these arguments when denying immunity in future cases.

However, as observed above, both arguments have limitations. For one, the suspension of treaty obligations on account of material breach applies only to the obligation to grant immunity to an IO under treaty and not under customary international law. This may not be a significant stumbling block however since as seen in chapters 4 and 5, it is the treaty obligation to grant immunity to IOs that is mostly invoked and considered by

domestic courts.[118] But the satisfaction of the procedural requirements for the application of both suspension of treaty obligations and countermeasures is less than clear cut. One may, not unreasonably, argue that domestic court decisions simply do not provide any evidence that the court is suspending a treaty obligation[119] or taking a countermeasure in response to a prior breach. Both arguments are thus subject to the criticism of being an *ex post facto* justification for a breach of international law by a State's domestic courts.[120]

Thus, without excluding the possibility that these arguments may, in certain circumstances, provide a legal justification for denials of immunity, the remainder of this thesis proceeds on the basis that the limitations to these arguments prevent the invocation of countermeasures or the rule allowing for suspension of treaty obligations due to material breach to legally justify the denial of immunity to an IO. However, the practice of unlawfully denying immunity, as well as other measures taken by domestic courts in claims against IOs, can still have important legal consequences. There are common elements in the practice before domestic courts in claims against IOs which, when taken together, may perform the function of inducing IOs to fulfil their fair trial obligations and also at times of triggering the implementation of the international responsibility of IOs for the breach of this obligation.

[118] See chapter 5, section IB.

[119] Except in cases such as *Drago v IPGRI* (Court of Cassation, Italy) ILDC827(IT 2007), where the inapplicability of the treaty obligation is expressly referred to.

[120] See e.g., *Interim Accord* Simma Separate Opinion [4], accusing Greece of precisely such post-facto justification in relation to both suspension due to material breach and countermeasures.

III. Interim Conclusion: The practice before domestic courts as inducing compliance with IOs' obligations

The case law assessed in chapters 4 and 5 demonstrates that domestic courts' decisions in claims against IOs are not consistent. What little consistency there is can be found in private law disputes before the domestic courts of Council of Europe States, where - following the ECtHR decision in *Waite and Kennedy* - immunity is made subject to reasonable alternative means for the settlement of disputes being available.[121] Another area of consistency is in claims related to the exercise by IOs of governmental power. In such cases, all domestic courts have routinely upheld IO immunity without considering, or despite the absence of, alternative remedies that satisfy the right to a fair trial.[122]

The practice also demonstrates that it is not possible to use a rule of normative hierarchy to resolve the conflict between immunity and the right to a fair trial. With respect to other conflict rules such as *lex specialis* or *lex posterior*, the courts' use of these principles has not been consistent and in any case, it may be structurally impossible to use them to resolve the conflict.

In spite of the inconsistency of the practice, the justification of a denial of immunity as a response to a material breach of a treaty or as a lawful countermeasure taken against the breach of the IO's obligation to create means to settle disputes is plausible. However, it may not be the case that every decision can be justified on these bases, particularly if the

[121] Chapter 4, Section IIA.

[122] Chapter 4, Section IIB.

procedure before the domestic court leading up to the decision to deny immunity does not satisfy the procedural requirements for reacting to a material breach or the taking of countermeasures.

Yet, there is much that *is* common in the practice before domestic courts in claims against IOs. First, in almost all cases, the court explicitly or implicitly refers to the obligation of the IO to create means to settle disputes. In every case in which immunity is made conditional on the presence of alternative remedies, the court highlights the obligation of the IO to create alternative remedies.[123] For instance, in *Y v Banque des états de l'afrique centrale*[124] the French Cour de Cassation held that the plaintiff had no remedy as he could not access the arbitration procedure set up by the IO since this required the IO to waive its immunity, which it had not done. Moreover, the Court held that since the agreement between the IO and the host state Cameroon did not provide an impartial and independent alternative remedy, the bank could not validly claim immunity.[125] Thus, even when courts do not expressly frame their decisions in terms of the *obligation* of IOs to ensure fair trial rights, the courts highlight this obligation by making the grant of immunity conditional on the presence of an alternative remedy.

In other cases, courts expressly base their decisions on the failure of the IO to create means to settle disputes.[126] Even in cases where immunity is upheld despite the lack of

[123] See the cases cited in chapter 4, section IIA.

[124] (Cour de Cassation, France) ECLI:FR:CCASS:2017:SO02638.

[125] Ibid, 4.

[126] See e.g., *UNESCO v. Boulois* (Cour d'appel,Paris , France) 1998 XXIV Yearbook Commercial Arbitration 294.

alternative remedies, the courts highlight the obligation of IOs to create means to settle disputes, at times expressing hope that immunity would 'not translate to no remedy at all',[127] requesting that the government intervene on behalf of the claimant[128] or at least stating that the IO's obligation to create means to settle disputes is an enforceable obligation.[129] Thus, the decisions of domestic courts in claims against IOs *reinforce* the existence and enforceability of the obligation of the IO to create means to settle disputes. The reinforcing of this obligation could be seen as the courts applying the obligation of the IO to ensure fair trial rights in the context of the facts of the case before them.

Second, after reinforcing the obligation of the IO to create means to settle disputes, courts often take some measure which signals to the IO that it must fulfil its obligation to create means to settle disputes. These signalling measures may range from an outright denial of immunity to a range of lesser measures. These measures include, as noted in chapter 4, explicitly stating in the judgment itself that the State should intervene on behalf of the claimant,[130] stating that it 'hopes' that a remedy will be available[131] and ordering the IO to address the claim through the executive branch of the State.[132]

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[127] *Northwest Atlantic Fisheries Organization* v *Amaratunga* (Court of Appeal Nova Scotia, Canada) 2011 NSCA 73 [74] ('*Ameratunga NSCA*').

[128] *Ochani v WHO*.

[129] *Georges* (CA), 14.

[130] *Ochani v WHO*.

[131] *Amaratunga* (NSCA).

[132] *Amitabha Mitra* (High Court of Judicature Calcutta, India) W.P.7154 (W) (2011).

The signalling measures are directed not only towards the IO, but also towards the executive branch of the State to exert pressure on the IO to ensure fair trial rights. Moreover, when a domestic court denies an IO immunity, even if this is based on domestic law, the State is forced to translate this argument to international law terms in order to defend its domestic courts' actions on the international plane.[133] This forces the State, in order not to be held responsible for a breach of the obligation to grant immunity, to highlight the IO's failure to create means to settle disputes[134] or to exert pressure on the IO to create the same. This process is exemplified in the proceedings of the *Cumaraswamy* Advisory Opinion before the ICJ, where the Malaysian domestic courts' denial of immunity led to the UN having to elaborate extensively before the ICJ the procedures it had in place for the settlement of disputes with private parties in fulfilment of its obligations under Article 29 of the CPIUN.[135]

Third, as evident from the above, the practice of domestic courts denying immunity or engaging in a lesser reaction can have the *effect* of spurring States and IOs to create means to settle disputes. This is best exemplified by the case of *Mendaro*[136] where, though the World Bank's immunity was upheld, it became difficult for the World Bank to maintain its lack of remedies for claims by third parties including employees. The US DC Circuit

[133] Tzanakopoulos (n 1) 67.

[134] In *Cumaraswamy*, Malaysia argued following its domestic court's refusal to grant the UN Special Rapporteur immunity that the UN did not have in place appropriate means to settle disputes, Cumaraswamy, Verbatim Record 10 December 1998, 51.

[135] *Cumaraswamy,* Verbatim Record 10 December 1998, 8-11

[136] *Mendaro v.The World Bank* (Court of Appeal, DC Circuit, US) 717 F.2d 610 (1983).

Court of Appeal, while upholding immunity, expressed sympathy with Mendaro and stated that in cases of widespread disregard of employee rights, immunity could potentially be revoked.[137] This resulted in the creation of the World Bank Administrative Tribunal in 1980, with the World Bank President expressly stating in a memorandum to the Executive Directors that without such a tribunal, national courts might assert jurisdiction over complaints against the Bank by staff members.[138]

Thus, the practice of domestic courts in claims against IOs does display consistency in reinforcing IOs' obligations to ensure fair trial rights and responding to the breach of that obligation by either denying immunity or taking some lesser signalling measure directed towards the State and the IO. These measures may have the effect of spurring the State and the IO to cease the IO's wrongful conduct; that is, to create means to settle disputes and to provide remedies, either in the particular case at hand, or with respect to future cases.

What the domestic court practice does then, is to provide a reason for States and the IO to ensure that the IO fulfils the obligation to create means to settle disputes; including, at times, to give effect to the IO's secondary obligations of ceasing the wrongful conduct and where applicable, making reparation for the breach of the obligation to ensure fair trial rights. The practice thus can induce compliance with IOs' obligations to ensure

[137] Ibid, note 41.

[138] Memorandum from the World Bank President to the Executive Directors, dated 14 January 1980, see Raul C Pangalangan, 'The Asian Development Bank Administrative Tribunal' (1997) 7 Asian Yearbook of International Law 209, 210, note 8; Robert A Gorman, 'The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank' (2004) 25 Comparative Labor Law & Policy Journal 423.

fair trial rights to private parties, and, in turn, may result in the adjudication and enforcement of the legal responsibility of IOs for the breach of their obligations. Even if the court's reaction of denying immunity results in a violation of the State's obligation to grant immunity to the IO, it contributes to ensuring compliance by the IO with its own obligations, guaranteeing the fundamental human rights of affected individuals and, insofar as the domestic court decision results in a claimant in a particular case against an IO being provided a means for the settlement of her dispute with the IO (as opposed to the IO setting up a dispute settlement mechanism for future claimants —the unfortunate plight of Mendaro), it contributes to implementing the responsibility of IOs for the breach of their international obligations. It is to the manner in which the practice of domestic courts performs this role of inducing compliance with IOs' fair trial obligations that Chapter 6 turns.

PART III

PROMOTING COMPLIANCE WITH IOS' FAIR TRIAL OBLIGATIONS

CHAPTER 6

INDUCING COMPLIANCE WITH IOS' FAIR TRIAL OBLIGATIONS THROUGH TRIGGERING REACTIONS FROM STATES AND IOS

Having considered the practice of international and domestic courts and tribunals in chapters 3 and 4 and specifically whether practice has carved out an exception to immunity where the IO does not ensure fair trial rights in chapter 4; as well as whether other rules of international law may operate to render a denial of immunity lawful in chapter 5, the present chapter turns to the effects of court decisions in claims against IOs on inducing compliance with IOs' fair trial obligations through triggering reactions from States and IOs.

The chapter argues that the most significant contribution of decisions of domestic courts in claims against IOs is not one that is captured by the debate on whether the denial of immunity and the exercise of jurisdiction by domestic courts is lawful. The denial of immunity to an IO by a domestic court could be unlawful, but the decisions of domestic courts in claims against IOs, including, but not limited to, decisions denying immunity, may result in positive consequences for compliance with international law and in turn, for enforcing legal responsibility under both international and domestic law.

As demonstrated below, the decisions of domestic courts have led to IOs complying with their obligation to ensure fair trial rights, whether by accepting the decision of the domestic court in the case at hand or by creating alternative means for the settlement of

disputes as a result of domestic court decisions. Therefore, domestic court practice in claims against IOs including, but not limited to decisions denying immunity, can and do contribute to the fair trial rights of individuals being upheld, the obligations of States to ensure fair trial rights being discharged, and IOs' obligation to ensure fair trial rights being fulfilled. In situations where the domestic court decision results in the availability of means to settle disputes for the claimant in the particular case, the decision results not only in the fulfilment of the IO's fair trial obligations, but also in the implementation of the international legal responsibility of the IO for the breach of its fair trial obligations. This is through the cessation of the wrongful act of failing to ensure fair trial rights to the particular claimant.[1]

Thus, domestic court decisions, including those that potentially unlawfully deny IOs immunity, may trigger compliance by IOs with their fair trial obligations, including at times implementing the responsibility of IOs for the failure to ensure fair trial rights. The fulfilment of fair trial obligations in turn results in the adjudication and enforcement of the legal responsibility of IOs for breaches of their other obligations under domestic and international law. There are structural reasons for domestic court decisions being able to trigger compliance with IOs' fair trial obligations. The decisions of domestic courts in claims against IOs provide an incentive to IOs to guarantee fair trial rights, lest their immunity be threatened by domestic courts. The decisions also provide States with a reason to ensure that the IO fulfils its obligation, lest the State is held responsible for denying immunity to IOs.

[1] See chapter 2, Section III.

To be sure, there are limitations to this argument. The examples analysed in this chapter demonstrate that domestic court decisions may and on numerous occasions have, triggered reactions from States and IOs which result in IOs complying with their fair trial obligations. No claim is made that there is a necessary causal relationship between decisions of domestic courts in claims against IOs and the fair trial obligations of IOs such that the former *always* induce compliance with the latter. All that can be demonstrated is that there are structural reasons which allow for domestic court decisions to trigger compliance with IOs' fair trial obligations and that examples demonstrate that this does take place in practice. The specific reasons, if any, that result in a domestic court decision necessarily generating reactions from States and IOs so that IOs' fair trial obligations are discharged are beyond the scope of the claim made in this section of the thesis.

Furthermore, domestic court decisions may result in only an improvement to IOs' compliance with its obligations to ensure fair trial rights and a partial implementation of its responsibility for the breach of these obligations. The impact on States and IOs of domestic court decisions may also differ based on which domestic court the decisions come from. The response of IOs to the US Supreme Court and other courts where IOs' headquarters are located is different to their reaction to decisions from less influential States, or lower courts.[2] The reaction of States and IOs to domestic court decisions may also differ based on whether the claim is with respect to employment matters or the commission of torts through human rights violations. Moreover, there may be situations in

[2] See particularly, the examples of the reform of the IFC's and the World Bank's internal accountability mechanisms, section II B below.

which the IO and other member States compel the relevant State to ensure that its domestic courts respect the immunity of IOs.[3] However, far from being a case of limiting the impact of domestic court decisions in a manner detrimental to inducing compliance with IOs' fair trial obligations, this reaction by IOs and other States is a safeguard to ensure that domestic courts do not abuse the tool of denying immunity to IOs.

The chapter will be organized as follows: Section I discusses the possible reasons for IOs' obligations to ensure fair trial rights often remaining unfulfilled and the responsibility for the breach of the obligations remaining engaged but unimplemented — the lack of incentive for States to implement the responsibility of IOs and the lack of incentive for IOs themselves to fulfil their obligations. Section II describes the role that domestic courts play in inducing compliance with IOs' obligations to ensure fair trial right with examples of where this has taken place in practice. Section III discusses some limitations to this argument.

I. THE FAILURE OF IOS TO FULFIL, AND OF STATES TO ENSURE THAT IOS FULFIL, IOS' FAIR TRIAL OBLIGATIONS

A. The failure of IOs to fulfil their fair trial obligations

IOs have demonstrated marked reluctance to fulfil their fair trial obligations in the absence of pressure from States. As noted in the literature, the list of mechanisms within IOs for

[3] See e.g., the example of Italian courts and the FAO, section II B.

the resolution of disputes with private parties other than employees is rather short.[4] A striking example of the reluctance of IOs to fulfil their obligations to ensure fair trial rights is the fact that, though the text of the relevant SOFAs is clear that standing claims commissions must be established for the settlement of third-party claims,[5] UN Missions and host States have not set up claims commissions under SOFAs.[6] This has been attributed in the literature to the unwillingness of the UN in its amicable settlement practice to move on from the negotiation stage to third party adjudication.[7] However, as set out in chapter 2,[8] independent and impartial third party adjudication is required in order required to fulfil an individual's fair trial rights.

There are several instances of the UN refusing to accept claims from private parties on the basis that they are not private law claims. In addition to the refusal of the Haitian cholera claims,[9] where several legal experts including the UN's Special Rapporteur on

[4] See e.g., Kristina Daugirdas, 'Reputation and Accountability Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' [2019] International Organizations Law Review 11, 11 referring inter alia to the World Bank Inspection Panel and similar mechanisms at other international financial institutions, the Ombudsperson for the ISIS and Al-Qaida Security Council sanctions regime, and the UN Mission in Kosovo Human Rights Advisory Panel.

[5] The Report of the Secretary General accepts this position, UN Secretary General, 'Procedures in Place for the Implementation of Article VIII section 29, of the Convention on the Privileges and Immunities of the United Nations' A/C.5/49/65, 24 April 1995 [16].

[6] Yale Transnational Development Clinic et al, 'Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic' (2013) 3.

[7] See e.g., Kirsten Schmalenbach, 'Dispute Settlement (Article VIII Sections 29–30 General Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (OUP 2016) 79.

[8] See chapter 2, sections I, IIG.

[9] One may claim that the UN fulfilled its responsibility with respect to the obligation to provide a remedy by setting up a fund to compensate victims. But quite apart from the fact that the contributions to the fund did not come anywhere close to the targets and compensation was not dispersed, (see OHCHR, 'UN inaction denies justice for Haiti cholera victims, say UN experts', Press release 30 April 2020 https://www.ohchr.org/en/press-releases/2020/04/un-inaction-denies-justice-haiti-cholera-victims-say-un-

extreme poverty and human rights noted that the refusal had no basis in law,[10] the UN has refused to set up claims commissions to consider claims by Rwandan nationals for the UN's failure to prevent genocide in Rwanda[11] and refused to accept claims for damage caused to Roma populations by lead poisoning.[12]

Less prominent but equally important is the fact that, as noted by the Redesign Panel for the system of internal justice at the UN in 2006, the system of justice within the UN had not undergone any substantial redesign since its establishment early in the life of the UN, despite significant developments in the rights of individuals to a fair trial and the obligation of the UN to ensure these rights.[13]

These examples demonstrate a tendency on the part of IOs, the UN in these particular instances, to prioritise the assertion of its privileges and immunities as opposed

experts?LangID=E&NewsID=25851 (accessed 18 March 2022)), the UN never set up a forum for the settlement of private law disputes of the claimants, thereby violating their right to access a forum for the settlement of disputes.

[10] Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', 26 August 2016, A/71/40823 [3].

[11] United Nations, Letter dated 25 November 2014 by Assistant Secretary-General Pedro Medrano (2014) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=32377> (accessed 16 September 2022) [91]; Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law n 5.

[12] Kristen Boon and Frederic Megret, 'New Approaches to the Accountability of International Organizations' (2019) 16 International Organizations Law Review 4.

[13] UNGA, Report of the Redesign Panel on the United Nations system of administration of justice A /61/205 28 July 2006 [7] 'The system of administration of justice as it currently stands is extremely slow, underresourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments'.

to fulfilling its obligation to ensure fair trial rights. This tendency, as noted at the outset of this thesis,[14] is also evident in other IOs.[15]

B. The reluctance of States to ensure that IOs fulfil their fair trial obligations

As more fully described in chapter 2, when IOs breach their obligation to ensure fair trial rights, the international responsibility of the IO is engaged.[16] An important manner under international law in which IOs can be made to comply with their fair trial obligations is for States to invoke and implement IOs' responsibility for the breach, i.e., to give effect to the obligations of cessation and reparation which arise for the IO by virtue of its internationally wrongful act.[17]

1. The obligation to ensure fair trial rights is owed to States

The obligation of IOs to ensure fair trial rights under treaty and general international law is owed to States.[18] Though individuals may be the beneficiaries of such obligations, they

[14] See chapter I section V.

[15] See section IIB below.

[16] Chapter 2, Section III.

[17] Cf. ARSIWA Commentary, 116 – introduction to Part Three.

[18] See e.g., Georges v United Nations 15- 455- cv (Court of Appeal for the Second Circuit) August 2015 fn 51,53; August Reinisch, *International Organizations before National Courts* (Cambridge University Press 2000) 288; Tobias Irmscher, 'Immunities and the Right of Access to Court — Conflict and Convergence', *Remedies and Responsibility for the Actions of International Organizations*, vol 2011 (Brill Nijhoff 2014) 464.

may not, in the absence of processes set up under the respective treaties,[19] invoke the responsibility of the IO for the violation of these obligations.[20] Thus, in a situation of the IO not ensuring fair trial rights to private parties, it is the State concerned that must invoke and implement the responsibility of the IO.[21]

There are several means for a State to do so. One means is for a State to call informally for the fulfilment of the IO's obligation.[22] This includes by making statements within the organs of the IO[23] or by written communication to the IO.[24] Additionally, a State may formally invoke and implement the responsibility of an IO for the failure to ensure the fair trial rights of individuals by presenting a claim against the IO through commencing

[19] E.g., human rights treaties, bilateral and regional investment protection agreements, see ARSIWA commentary to Article 33[4]. IOs are generally not party to treaties which allow individuals to bring claims under international law. An exception will be if the European Union accedes to the ECHR. Article 6(2) of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] 2007/C 306/01 provides that the EU 'shall accede' to the ECHR. See José Maria Beneyto, 'Accountability of International Organisations for Human Rights Violations' (Council of Europe, Committee on Legal Affairs and Human Rights 2013) para 42.

[20] Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 120 ff.; Simone Gorski, 'Individuals in International Law', *Max Planck Encyclopedias of International Law* (2013) para 26. See also *Pázmány University v State of Czechoslovakia* [Merits] PCIJ Series A/B No 61, 231 where the PCIJ stated that ''[I]t is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself'.

[21] See e.g., Philip Alston, Report of the Special Rapporteur on extreme poverty and human rights UN Doc A/71/40823 (26 August 2016) [28,29] stating that there are no means for the individual to challenge a decision by the UN that claims are not receivable.

[22] For the distinction between formal invocation of responsibility, which entails action such as presenting a claim, and informal calls for the observance of the obligation, see ARSIWA Commentary, 117[2].

[23] See e.g., Provisional verbatim record of the UNSC's 8005th meeting, UN Doc S/PV.8005 (18 July 2017) where the delegate of Egypt called for the implementation of the legal responsibility to of the UN to support the Haitian authorities in combating the Cholera epidemic.

[24] See e.g., Letter dated 2 August 1965 from the Acting Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General (Document S/6589) 1965 UNJY,40 fn26 calling for the implementation of the UN's obligations by cancelling the agreements entered into on behalf of the United Nations.

proceedings against it before an appropriate forum, or by taking countermeasures against the IO.[25]

2. The practice of States invoking the responsibility of IOs for the breach of the obligation to ensure fair trial rights

States have only very rarely[26] informally called for the implementation of the responsibility of IOs for the breach of the obligation to ensure fair trial rights in the absence of pressure from domestic courts to do so.[27] The lack of reaction by States to IOs' failure to ensure fair trial rights is well documented in the literature.[28] A stark example is provided by the aftermath of the UN's refusal to receive the claims of victims of cholera in Haiti. Despite calls for the UN to accept legal responsibility and to establish means for the settlement of disputes by a range of actors,[29] the UN General Assembly only adopted a resolution

[25] On the possibility of diplomatic protection against IOs, see *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion,*1949 ICJ Rep 174, (Dissenting opinion, Krylov) [219]: 'The majority of the Court has in view the functional protection of an agent of the United Nations Organization, even as against the national State of the agent. But it has not borne in mind, for example, the opposite-and possible-situation in which the said State may find it desirable and necessary to protect the agent against the acts of the Organization itself'.

[26] One possible instance is the UNGA deciding in 1994, on the recommendation of the 5th Committee, to request the Secretary General to report to the General Assembly on the procedures in place for the implementation of article VIII, section 29, of the CPIUN. See Resolutions and Decisions adopted by the General Assembly during its forty eighth session Vol II Supplement No 49A (A/48/49/Add.1), decision 48/493B. However, this was in the context of reviewing the efficiency of the administrative and financial functioning of the UN and not a call for the implementation of the UN's responsibility for failure to ensure fair trial rights.

[27] See Section II below.

[28] See e.g. Schmalenbach (n 7) 572; Frederic Megret, 'Beyond UN Accountability for Human Rights Violations' [2019] IOLR 68, 71; Daugirdas (n 4) 33.

[29] E.g., Alston(n),4; Rashkow, 'Remedies for Harm Caused by UN Peacekeepers', AJIL Unbound, 2 Apr. 2014; Office of the High Commissioner of Human Rights, Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón, A/HRC/25/71, 7 Feb. 2014[83(f)].

recognizing the 'moral responsibility' of the UN[30] and many States did not to take a stance on the UN's legal responsibility, including, notably, Haiti itself.[31]

Formal invocations of the responsibility of IOs for the failure to ensure fair trial rights are virtually non-existent.[32] Treaties incorporating the obligation of IOs to create means to settle disputes usually contain a provision providing for the resolution of disputes between the IO and member States.[33] For instance, section 30 of the CPIUN provides for a difference between a member State and the UN to be submitted to the ICJ for an advisory opinion. A similar provision appears in the CPISA.[34] No State has used the procedure set out in section 30 of the CPIUN to invoke the responsibility of the UN or the specialized agencies for the failure to ensure fair trial rights.[35] Moreover, though States have not hesitated to create arbitral tribunals to settle disputes with IOs under agreements relating

[30] UNGA, The new United Nations approach to cholera in Haiti A/RES/71/16113 January 2017, preambular [8].

[31] See e.g., Provisional verbatim record of the UNSC's 8005th meeting UN Doc S/PV.8005 (18 July 2017). See also Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 European Journal of International Law 991, 1004.

[32] An exception might be the intervention of the Belgian government with respect to the claims of its nationals for damages caused by UN Peacekeepers in the Congo, on which, see section IC below.

[33] E.g., Agreement between INTERPOL and the French Republic (Paris 24 April 2008), Article 24(2).

[34] CPISA, Section 32.

[35] The only use of section 30 of the CPIUN has been by the UN itself in *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion 1999 ICJ Rep 62 ('*Cumaraswamy')* and unsuccessfully in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 1989 ICJ Reports 177. See also 'The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat' A/CN.4/L.118 and Add.1 and 2, 1967 YBILC 154, 176.

to privileges and immunities with respect to, for instance, taxation,[36] no use of dispute settlement procedures appears to have been made with respect to the obligation of IOs to ensure fair trial rights.

There is no practice on States exercising diplomatic protection to espouse the claims of nationals against IOs.[37] Unless one characterises denials of immunity by domestic courts due to the failure of IOs to fulfil their fair trial obligations as countermeasures,[38] there is very limited practice of States taking countermeasures against an IO[39] and none on the executive branches of States taking countermeasures against IOs for the failure to ensure fair trial rights.

C. The settlement of claims by Belgian nationals in the Congo

The claims of Belgian nationals for damage caused by UN peacekeepers in the Congo was a rare case in which a State did get involved in the presentation of private persons' claims

[36] See e.g., Arbitration Tribunal constituted by the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France, 2001 UNJY 421.

[37] John Dugard, Fifth report on diplomatic protection A/CN.4/538 4 March 2004, 50; John Dugard, 'Diplomatic Protection', *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2021) para 78. However, see section I C below on the settlement by the UN of claims made by Belgian nationals in the Congo.

[38] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 194-197. See also chapter 5, section III.

[39] Simone Vezzani, 'Countermeasures by Member States against International Organizations', *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 374; The limited instances of practice referred to in the literature concern the witholding of membership contributions due to an alleged wrongful act by the IO. But such wrongful acts have not included breach of fair trial obligations. See Frédéric Dopagne, 'Les Contre-Mesures Des Organisations Internationales : Essai de Transposition Du Régime Des Contre-Mesures Étatiques' (UCL - Université Catholique de Louvain 2008) 66.

against an IO.[40] The Belgian government centralised the claims of Belgian nationals and transmitted them to the UN seat in New York.[41] Following intercessions by the Belgian government, the UN declared that it was prepared 'to accept financial liability where the damage is the result of action taken by agents of the United Nations in violation of the laws of war and the rules of international law'.[42]

However, according to the UN's correspondence, Belgium was not exercising diplomatic protection on behalf of its nationals. Rather, this was a case where the UN considered it convenient to effect the disbursement of compensation, the extent of which was subsequently strongly questioned judicially,[43] through the State of nationality of the claimants.[44] This is revealed in an excerpt from the letter of the UN Secretary General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, cited in a footnote in the UN Juridical Yearbook reproducing the exchange of letters on the settlement of claims. In the letter, the UN Secretary General, in response to a query from the Soviet Permanent Representative as to why a State that had violated the prohibition on aggression was being compensated, states that

[40] Boon (n 11) 377 As will be demonstrated in Section III however, this limited response by the UN can also be ascribed to the Manderlier claim before Belgian domestic courts at the time.

[41] Pierre Schmitt, 'Manderlier v Organisation Des Nations Unies and Etat Belge (Ministre Des Affaires Etrangères)' in Cedric Ryngaert and IF Dekker (eds), *Judicial Decisions on the Law of International Organizations* 364.

[42] Exchange of letters between the UN and Belgium constituting an agreement relating to the settlement of claims filed against the UN in the Congo by Belgian nationals 1965 UNJY 39.

[43] See *M. v. Organisation des Nations Unies and État Belge* (Ministre des Affaires Étrangères). (Civil Tribunal of Brussels) 45 ILR 446, 449 ('*Manderlier*').

[44] Exchange of letters, 39-42.

> As regards the role of the Belgian Government, it was considered that there was an advantage for the Organization both on practical and legal grounds that payment to the Belgian claimants whose claim has been examined by the United Nations should be effected through the intermediary of their Government. This procedure obviously avoided the costly and protracted proceedings that might have been necessary to deal with the 1,400 cases submitted and to settle those in which United Nations responsibility was found. Following consultations, the Belgian Government agreed to act as an intermediary and also agreed that the payment of a lump sum amounting to $1.5 million would constitute a final and definite settlement of the matter.[45]

Thus, though the Belgian State intervened to centralise and transmit the claims to the UN and though its intervention seems to have forced the UN to stop denying liability, it appears that the involvement of the State in the determination of the compensation due was minimal and that it only acted as the medium for distribution of compensation. As pointed out by the Belgian domestic courts in *Manderlier*, the UN 'had the claims addressed to it… examined by its own authorities, without argument of any kind' and took a 'unilateral decision', thus in reality being 'a judge in its own cause'.[46] The amount determined to be paid as compensation was set off against amounts already owed to the UN by the Belgian Government.[47]

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[45] Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics (Document S/6597) 1965 UNJY 41 at n26.

[46] *Manderlier*, 451.

[47] The exchange of letters between the UN and Belgium, 'At the same time, a number of financial questions which were outstanding between the United Nations and Belgium were settled. Payment was effected by

With respect to Manderlier's claim in particular, the sum awarded through the UN scheme was significantly lower than the amounts claimed. Manderlier was allegedly manhandled, his life threatened, his house ransacked, his livestock and poultry destroyed, his property stolen, and finally, his house sprayed with petrol and set on fire by peacekeepers.[48] The initial claim by Manderlier against the UN for damage caused by these acts was for 3,799,675 francs. As per the UN settlement scheme, Manderlier was entitled to 100,000 francs and the Belgian government offered to pay him a total of 140,000 francs.[49]

It is clear that though the Belgian government interceded on behalf of the claimants, it merely accepted the UN's recommendation of a lump sum payment as compensation.[50] The process did not involve the claimant at any stage in the settlement of compensation. The agreement was concluded entirely between Belgium and the UN to the complete exclusion of the claimants.

offsetting the amount of $1.5 million against unpaid ONUC (United Nations Operation in the Congo) assessments amounting approximately to $3.2 million.'

[48] *Manderlier*, 449.

[49] *Manderlier*, 449, 452.

[50] Exchange of letters (n 41).

In addition to claims by Belgian nationals, the UN went on to settle claims of Italian,[51] Greek,[52] Luxembourg[53] and Swiss[54] nationals, all via lump sum payments through the respective host states. It appears that further settlements were made with Zambia, the US, the UK and the ICRC though it is not clear whether these were with respect to individual claims.[55] What is noteworthy is that there is no settlement of claims by Congolese nationals. The records of the UN investigations into the claims including the breakdown of claims submitted by nationals of different States are classified.[56] It is either the case that Congolese nationals did not submit claims against the UN for damage suffered or that the UN chose not to settle such claims.

The foregoing illustrates that even in a situation where a State intervenes on behalf of a claimant, ensuring that IOs comply with their fair trial obligations and the implementation of the responsibility of IOs for the breach of these obligations is riddled with difficulty. Manderlier was a wealthy Belgian national who was able to submit a claim, initially through the Consul General in Elizabethville in Congo and then through the Belgian Ministry of Foreign Affairs. Manderlier thus appears to have been better placed

[51] 1967 UNJY 77-78.

[52] 1966 UNJY 39-40.

[53] 1966 UNJY 39-40.

[54] 564 UNTS 193.

[55] See ARIO Commentary, 61(1).

[56] The author made a request from the UN Archives for this information and was informed that the relevant file is classified. See Annex I to the thesis for a copy of the correspondence. The registries of domestic courts including those in Chile and Canada responded positively and promptly to the author's requests for information.

than most persons affected by the acts of IOs, particularly the Congolese nationals who were caught up in this conflict, to lobby the IO and their States of nationality with respect to damages caused to them. However, even Manderlier's right to a fair trial was not upheld (he never had a hearing of any sort) and the satisfaction received for his claim was woefully inadequate.

The example of the settlement of claims by Belgian nationals in the Congo suggests a lack of motivation on the part of IOs, the UN in this instance, and the States of the affected parties to meaningfully fulfil and implement IOs' responsibility to ensure fair trial rights. As demonstrated by the examples cited above[57] it does not appear that this attitude has changed over the intervening decades.

In this case, the predominant consideration appeared to be to disperse some sort of compensation to these parties (and this too, as will be seen, was at least partly due to pressure from domestic courts) without going through the 'costly and protracted' procedure of offering fair trial rights to the victims. As for States, since diplomatic protection is discretionary in nature[58] States may choose not to exercise it for a variety of reasons. Moreover, when the implementation of the responsibility of the IO happens through the

[57] Section IA.

[58] *Barcelona Traction Light and Power Company Limited* (*Belgium/Spain*) (New Application, 1962), Judgment, Merits, Second Phase [1970] ICJ Rep 3 [79].

State, there is no guarantee that the compensation will trickle down to the individuals that have suffered violations and that their right to a remedy will be upheld.[59]

D. Reasons for IOs' lack of compliance with fair trial obligations

There is an extensive literature on why States do or do not fulfil obligations under international law,[60] some of which has been applied also to IOs.[61] The following will highlight a few pertinent reasons for the lack of motivation of IOs and States respectively to fulfil and ensure compliance with IOs' fair trial obligations.

A key reason for the non-implementation of the responsibility of IOs for the failure to ensure fair trial rights is that the beneficiaries of fair trial rights, private persons, have no means of bringing claims against IOs for the breach of IOs' fair trial obligations.

The prevalence of mechanisms for individuals to bring claims against the relevant obligation holders is crucial for the enforcement of obligations, the beneficiaries of which are individuals.[62] However, as shown by the settlement of claims arising from incidents in

[59] Since the State is exercising its own right, there is no obligation disburse any financial reparation amongst individuals affected. See e.g., *Administrative Decision No V*, Reports of International Arbitral Awards Vol VII 119, 152. Cf. Article 19(c) Draft Articles on Diplomatic Protection 2006 II YBILC Part Two, 26.

[60] See e.g., Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Pall Mall Press for the Council on Foreign Relations 1968); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2010).

[61] See e.g., Daugirdas (n 4) 16.

[62] See e.g., Rosalyn Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom', *Themes and Theories* (Oxford University Press 2009) 620 noting that the easiest way for a beneficiary to enforce rights is before their own domestic courts and not before an international mechanisms; Thomas Mensah, 'Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law' in Buffard et al I. (ed), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV) 799 who notes the role of mechanisms for individuals to bring claims, particularly recourse to domestic courts, as a means to ensure compliance with international environmental agreements; Chimène I Keitner, 'Jam v. International Finance

the Congo, the process of implementing the responsibility of IOs for the failure to ensure fair trial rights takes place between the IO and the States of affected nationals, to the exclusion of the persons whose rights have been affected. The lack of mechanisms, particularly domestic courts, for individuals to enforce their rights with respect to IOs results in the responsibility of IOs for the breach of fair trial obligations not being implemented and the obligation not being complied with.

Another reason is cost. IOs may simply be unwilling to create means which would put its conduct under heightened scrutiny,[63] but even when IOs are willing to create such means, they may be thwarted in their attempts to ensure fair trial rights by States refusing to fund such proposals.[64]

For States, cost is an important factor which limits the invocation of the responsibility of IOs for the failure to ensure fair trial rights. On one level, pursuing a claim on behalf of a national may not contain a sufficient monetary incentive for the State.[65] On the other hand, IOs and more powerful States may be unwilling to implement the responsibility for the failure to ensure fair trial rights due to the cost of setting up the

Corp.', (2019) 113 American Journal of International Law 805, 809 noting that inadequate recourse for those injured by an IO's activities results in insufficient incentives for IOs to self-regulate.

[63] See Robert A Gorman, 'The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank' (2004) 25 Comparative Labor Law & Policy Journal 423, 425 who questions why the [World] Bank would relinquish the legally unfettered discretion that immunity from jurisdiction brings.

[64] Chris de Cooker and others (eds), *Accountability, Investigation and Due Process in International Organizations* (Brill Nijhoff 2005) x describing proposals to reform internal justice at the UN being thwarted by funding considerations at the UNGA.

[65] Brenda K Kombo, 'Closing the 'Remedy Gap'- The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti' (2017) 5 Groningen Journal of International Law 115, 129.

mechanisms to do so and the cost of ultimately having to fund reparation towards private claimants.[66] States may also wish to avoid scrutiny of their own role as voters within the organs of the IO in the process of hearing claims against IOs.[67]

Reasons for poorer States to refrain from invoking and implementing the responsibility of IOs include the dependence of such States on aid and assistance from the IO.[68] This perhaps explains Haiti never invoking the responsibility of the UN for failure to ensure fair trial rights with respect to the cholera claims[69] as well as the State of Congo possibly having not made any claims against the UN on behalf of its nationals for damages in caused by the United Nations Operation in the Congo (ONUC) in 1965.

II. THE ROLE OF DOMESTIC COURTS IN INDUCING COMPLIANCE WITH FAIR TRIAL OBLIGATIONS

A. How domestic courts induce compliance with fair trial obligations

The individual being unable to bring claims against IOs to enforce their rights, as well as the several other political and economic factors discussed above, result in a lack of incentive on the part of IOs to comply with and States to push IOs to comply with IOs' fair trial obligations. The default position in the absence of pressure from external sources,

[66] E.g., Daugirdas (n 4) 33 stating that the UN's refusal to acknowledge a legal obligation re the Haiti Cholera claims may have been due to the fear that member States would not fund the payment of claims.

[67] Boon and Megret (n 12) 7.

[68] See e.g., Kombo (n 65) 129.

[69] Boon and Megret (n 12) 7.

therefore, is for IOs to assert immunity before domestic courts and not take the corresponding measure of ensuring the fair trial rights of private parties.

This is where domestic courts perform a crucial function. Through their decisions in claims against IOs, domestic courts can provide an incentive for States and IOs themselves to ensure that IOs fulfil their fair trial obligations, by making available forums for the settlement of disputes between the IO and private parties.

How does this process take place? As noted in chapter 5,[70] two factors are common to the practice of claims against IOs before domestic courts. First, in almost all cases, domestic courts explicitly or implicitly refer to and reinforce the obligation of the IO to uphold fair trial rights.[71] Every time a domestic court refers to the obligation of IOs to ensure fair trial rights under treaty law, they confirm the existence and scope of the obligation under treaty. Every time a domestic court refers to the obligation of IOs to ensure fair trial rights without reference to a treaty, the courts contribute, as an organ of the State, to the body of State practice and *opinio juris* confirming the existence of this obligation as part of general international law.[72]

Second, after reinforcing the obligation of IOs to uphold fair trial rights, domestic courts either deny the IO immunity or may take a lesser measure such as either explicitly

[70] See chapter 5, section IV.

[71] For the different ways in which domestic courts reinforce the obligation of IOs to ensure fair trial rights, see Chapter 5, text accompanying (nn123-129).

[72] On domestic court decisions as State practice and/or *opinion juris*, see e.g., Michael Wood, Second report on identification of customary international law A/CN.4/672, 22-24, 55.

or implicitly signalling to States and IOs that fair trial rights must be upheld.[73] As will be demonstrated through the examples below,[74] this may have the effect of generating reactions from States and IOs.

1. Reactions from IOs

For IOs, the denial of immunity or lesser measure could push it to directly accept the decision of the domestic court in the case at hand. This would fulfil the IO's obligation to ensure fair trial rights as well as implement the IO's responsibility for the breach of its fair trial obligations through cessation of the wrongful act. This happened for instance in the case of an accident involving a UNICEF-operated vehicle.[75] The domestic court in this instance denied the UNICEF's immunity and ordered for an amount to be withdrawn as compensation from UNICEF's account with a bank in the relevant State. In response, the UN Legal Counsel stated that he 'regrets the delay which has arisen in the settling of this case' and that 'UNICEF has decided to settle this claim on the basis of the award given to the victim's family by the courts of [the relevant state].' The Legal Counsel explicitly stated that this is 'in keeping with UNICEF's obligations under article VIII, section 29, of the 1946 Convention on the Privileges and Immunities of the United Nations'.[76]

[73] For the different ways in which this signalling takes place, see chapter 5 (nn 130-132).

[74] See section B below.

[75] See Note to the Permanent Representative of a Member State to the United Nations 1992 UNJY 433.

[76] Ibid.

Additionally, for IOs, the decisions of domestic courts could directly push them to put in place impartial and independent means to settle disputes and to provide remedies to private parties, thereby fulfilling their obligation to ensure fair trial rights.[77]

The fact that domestic court decisions denying immunity or reinforcing IOs' fair trial obligations may trigger reactions from IOs is not surprising. IOs face the risk of domestic courts denying their immunity *en masse* and having a plausible (even if not legally watertight) reason for doing so — that the IO has violated its obligation to ensure fair trial rights, which in turn may result in the State being in violation of its own obligations to ensure fair trial rights to persons within its jurisdiction and that private persons are denied justice. If enough domestic courts deny IOs immunity, this may change the law on IO immunity, either by constituting subsequent practice that constitutes the agreement of the parties to immunity-conferring treaties or, to the extent that there is customary international law on the immunity of IOs, by constituting an exception to such customary rule.[78]

There are many examples that demonstrate that IOs consider it very important to prevent domestic courts exercising jurisdiction over them. Amerasinghe points out that the reason that IOs accept the jurisdiction of administrative tribunals is due to their aversion to being subject to the jurisdiction of national courts.[79] Similarly, as pointed out by a set of

[77] See section IIB below for examples.

[78] See chapter 4, section V.

[79] Chittharanjan Felix Amerasinghe, 'International Administrative Tribunals' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (University Press 2015) 319; See also August Reinisch and Ulf Andreas Weber, 'In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 International Organizations Law Review 59,

amici curiae for the Center for International Environmental Law et al in the case of *Jam v IFC* before the US Supreme Court, '[i]f international organizations face the unappealing prospect of being hauled into a U.S. court for noncompliant behaviour, they will make reasonable efforts to resolve complaints and grievances before litigation becomes necessary. That will only redound to the benefit of the communities and peoples that these organizations are meant to help, and thus ultimately to the organizations themselves'.[80]

In a 1999 report to the UN General Assembly on recovery procedures from staff in the event of gross negligence, the UN Legal Counsel stated that:

> referring cases to national courts for recovery would have serious ramifications for the privileges and immunities of the United Nations. By initiating such proceedings before the national courts, the Organization could allow its internal regulations and rules and policies to be examined by the courts, *which might question whether the rights of the person from whom recovery has been sought have been observed*.[81]

This neatly illustrates the force that the need to resist national courts exerts on IOs, a force which, as will be further illustrated in the following section, exerts considerable pressure on IOs to create means to settle disputes themselves. Here the report seems to suggest that what is important is not that the rights of persons from whom recovery has

n 40 where Reinisch and Weber point to two UN studies from 1967 and 1985 which state that as long as alternative means of legal recourse are available, national courts will not deny immunity on human rights grounds .

[80] Brief of Amici Curiae Center for International Environmental Law et al. in Support of Petitioners (July 31 2018), 31 https://www.supremecourt.gov/DocketPDF/17/17-1011/56098/20180731223229014_2018-07-31%20Amicus%20Brief%20CIEL%20et%20al%20-%20Jam%20v%20IFC%207-31-18.pdf (accessed 23 March 2022).

[81] 1999 UNJY 403 (emphasis added).

been sought are upheld, but that domestic courts are not allowed to scrutinise whether such rights are upheld.

Another example of the need to resist domestic courts is provided by a legal opinion by the Office of Legal Affairs of the UN on the ability of the United Nations Environmental Programme (UNEP) to take direct legal action against private entities of State members for environmental damage and damage to the ozone layer.[82] The opinion advised against instituting action before domestic courts since this would waive the UNEP's immunity and it would be susceptible to counter claims.[83] These examples illustrate that IOs consider it very important to avoid domestic courts exercising scrutiny over them. Thus, it stands to reason that domestic court decisions which underscore the fair trial obligations of IOs and either deny immunity or express displeasure at the claimant's fair trial rights being violated without denying immunity, may generate reactions from IOs.

2. Reactions by the executive branches of States

For States, the denial of immunity could push (the executive branch of) States to exert pressure on IOs to fulfil their obligation to ensure fair trial rights, including invoking and implementing the responsibility of the IO for the breach of its fair trial obligations. As noted in chapter 5, when a domestic court denies an IO immunity, the executive branch of the State is forced to react so that the State will not be held responsible for a breach of the

[82] 1995 UNJY 411-416.

[83] Ibid 412. A further example is provided in a Note by the Office of Legal Affairs, 1999 UNJY 421 in which the office of legal affairs recommends that UN organizations do not participate in bidding exercised conducted by governments due to the possibility that the immunity of such organizations may be challenged in court.

obligation to grant IOs immunity. Even if the domestic court's denial of immunity is based on domestic law, the State is forced to translate this argument to international law terms in order to defend its domestic courts' actions on the international plane.[84]

The reaction of the State may involve the State formally invoking the responsibility of the IO for its failure to fulfil the obligation to ensure fair trial rights. Such formal invocation of the responsibility of IOs, even with the pressure of domestic court decisions, never takes place in practice. The reaction of the State could also be a defensive reaction to highlight that the IO has not fulfilled its obligations to ensure fair trial rights when confronted with an argument from the IO or another member State that the State has breached its obligation to grant immunity. This is precisely what took place in *Cumaraswamy* where, following the commencement of proceedings before the ICJ under the CPIUN by the UN against Malaysia for the failure of Malaysian courts to grant immunity to a UN Special Rapporteur, Malaysia contended that the UN did not have in place appropriate means to settle disputes.[85]

What could also happen is that, less formally, the State may exert pressure within the internal organs of the IO for the IO to create means to ensure fair trial rights, so that the State won't be confronted with a situation of its domestic courts denying immunity to IOs. As demonstrated below in section IIB, this does occur in practice.

[84] Antonios Tzanakopoulos, 'Collective Security and Human Rights', *Hierarchy in International Law* (University Press 2012) 67.

[85] *Cumaraswamy*, Verbatim Record 10 December 1998, 51.

B. Examples of domestic courts inducing compliance with IOs' fair trial obligations

The manner in which domestic courts trigger the development of mechanisms to ensure fair trial rights when they are not in place and prompt the review of and improvement to existing mechanisms when they do not satisfy fair trial rights is not a matter of speculative theory but does take place in practice. Since this claim is an empirical one, several examples of this having occurred in practice will be discussed below.

1. The World Bank Administrative Tribunal

An early example of an IO reacting to a claim against it before domestic courts is the creation of the World Bank Administrative Tribunal following the claim before US courts by Susan Mendaro, which was referred to in chapter 5.[86] Though Mendaro's claim was rejected by the US courts, the World Bank Administrative Tribunal was set up in 1980 with the World Bank President expressly stating in a memorandum to the Executive Directors that without such a tribunal, national courts might assert jurisdiction over complaints against the bank by staff members.[87] The creation of the World Bank administrative tribunal in turn had a major impact on other IOs, particularly international financial

[86] *Mendaro v.The World Bank* Ct of Appeal, DC Circ717 F.2d 610 (1983),

[87] Memorandum from the World Bank President to the Executive Directors, dated 14 January 1980, see Raul C Pangalangan, 'The Asian Development Bank Administrative Tribunal' (1997) 7 Asian Yearbook of International Law 209, 210, note 8. Chittharanjan Felix Amerasinghe, 'The World Bank Administrative Tribunal' (1982) 31 The International and comparative law quarterly 748, 750.

institutions, which created administrative tribunals based on the World Bank Administrative Tribunal statute.[88]

2. Italian courts and the FAO

Another example is the events following the Italian courts' denial of immunity to the FAO in the early 1980s.[89] The denial of the FAO's immunity led to protracted diplomatic discussions including the FAO considering submitting the question of the denial of its immunity for an advisory opinion to the ICJ.[90] The dispute was eventually resolved with Italy acceding to the CPISA, which, significantly, explicitly contained the obligation for the FAO to provide means to settle private law disputes.[91]

Thereafter, Italy requested the FAO to provide information on how it satisfied this obligation, most probably in order to satisfy its domestic courts.[92] The FAO complied with this request, stating that it 'has undertaken to set up procedures safeguarding the fundamental principles on which judicial proceedings are based both under national legal systems and international law…[including] the independence and impartiality of those charged with adjudicating the dispute, the right of defence, the right of both parties to state their cases, and the practicality of the proceedings and the possibility of having recourse to

[88] Amerasinghe (n 79) 321.

[89] *FAO v Istituto Nazionale di Previdenza per i Dirigenti di Aziende Industriali* No. 5399 (Corte di Cassazione, Italy)18 October 1982.

[90] See 1985 UNJY 82ff; Reinisch (n 18) 131ff.

[91] CPISA Article IX, section31(a).

[92] Note verbale no. 006207 dated 16 december 1986, from the Italian Permanent Representation to FAO, 1986 UNJY 156.

them at reasonable cost' as well as detailing the methods that are already in place and those that it was willing to provide.[93]

3. Manderlier

Another example of IOs and States reacting to claims against IOs before domestic courts could be found as far back as 1965 when the UN settled the claims of Belgian nationals for damages caused by peacekeepers in the Congo. Though the manner in which the claims were settled and the implementation of the responsibility of the UN for the failure to create fair trial rights were not satisfactory,[94] there is a suggestion in the literature that the Belgian State and the UN only took heed of the claims at all due to Manderlier's claim before the Belgian courts.[95] One of the arguments Manderlier made before the Brussels court was that the immunity of the UN was conditional on the obligation to create means to settle disputes under Article VIII, section 29 of the CPIUN. While the UN rejected the argument that immunity is conditional in this manner and the Belgian courts agreed with this, the UN did argue that it had fulfilled its obligation by the settlement of claims through the Belgian State.[96]

It could be that the pressure of having to invoke its immunity before a domestic court without having taken any measures to uphold its fair trial obligations pushed the UN

[93] Letter from the Director General of FAO to the Permanent Representative of Italy, 19 December 1986, 1986 UNJY 156 ff.

[94] See section I C above.

[95] Boon (n 11) 377 noting that the settlement of claims was in response to Manderlier's claim.

[96] *Manderlier*, 452.

to take some measures to settle the claims. Similarly, the Belgian State was also a party to the litigation and its role in coordinating the claims and submitting them to the UN could be a result of having to demonstrate before the domestic court that steps had been taken to uphold the claimant's fair trial rights, in fulfilment of the Belgian government's fair trial obligations under domestic and international law. Though the Belgian court emphatically rejected that the settlement of claims through the Belgian State constituted an adequate means to settle disputes, it upheld the immunity of the UN.[97]

4. Practice of UN organs responding to decisions of domestic courts

There are many instances of practice by UN agencies, where the UN has reacted to a denial of immunity by domestic courts by requesting that the executive branch of the State fulfil its international obligations and inform the courts of the UN's immunity. However, in the course of taking these steps in response to a decision by a domestic court, the UN has taken pains to explain to the relevant domestic court that it is not leaving the claimant without a remedy. In being forced to point out the remedies available to claimants, IOs are forced to make such remedies available to the relevant claimants and also to improve these remedies where they are lacking in independence and impartiality.

For instance, in a case involving UNICEF,[98] the IO's Legal Counsel noted that the court had issued an order holding UNICEF liable for a payment to the claimant, had entered subsequent orders relating to execution of the order and that the State's authorities had

[97] *Manderlier*, 452.

[98] 2000 UNJY 346.

seized some assets of UNICEF to levy execution of the court's order. Noting that the action is illegal, the legal counsel noted that notwithstanding the immunity of the IO from legal process the claimant must be provided an appropriate mode of settlement. The legal counsel then proceeded to state that UNICEF had already attempted to pursue a negotiated resolution of this matter with the claimant, and that it had indicated to the Government of the State its readiness to meet further with the claimant in conjunction with the Ministry of External Relations to pursue a resolution to the dispute. The legal counsel further noted that in the absence of a settlement, the regular practice is to submit such claims to arbitration.

In a *note verbale* with respect to the freezing of bank accounts of the World Food Programme by a member State, the Legal Counsel stated that 'the competent judicial authorities should be assured that, notwithstanding the immunity of the Organization from legal suit, [the claimant] is not without a remedy to redress his complaint'[99] before setting out the means available to the claimant to make his claim.

Another interesting example of the responsiveness of the UN to domestic courts is provided by a memorandum to the director of the supply division of UNICEF by the office of legal affairs of the UN. Here, the office of legal affairs advised UNICEF to change its Basic Agreement in mass immunization programmes so that vaccine manufacturers would be obligated to maintain product liability insurance. This was to cover potential new areas of liability raised by a domestic court decision on product liability in vaccination

[99] 2004 UNJY 428.

programmes.[100] This demonstrates the reactivity of IOs to domestic court decisions and the creation of remedies for claimants so as to avoid IOs being scrutinized by domestic courts.

The process of IOs having to focus on the mechanisms available for private parties to make claims due to decisions of domestic courts is also exemplified in the proceedings of the *Cumaraswamy* Advisory Opinion before the ICJ. Here the Malaysian domestic courts' denial of immunity led to the UN having to extensively elaborate before the ICJ the procedures it had in place for the settlement of disputes with private parties in fulfilment of its obligations under Article VIII section 29 of the CPIUN and to state that it was ready to offer means for the settlement of disputes for the claims with respect to which it was asserting immunity.[101]

Additionally, one of the most well-known and most comprehensively analysed reactions of the UNSC to domestic courts is the creation of the office of the ombudsperson to enable persons to challenge their listing under the UNSC sanctions regimes against persons associated with Al Qaida, the Taliban or the Islamic State (ISIL).[102]

5. The reform of the UN internal justice system

Yet another example of domestic courts pushing States and IOs to fulfil IOs' obligations to ensure fair trial rights is provided through the UN internal justice reforms. There had been attempts to reform the UN internal justice process in the late nineties which were

[100] 1992 UNJY 418.

[101] *Cumaraswamy*, Verbatim Record 10 December 1998, 8-11.

[102] Tzanakopoulos, *Disobeying the Security Council* (n 38) 202ff.

thwarted by budgetary considerations at the UNGA.[103] However, in 2002, the UNGA, on the recommendation of the General Committee, included in its agenda the administration of justice at the United Nations[104] and repeatedly followed up with the Secretary General on the matter, 'regretting that the present system of administration of justice in the Secretariat continued to be slow, cumbersome and costly'[105] and regretting also that the reports on this matter were not conveyed in a timely manner.[106] The UNGA thereafter directed the Secretary-General to form a panel of external and independent experts to consider redesigning the system of administration of justice.[107]

The redesign panel delivered a scathing report on the internal justice system of the UN, including that the present system of internal justice, established early in the life of the Organization has outlived its relevance, fails to meet many basic standards of due process established in international human rights instruments[108] and that it needs to be replaced 'if the UN is to avoid the double standard — which currently exists — where the standards of justice that are generally recognized internationally and that the Organization pursues in

[103] See Cooker and others (n 64) x.

[104] See Allocation of agenda items for the fifty-seventh session of the General Assembly 20 Sept 2002 A/57/252, 16.

[105] E.g., UNGA, Administration of justice in the Secretariat 22 May 2003 A /RES/57/307 [3].

[106] E.g., UNGA, Administration of justice at the United Nations 2 June 2005 A/RES/59/283, Preambular [12].

[107] Ibid [47] ff.

[108] UNGA, Report of the Redesign Panel on the United Nations system of administration of justice 28 July 2006 A/61/205 [5].

its programmatic activities are not met within the Secretariat or the funds and programmes themselves'.[109]

On the basis of the redesign panel's report, the General Assembly established the current two-tier formal system of administration of justice within the UN, comprising the first instance United Nations Dispute Tribunal (UNDT) and the appellate instance United Nations Appeals Tribunal (UNAT). The UNGA also established the Office of Administration of Justice, a single integrated and decentralized Office of the Ombudsman for the UN Secretariat, funds and programmes with branches in several duty stations, a new mediation division as well as the UN Internal Justice Council.[110] There has been continuous monitoring of the system of justice within the UN with the UNGA considering reports by the Secretary-General and the Internal Justice Council at successive sessions.[111]

Though there was no express reference to the decisions of domestic courts in the consideration of the topic by the UNGA, by the 5th Committee of the General Assembly, or by the redesign panel, one of the key considerations for the reform of the system was noted as being 'the immunity of United Nations staff from national laws[sic] and thus the lack of recourse to national courts'.[112] Moreover, the timing of the pressure by member States to overhaul the system of justice, in 2002, immediately following the much-

[109] Ibid [9].

[110] UNGA, Administration of justice at the United Nations 6 February 2008 A/RES/62/228.

[111] For the history of the consideration of the topic by the UNGA, see e.g., UNGA, Administration of justice at the United Nations 13 January 2020 A/RES/74/258, preambular [1].

[112] Resolution 59/283 [49].

discussed ECtHR decisions in *Waite and Kennedy* and *Beer and Regan*,[113] which stemmed from domestic court decisions and in turn, heavily influenced the subsequent decisions of European domestic courts in claims against IOs, is noteworthy. There were also repeated references to the fact that the system of justice within the UN failed to meet the basic standards of fair trial and due process in international human rights instruments as well as that this was especially problematic due to the jurisdictional immunity before domestic courts.[114] Furthermore, the European Union, the member States of which are home to most of the case law which considers the presence of alternative means of redress when granting immunity to IOs, was one of the key stakeholders stressing that the new system should be consistent with fundamental principles of the rule of law and due process, including the right to an effective remedy, equal access to justice and the right to be heard.[115] It has also been noted by UN officials that one of the key reasons for the reform of the internal justice system was so that the national courts will not question the immunity of the UN.[116]

Following the creation of the new system of internal justice, the reports of the internal justice council have noted that failure to address the continuing deficiencies of the internal justice system could result in the immunity of the UN being jeopardized before national courts. For instance, the Internal Justice Council Report in 2016, in recommending that the UN take steps to widen the access to its internal dispute resolution mechanisms,

[113] Application No 26083/94, Application No 28934/95 (ECtHR, 18 February 1999).

[114] E.g., Report of the Redesign Panel [7].

[115] E.g., 6th Committee, Summary record of the 4th meeting, A/C.6/65/SR.4 of 25 October 2010 [64].

[116] See e.g., Remarks of Brian Gorlick, Proceedings of the Annual Meeting (American Society of International Law), Vol. 106, Confronting Complexity (2012) 360, 361.

acknowledged that it was seeking to 'effectively protect the long term the immunity of the Organization,' since national courts may insist on an appropriate remedy being one that is workable and easily accessible in conditions where non-staff personnel are used.[117] This shows that the threat of domestic courts challenging immunity is a paramount consideration in continuously improving the system of justice.[118]

6. Reactions to French domestic court decisions and the reform of the Commission for the Control of INTERPOL's Files

The jurisprudence from French courts denying immunity to IOs[119] has led many IOs based in France, which previously did not offer fora for the settlement of disputes with staff, to offer recourse to tribunals or claims commissions.[120] Moreover, the jurisprudence of French courts may have some part to play in France excluding immunity for IOs for claims such as those for damages in driving accidents in more recent headquarters agreements.[121]

One of the most sweeping recent reforms of an internal justice process of an IO headquartered in France was that of INTERPOL. In November 2016, INTERPOL adopted

[117] e.g., Administration of justice at the United Nations Report of the Internal Justice Council 15 July 2016 A/71/158 [141].

[118] A further example is Administration of justice at the United Nations Report of the Internal Justice Council 15 July 2019 A/74/169 [7], [53].

[119] E.g., *Banque africaine de d´eveloppement v. M.A. Degboe* Cour de Cassation,Chambre sociale(France)132 Journal du droit international (2005).

[120] See Genevieve Burdeau, 'France' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013) 119.

[121] E.g., Agreement between the International Criminal Police Organization and the Government of the French republic regarding INTERPOL's headquarters and its privileges and immunities in France (Paris 24 April 2008), Article 5(1)(b).

major reforms to its internal complaints mechanism, the Commission for the Control of INTERPOL's Files (CCF).[122] The criticism of INTERPOL's internal mechanisms by parties such as the Parliamentary Assembly of the Council of Europe was driven by judicial decisions in cases such as *Kadi*[123] which reviewed the measures implementing the UNSC sanctions regime against persons associated with Usama bin Laden, the Al-Qaeda network and the Taliban and found the measures to fall short of the human rights guarantees to a fair trial.[124]

Furthermore, one of the key reasons given by INTERPOL itself and the Parliamentary Assembly of the Council of Europe for the reform of the INTERPOL's CCF is that the process which existed at the time may create a problem for the continued jurisdictional immunity of INTERPOL.[125]

7. The creation of the NATO Administrative Tribunal

Yet another example of an IO engaging in a thorough review and overhaul of its internal dispute resolution mechanisms, as a result of domestic and regional court decisions, is

[122] Statute of the Commission for the Control of INTERPOL's Files https://www.interpol.int/content/download/5695/file/Statute%20of%20the%20CCF-EN.pdf accessed 24 March 2022.

[123] (CJEU) Joined Cases C-402/05 P and C-415/05 P 3 September 2008.

[124] Bernd Fabritius, 'Abusive Use of the Interpol System: The Need for More Stringent Legal Safeguards' (Parliamentary Assembly, Council of Europe 2017) 14277 para 24,30; Alex Tinsley and Rebecca Shaeffer, 'Strengthening Respect for Human Rights, Strengthening INTERPOL' (Fair Trial International 2013) paras 184–186 See also chapter 3, section IIIC.

[125] Fabritius (n 124) para 27 See also the speech by the Chair of the CCF to the INTERPOL General Assembly 9 November 2016 where the chairperson states that 'If an applicant is not provided with an effective remedy, INTERPOL might be exposed to challenges to its immunity from potential lawsuits brought before national jurisdictions' <https://www.interpol.int/content/download/6943/file/85%20GA%20-%20Speech%20by%20Ms%20Nina%20VAIJIC%20CCF%20Chairperson.pdf> (accessed 24 March 2022).

provided by the reform of the NATO Appeals Board. As noted in chapter 3, several cases were brought before domestic courts as well as the ECtHR, challenging the immunity granted to NATO on the basis that the NATO Appeals Board did not constitute a reasonable alternative means for the protection of the rights of private parties.[126]

Despite the fact that NATO's immunity was not denied in the cases concerned, NATO undertook a comprehensive review of its internal dispute settlement mechanisms in 2011. It appointed an independent panel of experts to assess NATOs complaints system and Appeals Board. The panel of experts made a number of recommendations including that the NATO Appeals Board become an administrative tribunal. The rules governing the constitution and function of the administrative tribunal was to be reflective of the tribunal's judicial character as well as the independence of the tribunal.[127]

Pursuant to the recommendations of the panel, on 23 January 2013, the North Atlantic Council approved amendments to its Civilian Personnel Regulations and established the NATO Administrative Tribunal with effect from 1 July 2013.[128] The Tribunal is to issue binding decisions after conducting oral hearings. It is noteworthy that the lack of oral hearings was an issue on which the procedure before the NATO Appeals Board had been strongly challenged before domestic and regional courts.[129] The creation

[126] See chapter 3, section IIB.

[127] See Steven Hill and Nick Minogue, 'The Effectiveness of the North Atlantic Treaty Organization in an Era of Adaptation: The Role of the North Atlantic Treaty Organization Administrative Tribunal' in Peter Quayle (ed), *The Role of International Administrative Law at International Organizations* (Brill 2021) 217.

[128] See 'NATO Administrative Tribunal' < https://www.nato.int/cps/en/natohq/topics_114072.htm> accessed 1 August 2022.

[129] See e.g., *Chapman v Belgium* (Admissibility) App No 39619/06 (ECtHR, 5 March 2013).

of the administrative tribunal established access for staff members to a fully-fledged impartial and independent tribunal to adjudicate appeals against decisions taken by NATO.[130]

8. The review of the IFC's and MIGA's internal remedial mechanisms

A prominent recent example of domestic court decisions inducing compliance with the obligation to ensure fair trial rights is the review of the IFC's internal review mechanisms which are also used by the Multilateral Investment Guarantee Agency (MIGA) following the decision of the US Supreme Court in *Jam v IFC*.[131] In April 2019, soon after the Court's decision in February 2019, the CEO of the IFC issued a public statement stating that 'we can do better' in terms of responding to complaints by people affected by IFC funded projects and seeking to resolve disputes as well as outlining measures to respond to complaints by affected parties sooner and more systematically.[132] As noted in the reactions to the statement, it was unprecedented for a high-ranking official of an International Financial Institution to make such a statement.[133]

[130] Steven Hill and Nick Minogue, 'The Effectiveness of the North Atlantic Treaty Organization in an Era of Adaptation: The Role of the North Atlantic Treaty Organization Administrative Tribunal' in Peter Quayle (ed), *The Role of International Administrative Law at International Organizations* (Brill 2021) 217.

[131] Supreme Court (United States) 27 February 2019 No. 17–1011.

[132] Philippe Le Houérou, 'Opinion: At IFC, accountability is of utmost importance' 10 April 2019 < https://www.devex.com/news/opinion-at-ifc-accountability-is-of-utmost-importance-94667> accessed 25 March 2022.

[133] See e.g., Bank Information Center 'Philippe Le Houérou Just Shook Up the Accountability Debate at IFC—Could this be a Game Changer for Communities?' https://bankinformationcenter.org/en-us/update/philippe-le-houerou-just-shook-up-the-accountability-debate/ accessed 25 March 2022.

Additionally, the Committee on Development Effectiveness of the Boards of IFC and MIGA requested a review of IFC's and MIGA's environmental and social accountability including the role and effectiveness of the Office of the Compliance Advisor and Ombudsman (CAO). The Terms of Reference for an independent external review were issued in June 2019.[134]

The final report of the External Review of IFC's and MIGA's Environmental and Social Accountability including the role of the CAO was submitted to the Boards of IFC and MIGA in June 2020. The Report was heralded by a group of 44 Non-Governmental Organizations as 'path-breaking in the field of development finance accountability, both in its thoroughness and its systems-level analysis'.[135]

Thereafter, following comments by interested parties, the Boards of IFC and MIGA approved a new Policy for the CAO with an emphasis on resolving complaints early and proactively. A notable feature of the reform is the remedial management action plans developed in consultation with complainants and clients.[136] Additionally, the recommendations of the External Review resulted in the creation of a working group to

[134] See World Bank, 'External Review of IFC/ MIGA Environmental & Social (E&S) Accountability, including CAO's Role and Effectiveness' < https://www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability> accessed 26 September 2022.

[135] Arab Watch Coalition et al, Joint Comment on Report and Recommendations from the External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness 11 September 2020 https://arabwatchcoalition.org/2020/09/12/joint-comment-on-report-and-recommendations-from-the-external-review-of-ifc-miga-es-accountability-including-caos-role-and-effectiveness/ accessed 25 March 2022.

[136] See IFC/MIGA Independent Accountability Mechanism (CAO) Policy, June 28 2021 https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf accessed 25 March 2022.

develop recommendations on enabling remedial solutions for stakeholders negatively affected by projects funded by the IFC.[137]

9. Reform of the World Bank Accountability Mechanism following *Jam v IFC*

Another remarkable response to the US Supreme Court decision in *Jam v IFC* is the reform of the World Bank accountability procedures.

In April 2019, soon after the decision of the US Supreme Court, the Joint Ministerial Committee of the Boards of Governors of the World Bank and the International Monetary Fund made reference to the important role of internal accountability mechanisms in 'mitigating risks in an efficient and effective way'.[138] In September 2020, the Board of the International Bank for Reconstruction and Development and the International Development Association adopted a Resolution creating the World Bank Accountability Mechanism. The mechanism consists of the Inspection Panel, which was set up in 1993, and a new Dispute Resolution Service.[139] The Resolution explicitly states that the power of the Inspection Panel to receive requests for inspection presented to it by an affected party in the territory of a borrower includes situations where the Bank is alleged to have failed

[137] See , 'External Review: IFC/MIGA Update of Enabling Remedial Solutions – August 2021 https://www.ifc.org/wps/wcm/connect/123a4cd3-89a0-40f8-a118-23e9e5e0d0d6/202108-IFC-MIGA-Enabling-Remedial-Solutions.pdf?MOD=AJPERES&CVID=nImw-23 accessed 25 March 2022.

[138] Development Committee Communique, 13 April 2019 [11] < https://www.devcommittee.org/sites/dc/files/download/Communiques/2019-04/Communique%28E%29%20final%20version%204.13.pdf> accessed 24 March 2022.

[139] International Bank for Reconstruction and Development Resolution No. IBRD 2020-0005; International Development Association Resolution No. IDA 2020-0004, 8 September 2020. The powers and procedure of the inspection panel were updated by a separate Resolution; International Bank for Reconstruction and Development Resolution No. IBRD 2020-0004; International Development Association Resolution No. IDA 2020-0003, 8 September 2020.

in its follow-up on the borrower's obligations under loan agreements —precisely the type of situation that took place in *Jam v IFC*.

The notable features of the enhancement of the Inspection Panel Procedure includes extending the time limit for the presentation of a claim to fifteen months after the closing of a World Bank project, enabling the Panel to share its investigation reports with requesters to allow them to more meaningfully consult on the development of Management Action Plans and the possibility of verifying the implementation of Management Action Plans. At the time of writing, this new procedure of verification of Management Action Plans had yet to be used.[140]

The reforms are by no means comprehensive in addressing the World Bank's obligations to ensure fair trial rights. There is, for instance, no means of challenging the decision of the Executive Directors not to authorize an investigation. Nonetheless, the creation of the Accountability Mechanisms however is an incremental step in the fulfilment of the obligation to ensure fair trial rights and the implementation of the responsibility of the World Bank for its breach of this obligation. Though there is no explicit reference to the case of *Jam v IFC* in the reform process, the temporal proximity of the reforms to the claim before the US courts and the nature of the reforms addressing precisely the type of claim that underlay the *Jam v IFC* decision suggests that *Jam v IFC* played a crucial role in instigating the reform.

[140] See Annual Report of the Inspection Panel July 1 2020 – June 30 2021, The World Bank Group https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/annual-report-2020-2021.pdf accessed 25 March 2022, Foreword by Chair of the Committee on Development Effectiveness.

III. LIMITATIONS TO THE ARGUMENT THAT DOMESTIC COURT DECISIONS INDUCE COMPLIANCE WITH IOS' FAIR TRIAL OBLIGATIONS

The aforementioned examples have been selected on the basis of material available on the reasons that triggered the creation within IOs of alternative means for the settlement of claims made by private persons, research on reactions by States and IOs following decisions of regional and domestic courts in claims involving IOs and by the perusal of records such as the UN Juridical Yearbook and the Repertory of Practice of United Nations Organs. Whilst it is by no means a comprehensive survey of all reactions of States and IOs to domestic court decisions in claims against IOs, the examples do point to a relationship between domestic court decisions and reactions from States and IOs, such that the decisions have at times resulted in the provision of access to a forum and remedies to private parties in the specific claims made before domestic courts, and/or with respect to future claims. Thus, there is empirical evidence to suggest that the decisions of domestic courts denying immunity to IOs or signalling to States and IOs that the fair trial rights of claimants against IOs must be upheld can, and at least on occasion do, promote compliance with the obligation of IOs to ensure fair trial rights including at times, implementing the responsibility of the IO for the breach of these obligations.

There are however limitations to this claim. The limitations considered in this section are those that restrict the validity of the claim that domestic court decisions in claims against IOs induce compliance with the obligation of IOs to ensure fair trial rights.

As such, objections that this process, though it takes place, is not normatively desirable will not be addressed in this section.[141]

As stated at the outset of this chapter, the claim is not that domestic court decisions always or on a majority of occasions induce compliance with the fair trial obligations of IOs. The analysis above is not a quantitative analysis that makes such a conclusion possible. However, given the structural reasons that incentivise States and IOs to react to domestic court decisions discussed in section IIA and the empirical evidence discussed in section IIB, the claim is that domestic court decisions can induce, and at least on occasion have induced, compliance with IOs' fair trial obligations through generating reactions from States and IOs.

Many of the limitations to the argument that domestic court decisions induce compliance with fair trial obligations are evident in the case of the claims of Haitian nationals for damage caused by Cholera spread by UN Peacekeepers. As noted above, in the case of Haiti, the UN rejected the claims of the Haitian nationals. Though the UN Secretary General set out a detailed programme and set up a fund to compensate victims, the fund neither reached its targets, nor were the collected funds effectively dispersed amongst the victims.[142] States did not show an active interest in ensuring the fair trial rights of Haitian victims, with some commentators suggesting that the UN rejected the claims

[141] The question of whether this process is normatively desirable will be considered in the conclusion.

[142] See e.g. Daugirdas (n 4).

due to pressure from the US.[143] As noted above, the response from the Haitian government was measured. It did not make a strong call for the UN to respect the fair trial rights of its citizens.[144]

With respect to claims before domestic courts, the US courts repeatedly upheld the immunity of the UN. The signalling effect in the US cases was only to state that the obligation of the UN to create means to settle disputes was 'more than merely aspirational…obligatory [and] perhaps enforceable'.[145] There is no record of the claims of the victims being made before Haitian courts and of Haitian courts challenging the UN's immunity in the absence of alternative remedies. The foregoing reveals several issues which will be considered in turn.

A. The limited reaction of domestic courts to mass tort claims involving governmental functions

Firstly, domestic court decisions in claims like the Haitian Cholera claims which concern large scale human rights violations (in addition to damages under tort) have been, to date, rather muted in terms of signalling that fair trial rights must be upheld. As noted in chapter 4, domestic courts have consistently upheld IO immunity despite the absence of alternative remedies in cases where the claim concerned so-called 'governmental functions' exercised

[143] Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, 'UN Responsibility for the Introduction of Cholera into Haiti', UNGA, 71st sess, 3rd comm, Agenda Item 68 (b)-(c) 25 October 2016.

[144] See e.g. Megret (n 28) 71ff.

[145] *Georges*,14.

by the IO.[146] It is interesting however, that it is the *nature of the claim* rather than the specific character of the IO, — its identity, purposes or functions — that seems to affect the decisions of domestic courts. Thus, the UN's immunity has been held to be dependent on fair trial rights in employment disputes though this has not been the case with claims relating to the exercise by the UN of its powers under Chapter VII of the UN Charter. Even lesser known IOs' immunity has been upheld when they exercise governmental functions in spite of the absence of alternative remedies.[147]

In the Haiti claims, the US courts merely considered the UN's immunity not to be conditional on its obligation to provide means for the settlement of disputes and that the plaintiffs did not have the standing to invoke the obligation of the UN to create means to settle disputes. In doing so, they continued the trend of upholding and securing the immunity of IOs in mass tort claims involving potential violations of human rights.

As pointed out in the literature, it is precisely for such mass tort claims that claimants have the least developed remedies (if any at all) against IOs.[148] Thus, the fact that the response of domestic courts in such claims have been limited reduces the efficacy of the argument that domestic court decisions induce compliance with the fair trial

[146] See Chapter 4, section IIB. The cases were immunity was upheld in spite of the absence of alternative remedies includes *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations* (Supreme Court, Netherlands) LJN:BW1999 13th April 2012 [4.3.6].

[147] See chapter 4, section IIB 2.

[148] See e.g., Rosa Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25 European Journal of International Law 239.

obligations of IOs, thereby providing means to adjudicate and enforce the legal responsibility of IOs under international and domestic law.

There is merit in this objection. Domestic courts not denying immunity or reacting strongly to claims involving governmental functions exercised by IOs is perhaps an indication that domestic courts are not unrestrained in denying immunity to IOs. It would undoubtedly result in more effective remedies for victims of human rights violations by IOs however if domestic courts were to send stronger signals to States and IOs to ensure the fair trial rights of victims in such cases.

There has been some success of domestic courts inducing compliance with IOs' fair trial obligations even with respect to mass tort claims involving governmental functions. The claim in *Jam v IFC* was a mass tort claim with respect to arguably a governmental function.[149] The limited reaction of the US Supreme Court in this case, which was to interpret the IOIA so that the IFC will have only the same immunity as that provided in the FSIA, triggered reform within the IFC, the World Bank and MIGA. The domestic and regional international court reactions in cases such as *Kadi*[150] had an impact on improving the means to ensure fair trial rights of persons targeted by UNSC sanctions in the most politically sensitive area of sanctions against persons associated with terrorist organizations. These very cases also had an impact on reforming INTERPOL's CCF. Thus, though the capacity of domestic courts to induce compliance with the fair trial obligations

[149] See *Jam v IFC*, 14 where the US Supreme Court held 'it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA'.

[150] (n 123).

of IOs may not have been utilised to the fullest with respect to mass tort claims, domestic court decisions have resulted in improved remedies for the claimants even in these claims.

B. Not all domestic courts have the same impact on inducing compliance with IOs' fair trial obligations

Different domestic courts have differing capacity to induce compliance with IOs' fair trial obligations. To state this is to state that the obvious power imbalances between States that pervade all of international law applies also to the impact of domestic court decisions in claims against IOs on inducing compliance with IOs' fair trial obligations.

Following *Jam v IFC,* the IFC and the World Bank, both headquartered in Washington D.C., reacted to the US Supreme Court by improving means to settle claims of private parties. The same was the case with IOs headquartered in France reacting to decisions by the French Cour de cassation denying IOs immunity. However, Argentinian courts had been denying immunity to IOs since the early nineteen eighties with no available evidence that this resulted in a significant change in the remedies afforded by IOs.[151]

Some courts may not be in a position politically to deny immunity to an IO or to signal that the IO and the State must ensure fair trial rights, just like the Haitian executive had many strong political reasons not to invoke the responsibility of the UN for its failure to afford Haitian citizens their fair trial rights. Other courts may be bound by domestic legislation to give effect to the immunity of IOs unconditionally,[152] but this reason has not

[151] See chapter 4, section IIA, IVA.

[152] E.g., *IWMI v Jayakody* (Supreme Court Sri Lanka 25 March 2014) SC Appeal 11/2011.

prevented courts from engaging in the crucial signalling function, highlighting to States and IOs' that the claimants' fair trial rights must be upheld.[153]

Whilst there are obvious differences in the impact of different courts as well as in the attitude of IOs to different courts,[154] there are cases from less powerful countries denying immunity to IOs which have brought about a reaction from the IO to cease its wrongful conduct of not ensuring fair trial rights.[155] Thus, combined with the momentum of other, more influential courts denying IOs immunity or signalling to States and IOs that fair trial rights must be upheld, even less influential courts can play a role in inducing compliance with IOs' fair trial obligations.

C. The compliance by the IO with its fair trial obligations may be incremental

There are many instances when IOs have reacted to domestic court decisions but have not provided a remedy which ensures that the IO complies fully with its fair trial obligations or which implements its responsibility for the failure to ensure fair trial rights.[156] An example is the manner in which the UN settled the claims arising from its activities in the

[153] See e.g., *Ochani vs WHO* (Delhi High Court, India) OXIO 591.

[154] IOs have even taken pains to write directly to US judges, see e.g., 1990 UNJY 287, whereas other States receive a curt reminder to ensure that the courts respect the IO's immunities, see e.g., 2013 UNJY 378.

[155] See e.g., the case of an accident involving a UNICEF vehicle 1992 UNJY 473, which involved a domestic court decision from Ethiopia.

[156] For an analysis of the criteria required for an alternative fora to satisfy fair trial rights, specifically from the perspective of domestic courts, see Gregor Novak and August Reinisch, 'Issues of Effectiveness and Legitimacy Desirable Standards for the Design of Administrative Tribunals from the Perspective of Domestic Courts' in Elias Olufemi (ed), *The development and effectiveness of international administrative law : on the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal* (Brill Nijhoff 2012) 300 ff.

Congo where the settlement excluded the victims and was determined unilaterally by the UN.[157] Another example may be that despite the push to reform the UN internal justice system, many persons, including those that are affected by the orders of the tribunals, still fall outside the jurisdiction of the mechanisms.[158] Moreover, despite the reform of the ombudsman processes within the World Bank and the IMF, in the absence of domestic courts, there does not appear to be a forum to challenge decisions of the Inspection Panel not to investigate a complaint or a decision of the Board not to follow the recommendation of the Panel to investigate a matter.[159]

There is no doubt that inducing compliance with IOs' fair trial obligations through decisions of domestic courts is an incremental process. IOs may not have the funds to immediately provide satisfactory remedies and States may be opposed to having to spend for the establishment of such mechanisms. But the threat of domestic courts denying IOs immunity undoubtedly acts as a catalyst for States and IOs to keep improving IOs' alternative dispute resolution mechanisms. This is evinced by the fact that the UN Internal Justice Council regularly invokes that domestic courts may deny IOs immunity when persuading the UNGA to approve further reforms to the UN internal justice system to make it more inclusive.[160] Another example is the manner in which the existing Ombudsman

[157] See section IC above.

[158] See *Lee v Secretary General of the United Nations* No. 2021-UNAT-1170 UN Administrative Tribunal [33,34] where the UNAT states that 'To the extent that there may be a casus omissus in the Statute by not permitting an appeal or review by non-parties affected by procedural orders issued by the UNDT, it is not an omissus that the Appeals Tribunal can easily or justifiably supply in the face of the unambiguous language adopted by the General Assembly in restricting the jurisdiction ratione personae of the Appeals Tribunal'.

[159] See Resolution No. IBRD 2020-0004.

[160] See Report of the Internal Justice Council [141].

procedures of the World Bank and IFC received considerable further improvement following the US Supreme Court decision in *Jam v IFC*. This highlights that that the push from domestic courts for IOs to fulfil their obligations is ever-present.

D. Other factors also contribute to IOs' compliance with fair trial obligations

To be clear, the argument is not that domestic courts are the only means through which IOs are induced to comply with their fair trial obligations and the responsibility of IOs for the breach of fair trial obligations is implemented. Other considerations, such as the reputation and credibility of the IO, a human rights discourse that emphasises fair trial rights and the focus in international criminal law on a victim centred approach to proceedings[161] all contribute to pushing States and IOs to ensure that IOs comply with fair trial obligations and to implementing IOs' responsibility for the breach of fair trial obligations. For instance, in the case of Haiti, where domestic courts did not deny the UN's immunity or send a strong signal that the UN needs to ensure fair trial rights, what made the UN and States respond at least in the way that they did was concern for the UN's image and reputation.[162] Additionally, when domestic courts do not signal strongly as in the Haiti situation, it may be the attention brought to the issue by the claim before domestic courts through scrutiny via the media, non-governmental organizations etc. and not the decision of the court itself that triggers a reaction by States and IOs.

[161] See e.g., Boon and Megret (n 12) 7.

[162] On the limits of reputation as a motivator to induce compliance with obligations, see Daugirdas (n 4) 41.

In spite of the fact that other considerations may play a part in inducing compliance with IO's fair trial obligations, the practice referred to in section II above demonstrates that IOs and States are particularly sensitive to decisions from domestic courts which signal that the IO's fair trial obligations must be fulfilled. This stands to reason given the importance that IOs place on their immunity from jurisdiction and the sensitivity of States to decisions from their domestic courts, which States have to defend internationally. This sensitivity of States to domestic court decisions is particularly strong when the decisions uphold human rights.[163]

V. INTERIM CONCLUSION

Having determined that there is no conclusive basis in international law to render a denial of immunity and exercise of jurisdiction by a domestic court in a claim against an IO lawful, the present chapter examined the effect of domestic and regional court decisions in claims against IOs on triggering reactions from States and IOs which result in IOs complying with their fair trial obligations. This includes, at times, implementing the IO's responsibility for the breach of the obligations to ensure fair trial rights to private parties.

The chapter argued that IOs often fail to fulfil and States fail to push IOs to fulfil their fair trial obligations. It was noted that in practice there is a tendency within IOs to assert their immunity without addressing the breach of a private parties' fair trial rights and

[163] Antonios Tzanakopoulos, 'The Countermeasure of Disobedience: Implementing the Responsibility of International Organizations', *Ragazzi (ed), The Responsibility of International Organisations: Essays in Memory of Sir Ian Brownlie* (2013).

that States lack the incentive to compel IOs to fulfil their fair trial obligations including invoking and implementing IOs' responsibility for the breach of their fair trial obligations. This lack of incentive on the part of States and IOs to ensure that IOs fulfil their fair trial obligations is at least partly traceable to the absence of means for individuals to bring claims against the obligation holder, the IO.

However, the chapter argued that domestic court decisions denying IOs immunity or signalling to States and IOs that the claimant's fair trial rights must be upheld can have and on multiple occasions have had the effect of triggering States and IOs to take steps towards IOs complying with their fair trial obligations and at times towards implementing the responsibility of IOs for the failure to ensure fair trial rights. It was demonstrated through the use of examples of States and IOs reacting to domestic court decisions by creating or improving means to uphold the fair trial rights of private parties that domestic court decisions have on several occasions had this effect on States and IOs in practice.

There are limitations to this argument. It cannot be said, on the basis of the material surveyed and the examples presented, that domestic court decisions will always induce compliance with IOs' fair trial obligations. Compliance with IOs' fair trial obligations and the implementation of IOs' responsibility for the breach of fair trial rights may take place partially and incrementally due to domestic court decisions. It will also depend on which court has challenged the IO's immunity as well as what type of claim the domestic court decision concerns. However, on the basis of the material examined, it can be said that decisions of domestic courts in claims against IOs, even if illegal in denying IOs immunity, can generate and have in fact generated reactions from States and IOs that result in IOs

increasingly complying with their fair trial obligations. In cases where these reactions result in ensuring the fair trial rights of the claimant in the particular case as opposed to the creation of forums for the settlement of disputes in the future, the decisions of domestic courts also result in the implementation of IOs' responsibility for the breach of the obligations to ensure fair trial rights.

CHAPTER 7

CONCLUSION

I. SUMMARY OF THE CLAIMS OF THE THESIS

This thesis began by identifying a lack of means to adjudicate and enforce the legal responsibility of IOs for conduct affecting individuals. This resulted from *inter alia* the immunity of IOs before domestic courts, the fact that States often do not invoke the responsibility of IOs for the breaches of their obligations and the failure by IOs to create appropriate means for the settlement of disputes with private parties. It was argued that whilst the immunity of IOs prevents domestic courts from acting as fora for the adjudication and enforcement of the legal responsibility of IOs, States and IOs lack the incentive to take steps to ensure that IOs create appropriate means to settle disputes with private parties.

In this context, the thesis analysed domestic court decisions as a means of promoting compliance by IOs with their fair trial obligations. IOs complying with their fair trial obligations would in turn mean that there are fora available for the adjudication and enforcement of the legal responsibility of IOs for the breach of their legal obligations through conduct affecting individuals.

The thesis considered whether the denial of immunity and the exercise of jurisdiction by domestic courts in claims against IOs in situations where individuals' fair trial rights are not upheld was legal, thus rendering domestic courts lawful fora for the

settlement of claims against IOs. The thesis also considered whether domestic court decisions in claims against IOs, both decisions that deny immunity and those that do not deny immunity, but signal to the State and the IO that the claimant's fair trial rights must be upheld, trigger reactions from States and IOs that result in IOs fulfilling their fair trial obligations through establishing fora for the settlement of disputes with private parties.

In situations where the IO has not created appropriate alternative means for the settlement of disputes with private parties, the persons impacted by an IO's actions are vulnerable, and unable to resort to the regular safeguards available in a domestic setting against an entity that wields sovereign power over them. In this way, the absence of means to ensure fair trial rights on the part of the IO results in a violation of a fundamental right of individuals, the right to a fair trial, specifically the right to a forum and the right to a remedy.

Chapter 2 undertook the preliminary step in the argument of the thesis — setting out the sources and scope of the fair trial obligations of IOs. The chapter established that IOs are bound by an obligation under treaty law for some IOs and under general international law for all IOs to ensure fair trial rights to persons within its control. The breach of this obligation results in the responsibility of the IO being engaged.

Thereafter, chapters 3 and 4 analysed the case law before domestic and international courts in claims involving IOs. The practice of international courts concerning immunity and fair trial rights is important in determining whether practice has carved out an exception to IO immunity in situations where the claimant's fair trial rights are not upheld. Moreover, international court decisions on immunity often stem from a domestic court

decision either granting or denying immunity and such international court decisions often influence domestic court decisions on immunity and fair trial rights in turn.

When domestic courts are confronted with a claim against an IO, the court faces a conflict between the obligation of the State to grant immunity to the IO on the one hand and the obligations of the State to ensure fair trial rights to persons within its jurisdiction on the other. Additionally, domestic courts have before them a situation where the IO may be in breach of its own obligations to ensure fair trial rights to private persons. An assessment of the practice revealed that some domestic courts deny immunity to IOs in situations where the IO has not fulfilled its obligation to ensure fair trial rights. Other courts do not deny immunity, but signal to the State and IO that means must be created to ensure the claimant's fair trial rights.

Chapter 4 analysed whether the practice of domestic courts had carved out an exception to IO immunity in situations where private persons' fair trial rights have not been fulfilled. The analysis of decisions from twenty jurisdictions revealed that the practice of domestic courts did not demonstrate the consistency required to constitute subsequent practice evidencing the agreement of the parties in the application of immunity conferring treaties to deny immunity when fair trial rights are not fulfilled. Nor was the practice consistent enough to constitute State practice and/or *opinio juris* evidencing an exception to any rule of customary international law requiring the grant of immunity to IOs.

Chapter 5 analysed whether other rules of international law can operate to render the denial of jurisdictional immunity to an IO by a domestic court legal. It was argued that there is no basis for a rule of normative hierarchy, i.e., *jus cogens* to operate to render a

denial of immunity to an IO legal. Nor were conflict rules such as *lex specialis*, *lex posterior* or *lex priori* capable of resolving the conflict between IO immunity and fair trial rights in favour of the latter. The rules allowing for the suspension of treaty obligations on account of material breach and the rules allowing for the taking of countermeasures in response to a prior wrongful act provided plausible bases for rendering a denial of immunity to an IO lawful in instances where fair trial rights had not been ensured. However, these rules also run into considerable difficulty when applied to the actual practice of domestic courts when denying IOs immunity. Thus, chapter 5 concluded that while the rules allowing the suspension of treaty obligations due to material breach and the rules relating to countermeasures could potentially be employed to lawfully deny immunity to IOs where the claimant's fair trial rights are not upheld, in the current state of practice it is difficult to assert that any method conclusively renders a denial of immunity lawful. The chapter noted however that the practice of domestic courts does display consistency in reiterating the obligation of IOs to ensure the fair trial rights of private persons and in signalling to States and IOs that measures must be taken to ensure fair trial rights.

Chapter 6 analysed the extra-legal impact of decisions of domestic courts in claims against IOs. It took the view that an important impact of domestic court decisions in claims against IOs is not the creation and enforcement of legal rules relating to IO immunity.[1] Rather, domestic court decisions can trigger States and IOs to take measures to ensure that IOs comply with their fair trial obligations. With respect to States, domestic court decisions

[1] On the dual role of domestic courts in international law – that of creating and enforcing legal rules,, see e.g., Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57, 61 ff.

may pressurise the executive branches of States to take measures towards IOs upholding their fair trial obligations by either denying immunity to IOs — thereby potentially exposing the State to responsibility for the breach of its obligation to grant immunity to the IO — or by signalling that the State may be in violation of its own fair trial obligations by granting immunity to IOs where IOs do not fulfil their fair trial obligations. With respect to IOs, domestic court decisions can push IOs to create means to settle disputes with private parties for fear of the IO's immunity being denied *en masse* by domestic courts. When IOs create means for the settlement of disputes for the specific claim which was the subject of the domestic court decision, the domestic court decision also results in the implementation of the responsibility of the IO for the breach of its fair trial obligations through cessation of the IO's wrongful conduct.

The empirical claim of the thesis — that domestic court decisions can and do promote compliance with IOs' fair trial obligations, thereby providing means to adjudicate and enforce the legal responsibility of IOs for the breach of their obligations through conduct affecting individuals, is not without limitations. These limitations were discussed in chapter 6. Importantly, it cannot be said that domestic court decisions always induce compliance with IOs' fair trial obligations and the means for the settlement of disputes that IOs create as a result of domestic court decisions may only incrementally fulfil private persons' fair trial rights. Moreover, though the denial of immunity does not appear to depend on the purposes and function of the IO *per se*,[2] domestic courts have displayed a

[2] Courts have not been reluctant to consider whether alternative remedies are available when the immunity of an IO exercising governmental functions such as the UN or NATO has been challenged in an *employment* dispute. See e.g., *Chapman v Belgium*, *Perez v Germany*, chapter 3, section II. *Contra* the reluctance of courts

marked reluctance to deny immunity in cases where the substance of the challenge concerns governmental functions exercised by the IO. This mirrors the activism of domestic court decisions in carving out an exception to State immunity for commercial activities, but not for governmental functions.

II. THE UNLAWFUL DENIAL OF IMMUNITY TO IOS IN ORDER TO INDUCE COMPLIANCE WITH FAIR TRIAL OBLIGATIONS IS NORMATIVELY JUSTIFIED

The empirical claim made in Part III of the thesis is that domestic court decisions, not by acting as fora for the settlement of claims against IOs through lawful denials of immunity, but by triggering reactions from States and IOs, can induce and on multiple occasions have induced compliance with the fair trial obligations of IOs. The decisions that induce compliance with IOs' fair trial obligations by signalling to States and IOs without denying immunity are lawful. But the domestic court decisions which achieve this result by denying IOs immunity may well be unlawful under international law. The thesis has hitherto not engaged with the question of whether the result of these unlawful decisions in inducing compliance with IOs' fair trial obligations is normatively desirable. A few words will be said about the matter in conclusion.

If domestic court decisions which deny immunity to IOs on the basis of fair trial rights are unlawful, there is no legal argument to be made that the illegality is only a minor

to consider alternative remedies when the claim itself concerns governmental functions exercised by the IO. See e.g., *Mothers of Srebrenica* (Supreme Court, Netherlands), chapter 4, section II.

one.[3] There is no basis in the current state of international law to claim that any illegality, apart from a breach of a *jus cogens* norm, is graver, or results in different consequences to other breaches.[4] Thus, if there is a breach of the obligation to grant immunity by a domestic court denying immunity to an IO, it is by no means, at least legally, a less grave breach than a breach of the obligation to grant fair trial rights.

In addition to the unlawfulness of a denial of immunity, the argument is made in the literature that allowing domestic courts to adjudicate claims against IOs could result in abuse by domestic courts.[5] The fear is that domestic court decisions denying immunity to IOs would contradict the objective of immunity in the first place, that of ensuring the independent functioning of IOs. This may hinder IOs from achieving their purposes and functions.

However, domestic court decisions that deny immunity may have the consequence of promoting the fulfilment of a fundamental right of private persons and inducing compliance with an important obligation of IOs that serves as a gateway for the

[3] Cf. Marko Milanovic, 'Illegal But Legitimate?' EJIL:Talk! 10 April 2017, < https://www.ejiltalk.org/illegal-but-legitimate/> contrasting M. Gandhi's civil disobedience in the face of colonial oppression with the unlawful air strikes in Syria and stating that the underlying norm in the latter case, Article 2(4) of the UN Charter, is 'a good norm, not an evil one' and that the moral balance of breaking the law to prevent greater harm should take into account the harm that undermining the norm generally will have.

[4] However, see Antonios Tzanakopoulos 'Collective Security and Human Rights' in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 66, arguing that domestic court practice may be interpreted to mean that the right to a fair trial forms a fundamental human right that ranks higher than *jus dispositivum*, though not amounting to jus cogens.

[5] See e.g., August Reinisch, 'To What Extent Can and Should National Courts Fill the Accountability Gap Special Issue: Immunity of International Organizations' (2014) 10 International Organizations Law Review 572, 579 stating that domestic courts exercising jurisdiction over IOs may expose IOs to the risk of bias and unfair trials. See also *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Rep 62, [66].

adjudication and enforcement of the responsibility of IOs for the breach of their other obligations. Whatever view one takes on the objectives of the law, upholding rights under the law and increasing compliance with legal obligations must be desirable consequences for a legal system.[6]

If one accepts these positive legal consequences of the unlawful domestic court decisions denying IOs immunity, the breach of international law that brings about the consequences may be normatively justified[7] and the exercise of jurisdiction by domestic courts may be argued not to hamper the independent functioning of IOs, if the situations in which domestic courts may deny immunity to IOs are well regulated.[8]

It is important also to note here that the unlawful denial of immunity is not justified only on the basis of the *unjust* nature of the failure of the IO to ensure fair trial rights but based on the *unlawfulness* of the failure. The fact that *prima facie* unlawful measures are taken in response to a prior unlawful act in order to induce compliance with the secondary obligations stemming from the prior breach within well-regulated limits is precisely the

[6] See e.g., Joseph Raz, 'The Functions of Law' in Joseph Raz (ed), *The authority of law: Essays on law and morality* (Oxford University Press 1979); Lon L Fuller, *The Morality of Law* (Rev ed, Yale University Press 1969) 106; On legal systems, see e.g., Joseph Raz, 'The Identity of Legal Systems' (1971) 59 California Law Review 795.

[7] As Tzanakopoulos notes with respect to civil disobedience, if the act is necessarily unlawful, the justification belongs to the realm of the extra-legal and only moral justifications are available, with the subjectivity that such an enquiry necessarily brings Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 177 ff.

[8] Indeed, one of the objections to the 'illegal but legitimate' justification for the use of force is the absence of norms to delimit the scope of the precedent that is set by the illegal use of force. See e.g., Anthea Roberts, 'Syrian Strikes: A Singular Exception or a Pattern and a Precedent?'10 April 2017 https://www.ejiltalk.org/syrian-strikes-a-singular-exception-or-a-pattern-and-a-precedent/ accessed 27 September 2022.

justification for the use of countermeasures in international law.[9] Thus, even though the denial of immunity may fall outside of the strict requirements for the application of countermeasures under international law, the view taken here is that domestic court decisions are subject to control and regulation such that they cannot abuse their capacity to deny immunity to IOs. This normatively justifies the breach of international law caused by the denial of immunity in light of the positive legal consequences it may bring about and also ensures that the independent functioning of the IOs, the very purpose of immunity, is not jeopardized.

Domestic courts are no strangers to interpreting and enforcing obligations under international law. The role of domestic courts in enforcing international obligations, including implementing responsibility for their breach is well noted in the literature.[10] Domestic courts may enforce international obligations in many different ways including through enforcing international judicial decisions, preventing the executive branch of the State from taking action in breach of international law, mandating the Executive to perform conduct in compliance with its international obligations and as examined in chapter 5, by

[9] See chapter 5, section III B.

[10] See e.g., FA Mann, 'The Consequences of an International Wrong in International and Municipal Law' (1976) 48 British Yearbook of International Law 1; Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 133, 145ff; André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 American Journal of International Law 760; Roberts (n 1) 58 with further references at note 10; With respect to enforcing obligations under particular branches of law, see Thomas Mensah, 'Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law' in Buffard et al I. (ed), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV); Rosalyn Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom', *Themes and Theories* (Oxford University Press 2009).

taking countermeasures against another State or IO.[11] By denying immunity to IOs due to the failure of the IO to ensure the fair trial rights of private persons, domestic courts are engaging in precisely this well-noted enforcement of international legal obligations, in this particular instance through generating reactions from States and IOs to the domestic courts' decisions.

Domestic courts do not have unfettered discretion to deny immunity to IOs. Domestic court are subject to regulation by the other organs of government, particularly those engaged in the legislative function,[12] and subject to the scrutiny of IOs and other States.[13] When domestic courts have seemingly unreasonably limited an IO's immunity, IOs and other States have been quick to raise the matter with the executive branches of the State concerned. Thus, in the case of Italian courts denying immunity to the FAO in the 1980s, the FAO was able to engage the Italian government so that a compromise to sign the CPISA, inclusive of the provision requiring the FAO to create alternative means for the settlement of disputes, was signed in exchange for Italian courts respecting the FAO's immunity.[14] Furthermore, when Belgian courts appeared to apply a stricter test than that set out by the ECtHR in *Waite and Kennedy* in determining whether IO immunity was a

[11] Chapter 5, section IIIB. See also Tzanakopoulos, *Disobeying the Security Council* (n 7) 194–197.

[12] ibid 154 referring to the 'corrective function' exercised by legislative organs of States over domestic courts.

[13] See Cedric Ryngaert, 'Belgium' in August Reinisch (ed), *The privileges and immunities of international organizations in domestic courts* (Oxford University Press 2013) 72 who states that the reaction of IOs and the Belgian political organs to the decisions in *Seidler vs Western European Union* appears to have resulted in a more conservative approach by Belgian courts to the alternative remedies available within IOs.

[14] See chapter 6, section IIB 2.

proportionate restriction of fair trial rights,[15] there was backlash by States and IOs against this approach, which resulted in subsequent Belgian decisions adopting a less strict alternative means test.[16] Perhaps due to this regulation and scrutiny, the denial of immunity to IOs by domestic courts has been quite restrained.[17] It appears that domestic courts are generally careful in engaging in the auto-determination of the responsibility of other international actors including IOs.[18]

Furthermore, there is a developed body of fair trial rights and corresponding obligations,[19] even with respect to IOs. Thus, domestic courts have reasonably well-formulated criteria against which to evaluate the means for the settlement of disputes provided by IOs.[20] Domestic courts which determine whether fair trial rights have been

[15] See e.g., *Western European Union v Siedler* (Court of Cassation Belgium 21 December 2009) ILDC1625(BE 2009).

[16] See Ryngaert (n 13) 72.

[17] See chapter 4, sections II, III, IV.

[18] Cf Simon Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility' (2013) 26 Leiden Journal of International Law 615.

[19] See chapter 2, sections I and II. See also Rishi Gulati, Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders (University Press 2022) ch 2.

[20] See e.g., Gregor Novak and August Reinisch, 'Issues of Effectiveness and Legitimacy Desirable Standards for the Design of Administrative Tribunals from the Perspective of Domestic Courts' in Elias Olufemi (ed), *The development and effectiveness of international administrative law : on the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal* (Brill Nijhoff 2012) 300 using domestic court decisions to distill a set of standards that can guide States and IOs with respect to the design of alternative remedies.

violated under domestic law should have little difficulty determining whether an IO has breached its fair trial obligations under international law.[21]

Crucially, the IO is in a position to address the denial of immunity and safeguard its immunity from jurisdiction by taking steps to fulfil its obligation to ensure fair trial rights of private persons. As evidenced from the examples of Italian courts and the FAO, the advisory opinion of the ICJ in *Cumaraswamy* and the Belgian courts' more restrained approach to denying immunity to IOs following the reaction to the *Seidler* decision, the idea that IOs are powerless and vulnerable in the face of overreaching domestic courts does not appear to be rooted in practice. IOs are capable of protesting and asserting their rights if a domestic court has exercised jurisdiction without basis.[22] However, it may be difficult for an IO to protest the decision of a domestic court without setting up means to ensure private person's fair trial rights, an undeniably desirable consequence of the domestic court decision.

A different objection to the claim that the denial of immunity to IOs in order to induce compliance with fair trial obligations is normatively justified is that IOs will in fact reduce their internal mechanisms for hearing complaints by private parties when individuals use the findings of such mechanisms to make claims against IOs before domestic courts. This argument was made by legal counsel for the IFC before the US

[21] On the relevance of domestic court decisions relying on fair trial rights under domestic law in claims against IOs, see chapter 4, section I.

[22] Cf. Emmanuel Gaillard and Isabelle Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass' (2002) 51 International and Comparative Law Quarterly 1.

Supreme Court in *Jam v IFC*.[23] As demonstrated in chapter 6 however, the decision of the US Supreme Court in *Jam v IFC* had the opposite effect of the IFC in fact acknowledging the shortcomings of and strengthening its internal accountability mechanisms following the decision.[24] The decisions of domestic courts have not, based on the material examined for the purposes of this thesis, ever had the effect of IOs reducing or retracting the means available for the settlement of disputes with private parties.

Thus, insofar as a domestic court decision denying immunity to an IO is unlawful, it can have the effect that a countermeasure does. It can induce compliance, not necessarily with the secondary obligations of cessation and reparation for the breach of the obligation to ensure fair trial rights, but with the primary obligation of IOs to ensure fair trial rights. The IO has within its power the ability to prevent the violation by domestic courts of its right to immunity from jurisdiction by compliance with an obligation that it is in any case incumbent upon it. Therefore, given the limited space within which domestic courts can deny IOs immunity; the fact that domestic courts which deny IOs immunity are subject to scrutiny and regulation by the other branches of government of the State, by other States including their domestic courts[25] and by IOs; the fact that IOs are able to prevent the denial of immunity by complying with their fair trial obligations and the importance of the rights

[23] *Jam v IFC* (Supreme Court, United States) No. 17-1011 , Verbatim Record, 31 October 2018, 60-1. 'Well, you know, the factual basis for the lawsuit is the report of our internal accountability process. So if they can just grab that and take it into court and make it the basis for a class action tort lawsuit in which they can make a claim for all this money, it's going to create a powerful disincentive for us not to engage in that kind of self-policing activity'.

[24] See chapter 6, section IIB 8 and 9.

[25] See e.g., Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in Ole Kristian Fauchald and André Nollkaemper (eds), *Unity or Fragmentation of International Law—The Role of International and National Tribunals* (Hart 2012).

that domestic courts uphold through their decisions in claims against IOs, the decisions of domestic courts denying IOs immunity where the claimant's fair trial rights are violated are normatively justified in spite of their unlawfulness.

The unlawfulness of denying IOs immunity is certainly not without consequence. However, the fact that this illegality may provide for persons such as the victims of the Srebrenica massacre or the Haiti Cholera outbreak, or for persons subject to harassment or unlawfulness in the workplace such as Susan Mendaro or Palihawadena,[26] a forum for the determination of their rights against the powerful entity that is alleged to have violated them is an important consequence that doctrinal study cannot and should not ignore. As Jan Klabbers notes, 'no matter how technically brilliant our arguments and analyses, at the end of the day the law is about people of flesh and blood, and it stands to reason to suggest that their fates are not decided on the basis of superbly crafted legal arguments alone'.[27] As the material discussed in chapter 6 demonstrates, IOs and executive branches of States require impetus to uphold the fair trial obligations of individuals impacted by IOs' conduct. A forum that is both capable and well – suited to provide this impetus, is domestic courts, through their decisions in claims against IOs.

Inducing compliance with obligations of IOs through decisions of domestic courts may not be an optimal solution. Such decentralised reactions to illegalities under

[26] See chapter 1, section V.

[27] Cf. Jan Klabbers, 'The Cheshire Cat That Is International Law' 31 no.1 European Journal of International Law 269, 282'After all, no matter how technically brilliant our arguments and analyses, at the end of the day the law is about people of flesh and blood, and it stands to reason to suggest that their fates are not decided on the basis of superbly crafted legal arguments alone'.

international law can be destabilizing.[28] However in a legal system with no centralised enforcement, such decentralised reactions by judicial organs of States which are regulated in multiple ways may be – for now - the least bad option for ensuring compliance with important obligations under the legal system.

[28] Antonios Tzanakopoulos, 'The Countermeasure of Disobedience: Implementing the Responsibility of International Organizations', *Ragazzi (ed), The Responsibility of International Organisations: Essays in Memory of Sir Ian Brownlie* (2013) 372.

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