The (Non-) Application of International Law by the ILO Administrative Tribunal: possible legal avenues for establishing responsibility

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INTRODUCTION

This report was written by the Amsterdam International Law Clinic upon request of Schwab, Flaherty & Associés (a law firm experienced in the practice of the law of the international civil service) and the International Commission of Jurists. The request follows from a number of potential cases of denial of justice for international civil servants, who allegedly have not received access to a fair trial under the International Labour Organisation's Administrative Tribunal (ILOAT). Such complaints regarding the procedure and practice of the ILOAT have been brought to public attention in recent years. During a reform conference for the ILOAT in 2002, the neglected norms of a right to fair trial were raised as being of particular concern in opinions written by leading international jurists such as Geoffrey Robertson QC, Professor Louise Doswald-Beck and Dr. Ian Seiderman.[1]

One example of the frustration of justice suffered by an international civil servant is that of a woman who experienced "mobbing", or systematic workplace harassment, and thereafter was denied the implementation of the internal protection policy for victims of mobbing. In addition, there was no opportunity to contest the supervisor's refusal to utilise the appropriate internal mechanisms regarding performance appraisal, nor an effective remedy for such workplace harassment.

In bringing this complaint first to the International Labour Organisation's quasi-judicial board (the ILO Joint Panel), which acts as the first-tier court for many international civil servants, and then to the ILOAT, many basic tenets of a fair trial were breached. Of the complainant's two cases brought before the first-tier quasi-judicial board, the ILO Joint Panel, only one complaint was allowed to proceed to hearing. The other was aborted prior to the adjudication of the dispute, due to the respondent party to the proceedings, the International Labour Organisation (ILO), unilaterally denying the adjudicatory body permission to proceed with the hearing, enforcing a sixty day time limit within which the proceedings were to be completed, so refusing the complainant a first instance hearing.[2] This resulted in the absence

[1] 'Opinions for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters' Staff Union <http://www.ilo.org/public/english/staffun/info/iloat> (18 June 2004).

[2] This despite the expressed position of the Chair of the Joint Panel, Professor Robert Upex, Professor of Employment Law at the University of Surrey, England, that "The Chair is of the view that hearings would have been appropriate and useful for the proper examination of this complex case, and that an extension of the time limits would have been reasonable in view of the fact that the claimant no longer works in the Office and resides

of any public hearing, no opportunity to call evidence or cross-examine witnesses and the consequential absence of a first instance hearing or judgment in a case where complex issues of both law and of fact were in dispute.

Proceedings were stopped at the document discovery stage, before documents were produced to the complainant and her lawyers. This meant that some fundamental documents were kept 'confidential' by the Administration, whereby the complainant and her lawyers were refused access. This is at odds with the standard that in litigation, only the written advice of lawyers should remain confidential under legal privilege. There is no neutral Registry for storage of documents involved in a case, which should act as a repository for all relevant documents to which both parties are able to have authorized access, which leads to lacunas in document discovery. Some documents were handed over to the complainant's lawyers on an inconsistent basis, and upon discretion of the Administration. There was no opportunity afforded to the complainant's lawyers to contest decisions regarding the confidentiality of legal documents under the ILOAT procedure.

During the litigation process before the ILOAT, there was uncertainty as to fundamental questions of causation before damage could be assessed, and whether or not intent is considered a pre-requisite for the establishment of harassment. Such uncertainty raises questions of legal consistency and predictability for cases of a similar nature. Furthermore the lack of any right to appeal or recourse for complaints about these very procedures, leads to a further frustration of justice for individuals in similar positions to the complainant.

The above example raises several legal issues, and this report is divided into three parts to address the most prominent of these. First, the preliminary issue of international legal personality of the International Labour Organisation. Second, the responsibility of States party to the European Convention of Human Rights (the Convention) for not securing proper judicial avenues when their transfer of certain powers to international organisations and the exercise of those powers within their jurisdiction result in the violation of human rights obligations incumbent upon them. This may be the case where the grant of immunity to such an organisation breaches the State's own human rights obligations under international law. If immunity is qualified by the limitations set out in human rights law, then an individual could

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abroad" (correspondence from Secretary, Joint Panel to Schwab, Flaherty and Associés, complainant's lawyers, 16 September 2003).

bring a State before an international court such as the European Court of Human Rights (the Court) for a breach of one or more rights under the Convention. Third, the question of responsibility under international law of the organisation *itself* for its own breaches of human rights norms will be addressed. It must therefore be determined whether an international organisation is in fact bound by human rights norms.

In determining which norms may be applicable, it must be noted that the impetus for this report is to consider the possibility of bringing test cases to the Court in respect of breaches of the norms of a right to fair trial within the ILOAT practice and procedure. Therefore the norms found in Article 6 the Convention will primarily be applied throughout. Norms derived from other human rights instruments and customary law will be applied in the third part of the report.

Part A will discuss international legal personality, as the basis for the following chapters. The international legal personality of an international organisation determines its relationship with its members and host States, its status before a court, whether it can be bound by international law, and whether it can be held responsible for breaches of human rights norms.

Part B deals with the responsibility of States party to the Convention for not securing proper judicial avenues when their transfer of certain powers to international organisations and the exercise of those powers result in the violation of human rights obligations incumbent upon them. The focus is therefore upon the case against a State before an international court, namely the Court.

B1 deals with the problem of the immunity of international organisations under domestic and international law. A brief account will be given of the development of immunity for international organisations under international law. The notion of functional necessity as the basis of immunity leads to the question of possible limits of such immunity, in particular when human rights are at issue.

B2 will consider the obligation of States party to the Convention to guarantee the right to a fair trial enunciated in Article 6 of the Convention. Several elements inherent to this right will be discussed in detail. Furthermore, attention will be paid to the principle of *stare decisis*.

B3 then addresses the question of responsibility of Member States of an international organisation deriving from their transfer of powers to that organisation and the exercise thereof within their jurisdiction, based on their obligations under Article 6 of the Convention. The basis of this section is the case of *Waite and Kennedy v. Germany,* which was decided by the Court in 1999. The Court held that a State's grant of immunity to an international organisation to which powers are transferred would only be permissible when there are reasonable alternative means available within the organisation for the effective protection of individual rights (including the right to a fair trial) under the European Convention. However, the level of scrutiny applied by the Court was very low. It therefore will be examined whether there are strong legal arguments for not qualifying, in this case, the ILOAT procedure as such a reasonable alternative means of redress, thereby disallowing the grant of immunity from national jurisdiction to the ILO and triggering the responsibility of the Member State for not providing access to a court by granting such immunity.

If a domestic court would hold that, in a particular case, no immunity should be granted to an international organisation, then legal recourse against the international organisation could be possible for alleged breaches of human rights norms by the organisation. Part C will thus focus, following on from B, on the arguments that can be put forward in establishing the responsibility of the ILO(AT) *itself*, independent of the responsibility of the State party to the Convention. It will therefore discuss the relationship between international organisations and international human rights norms. Since international organisations are not parties to international human rights instruments, it will be examined whether international organisations are bound by human rights norms through other means such as international customary law and the concept of estoppel. This is necessary, since a legal entity can only be held responsible for violations of norms by which it is bound.

C1 will pay attention to the argument to bind international organisations to human rights norms by means of customary international law. Furthermore, it will be examined which human rights norms are specifically binding upon the ILO(AT), taking account of the specific nature, object and functions of the organisation.

C2 subsequently raises the question of whether, apart from customary international law, international organisations can be bound to international human rights norms by virtue of the concept of good faith and estoppel. Again, special attention will be paid to human rights

norms binding upon the ILO(AT) through this concept. It will start from the premise that, due to the object and purpose of the ILO to provide protection to employees all over the world, these very norms advocated should be applied to the organisation itself. To support this legally, it will be examined in detail which statements by the organisation and its organs can give rise to such estoppel.

C3 will eventually draw a conclusion on both these alternative means to bind international organisations, and more specific the ILO(AT), to international human rights norms, in the absence of the binding force of international human rights treaties on these subjects of international law. In this respect, a final remark will be made concerning the practical application of both concepts.

Part D draws a final conclusion on the mechanisms available for establishing responsibility for breaches of international human rights norms by the ILO.

A. INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANISATIONS

1. INTRODUCTION

Nowadays, it is well established that international organisations may possess international legal personality, making them subjects of international law capable of having international rights and obligations.[3] This international legal personality may either be subjective or objective in nature. An international organisation has subjective international legal personality when this legal personality is acknowledged by its member States. It has objective legal personality when the organisation's legal personality is generally recognised by all or most States, including non-members.[4]

The attribution of international legal personality to international organisations establishes these organisations as entities operating directly upon the international stage. Whether a particular international organisation indeed has such international legal personality will depend upon the circumstances of the case, including the organisation's constitutional nature, its actual powers and practice. Indicia of personality are the capacity to enter into relations with (non-member) States and other organisations and to conclude treaties with them, as well as the organisation's status under municipal law.[5]

In determining whether an international organisation has international legal personality, one should first make reference to the terms of the instrument establishing the organisation: in some rare cases, it will appear in the constituent instrument that the organisation was specifically endowed with international personality, which will determine the issue.[6] In the

[3] see *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 (Advisory Opinion)* [1980] ICJ Rep 73, 89-90; MN Shaw *International Law* (4th edn Cambridge University Press 1997) 191; A Reinisch *International Organisations Before National Courts* (Cambridge University Press 2000) 53.

[4] see e.g. ND White *The Law of International Organisations* (Manchester University Press 1996) 27, 31; *Reparations* (n 3) 179.

[5] see Shaw (n 3) 191, 910-911; A Reinisch (n 3) 54. With regard to the United Nations (UN), see the *travaux préparatoires* of Article 104 of the UN Charter: 13 UNCIO 803, UN Doc IV/2/A/7 (1945) 817.

[6] e.g. Treaty on European Union (adopted 7 February 1992, entered into force 1 November 1993) 31 ILM 253 art 281: "The Community shall have legal personality". Such 'derivative' international legal personality can be traced back to the will of the founding member States, having explicitly bestowed international personality upon the organisation.

absence of any such specific provision, personality on the international plane may be inferred from the powers and purposes of the organisation as well as its practice.[7]

International organisations do not have the same full legal personality as States. The legal personality of international organisations is ultimately linked to the organisation's purposes and functions.[8] The scope of the powers of an international organisation, when not explicitly indicated in its respective constituent document, will be determined on the basis of the 'implied powers' doctrine as applied by the International Court of Justice (ICJ) in the *Reparations* case. In this case, the ICJ determined that:

> "Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." [9]

The scope of the powers of, for instance, the ILO is thus determined by the functions and purposes of the ILO.

2. INTERNATIONAL LEGAL PERSONALITY OF THE INTERNATIONAL LABOUR ORGANISATION

2.1 The International Labour Organisation

The ILO was founded in 1919, when its constitution was adopted at the Paris Peace Conference in April of that year.[10] The ILO operates through a tripartite structure (governments – employers – workers), formulating international labour standards in the form of Conventions and Recommendations which set minimum standards of basic labour rights.[11]

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[7] The majority view or the 'implicit personality concept' accepts the aggregate of legal capacities or powers in the international organisations' constituent treaty as an implicit conferment of international legal personality. Such personality can still be traced back to the will of the founding member States, as this 'derivative' international personality is indirectly deduced from treaty provisions. In the alternative, instead of relying on the subjective will of member States, a broader approach depends on objective criteria in order to ascertain the international legal personality of international organisations. According to this theory of 'objective international personality', a rule of customary international law confers international legal personality upon international organisations which fulfil certain objective requirements. However, "[i]t still remains the majority view that personality is determined – either expressly or implicitly – by an organisation's constituent instrument". see Reinisch (n 3) 54-59; HG Schermers *International Institutional Law* (Martinus Nijhoff The Hague 1995) 778. cf *Reparations* (n 3); International Law Commission 'Yearbook of the International Law Commission' vol II part I, 153-168 (1989) UN Doc A/CN.4/424; Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations (adopted 21 March 1986, not yet entered into force) arts 6, 2(1)(j), preambular para 11.

[8] see e.g. White (n 4) 31; HG Schermers & NM Blokker *International institutional law: unity within diversity* (4th rev edn Nijhoff Leiden 2003) 990.

[9] *Reparations* (n 3) 179.

[10] ILO Constitution (28 June 1919) LNTS 874.

[11] 'About the ILO' <http://www.ilo.org/public/english/about/index.htm> (28 May 2004); Schermers & Blokker (n 8) 989.

In 1945, the organisation became a specialised agency of the UN by treaty.[12] Unlike other UN specialised agencies, the ILO is not a specialised agency created by a UN General Assembly resolution.[13]

The ILO consists of several organs that are each endowed with specific powers to ensure the effective functioning of the organisation in pursuance of its purposes and missions reflected in its Constitution.[14] In 1946, the ILOAT was created as a subsidiary organ of ILO.[15] This tribunal hears complaints about, *inter alia*, the non-observance of rules applicable to ILO staff, as well as complaints from (formerly) serving ILO officials or from officials who work for other international organisations that recognise the ILOAT's jurisdiction.[16] Similarly, the ILOAT "shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal […]"[17] International civil servants, as employees of international organisations, have in general no recourse to a domestic court in the event of a legal dispute with their employer, due to the immunity from national jurisdiction enjoyed by international organisations. At the same time, the establishment of internal dispute settlement mechanisms reflects the notion that, notwithstanding the immunity of the organisation, means of legal recourse against the organisation should be available for its staff and other individuals. The ICJ expressed this view when it argued in the *Effects of Awards* Advisory Opinion that it would

> "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals […] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between them."[18]

The ILOAT was therefore created in order to offer an alternative form of redress for employees of the ILO. Through time, its jurisdiction has been recognised by some forty other

[12] Agreement between the United Nations and the International Labour Organisation *Official Bulletin of the ILO* vol XXIX no 4 (15 November 1946).
[13] Schermers & Blokker (n 8) 1097.
[14] The main organs are the International Labour Conference, the Governing Body and the International Labour Office; see ILO Constitution (n 10) art 2.
[15] J Gomula 'The International Court of Justice and Administrative Tribunals of International Organisations' (1991) 13 Mich J Int'l L 83, 86; Schermers & Blokker (n 8) 381-386.
[16] Statute of the Administrative Tribunal of the International Labour Organisation (adopted by the International Labour Conference on 9 October 1946; amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998) art II.
[17] ibid art II(4).
[18] *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 57.

international organisations.[19] As a result, the ILOAT embodies the sole legal avenue for over 35.000 international civil servants.[20]

2.2 International Legal Personality of the ILO

As has been stated, an international organisation may have subjective or objective legal personality. Since this report only examines the possible consequences of breaches of international law for a host State, the question of whether the international legal personality that the ILO enjoys is of an objective or subjective nature need not be discussed for the purpose of this report.

Since the ILO is not a 'normal' specialised agency created by the UN General Assembly through a resolution,[21] but has its own constitution and its own member States, the ILO has original autonomous international legal personality, apart from the international legal personality it currently also derives from its status as a specialised agency of the UN.[22]

A first indication of the ILO's autonomous international legal personality can be derived from its own Constitution, Article 39 of which confers legal personality upon the organisation:

> "The International Labour Organisation shall possess full juridical personality and in particular the capacity -
> (a) to contract;
> (b) to acquire and dispose of immovable and movable property;
> (c) to institute legal proceedings."[23]

A second indication of the autonomous international legal personality of the ILO can be inferred from its capacity to conclude treaties with States or other subjects of international law.[24] In this respect, reference could be made to the Agreement between Switzerland and the

[19] For example, the WIPO, ICC, OPCW, WHO and the WTO have recognised the ILOAT's jurisdiction; see <http://www.ilo.org/public/english/tribunal/orgs.htm> (1 July 2004).
[20] 'Opinion prepared by Geoffrey Robertson QC for the information meeting on the ILO Administrative Tribunal Reform and related matters' Staff Union <http://www.ilo.org/public/english/staffun/info/iloat/> (21 June 2004).
[21] Schermers & Blokker (n 8) 1075.
[22] ibid 1076. See also JE Hickey Jr. 'The source of international legal personality in the 21st century' (paper presented at the Hofstra Law and Policy Symposium 1997); E Paasivirta 'The European union: from an aggregate of states to a legal person?' (paper presented at the Hofstra Law and Policy Symposium 1997); cf R Wilde, 'Quis custodiet ipsos custodes: why and how UNHCR governance of 'development' refugee camps should be subject to international human rights law' (1998) 1 Yale Human Rights and Development Law Journal 107, 114.
[23] ILO Constitution (n 10) art 39; <http://www.ilo.org/public/english/about/iloconst.htm> (30 June 2004).
[24] Schermers & Blokker (n 13) 989.

ILO concerning the status of the ILO on Swiss territory.[25] Article 2 of this agreement expressly states that Switzerland recognises the international personality and legal capacity of the ILO.

Furthermore, as stated above, international legal personality can be inferred from the functions and purposes of the organisation, which can usually be derived from its constituent document, as well as its practice and organisational activities.[26] Such activities may broaden over time, as the conditions under which an organisation has to operate, and the needs of the moment, so demand.[27] Therefore a functional analysis requires a closer study of the activities of the ILO since its conception, as well as a brief look at its constituent document.

The ILO Constitution establishes the ideological basis of the ILO in the Preamble: "Universal justice and lasting peace can be established only if it is based upon social justice […]"[28] Conditions of labour, protection of the interests of workers employed abroad, health and wage concerns, the protection of children, interests of women and other issues of equality, and the recognition of freedom of association are all listed in the preamble as central to this social justice. The above mentioned tripartite organisational structure is advocated both within the ILO and for its members; States, employers organisations and worker's organisations are encouraged to negotiate on equal terms.[29] Article 1(1) also specifies that the aims and purposes of the ILO adopted in a conference in 1944, are annexed to the Constitution. This Annex reiterates the importance of social justice for lasting peace, and declares it the responsibility of the ILO to examine and consider all international economic and financial policies and measures in the light of this fundamental objective.[30]

Further it is the "solemn obligation of the [ILO] to further among the nations of the world programmes which achieve" the provision of fundamental protections and assurances for workers and children, including working conditions, nutrition, housing and education, bargaining avenues, wage guarantees and restricted working hours.[31]

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[25] Agreement between the Swiss Federal Council and the International Labour Organisation concerning the legal status of the International Labour Organisation in Switzerland (entered into force 27 May 1946) 15 UNTS 377.
[26] PH Bekker *The Legal Position of Intergovernmental Organisations; A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff The Hague 1994) 107.
[27] White (n 4) 5.
[28] ILO Constitution (n 10) preamble.
[29] ibid arts 7(1), 24.
[30] ibid Annex: Declaration Concerning the Aims and Purposes of the International Labour Organisation art II(c).
[31] ibid art III.

The functions of the ILO are enumerated in Article 10 of the Constitution, where a non-exhaustive list of activities is given, including the collection and distribution of information on international adjustment of conditions and industrial life, according assistance to governments in framing laws and regulations, and carrying out the duties required of it in the effective observance of the conventions which have been drawn under its supervision. The proposals made by the Governing Body of the ILO can become either Recommendations or Conventions, to which the members can choose to become party.[32]

Among the numerous conventions that have been drawn up by proposal of the ILO are the eight fundamental conventions, covering forced labour, freedom of association, equality of opportunity and treatment, minimum age requirements and child labour.[33] The ILO expends much energy encouraging the ratification of these conventions, tracking their application and the adherence to their provisions, and providing assistance to governments, employers and workers unions in consultations, with the approach that such dialogue is essential to the democratisation of public life.[34]

It follows that the ILO must, in any case, be deemed to have the powers, and thus the international legal personality, essential to the performance and the fulfilment of its purposes and functions as described above.

3. CONCLUSION

It can be concluded that the ILO has international legal personality. Consequently, the ILO is a subject of international law and is capable of bearing international rights and obligations. Now that the existence of international legal personality of the ILO is conceded, the next chapters will deal with inextricably intertwined issues, such as immunity from national jurisdiction, the extent to which an international organisation is subject to human rights norms and the responsibility of the organisation for breaches of such norms.

[32] ILO Constitution (n 10) art 19.
[33] International Labour Conference 88th Session 'Report of the Director General: Activities of the ILO' (May-June 2000) <http//www.ilo.org/public/english/standards/relm/ilc/ilc88/rep-1a-1.htm> (15 June 2004) 2.
[34] ibid 7.

B. THE RESPONSIBILITY OF MEMBER STATES FOR DENYING LEGAL RECOURSE FOR BREACHES OF HUMAN RIGHTS NORMS BY INTERNATIONAL ORGANISATIONS ON THEIR TERRITORY

Part B will attempt to answer the question whether Switzerland, as a State party to the Convention, could be held responsible before the Court for not securing proper judicial avenues, when the transfer of certain powers to international organisations and the exercise of those powers result in the violation of human rights obligations incumbent upon it. The immunity enjoyed by international organisations presents a bar to litigation that will first be examined. Immunity from jurisdiction may be limited by functional necessity or by the prevalence of human rights norms in international law. Following this, the obligation of Switzerland as a party to the Convention to ensure a right to fair trial and alternative redress will be addressed.

1. IMMUNITY OF INTERNATIONAL ORGANISATIONS UNDER INTERNATIONAL LAW

One of the core problems in enforcing a norm such as the right to a fair trial against an international organisation, is due to the immunity from jurisdiction that international organisations enjoy under domestic and international law.[35] A brief history of immunities under international law will help in understanding the difficulty of remedying an alleged breach of international human rights, which is one of the core issues of this study. Of particular importance is the function immunity has played in ensuring the fulfilment of the duties, object and purpose of, respectively, diplomats, States and more recently international organisations. The functional basis of immunity has led to the modern doctrine of functional necessity, discussed in paragraph 1.2.

1.1 The Development of Immunity in International Law

Immunity falls under the determination of jurisdiction *ratio personae*, that is, where a court would normally have jurisdiction over the substance of a dispute, but due to the status of the legal person in question, is not permitted to exercise this jurisdiction.[36] This leads to the question of enforceability of norms that do in fact apply, and to which the legal person in

[35] I Pingel-Lenuzza 'International Organisations and Immunity from Jurisdiction: To Restrict or Bypass' (2002) 51 JCLQ 1, 3.
[36] M Dixon *Textbook on International Law* (4th edn Blackstone Press London 2000) 165.

question is in fact bound, but to which no court may demand compliance.[37] International immunities can be divided into three categories; sovereign immunity held by States, diplomatic immunity afforded to individuals as representatives of States, and organisational immunities granted to international organisations.[38]

Based on diplomatic immunities, the concept has its origin in Roman law[39] and has since been well established in international law and practice.[40] The essence of immunities afforded to representatives of foreign territories has always been to secure the unhindered fulfilment of diplomatic functions, such as immunity from criminal and civil litigation and a guarantee of safe passage.[41]

As the sovereign State emerged as the primary actor in international law, the absolute territorial jurisdiction a State could exercise over all legal persons yielded to immunities afforded both to foreign ambassadors and to foreign States as legal entities.[42] The rules of contemporary State immunity are derived mainly from State practice since the 19th century, and from American and British case law.[43]

The most often cited authority for State immunity is Marshall CJ in *The Schooner Exchange*,[44] also marking the development of the restrictive theory, namely that immunity applies only to public acts done in the sovereign character of a State, and not to private acts. This was further developed in British case law[45] and the distinction between acts *jure gestionis* (those falling under private law) and acts *jure imperii* (acts in exercise of the sovereign power) is now generally accepted as defining and restricting the extent of State immunity.[46] The independence or sovereignty of the State is not endangered when it is brought before a domestic court for acts *jure gestionis*.[47]

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[37] Bekker (n 26) 107.
[38] ibid 152-153.
[39] ACGM Eyffinger (ed) *Compendium Volkenrechtsgeschiedenis* (2nd edn Kluwer Den Haag 1991) 59.
[40] Bekker (n 26) 144; International Law Commission 'Preliminary Report on Relations Between States and International Organisations' (second part) (1997) UN Doc A/CN.4/304 reprinted in [1997] 2 Ybk Int'l L Comm'n 139, 151-152, paras 59-62.
[41] DB Michaels *International Privileges and Immunities* (Martinus Nijhoff Den Haag 1971) 7.
[42] GM Badr *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Den Haag 1984) 11.
[43] ibid 9.
[44] *The Schooner Exchange v M'Fadden and Others* (1812) US Supreme Court Reports vol VII, 287; cited in Badr (n 42) 12.
[45] e.g. *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1 ff; cited in Badr (n 42) 15.
[46] P Sands and P Klein (eds) *Bowett's Law of International Institutions* (Sweet and Maxwell London 2001) 491.
[47] Pingel-Lenuzza (n 35) 5.

The emergence and proliferation of international organisations after World War II meant a new application of immunities had to be developed. International organisations are subjects of international law,[48] which have been created as a co-operation between sovereign States, where certain purposes are deemed more effectively fulfilled in collaboration than by individual States.[49] Recognising immunity for an international organisation, which lacks its own territory and is established on the territory of a State, has been considered necessary in order to protect the organisation against any undue interference by the host State in the exercise of its functions and activities.[50] Similar concessions of privileges and immunities as those accorded to States and State diplomats have been accorded for this reason.[51]

Traditionally, *absolute* immunity from jurisdiction has been accorded,[52] with the justification that it is undesirable for the courts of many different States to define the status and responsibilities of international organisations,[53] or to interpret the legality of actions of an international organisation, and that it may be necessary to protect these entities from the prejudice of governments and individuals.[54]

1.2 Functional Necessity

International organisations are no longer as fragile as they were when they first began to appear. While the *jure gestionis/jure imperii* distinction has led to a definite restrictive application of immunity for States,[55] absolute immunity has remained guarding international organisations until fairly recently. The recent trend is towards a diminution of privileges and immunities, with a greater emphasis on the functional basis of such protections.[56]

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[48] n 3.
[49] Bekker (n 26) 47.
[50] Pingel-Lenuzza (n 35) 4.
[51] Sands & Klein (n 46) 486.
[52] Sands & Klein (n 46) 490; e.g. Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15, para 2.
[53] AS Muller *International Organisations and Their Host States; Aspects of their Legal Relationship* (Kluwer Den Haag 1995) 151.
[54] Sands & Klein (n 46) 490. See for example the 1945 ILO Memorandum in which it was stated that "[…] international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible […]"; *Official Bulletin of the ILO* vol XXVII no 2 (10 Dec 1945) 199; Bekker (n 26) 101-107.
[55] See for example the 'Tate Letter'; Letter from Acting Legal Adviser of the Department of State, Jack B. Tate, to Acting Attorney General, Philip B. Perlman, 26 US Dep't St Bull 984 (1952), cited in Bekker (n 26) 155, whereby the US officially dropped the doctrine of absolute immunity for States and acknowledged the restrictive theory.
[56] Sands & Klein (n 46) 487.

The *jure gestionis/jure imperii* distinction cannot be applied to international organisations, since these cannot act in sovereign authority. International organisations do, however, share the commonality of autonomy with the States that have created them, and both entities "demand the jurisdictional immunity they need to go about their autonomous and independent business in the world."[57] This demand for immunity coupled with the trend towards diminishing and restricting such privileges, has led to the doctrine of functional necessity, which is reflected in Article 105 of the UN Charter:

> "(1) The Organisation shall enjoy in the territory of each of its members such privileges and immunities as may be necessary for the fulfilment of its purposes […]"

Essentially, the doctrine of functional necessity poses the question how *much* immunity an international organisation requires to exercise its functions. It enables an organisation to be granted immunities when the interest of that organisation's functions and purposes so require, and, moreover, sets limits beyond which there is no need to grant them [58] and an opening for litigation may be found in certain cases. "[An international organisation] shall be entitled to…no more [jurisdictional immunity] than what is strictly necessary for the exercise of its functions in the fulfilment of its purposes."[59] This will be discussed further in paragraph 3.1.

The legal sources of immunities for international organisations are the constituent documents of organisations (for example Article 40 of the ILO Constitution,[60] which follows the format of Article 105 UN Charter), domestic legislation in the host State, and applicable multilateral conventions.[61] There has also been a move towards bilateral agreements between a host State and an international organisation, stipulating the exact nature and scope of immunities granted by the host State, such as the agreement between Switzerland and the ILO.[62]

The functional necessity doctrine has arguably also reached the status of customary law. Between 1963 and 1992, the International Law Commission (ILC) produced several reports on inter-State diplomatic and consular intercourse, which led to the commissioning of work

[57] Sands & Klein (n 46) 65.
[58] Bekker (n 26) 165.
[59] Bekker (n 26) 74.
[60] ILO Constitution (n 10) art 40.
[61] e.g. Convention on the Privileges and Immunities of the Specialised Agencies (21 November 1947) 33 UNTS 261.
[62] n 25.

on the topic of immunities and privileges for international organisations. The most relevant of these reports is the Fourth Report,[63] which included draft articles that were referred to the drafting committee for a possible future convention. The ILC stopped work on this topic in 1992.[64] The doctrine of functional necessity received general agreement throughout; in particular, evidence of immunities granted in practice on a functional necessity basis was surveyed in the Preliminary Report of this series.[65] In the Fourth Report it was stated that "[international organisations] are entitled to certain immunities in their capacity as legal persons and can require them of States."[66] The question to be posed is just what these "certain immunities" are, and to what extent they might be limited by functional necessity in the case of the ILO.

1.3 Functional Necessity and Immunities of the ILO

Traditionally, the competence of an organisation includes those powers necessary to fulfil its functions and purposes, and it has been argued that as long as the organisation has acted within its competence, then there is sufficient reason to grant immunity. However, functional necessity connotes an 'urgent and essential need' for immunities.[67] Only where an organisation needs immunity from jurisdiction in order to ensure independence in fulfilling its functions and purposes, should it receive such protections.

Singer suggests the importance of the question whether the international organisation would be able to continue exercising its functions in fulfilment of its purposes if a court were to assert jurisdiction.[68] Considering the functions and purposes of the ILO as illustrated above (Part A 2.2), in striving towards lasting peace through social justice, it would seem that in fact the very notion of a fair trial as an element of social justice falls under the very principles which the ILO seeks to promote and protect. In asking whether jurisdictional immunity should apply according to functional necessity, a court would "grant jurisdictional immunity

[63] International Law Commission UN Doc A/CN.4/SR 2176-2180 (1990) reprinted in [1990] 1 Ybk Int'l L Comm'n 200-233. (Hereinafter Fourth Report.)
[64] In 2000, the ILC commissioned Mr. Giorgio Gaja to proceed with work on the responsibility of international organisations, based on the preceding reports. However, the new work is very preliminary and focuses on the responsibility of organisations and of States for acts of organisations rather than on the immunity; Report of the International Law Commission on the Work of its 55th Session, Suppl. No. 10 (A/58/10).
[65] n 40, 151-152, paras 59-62.
[66] n 63, 158, para 32.
[67] M Singer 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns' (1995) 36 Va J Int'l L 53, 123.
[68] ibid 134.

if, *but only if*, the international organisation offers its own procedures for a fair examination of the case at issue."[69] One could contend that the ILO itself could continue to function effectively on the international plane, ensuring high standards of workers' protection and social justice, even if the procedures in the ILOAT were open to scrutiny from another court. While it may be true that the ILOAT is itself operating to fulfil a function of the ILO, the doctrine of functional necessity could possibly be applied such that the ILO can still be seen to operate independently of interference from local authorities, while its internal dispute resolution organ is open to checks and balances according to the concern for a fair examination of cases before it.

Moreover, the question whether a fair examination is provided for a case such as that given in the introduction can only be answered if these procedures are subject to the jurisdiction of another judicial body. The very essence of the complaint is that there is no fair examination of the case at issue. Absolute immunity is now outdated by functional necessity precisely because the operations of an organisation would otherwise go unchecked, sometimes to the detriment of other subjects of international law.

Based on Article 6(1) of the agreement between Switzerland and the ILO concerning the status of the ILO on Swiss territory, the ILO enjoys absolute immunity:

> "The International Labour Organisation, its properties and assets wherever they may be or by whomsoever they may be held shall enjoy immunity from every form of legal process except in so far as this immunity is formally waived […]"[70]

In a case where an individual before the ILOAT, which is an organ of ILO, has suffered a breach of due process, it is unlikely that the ILO would waive its immunity, or that of the ILOAT itself, to allow a domestic court to hear the case.[71] The absolute immunity afforded to the ILO in the agreement with Switzerland seems at odds with the boundaries set on immunity by functional necessity as formulated in Article 40(1) of the ILO Constitution: "The International Labour Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." It is arguable that such immunity goes beyond that which should be afforded to the ILO.

[69] ibid 146 (emphasis added).
[70] n 25, art 6(1).
[71] Pingel-Lenuzza (n 35) 14.

1.4 Conclusion

The doctrine of functional necessity would require lifting immunity from jurisdiction when the functioning of the international organisation is not at issue. If this were not the case, then protection of the institution would prevail over all other considerations, including the denial of the fundamental right of access to justice guaranteed to all persons.[72] If the competence of the ILO is not at issue, and if the ILO can continue to operate independently according to its functions and purposes notwithstanding the exercise of domestic jurisdiction over the practice of the ILOAT, then immunity should be lifted. In fact, maintaining absolute immunity may deny the very remedy that is purported to be provided by the existence of the ILOAT, if the ILOAT does not fulfil the standards of a right to fair trial, which may indeed be the case according to the example given in the introduction.

If the internal judicial remedy, in this case the ILOAT, does not itself provide a fair trial, then the question must be raised as to what kind of recourse is available to the individuals who suffer unfair processes and a denial of justice. In a case such as the example given in the introduction of this report, there is no access to alternative redress where the complainant has suffered a denial of justice. The risk is that immunity becomes a veil behind which the organisation can hide from any accountability for its interactions with individuals.

Should a domestic court come to the conclusion that, according to functional necessity, the veil of absolute immunity must be lifted, then an individual could sue an international organisation before a domestic court. In the case of the ILOAT, an individual could sue the ILO before a Swiss court. This would leave the court to determine whether the ILO is in fact bound by international human rights norms, such as the right to a fair trial. This will be dealt with in detail in part C.

However, should a domestic court be reluctant to lift immunity, this may result in State responsibility where the State has obligations under treaties such as the Convention. The question must be considered whether a State party to the Convention which also hosts an international organisation has an overriding obligation to ensure a right to fair trial, notwithstanding the assumed immunity of an international organisation. Functional necessity

[72] ibid 5.

may help in determining the prevalence of human rights over this assumed immunity. The question of State responsibility for States party to the Convention will be considered below.

2. Obligations of States Party to the Convention to Ensure a Guarantee of Fair Trial Rights

This section will discuss the extent of obligations for States party to the Convention to ensure that there are no breaches of the right to a fair trial as embodied in Article 6 of the Convention against persons under their jurisdiction and on their territory. The question to be raised is whether this obligation extends also to the protection of individual rights under the Convention within an international organisation operating on the territory of a States Party, as an obligation overriding the grant of absolute immunity to that organisation.

2.1 The Right to a Fair Trial Under Article 6 the Convention

Article 6(1) of the Convention provides, *inter alia*, that:

> "In the determination of his civil rights and obligations […] everyone is entitled to a *fair* […] and public hearing […] by an independent and impartial tribunal […]."[73]

As such, Article 6(1) provides a general right to a 'fair hearing' in proceedings which constitute a determination of a person's civil rights and obligations, including cases involving employment law.[74] As the Convention provides no definition of 'fair hearing', the interpretation of this phrase has fallen to the former European Commission of Human Rights (the Commission) and the Court. They have affirmed the centrality of the due process norms and an expansive view of Article 6(1) as fundamental to the consideration of this issue:

> "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision."[75]

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[73] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art. 6(1) (emphasis added).

[74] Disputes relating to private law relations between employer and employee generally are of a 'civil' nature for the purposes of Article 6(1); see *Buchholz v Germany* [1981] ECHR (App 7759/77) para. 46; *Obermeier v Austria* [1990] ECHR (App 11761/85) para. 67. As a general rule, the guarantees in the Convention extend to civil servants. However, the Convention does not secure a right of recruitment to the civil service, and disputes relating to the recruitment, employment and retirement of civil servants are as a general rule outside the scope of Article 6(1); see *Glasenapp and Kosiek v Germany* [1986] ECHR (App 9228/80 and 9704/82) paras 48-49 and paras 34-35, respectively; *Francesco Lombardo v Italy* [1992] ECHR (App 11519/85) para 17; *Argento v Italy* [1997] ECHR (App 25842/94) para 18.

[75] *Delcourt v Belgium* [1970] ECHR (App 2689/65) para. 25. See also *Moreira de Azevedo v Portugal* [1990] ECHR (App 11296/84) para 66.

The fair trial rights guaranteed by Article 6(1) can be divided into two categories: express and implied rights. For the purposes of the present report, Article 6(1) contains the following specific express rights:

- the right to a hearing within a reasonable time;
- the right to an independent and impartial tribunal established by law;
- the right to a public hearing unless it is necessary to exclude the press and public from all or part of the trial in the interest of morals, public order, national security, to protect juveniles or private life or where publicity would prejudice the interests of justice;
- the right to the public pronouncement of judgment.

These rights are 'absolute', in the sense that depriving a person of them will always amount to a breach of the Convention.[76]

In addition, Article 6(1) has been interpreted by the Strasbourg authorities as providing, as aspects of the general right to a fair hearing, the following implied rights:

- the right of access to a court;[77]
- the right to be present at an adversarial hearing;[78]
- the right to equality of arms;[79]
- the right to fair presentation of the evidence;[80]
- the right to a reasoned judgment.[81]

These rights are subject to inherent limitations. As such, their breach does not always entail a violation of Article 6(1). In considering the fairness of the proceedings as a whole, it is often necessary to carry out a 'balancing exercise' between the interests of the individual and those of society. Accordingly, in each case of apparent violation, one ought to consider whether this deviation is necessary and proportionate in pursuit of a legitimate aim.[82]

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[76] R Clayton and H Tomlinson *Fair Trial Rights* (Oxford University Press 2001) 88.
[77] Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a tribunal; see *Golder v United Kingdom* [1975] ECHR (App 4451/70) para 36; *Airey v Ireland* [1979] ECHR (App 6289/73) para. 22; *Ashingdane v United Kingdom* [1985] ECHR (App 8225/78) para 57; *Fayed v United Kingdom* [1994] ECHR (App 17101/90) para. 65; *Bellet v France* [1995] ECHR (App 23805/94) para 31.
[78] n 100.
[79] n 85-86.
[80] n 88-92.
[81] see *Hadjianastassiou v Greece* [1992] ECHR (App 12945/87) para 33; *Van de Hurk v The Netherlands* [1994] ECHR (App 16034/90) para 61. See also n 107.
[82] Clayton & Tomlinson (n 76) 89; RA Lawson and HG Schermers *Leading Cases of the European Court of Human Rights* (Ars Aequi Libri Nijmegen 1999) 26; *Golder v United Kingdom* [1975] ECHR (App 4451/70) para 37; *Ashingdane v United Kingdom* [1985] ECHR (App 8225/78) para 57; *Lithgow v United Kingdom* [1986] ECHR (App 9006/80) para 120; *Tolstoy Miloslavsky v United Kingdom* [1995] ECHR (App 18139/91) para 59.

2.2 Elements of a Fair Trial Under Article 6 of the Convention

Before elaborating on whether and to what extent particular rights and legal concepts exist under the Convention and in the Court's case-law, it should be emphasised that these rights and concepts may not have an identical scope and impact in the distinct fields of criminal and civil law. The Court itself has underlined that the requirements inherent in the concept of 'fair trial' are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge.[83] This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.[84] Keeping in mind these considerations and our emphasis on the civil law domain, the next sub-paragraphs will deal with some specific rights and concepts which are highly relevant with regard to ILOAT's practice.

2.2.1 Right to equality of arms and adversarial proceedings

> "The requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, […] implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."[85]

As one of the elements of the wider concept of a fair trial under the Convention, the principle of equality of arms applies to criminal cases as well as to cases concerning civil rights and obligations.[86] Closely related to the concept of equality of arms is 'the right to adversarial proceedings', which "means in principle the opportunity for the parties to a criminal or civil case to have knowledge of and comment on all evidence adduced or observations filed, […]

[83] The applicability and scope of Article 6 in civil cases and in criminal cases has been discussed by the Court, respectively, in *Benthem v The Netherlands* [1985] ECHR (App 8848/80) paras 30-36, and in *Öztürk v Germany* [1984] ECHR (App 8544/79) paras 46-56.
[84] e.g. *Dombo Beheer BV v The Netherlands* [1993] ECHR (App 14448/88) para 32.
[85] *Ankerl v Switzerland* [1996] ECHR (App 17748/91) para 38. See also, in particular, *Dombo Beheer BV v The Netherlands* [1993] ECHR (App 14448/88) para 33; *Wierzbicki v Poland* [2002] ECHR (App 24541/94) para 39; *Hentrich v France* [1994] ECHR (App 13616/88) para 56; *Stran Greek Refineries v Greece* [1994] ECHR (App 13427/87) para 46. Cf *Delcourt v Belgium* [1970] ECHR (App 2689/65) para 28; *Borgers v Belgium* [1991] ECHR (App 12005/86) para 24. However, in *Bulut v Austria* the Court used a slightly different version of its 'equality of arms'-concept, this time (only once?) merely referring to a 'disadvantage' instead of a 'substantial disadvantage'; see *Bulut v Austria* [1996] ECHR (App 17358/90) para 47.
[86] see *Ankerl v Switzerland* [1996] ECHR (App 17748/91) para. 38; *Dombo Beheer BV v The Netherlands* [1993] ECHR (App 14448/88) para 33; *Feldbrugge v The Netherlands* [1986] ECHR (App 8562/79) para. 44.

with a view of influencing the court's decision".[87]

2.2.1.1 Right of access to documents relating to the case

In all cases covered by Article 6 of the Convention, the principle of equality of arms dictates that parties should in principle have access to all documents relating to the case. As such, in both criminal and civil cases, the right to equality of arms *c.q.* 'document discovery' means that all parties must have access to the records and documents which are relied on by the court.[88] Furthermore, it appears that the parties should have the opportunity to make copies of the relevant documents from the court file.[89] In criminal cases, the right of access to documents relating to the case follows both from the principle of equality of arms and the rights of the defence, which are features of the wider concept of a fair trial. This was first established by the Court in the *Borgers* case, in which the principle of equality of arms played a crucial role.[90] In subsequent case-law regarding civil proceedings, the same principle was applied by the Court,[91] although in some cases similar findings were based primarily on a nearly identical right to adversarial proceedings.[92] In sum, Article 6 would demand that parties be given access to all documents relevant to (pre-trial) litigation procedures.

2.2.2 Right to legal assistance

Article 6(3)(c) of the Convention provides for legal aid, but this provision applies only to criminal cases. Using an *a contrario* line of reasoning, one would be tempted to conclude that the obligation to provide legal aid does not apply to civil cases.[93] However, in the *Airey* case

[87] *JJ v The Netherlands* [1998] ECHR (App 21351/93) para 43. See also *Kress v France* [2001] ECHR (App 39594/98) para 65; *Van Orshoven v Belgium* [1997] ECHR (App 20122/92) para 41; *Mantovanelli v France* [1997] ECHR (App 21497/93) para. 33; *Nideröst-Huber v Switzerland* [1997] ECHR (App 18990/91) para. 24; *Vermeulen v Belgium* [1996] ECHR (App 19075/91) para 33; *Lobo Machado v Portugal* [1996] ECHR (App 15764/89) para 31; *McMichael v United Kingdom* [1995] ECHR (App 16424/90) para 80. Cf *Ruiz-Mateos v Spain* [1993] ECHR (App 12952/87) para. 63; Lawson & Schermers (n 82) 427.

[88] see *Lynas v Switzerland* [1976] EComm HR (App 7317/75) 6 DR 141; *Lobo Machado v Portugal* [1996] ECHR (App 15764/89) para 31. See also ILOAT Reform Opinion prepared by Professor Louise Doswald-Beck 'ILO: The right to a fair hearing Interpretation of lnternational law' para 3; ILOAT Reform Opinion prepared by Geoffrey Robertson QC (n 20) para 15. Both 'Opinions' are available at <http://www.ilo.org/public/english/staffun/info/iloat/> (21 June 2004).

[89] see *Schuler-Zgraggen v Switzerland* [1993] ECHR (App 14518/89) para 52; Clayton & Tomlinson (n 76) 100.

[90] see *Borgers v Belgium* [1991] ECHR (App 12005/86) paras 24-29. With regard to criminal cases, the Court has adopted a strict interpretation of the principle of equality of arms; e.g. *Bulut v Austria* [1996] ECHR (App 17358/90) para 47.

[91] e.g. *Dombo, Hentrich, Stran Greek Refineries* and *Ankerl* cases (n 85).

[92] e.g. *Ruiz-Mateos, Vermeulen* and *Lobo Machado* cases (n 87). See also *McMichael v United Kingdom* [1995] ECHR (App 16424/90) paras 80, 83.

[93] Lawson & Schermers (n 82) 91.

the Court accepted that Article 6(1) imposed a 'positive obligation'[94] to provide the applicant with free legal assistance, as civil litigation was so complicated that (without legal aid) the applicant would be unable to present her case effectively.[95] Hence, in the absence of any legal assistance, the applicant did not enjoy an effective right of access to a court. This amounted to a breach of Article 6(1).[96] Nevertheless, the Court also confirmed that States are not obliged to provide free legal assistance for each and every dispute relating to a civil right; when applicants can litigate themselves, free legal aid is not required.[97] Conversely, when the law requires representation by a lawyer in particular litigation – especially in appeal – one could argue that Governments are obliged to provide legal aid when the applicant can demonstrate that he is unable to afford the lawyer required.[98] In its subsequent case-law concerning criminal cases, the Court has established two criteria in order to decide whether an individual is entitled to free legal representation: the severity of the penalty at stake and the complexity of the case.[99] It follows that, both in civil and criminal cases, the complete absence of legal assistance could well fall below Convention standards, especially in situations of high legal complexity and/or insufficient financial resources on the part of the individual concerned.

2.2.3 Right to a public hearing

Article 6(1) of the Convention expressly provides that "[i]n the determination of his civil rights and obligations […] everyone is entitled to a […] *public hearing*." In this regard, the Court has held on a number of occasions that, provided that there has been a public hearing at first instance, the absence of "public hearings" at a second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of

[94] The fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State. In the *Airey* case, the 'obligation to secure an effective right of access to the courts' fell into this category of duty; see *Airey v Ireland* [1979] ECHR (App 6289/73) para 25. Cf *Marckx v Belgium* [1979] ECHR (App 6833/74) para 31; *De Wilde, Ooms and Versyp v Belgium* [1972] ECHR (App 2832/66, 2835/66, 2899/66) para 22.
[95] see *Airey v Ireland* [1979] ECHR (App 6289/73) para 24.
[96] see *Airey v Ireland* [1979] ECHR (App 6289/73) para 28. Cf *Van der Mussele v Belgium* [1983] ECHR (App 8919/80) para 29: "…[I]n civil matters, [a State's obligation to grant free legal assistance] sometimes constitutes one of the means of ensuring a fair trial as required by Article 6(1)…". See also Doswald-Beck (n 88) para 7.
[97] see *Airey v Ireland* [1979] ECHR (App 6289/73) para 26.
[98] see Lawson & Schermers (n 82) 92. Cf *Airey v Ireland* [1979] ECHR (App 6289/73) paras 26-27.
[99] e.g. *Perks et al. v United Kingdom* [1999] ECHR (App 25277/94) para 76; *Granger v United Kingdom* [1990] ECHR (App 11932/86) para 47; *Quaranta v Switzerland* [1991] ECHR (App 12744/87) paras 32-38.

being heard in person by the appeal or cassation court.[100] Accordingly, an appellate court may depart from the principle that there should be a public hearing if hearings have taken place at first instance and if the nature of the issues to be decided by it does not call for a public hearing.[101] In other words, at the appeal stage, a hearing would be necessary only if the appeal raises questions of fact bearing on the assessment of the applicant's civil rights and obligations. As a result, Convention standards indicate that any system of internal judicial dispute-settlement should at least provide for public hearings concerning all factual matters, whether it be in first instance or at the appeal stage.

2.2.4 Right to appeal

It follows from the Court's established case-law that "Article 6(1) of the Convention, which provision entitles everyone to a fair hearing by a tribunal in the determination of his civil rights and obligations, *does not as such guarantee the right of appeal to a higher court* […]."[102] This has been reiterated by the Commission, which stated that "the Convention does not guarantee the right of appeal in civil proceedings."[103] As of today, only a right of appeal in

[100] see *Bulut v Austria* [1996] ECHR (App 17358/90) para 41; *Stefanelli v San Marino* [2000] ECHR (App 35396/97) para 19; *Tierce et al. v San Marino* [2000] ECHR (App 24954/94) para 84 ff; *Guisset v France* [2000] ECHR (App 33933/96) paras 72-76; *Helmers v Sweden* [1991] ECHR (App 11826/85) para 36; *Fejde v Sweden* [1991] ECHR (App 12631/87) para 31; *Ekbatani v Sweden* [1988] ECHR (App 10563/83) para 31; *Monnell & Morris v United Kingdom* [1987] ECHR (App 9562/81 & 9818/82) para 58; *Sutter v Switzerland* [1984] ECHR (App 8209/78) para 30; *Axen v Germany* [1983] ECHR (App 8273/78) para 28. For cases concerning the right to personal participation on appeal, where an examination of the personality and character of the applicant was important and where the professional life of that person was at stake, see *Botten v Norway* [1996] ECHR (App 16206/90) para 39; *Kremzow v Austria* [1993] ECHR (App 12350/86) paras 58-59, 67. With regard to the right to be heard and (respect for) time-limits for requests to appear in person before a court, see *Kampanis v Greece* [1995] ECHR (App 17977/91) para 51. A right to be heard would seem to exist in (criminal) cases where an appeal court has to analyse questions of both fact and law: see *Belziuk v Poland* [1998] ECHR (App 23103/93) para 38.

[101] see Lawson & Schermers (n 82) 640. The underlying reason is that a court of appeal would not have the task of establishing the facts of the case, but only of interpreting the legal rules involved.

[102] *De Vries v Netherlands* [1992] EComm HR (App 16690/90) (emphasis added). See also *Delcourt v Belgium* [1970] ECHR (App 2689/65) para 25: "Article 6 para. 1 of the Convention does not, it is true, compel the Contracting States to set up courts of appeal…"; *Tolstoy Miloslavsky v United Kingdom* [1995] ECHR (App 18139/91) para 59: "It follows from established case law that Article 6(1) does not guarantee a right of appeal"; *Rolf Gustafson v Sweden* [1997] ECHR (App 23196/94) para 48: "…this Article [6(1)] does not guarantee a right of appeal."; Clayton & Tomlinson (n 76) 98; Lawson & Schermers (n 82) 640.

[103] *McLeod v United Kingdom* [1996] EComm HR (App 24755/94) para 3. See also e.g. *Barfod v Denmark* [1986] EComm HR (App 11508/85) para 3. Nevertheless, in principle, the guarantees under Article 6(1) apply to any appeal which does take place, though depending on the special features of the proceedings involved; e.g. *Delcourt v Belgium* [1970] ECHR (App 2689/65) paras 25-26; *Monnell & Morris v United Kingdom* [1987] ECHR (App 9562/81 & 9818/82) para 56; *Kerojärvi v Finland* [1995] ECHR (App 17506/90) para 40; *Bulut v Austria* [1996] ECHR (App 17358/90) para 40. It is further mentioned by Lawson & Schermers (n 82) at 640, that "Article 6 of the Convention does not include the right to an appeal from a decision by a court *complying with Article 6*" (emphasis added). The apparent implication that a right to appeal *would* nonetheless exist under the Convention in case of (previous) non-compliance with Article 6 requirements, is, unfortunately, not further

criminal matters is guaranteed by Article 2 of Convention Protocol No. 7.[104]

2.3 Stare decisis

While not directly related to Article 6 of the Convention, for present purposes it should be mentioned that, under the Convention, there is no rule of *stare decisis*. In the *Cossey* case, it was stated by the Court that:

> "[T]he Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the [old] Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were *cogent reasons* for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[105]

The 'cogent reasons' test was applied again in the case of *Wynne*.[106] More recently, the Court has reiterated that it does not consider itself bound by the rule of *stare decisis*, yet articulating its position in a slightly different way:

> "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, *without good reason*, from precedents laid down in previous cases."[107]

Maintaining its dynamic and evolutive approach, the Court will interpret and apply the Convention in a manner which renders its rights practical and effective, not theoretical

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discussed or substantiated by the authors. At any rate, standing case-law does not seem to support such a position.

[104] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Seventh Protocol), Strasbourg, 22 November 1984. Switzerland ratified the Seventh Protocol on 28 February 1988.

[105] *Cossey v United Kingdom* [1990] ECHR (App 10843/84) para 35 (emphasis added). See also Lawson & Schermers (n 82) 105, 204-205. As the Court is not bound by its own precedents, neither does the Convention contain a strict requirement that national courts are bound by the Court's decisions. In practice, however, they should consider themselves bound for the reason that national judgments contrary to the Court's interpretations will most likely lead to the finding of an infringement of the Convention; *Vermeire v Belgium* [1991] ECHR (App 12849/87) para 25.

[106] see *Wynne v United Kingdom* [1994] ECHR (App 15484/89) para 36: "…[T]he Court sees no cogent reasons to depart from [its previous findings]…"

[107] *Christine Goodwin v United Kingdom* [2002] ECHR (App 28957/95) para 74 (emphasis added). See also *Chapman v United Kingdom* [2001] ECHR (App 27238/95) para 70. With regard to the duty for courts to give reasoned judgments, see *Van de Hurk v The Netherlands* [1994] ECHR (App 16034/90) para 61: "Article 6(1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument." National courts must indicate with sufficient clarity the grounds on which they base their decisions; see *Hadjianastassiou v Greece* [1992] ECHR (App 12945/87) para 33. See also *Kokkinakis v Greece* [1993] ECHR (App 14307/88) para 49; *Ruiz Torija* and *Hiro Balani v Spain* [1994] ECHR (App 18390/91, 18064/91) paras 29 and 27, respectively.

and illusory.[108] As such, the Court may depart from previous case-law, assessing "in the light of present-day conditions"[109] what is now the appropriate interpretation and application of the Convention.

2.4 Conclusion

In sum, in order to constitute a fair trial in the sense of the Convention, any civil or criminal court procedure would at least have to guarantee equality of arms in adversarial proceedings, including full access to documents relating to the case, assistance – if necessary – by a competent lawyer, as well as public hearings regarding all factual matters. Furthermore, despite the absence of a rule of *stare decisis* within the framework of the Convention, settled case-law indicates that a court should not depart from its own precedents without good reason.

The next chapter will examine whether the absence of these core elements of a fair trial within an international organisation's internal system of dispute settlement could ever give rise to State responsibility for granting immunity from national jurisdiction to that organisation.

3. Responsibility of States Party to the Convention Deriving from Their Transfer of Powers to an International Organisation and the Exercise of Those Powers on Their Territory

This section deals with the core question of Part B; whether Member States of an organisation can be held responsible for denying recourse for breaches of a human rights norm by an international organisation on their territory. First, while immunity from jurisdiction leads essentially to a bar from any effective remedy where the right to fair trial is breached, the paramount importance of human rights norms may well defeat the threshold for immunity based on functional necessity. A State would no longer be obliged to grant immunity; on the contrary the obligation would be to ensure no such breach occurred. Second, based on a decision of the Court in *Waite and Kennedy v. Germany*, there appears to be a threshold of proportionality whereby granting immunity to an international organisation may not impair

[108] See *Christine Goodwin v United Kingdom* [2002] ECHR (App 28957/95) para 74. See also e.g. *Matthews v United Kingdom* [1999] ECHR (App 24833/94) para 34; *Soering v United Kingdom* [1989] ECHR (App 14038/88) para 87; *Artico v Italy* [1980] ECHR (App 6694/74) para 33; *Airey v Ireland* [1979] ECHR (App 6289/73) para 24.

[109] *Christine Goodwin v United Kingdom* [2002] ECHR (App 28957/95) para 75. See also e.g. *Matthews v United Kingdom* [1999] ECHR (App 24833/94) para 39; *Loizidou v Turkey* [1995] ECHR (App 15318/89) para 71; *Airey v Ireland* [1979] ECHR (App 6289/73) para 26; *Marckx v Belgium* [1979] ECHR (App 6833/74) para 41; *Tyrer v United Kingdom* [1978] ECHR (App 5856/72) para 31.

the essence of a right to fair trial. Should the case at hand fall under this threshold then Switzerland may indeed be liable for a breach by the ILOAT.

3.1 Human Rights versus Immunity

It has been established above that the doctrine of functional necessity is the modern basis for granting international organisations immunity from domestic jurisdiction. It is therefore clear that absolute immunity is no longer the basis, nor the accepted scope for immunities applying to international organisations. It has been suggested that, where human rights are at issue, the veil of absolute immunity is also pierced, due to the prevalence of human rights obligations on the part of the State.[110] There is in fact an affirmative duty for a State to prevent a breach of human rights law committed by non-State actors on the territory of that State. This was established by the ICJ in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*.[111] The issue is whether this obligation, coupled with a State's obligation under article 6 of the Convention, prevails over the obligation to grant immunity to an international organisation as set out above, or whether it limits the scope of the right an international organisation has to claim certain immunities from a host State.

Individuals falling under the jurisdiction of the ILOAT are international civil servants, deprived of any other judicial recourse due to the immunity of their employers. If the ILOAT is their only legal remedy, and if this tribunal itself does not meet the standards of a right to fair trial, then absolute immunity for the ILO(AT) would lead to depriving an individual of *all* legal remedies. There must be a counterbalance between the necessity of assuring the independence of the ILO(AT) and the need for protection of a private individual.[112]

The dominant theory is that the existence of an administrative tribunal (ILOAT) justifies broad immunities for the ILO as it constitutes an alternative recourse to justice, and conversely that due to the immunity afforded to international organisations, the acts and procedures of an internal tribunal do not fall under the domestic jurisdiction.[113] The problem in the example given in the introduction is that a dispute arises over the implementation of

[110] Singer (n 67) 89.
[111] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, 35.
[112] Bekker (n 26) 181.
[113] e.g. *Spaans v The Netherlands* [1988] EComm HR (App 12516/86).

this very tribunal, and the prevalence of human rights in today's international society obligations must be considered against traditional notions of immunity.

In order to effectively counterbalance immunity from jurisdiction with the provision of alternative dispute mechanisms, the recourse to arbitration tribunals must offer adequate guarantees to claimants of their due process rights.[114] Immunity would remain if the ILO(AT) were to fulfil the responsibility towards the norm of a right to fair trial and a fair examination of the case at hand. But according to the example given in the introduction, and to the experience of jurists in cases before the ILOAT,[115] these guarantees are not fulfilled. The legality of providing immunity in this case must be questioned in respect of a State's obligation to protect a right to fair trial, in light of the above analysis of the extent and authority of Article 6 of the Convention. Indeed,

> "One cannot justify…immunity by reference to the existence of an alternative means of dispute and, at the same time, allow immunity to interfere with the proper functioning of the mechanisms that are supposed to counterbalance [immunity]" [116]

3.2 The Right to a Fair Trial and the Obligation to Ensure Alternative Redress

There is one decision of the European Court of Human Rights that offers a possible point of departure for arguing the responsibility of a Member State for not securing proper judicial avenues when the transfer of certain powers to international organisations and the exercise of those powers result in the violation of human rights obligations incumbent upon it. The case of *Waite and Kennedy v. Germany*[117] may be pivotal in determining a threshold for the grant of immunity from national jurisdiction to an international organisation, where no reasonable alternative means to effectively protect individual rights under the Convention is provided for within the organisation itself.

3.2.1 The case of Waite and Kennedy v. Germany

In *Waite and Kennedy* the applicants were two British nationals, employed by British companies. In 1977, both applicants were placed at the disposal of the European Space

[114] Pingel-Lenuzza (n 35) 11.
[115] e.g. Geoffrey Robertson QC, Professor Louise Doswald-Beck and Dr Ian Seiderman (n 1).
[116] Pingel-Lenuzza (n 35) 4.
[117] *Waite and Kennedy v Germany* [1999] ECHR (App 26083/94). A substantially identical and simultaneously decided case was *Beer and Regan v Germany* [1999] ECHR (App 28934/95).

Agency (ESA)[118] to perform services at the European Space Operations Centre (ESOC)[119] in Darmstadt, Germany. In 1990, after the applicants had been informed by their British employers that their contracts would not be renewed, they instituted proceedings before the Darmstadt Labour Court (*Arbeitsgericht*) against ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) Act, they had acquired the status of ESA employees.[120] In these proceedings, ESA successfully relied on its immunity from jurisdiction under Article XV(2) of the ESA Convention and its Annex I.[121] Accordingly, the applicants' actions were declared inadmissible by the labour court, which considered that ESA had been established in 1975 as an independent international organisation. In upholding the inadmissibility, the Labour Appeals Court (and later the Federal Labour Court) stated that Section 20(2) of the Courts Act provided that persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules; being an international organisation, ESA could not be subject to German jurisdiction. The applicants' subsequent request for a waiver of immunity was denied by the Council of ESA. Similarly, the German Constitutional Court (*Bundesverfassungsgericht*) declined to accept their appeal for adjudication. The applicants then petitioned the European Commission of Human Rights (the Commission), relying on Article 6(1) of the Convention and arguing that they had been denied access to a court[122] for a determination of their dispute with ESA (arising under German labour law).

3.2.1.1 The case before the Commission

The Commission declared the application in *Waite and Kennedy* admissible. In its Report,[123] it expressed the opinion (by 17 votes to 15) that there had been no violation of Article 6(1) of the Convention. In particular, the Commission found that the underlying aim of the system of providing international immunities to international organisations was to contribute to their

[118] ESA was established under the Convention for the Establishment of a European Space Agency (adopted 30 May 1975, entered into force 30 October 1980) 14 ILM 864.
[119] Under the Agreement concerning the European Space Operations Centre of 1967, ESOC is run by ESA; see the German Official Gazette (*Bundesgesetzblatt*) II no. 3, 18 January 1969.
[120] It should be noted that the applicants had been employed by British companies and that they were working in Germany as quasi sub-contractors for ESA rather than as permanent ESA employees. As such, there never existed a contractual relationship, entered into by the applicants themselves, between ESA and the applicants. The applicants' reason for not having instituted proceedings against their (actual) British employers was that any such court action would not have afforded them the possibility to ensure continuation of their work for ESA. See *Waite and Kennedy v Germany* (n 117) paras 11-15, 52, 60, 75.
[121] ESA Convention (n 118) art XV(2), Annex I.
[122] n 77.

proper functioning. The contested limitation on the ability to take legal proceedings against ESA therefore resulted from rules which pursued legitimate aims.[124] However, in the Commission's opinion, the legal impediment to bringing litigation before the German courts, namely the immunity of ESA from German jurisdiction, was only permissible under the Convention if there was an "equivalent legal protection" of fundamental rights within ESA.[125] After briefly noting the main features of ESA's internal system of dispute-settlement, the Commission concluded *in abstracto* that

> "in private law disputes involving the European Space Agency, judicial or equivalent review *may* be obtained, albeit in procedures adjusted to the special features of an international organisation and therefore different from the remedies available under domestic law."[126]

Regarding the case under its consideration, the Commission acknowledged that the procedures under ESA's legal regime did not provide the applicants with a remedy. They did not, therefore, receive a legal protection within ESA which could be regarded as equivalent to the jurisdiction of the German labour courts. However, according to the Commission, litigation in a German court would bypass and could undermine the employment policies of international organisations under their own staff regulations. Bearing in mind that the aim of international immunities accorded to international organisations was to protect them from unilateral interference by individual governments, whether through their executive, legislative or judicial organs, the Commission could not apply the test of proportionality in such a way as to force international organisations to be a party to domestic litigation on a question of employment governed by domestic law.[127] Accordingly, the Commission found that the national authorities, in providing immunity from jurisdiction to ESA, had not exceeded their margin of appreciation to limit the applicants' access to the courts under Article 6(1). As such, in the Commission's opinion, the limitation on the applicants' opportunity to take legal proceedings against ESA did not amount to an unjustified denial of their 'right to a court' under Article 6(1).[128]

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[123] Commission Report *c.q.* 'Opinion' of 2 December 1997, App 26083/94, included in *Waite and Kennedy v Germany* (n 117) paras 43-84.
[124] ibid para 71.
[125] ibid paras 73-74. Cf *M & Co v Germany* ('Melchers') [1990] EComm HR (App 13258/87) 64 DR 138.
[126] ibid para 78 (emphasis added).
[127] ibid paras 79-80.
[128] ibid paras 82-83. However, the voting record (17-15) shows that the Commission was sharply divided on this issue. In this regard, note the strong dissenting opinion signed by fifteen members of the Commission.

3.2.1.2 The case before the Court

Before the European Court of Human Rights, the applicants (again) contended that they had not had a fair hearing by a tribunal on the question of whether, pursuant to the German Provision of Labour (Temporary Staff) Act, a contractual relationship existed between them and ESA. Accordingly, they alleged that there had been a violation of Article 6(1) of the Convention. The Court, after first having stated that the German courts had not been acting arbitrarily in deciding that ESA enjoyed immunity from jurisdiction, then went on to consider whether the consequence of restriction of Article 6(1) was legitimate. It was recalled by the Court that the right of access to the courts secured by Article 6(1) of the Convention was not absolute, but could be subject to limitations as regulated by the State. In this regard, Member States enjoyed a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rested with the Court. In particular, the Court needed to be satisfied that the limitations applied did not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right of access to a court is impaired. Furthermore, a limitation would not be compatible with Article 6(1) if it did not pursue a legitimate aim and if there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[129]

After having emphasized the function of immunity from jurisdiction of international organisations, the Court held that the rule of immunity from jurisdiction, which the German courts had applied to ESA, had a legitimate objective.[130] With regard to the issue of proportionality, the Court considered that where States established international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attributed to these organisations certain competencies and accorded them immunities, there could be implications as to the protection of fundamental rights. However, it would be incompatible with the purpose and object of the Convention if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[131] Accordingly, the Court stated that:

> "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had

[129] *Waite and Kennedy v Germany* (n 117) para 59.
[130] ibid para 63. Cf Commission Report (n 123) paras 70-71; *Al-Adsani v United Kingdom* [2001] ECHR (App 35763/97) para 54; *Spaans v The Netherlands* [1988] EComm HR (App 12516/86) 58 DR 119.
[131] *Waite and Kennedy v Germany* (n 117) para 67. Cf *M & Co v Germany* ('Melchers') [1990] EComm HR (App 13258/87) 64 DR 138.

> available to them *reasonable alternative means* to protect effectively their rights under the Convention."[132]

In the Court's view, the German courts had not exceeded their margin of appreciation in giving effect to ESA's immunity from jurisdiction, as the applicants could and should have had recourse to the ESA Appeals Board[133] as a 'reasonable alternative means' of redress.[134] Furthermore, the Court argued (like the Commission) that the test of proportionality could not be applied as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law.[135] In conclusion, it was unanimously held by the Court that:

> "taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their 'right to a court' or was disproportionate for the purposes of Article 6(1) of the Convention."[136]

3.2.1.3 Some observations regarding the case of Waite and Kennedy

With regard to the Court's reasoning in *Waite and Kennedy*, two aspects seem particularly striking: *first*, the low level of scrutiny applied by the Court in assessing whether the ESA Appeals Board constituted a 'reasonable alternative means' of redress, and, *secondly*, the fact that the Court accorded prevalence to the Convention over later treaty obligations between the same parties.

Regarding the first observation, it should be emphasised that, in evaluating ESA's internal system of dispute-settlement, the actual level of scrutiny of the Court (like the Commission's) was very low. Indeed, it effectively took one glance at the formal rules of procedure within ESA, without testing whether the procedure in the specific case actually lived up to those formal rules. As such, it seemed to be working with a presumption of legality *c.q.* sufficiency of the Appeals Board procedures instead of actually reviewing the means of redress within ESA, thus setting a high threshold for possible future review of the ILOAT procedures.[137]

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[132] *Waite and Kennedy v Germany* (n 117) para 68 (emphasis added).
[133] See ESA Staff Regulations, Chapter VIII, Regulations 33 to 41; ESA Convention (n 118) Annex I art XXVII.
[134] *Waite and Kennedy v Germany* (n 117) para 69.
[135] ibid para 72. Cf Commission Report (n 123) paras 79-80.
[136] *Waite and Kennedy v Germany* (n 117) para 73.
[137] See *Waite and Kennedy v Germany* (n 117), para. 69. Cf. Commission Report (n 123), paras. 77-78. The fact that the Court did not enter into full review could be explained if neither the Commission nor the Court had been provided (despite a request thereto) with detailed information regarding the jurisprudence, practice and procedure of the ESA Appeals Board and hence were not in a position to comment on this. On the other hand, if

The second observation concerns the fact that this case was dealt with by the Court as a matter of State responsibility, which remained unaffected by the fact that the ESA Convention was adopted after the European Convention. The Court's position that obligations under the European Convention would prevail over later treaty obligations between the same parties could be based on two arguments. First, the Court did not regard rules about the law of treaties (*lex posterior derogat legi priori*) as decisive, but attributed a special "constitutional" quality to the European Convention, giving it priority over the ESA Convention.[138] Second, the matter was not approached by the Court in terms of a conflict between treaties, but as a matter of State responsibility which is not affected by any rules of the law of treaties on the relationship between incompatible treaties.[139] At any rate, it follows that States, by creating international organisations, cannot evade by these treaties their responsibility under the European Convention.

3.2.1.4 Related case-law

In *M. & Co. v. Germany*,[140] the applicant (a German company) invoked Article 6 of the Convention, complaining that German authorities had issued a writ for the execution of a judgment of the European Court of Justice (ECJ) in violation of Convention guarantees. The question to be decided by the Commission was whether, by giving effect to an ECJ judgment reached in proceedings that allegedly violated Article 6, Germany had incurred responsibility under the Convention on account of the fact that these proceedings against a German company had been possible only because Germany had transferred its powers in this sphere to the European Communities (EC). It was held by the Commission that:

> "If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty […][A] transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the

these materials had not even been requested by the Court, the absence of review may have resulted from (political) unwillingness to 'look behind the rules'. Not having enough sources of information in this regard, we are not in a position to comment on this.

[138] See E de Wet and A Nollkaemper 'Review of Security Council Decisions by National Courts' (2002) 45 German Yearbook of International Law 166, at 189. Cf Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 30(3) & 30(4); *Loizidou v Turkey* [1995] ECHR (App 15318/89) para 75.

[139] De Wet & Nollkaemper (n 138) 189. Cf Vienna Convention on the Law of Treaties (n 138) art 73; *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) [1997] ICJ Rep 7, 38.

[140] *M & Co v Germany* ('Melchers') [1990] EComm HR (App 13258/87) 64 DR 138.

> transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective […] Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an *equivalent protection*."[141]

The Commission then noted that the legal system of the European Communities not only secured fundamental rights but also provided for control of their observance.[142]

In the *Matthews* case,[143] the responsibility of the member States for the protection of human rights by international organisations to which they have transferred powers was similarly recognized by the Court. The applicant, a British citizen, was a resident of Gibraltar. In April 1994, she applied to be registered as a voter in the elections to the European Parliament. She was told that under the terms of the 1976 EC Act on Direct Elections (a treaty instrument agreed by all EC Member States) Gibraltar was not included in the franchise for those elections. The applicant claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections to choose the legislature under Article 3 of Convention Protocol No. 1, which applied in Gibraltar. The Court observed that:

> "acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competencies to international organisations *provided that Convention rights continue to be "secured"*. Member States' responsibility therefore continues even after such a transfer."[144]

The Court then stated that Contracting States were responsible under the Convention and its Protocols for the consequences of international treaties entered into subsequent to the applicability of the Convention guarantees.[145] In particular, it held the United Kingdom responsible for not securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar.[146]

[141] ibid 138 (emphasis added).
[142] ibid.
[143] *Matthews v United Kingdom* [1999] ECHR (App 24833/94).
[144] ibid para 32 (emphasis added).
[145] ibid para 33.
[146] ibid paras 34-35, 65.

Both *M. & Co*. and *Matthews* show that Member States cannot, by transferring powers to an international organisation (*in casu* the EC), unilaterally diminish the obligations which they have assumed towards the other States party to the Convention.[147] Similarly,

> "where States establish international organizations and attribute powers to them in order to pursue or strengthen their cooperation in certain fields of activities, they may remain responsible under international human rights law for the consequences of the exercise of the powers by the international organizations".[148]

From these cases one could also infer that the responsibility for securing human rights would only apply to treaty obligations entered into after the entry into force of the Convention, and thus would not be relevant with regard to the ILO. However, such a narrow conclusion would create a dangerous loophole by which Member States could evade their duties under the Convention.[149]

3.2.2 Conclusion

It follows from the Court's findings in *M. & Co.*, *Matthews* and *Waite and Kennedy* that the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection *c.q.* continue to be secured through reasonable alternative means of redress within the organisation. In particular, in follows from *Waite and Kennedy* that a material factor in determining whether granting immunity from national jurisdiction to an international organisation is permissible under the Convention, is whether there are such reasonable alternative means of redress to effectively protect individual rights under the Convention. However, a very low level of scrutiny was applied by the Court in determining whether the ESA Appeals Board constituted reasonable alternative means, thus setting a high threshold regarding possible future review of the ILOAT procedures and the ILO's immunity from national jurisdiction. Accordingly, it will take solid legal arguments for qualifying the ILOAT as not constituting such a reasonable alternative means, thereby disallowing the grant of immunity from national jurisdiction to the ILO and triggering the responsibility of a State party to the Convention for not providing access to a court by granting this immunity.

[147] see Lawson & Schermers (n 82) 678-680.
[148] De Wet & Nollkaemper (n 138) 189.
[149] cf De Wet & Nollkaemper (n 138) 189-190.

3.2.3 Does the ILOAT procedure and practice qualify as a 'reasonable alternative means' of redress as required by the European Court of Human Rights in the case of Waite and Kennedy?

The test of limitation which was applied in *Waite and Kennedy* regarding the right to a fair trial, was that the Court must be satisfied that the limitations applied do not restrict or reduce the access to a fair trial in such a way or to such an extent that the very essence of the right is impaired.[150] In applying this test to the ILOAT, one must have regard to both practice and procedure. Article V of the Tribunal's Statute secures the right to an oral hearing.[151] Similarly, Article 11 of the ILOAT's Rules provides for the taking of evidence or appointing of an expert inquiry,[152] while Article 12 of the Rules describes procedures for the taking of evidence from witnesses.[153] Despite these provisions and repeated requests by complainants,[154] no oral hearing has been granted over the past twelve years.[155] To this must be added the consideration that a number of the quasi-judicial boards over which the ILO Administrative Tribunal sits as presiding judicial body, are not staffed by lawyers, one even recently having been disbanded and lawyers debarred from appearing before it.[156] These factors, together with concern over whether the system of judicial appointments satisfies the minimum requirements for the independence of the judiciary,[157] may suggest, depending on the nature of the particular case, that the Tribunal does not always satisfy the requisite

[150] see *Waite and Kennedy v Germany* (n 117) para 59.
[151] ILOAT Statute (n 16) art V: "The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be public or *in camera*."
[152] Rules of the Administrative Tribunal of the International Labour Organization (adopted by the Tribunal on 24 November 1993) art 11: "The Tribunal may, on its own motion or on the application of either party, order such measures of investigation as it deems fit, including the appearance of the parties before it, the hearing of expert and other witnesses, the consultation of any competent international authority, and expert inquiry."
[153] ibid art 12: "1. An application by either party for hearings shall identify any witness whom that party wants the Tribunal to hear and the issues which the party wants the witness to address. 2. The Tribunal shall determine the conduct of any hearings. 3. Hearings shall include oral submissions by the parties and may, with leave from the Tribunal, include oral testimony by any witness."
[154] Observable in the opening line of many judgments handed down by the ILOAT: "Having examined the written submissions and disallowed the complainant's application for hearings"; e.g. *Mrs. A. K. against the World Health Organization (WHO)* [2004] judgment 2308 (ILOAT); *Mrs. K. K. against the International Labour Organization (ILO)* [2004] judgment 2301 (ILOAT). ILOAT judgments are available at <http://www.ilo.org/dyn/triblex/triblex_browse.home> (1 July 2004).
[155] This has led to calls for reform, see Robertson (n 20) paras 9-13. See also the ILOAT website itself, 'Advice to litigants', under D, 'Applications for hearings', para. 2: "Very seldom does the Tribunal allow applications for hearings. It is likely to allow such applications only where the written submissions and evidence do not enable it to rule on the issues of fact and of law that it sees as decisive", available at <http://www.ilo.org/public/english/tribunal/advice.htm> (1 July 2004).
[156] The ILO's internal quasi-judicial body, the ILO Joint Panel, was disbanded by internal (ILO) directive no GB 289/PFA/18 and the right to legal representation and the requirement for a legally qualified chair both removed. See GB 289/PFA/18 Appendix II 'Collective Agreement on Conflict Prevention and Resolution' *Between the International Labour Office and the ILO Staff Union* art 3.

standard of reasonable alternative means of redress. In this respect, it should be noted that the Court has frequently emphasized that "the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective."[158]

Another element to be noted regarding the practice and procedure of the ILO's internal system of dispute settlement, is the difficulty periodically encountered in accessing the judgments and the rules of the lower level quasi-judicial boards, together with experienced inequality of arms. As one example, this report originally planned to examine in some detail the judgments handed down by the ESA Appeals Board, but, access to these judgments was denied on grounds of 'confidentiality', a problem also regularly encountered by our client. This is inconsistent with the principles of transparency and accessibility to the legal system, and conflicts with the principle of the equality of arms, in that international organisations' internal lawyers are invariably permitted access to all rules and access to the accompanying jurisprudence through internal websites.

Yet another concern in terms of compliance with the standard set out in *Waite and Kennedy v. Germany* is the concept of an effective remedy for one of the issues gradually being recognized within many quarters within the international system of organisations as a real problem: those of sexual harassment[159] and, more recently, of mobbing.[160] Sexual harassment and mobbing are by their nature difficult behaviours to prove without adducing oral evidence accompanied by an opportunity to cross-examine witnesses in properly conducted hearings, which complainants before the ILOAT have not had access to for the past twelve years. In cases where complainants do not have access to a first instance hearing before a judicial body

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[157] See ILOAT Reform Opinion prepared by Dr. Ian Seiderman, 'Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?' Staff Union <http://www.ilo.org/public/english/staffun/info/iloat/> (1 July 2004).

[158] n 108.

[159] See A Houshang Fraud *Waste and Abuse: Aspects of UN Management and Personnel Policies* (University Press of America Lanham 2003) 227-271, about "Sexual Harassment in the United Nations System" or a detailed description of sexual harassment in the United Nations including a case involving the sexual assault of staff member Ms Claxton, resulting in her harasser resigning with a generous financial package (US$75,977.40, received February 1994) and a reappointment as UNDP staff member of $US100,00 while she was denied any financial compensation. Of particular note is the internal procedure detailed from pages 247 to 249, delineating some of the problems faced by legal officers and judges within the UN's internal legal system; problems resulting largely from a failure to provide adequate separation of powers, including Justice Carroll's disappointment at the manner in which the matter was handled, describing the secretive nature of the proceedings as being a travesty of justice, which (at 251) "smacks too much of the Star Chamber".

[160] An empirical case study by Professor Dieter Zapf of the University of Frankfurt found a minimum prevalence of 6.9% of behaviours which satisfied the criteria for "mobbing" or severe bullying experienced by World Health Organisation employees in a study conducted by the Johann Wolfgang Goethe-Universität in Frankfurt and presented to WHO staff in Geneva on 11 December 2003.

satisfying those standards described in the Court's jurisprudence cited above, it could be concluded that the ILOAT's standard practice (of failing to provide public hearings to guarantee thorough judicial review) does not reach the level of 'reasonable alternative means' of redress as required by *Waite and Kennedy*. However, due to the low level of scrutiny applied by the Court in *Waite and Kennedy*, only highly persuasive legal arguments may convince the Court that the grant of immunity to the ILO would not be justified.

4. CONCLUSION

It can be concluded from the above that there may be two avenues of responsibility available to international civil servants who suffer a breach of their right to a fair trial. First, the doctrine of functional necessity operates to exclude immunity where the independent functioning of an international organisation would not be affected by the exercise of jurisdiction by a domestic court. Subjecting the procedure of the ILOAT to scrutiny by a Swiss court would arguably not prevent the ILO from independent functioning. As such, a Swiss court should lift immunity to allow recourse to justice for an international civil servant falling under the jurisdiction of the ILOAT.

Second, due to the reluctance of domestic courts to lift immunity, the question of State responsibility rises. A host State which is also party to the Convention must honour its obligations under the Convention. If it could be established that the ILOAT procedure does not qualify as a fair trial as enunciated in Article 6 of the Convention, the host State could be held responsible for granting immunity to the international organisation, despite the absence of a "reasonable alternative means" to effectively protect individual rights under the Convention. It follows from our previous considerations that it is highly questionable whether a fair trial is provided for to international civil servants under the jurisdiction of the ILOAT. It follows that Switzerland may accordingly be held responsible for not ensuring reasonable alternative means to international civil servants on its territory.

C. RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS FOR BREACHES OF INTERNATIONAL LAW

This part follows-on from Part B, as it will start from the assumption that the veil of immunity can be pierced, making it in principle possible to bring a suit against international organisations before a domestic court. Three preliminary remarks must be made in this respect. First, if the case would be adjudicated by a domestic court, this most likely will not ensue only on the basis of the international human rights norms discussed in this study, but for a large part on the basis of national law. This study, though, does not examine what norms of international law can be applied and invoked before domestic court. In addition to the substantive applicable law, also the principles governing the responsibility will mostly be determined in whole or in part by domestic law. The domestic principles of responsibility are outside the scope of this study. Third, this study focuses only on breach, and not on other aspects of responsibility, such as attribution, causality and circumstances precluding wrongfulness, as these aspects must be examined on a case-by-case basis. In conclusion, the effective invocation of the responsibility of international organisations before domestic courts can be subject to many obstacles. It depends on the degree in which international has effect in the domestic legal order of a particular country, whether or not the responsibility for international human rights norm can be enforced by a domestic forum.

However, apart from the foregoing, even if the veil of immunity could not be pierced, arguments to bind international organisations *themselves* to human rights norms are highly relevant for the development of international law in this field. The reluctance of both national and international courts, in the name of immunity, to examine thoroughly whether international organisations have violated human rights norms, can be countered and eventually transformed by the repetition of strong legal arguments introduced in political conversation.

International organisations are established by States by way of international treaties.[161] Their relevant constituent agreements, as well as other treaty law and customary international law, form the 'proper' law of international organisations. As these sources are interpreted according to international law, the 'proper' law is in general international law, for a large part

[161] MN Shaw *International Law* (5th edn Cambridge University Press 2003) 1198.

to the exclusion of national law.[162] In order to hold international organisations accountable for violations of human rights norms, it first has to be established whether these norms indeed form part of this 'proper' law, i.e. the law binding on international organisations. Only when this has been established, can one properly start to examine the responsibility and the enforcement of this responsibility before domestic courts or through other channels. In Part A, it was concluded that the ILO possesses international legal personality and that it consequently qualifies as a subject of international law, i.e. as a bearer of international rights and obligations. However, the precise extent to which it is such a bearer of rights and obligations has been left open, partly because legal personality is not a fixed concept but has an evolutionary character. In the context of this study, it will be necessary to limit the attempt to demarcate the boundaries of the legal personality of international organisations to the question whether the ILO is capable of bearing fundamental human rights obligations. Only when it is bound by these obligations, would it be legally possible to hold the ILO responsible for a violation of these human rights obligations.

1. INTERNATIONAL ORGANISATIONS AND FUNDAMENTAL HUMAN RIGHTS OBLIGATIONS: THE CUSTOMARY LAW ARGUMENT

1.1 The Absence of Human Rights Treaties Binding on International Organisations

As a general rule, international organisations are not parties to human rights treaties such as the Convention and the International Covenant on Civil and Political Rights (ICCPR). Consequently, those treaties are not binding on international organisations and the most obvious way by which international organisations could be bound to human rights standards is thereby excluded. However, treaties are not the only source of international law in which human rights standards are enshrined. Quite a number of human rights obligations have reached the status of customary international law.[163] Before identifying those rights, it first has to be considered whether customary international law itself is binding on international organisations.

[162] A Reinisch 'Securing the Accountability of International Organisations' (2001) Global Governance vol 7 no 2, 131, 133; Shaw (n 161).
[163] T Meron *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press Oxford 1989) 34; Reinisch (n 162) 135; JE Alvarez 'The Security Council's War on Terrorism: Problems and Policy Options' in E de Wet & A Nollkaemper (eds) *Review of the Security Council by Member States* (Intersentia Antwerp 2003) 7, 119, 129.

1.2 Customary International Law as a Source Binding on International Organisations

The most common argument in this respect is that as a consequence of possessing international legal personality, international organisations are at least bound to follow human rights norms from the conventions that have risen to the level of custom.[164] This argument finds strong support in the statement of the ICJ in its advisory opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*: "International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."[165]

In addition, it has been emphasised that it would be incompatible with the general principles of law if States were to be allowed to collectively "opt-out" of customary law, simply by creating an international organisation that is not bound by that which restricted its founding Members.[166] This idea is reflected in the following statement by the International Law Commission in respect of *jus cogens* norms:

> "International organisations are created by treaties concluded between States….despite a personality which is in some aspects different from that of States parties to such treaties, they are nonetheless the creation of those States. And it can not be maintained that States can avoid compliance with peremptory norms by creating organisations."[167]

Respected authors, like Reinisch, have argued that this statement must also be applied to other sources of international law, in particular customary international law.[168]

Lastly, the practice of international organisations *themselves* exposes a trend in observing principles of customary international law. Although there has been great reluctance by international organisations to acknowledge in explicit terms a legal obligation to comply with human rights,[169] the practice of the ILOAT does seem to accept human rights law as an applicable source before the Tribunal. Even more surprisingly, the Tribunal also makes

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[164] E Abraham 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo' (2003) AULR 1291, 1321.
[165] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (n 3) 90.
[166] Reinisch (n 162) 136.
[167] see International Law Commission 'Commentary on the *jus cogens provision* of Article 53 Vienna Convention on the Law of Treaties Between States and International Organisations 1986' (1982) Ybk Int'l L Comm'n vol 2 pt 2, 56.
[168] Reinisch (n 162) 101.
[169] Wellens K *Remedies Against International Organisations* (Cambridge University Press 2002) 15.

explicit reference to international human rights instruments as this short summary of case law shows:

> "[…]les functionnaires ne peuvent invoquer ni une disposition de la législation de l'Etat du siège, ni une convention internationale du travail. En revanche, il se réfère à la Chartre des Nations Unies, *aux principes généraux du droit*, *aux principes régissant la function publique internationale ainsi qu'aux instruments internationaux relatifs aux droit de l'homme."* [170]

Thus, decisions of the ILO can be reviewed by its own Tribunal on compatibility with human rights law.

In conclusion, it appears to be widely accepted that, in principle, international organisations are bound by rules of customary international law.[171] With this statement, however, two questions remain to be answered. First, are the subsidiary organs of an international organisation also bound by customary human rights norms? And, second, what human rights norms have reached the status of customary international law?

1.2.1 Subsidiary organs and customary human rights norms

It is commonly accepted that the individual organs of an international organisation enjoy legal personality derived, but not separate, from the legal personality of the international organisation. Consequently, international law binding on the organisation is *ipso facto* binding on all its organs:

> "It would be useful to make it clear that, unless there is a properly established indication to the contrary, when an international organisation binds itself by a treaty, it also binds all the entities, subsidiary organs, connected organs and related bodies which come into the orbit of that organisation and are cooperated in it to a greater or lesser extent."[172]

This point has also been raised by Judge Fitzmaurice in his dissenting opinion in the *Namibia* Opinion:

> "[Territorial sovereignty] is a principle of international law that is well established as any there can be-and *the Security Council is as much subject to it* (*for the*

[170] see 'Le Jurisprudence du Tribunal Administratif de L'OIT' (2002) Annuaire Francais de Droit International 477. The quote summarizes decisions [2002] ILOAT 2120 para 10, [2002] ILOAT 2147 para 8, [2003] ILOAT 2193.
[171] see Reinisch (n 166).
[172] International Law Commission 'Report on the work of its 34th session' (1982) UN Doc A/37/10, 80.

> *United Nations is itself a subject of international law*) as any of its individual Member States are."[173]

His reasoning is obviously not restricted to the principle of territorial sovereignty or to the specific character of the United Nations, but could be applied more generally to other international organisations in respect of other norms or principles of international law.[174]

In conclusion, if it can be established that the ILO is bound to certain customary human rights norms, then also its organs are bound, including the ILOAT.

1.2.2 Human rights standards as customary international law

In the past, one could not assume too swiftly that human rights norms, by virtue of their importance, had reached the status of customary international law, as this was certainly not a perception of all times.[175] In addition, human rights instruments, in contrast with humanitarian law instruments, were (and in fact still are, although the difference has reduced over time) ratified by considerably fewer States.[176]

However, nowadays it can safely be asserted that human rights treaties have generated some new norms of customary international law. Nonetheless, it still cannot safely be assumed that all human rights norms have acquired a customary status. It takes an empirical study of State practice and *opinio juris* (the two constituent elements of customary international law) to establish whether a particular right has matured into custom.[177] The central focus of this report is whether the procedure of the ILOAT, as an administrative tribunal of an international organisation, violates human rights norms binding upon it. Therefore, the human rights norms applicable to the ILO(AT) must be considered.

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[173] *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (Dissenting Opinion Judge Fitzmaurice)* [1971] ICJ Rep 294 (emphasis added).
[174] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (n 3) 90.
[175] International Law Commission UN Doc A/CN.4/SER.A/1977/Add.1 (1977) Ybk Int'l L Comm'n vol 2, 46: "[W]ithout in any way disregarding the existence of a few customary international rules on the subject, and without ruling out the possibility - even the likelihood - that such rules will increase in number, we are bound to conclude that, today, the international obligations of the State in regard to the treatment of its own nationals are almost exclusively of a *conventional nature* […]" (emphasis added).
[176] For example the Geneva Conventions of 1949 have been ratified by almost 200 States, while only 152 States have ratified the ICCPR. Even fewer States have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 136 are States party to that Convention.
[177] Meron (n 163) 94.

In this respect, it is important to note that there is a debate whether all norms of customary international law are applicable to international organisations or whether they are *only* bound by norms that apply to their specific functions (principe de specialité) as is advocated by Klein:

> "La principale limite à cette applicabilité de principe du droit des gens réside dans le fait qu'une norme internationale ne peut être appliquée a une organisation donnée qu'en tentant compte de ce que chaque organisation possède des compétences limitées et est régie par le principe de spécialité."[178]

Even though it might thus be argued that international organisations are bound by all norms of customary law, it will be demonstrated that, even if one advocates the narrow concept, basic human rights norms are applicable to ILO(AT), taking account of its powers and functions.

1.3 Human Rights Norms Binding Upon ILO(AT) by Virtue of Customary International Law

According to the narrow concept, it is necessary to first examine the specific powers and functions of the ILO(AT) in order to determine which human rights norms are applicable and possibly binding upon the ILO(AT).

1.3.1 Powers and functions of ILO(AT)

As discussed in paragraph 2.2.2 of Part A, the primary function of the ILO is, in short, to ensure respect for the basic and fundamental rights, protections and assurances of workers, including the right to a fair system of adjudicating disputes with employees.

The creation of the ILO Administrative Tribunal reflects the need to provide a remedy in order to protect civil servants against the improper actions of the organisation, due to the immunity enjoyed by the ILO under international law.[179] The judicial character of the ILOAT can, due to the similarity between the ILOAT and UNAT Statutes,[180] be deduced from the following reasoning by which the ICJ affirmed the judicial character of the UNAT:

> "examination of the relevant provisions of the statute shows the Tribunal is established, not as an advisory organ […] but as an independent and truly judicial

[178] P Klein *La Responsabilité des Organisations Internaitonales Dans les Ordres Juridiques Internes et en Droit des Gens* (Editions de l'Université de Bruxelles 1998) 304.
[179] Wellens (n 169) 82.
[180] Also the ILOAT can be considered as a 'court' of last instance. Its judgments are final and without appeal; see ILOAT Statute (n 16) art VI.

> body pronouncing final judgments without appeal within the limited field of its functions."[181]

The next paragraph will examine which human rights norms might be applicable to the judicial functions of the ILOAT.

1.3.2 Human rights norms applicable to the ILOAT

Similar to all judicial bodies existing in both the international as well as the domestic sphere, the main human rights obligation in principle applicable to the nature of the ILOAT is to ensure a fair trial. A statement of the Special Court for Sierra Leone may be illustrative in this respect:

> "The Special Court is […] an international agreement an it is a norms of international law that for it to be "established by law", its establishment must accord with the rule of law. This means that it must be established according to proper international criteria; must have its mechanisms and facilities to dispense even-handed justice, providing at the same time all guarantees of fairness and it must be in tune with international human rights instruments."[182]

The right to a fair trial is enumerated in several human rights instruments, for instance in Article 14 ICCPR, Article 6 of the European Convention, Article 8 of the American Convention on Human Rights and Articles 7 and 27 of the African Charter on Human and Peoples Rights. It encompasses a number of due process guarantees for disputes of a civil nature, such as the right to a fair and public hearing, the right to a trial by a competent, independent and impartial tribunal and the right to equality of arms. These rights are applicable to the powers and functions of the ILOAT, as the judicial body deciding in civil suits. It would be contrary to the opinion of the ICJ cited above, in which it pleas for a judicial remedy for the protection of civil servants against their employers, if the ILOAT were not called to ensure a full and fair application of these principles of due process and justice. In this respect, it must be reemphasised that the ILOAT was in fact specifically created and empowered with judicial functions to guarantee the right of civil servants to enjoy natural justice and basic standards of human rights, to which every individual is entitled.

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[181] *Effects of Awards* (n 18) 53.

[182] *Prosecutor v Kallon, Norman, Kamara (Decision on constitutionality and lack of jurisdiction)* SCSL-04-15-PT-059-II (13 March 2004) para 55. See also *Prosecutor v Gérard Ntakirutimana* ICTR-96-10-T/ ICTR-96-17-T (11 June 1997), in which the rights of the accused under several human rights instruments were applied by the Tribunal.

It will be examined below whether the right to a fair trail has acquired a customary international law status by virtue of which the ILO(AT) is bound to ensure and guarantee this right and the associated norms of due process.

1.3.3 Customary international law status of the right to a fair trial

This inquiry aims at determining whether the right to a fair trial and the guarantees of due process flowing from it, have acquired the status of customary international law. Useful indicators for evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument has been repeated in other human rights instruments (*opinio iuris*), and second, the confirmation of the right in national practice, primarily through the incorporation of the rights in national law (State practice). In application, those two indicators seems to be linked. Many of the international human rights instruments in fact strive to ensure that the domestic legal systems of the State Parties enable an individual to obtain a fair trial, that is:

> "a fair hearing before a legal and competent, impartial, and independent tribunal that employs fair, prompt, and public procedures (with minor exceptions), which renders an effective, public decision, and affords an appropriate, enforceable remedy."[183]

Thus, under the European Convention, all State Parties are under a legal obligation to implement the right to a fair trial in their domestic legal orders and practice. The same goes for States party to the ICCPR.

The fact that the right to a fair trial is enunciated in so many legal instruments, combined with the fact that the right to a fair trial is now recognised in many domestic legal systems, has led to the conclusion that the right to a fair trial (sometimes without a more specific examination of the components of the right) embodied in human rights instruments is now customary international law.[184] This has also been affirmed in the *Alekskovi* case before the ICTY. Here, the Appeals Chamber stated: "The right to a fair trial is, of course, a requirement of customary international law."[185] However, some components of the right to a fair trial, relevant to our

[183] G Rokous and R Brescia 'Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals' (1993) 18 Yale J Int'l Law 559, 566.
[184] H Hannum 'The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law'(1995-96) Georgia J Int'l & Comp L 287, 345; Rokous & Brescia (n 183) 566.
[185] *Prosecutor v Alekskovi* ICTY-95-14/1 (24 March 2000) para 104.

study, have been more clearly identified as customary law. These include the right to a fair and public hearing, the right to a trial by a competent, independent and impartial tribunal and the right to equality of arms. [186]

In conclusion, the right to a fair trial and the core due process rights enshrined in this right have acquired the status of customary international law. The next paragraph will deal with the specific consequences flowing from this conclusion for international organisations, and more specifically the ILO(AT).

1.4 Conclusion: Human Rights Standards Derived From the Right to a Fair Trial Binding Upon ILO(AT)

Since it has been established that the right to a fair trial and the inherent due process norms of the right to a fair and public hearing, the right to a trial by a competent, independent and impartial tribunal and the right to equality of arms have acquired a customary status in international law, one cannot circumvent the conclusion that these human right norms are binding in law upon the ILO(AT). This implies that the ILO(AT) is under a legal obligation to secure and respect these human rights in the exercise of its functions. If the ILO or its organs do not comply with its human rights obligations under customary international law, the ILO can be held accountable *itself*, as an individual subject of international law, for its own breaches of that law.[187] In case of such a breach, legal recourse for the victim before domestic courts can be possible if immunity is lifted due to the absence of a reasonable alternative means of redress within the organisation.

[186] Meron (n 163) 94; B Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law* (Oxford Clarendon Press 1984) 115, 133, 151.
[187] International Law Association, Committee on Accountability of international organisations, New Delhi Conference 2002 <http://www.ila-hq.org/html/layout_committee.htm > (18 June 2004) 6.

2. INTERNATIONAL ORGANISATIONS AND FUNDAMENTAL HUMAN RIGHTS NORMS: THE ESTOPPEL ARGUMENT

2.1 Good Faith and the Concept of Estoppel

Customary international law is arguably not the only possible way to bind international organisations to human rights standards. In doctrine, attention is paid to binding international organisations to these norms through the principle of good faith and the closely related concept of estoppel. In fact, the doctrine of estoppel is considered to be a general principle of international law founded in the broad concept of good faith.[188] Where one party had reason to believe in good faith, based on the actions or words of another party, that a situation or occurrence would or would not in future change in a particular manner, the other party may not change the situation in that manner.[189] This paragraph will first set out the features of the concept of estoppel, where after the second paragraph will examine which statements of the ILO specifically give rise to estoppel.

2.1.1 Requirements for estoppel

Three requirements define the concept of estoppel. First, the statement creating the estoppel must be clear and unambiguous; second, the statement must be voluntary, unconditional and authorised; and finally, there must be good faith reliance upon the representation of one party by the other party either to the detriment of the relying party or to the advantage of the party making the representation.[190] This last requirement, however, is not undisputed. It has been argued that the concept of estoppel should not have such a narrow meaning but should be awarded a more extensive meaning, based on the maxim *non licet contra factum proprium*.[191] In other words, it is advocated that one should merely focus on the expectation created, without examining whether any detriment was suffered.[192] This argument is supported by case

[188] R Bernhardt *Encyclopedia of International Law* (Kluwer Law International The Hague 2000) Part II, 118; International Law Association New Delhi Conference 2002, Committee on Accountability of International Organisations (n 187) 'Third report - consolidated, revised and enlarged version of recommended rules and practices (RRP-S)'.
[189] E de Wet 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View' in E de Wet and A Nollkaemper (eds) *Review of the Security Council by Member States* (Intersentia Antwerp 2003) 7, 10; Bernhardt (n 188) 116.
[190] M Wagner 'Jurisdiction by Estoppel in the International Court of Justice' (1986) California L Rev 1777, 1779.
[191] Bernhardt (n 188) 117; C Brown 'A Comparative and Critical Legal Assessment of Estoppel in International Law' (1996) Miami L Rev 369, 396.
[192] De Wet (n 189) 11.

law of the ICJ and its predecessor. For example, in the *Eastern Greenland*[193] case, the PCIJ seemed to apply a less restrictive notion of estoppel. The first element of reliance on the part of the party invoking estoppel was *in casu* satisfied. However, as to the detriment suffered it is not at all clear that the Court identified this as a requirement.[194] Another supporting example can be found in the *Nuclear test*[195] case, in which the ICJ considered France to be bound by its unilateral statement, without requiring that the party invoking it suffered any detriment.[196] Especially the Court's judgement in the Nuclear Test case has had some deep impact on the notion of estoppel in international law. As Brown states: "Whatever the status of estoppel as a principle of international law prior to the ICJ's decision in this case, the Court's pronouncements may well have shattered any hope of refining and narrowing estoppel."[197]

2.1.2 Form

Claims of estoppel can arise out of two contexts: first, in the context of unilateral declarations and, second, in the context of acquiescence.[198]

a. Unilateral declarations

"Unilateral declarations" consist, for present purposes, of two unilateral acts; the unilateral promise and the unilateral statement of fact.[199] Either may give rise to estoppel. In the aforementioned *Nuclear Test case*, the Court held that France was bound to its unilateral statement that the atmospheric nuclear testing campaign of 1974 would be the last. With respect to the unilateral promise, the ICJ supports the view that also unilateral promises may give rise to estoppel. Although it limited the binding declarations to those that were intended to bind, it did not make a distinction between statements of facts or promises, since they could both be made with the requisite intent. It should also be emphasised that the distinction

[193] *Legal Status of Eastern Greenland* (*Denmark v Norway)* [1933] PCIJ Ser A/B No 53, 22.
[194] ibid 73.
[195] *Nuclear Test (Australia v France)* [1974] ICJ Rep 253, 266.
[196] ibid 268.
[197] Brown (n 191) 409.
[198] Wagner (n 190) 1781.
[199] ibid.

between promise and statement of fact is not always clear. A vivid example is provided by the French declaration in the *Nuclear Test case,* which could be interpreted both ways.[200]

b. Acquiescence

Although acquiescence may give rise to estoppel, it is not free of obstacles. The greatest obstacle it must overcome relates to the first requirement of estoppel, namely the requirement of a clear and unambiguous statement. In case of acquiescence of an entity to the declaration of another entity or to existing circumstances, this first requirement is clearly absent. However, it is generally accepted that acquiescence can lead to estoppel. Thus, even though the requirements for estoppel are not met, acquiescence may still have legal effect. It will depend on whether the intent was clear and whether the objecting entity detrimentally relied on the other's silence.[201]

2.2 Application of Estoppel to Acts of International Organisations

Although the concept of estoppel was at first exclusively applied in inter-State relations, its qualification as a general principle of international law makes the concept also suitable for an application in relations between other subjects of international law.[202] It is therefore no coincidence that increasing attention is paid to the way in which estoppel can and should bind international organisations to the legitimate expectations created by their actions. In fact, it is practically undisputed that unilateral acts of international organisations, such as approval and acceptance, may also indeed create binding obligations for them.[203] The United Nations has been the most prominent object of examination in this respect. For example, UN Force Regulations according to which UN troops "shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel," or at least the affirmation of that proposition in a letter of the UN Secretary-General to the International Red Cross,[204] were viewed as internationally binding declarations of the UN.[205]

[200] For example, Wagner interprets the French declaration as a statement of fact, whereas De Wet and Brown use the French declaration as an example of promissory estoppel.
[201] Wagner (n 190) 1783.
[202] Bernhardt (n 188) 118.
[203] M Virally 'Unilateral Acts of International Organisations' in M Bedjaoui (ed) *International Law: Achievements and Prospects* (Nijhoff Dordrecht 1991) 241; Reinisch (n 162) 137.
[204] Reprinted in (1962) International Review of the Red Cross 29.
[205] Reinisch (n 162) 137; Y Sandoz 'The application of Humanitarian Law by the Armed Forces of the United Nations Organization' (1987) International Review of the Red Cross 274-284.

Obviously, the principle of estoppel is not only applicable to the UN. In the next paragraph, the principle will be applied to the acts and declarations of the ILO and its organs, including the acts of its administrative tribunal.

2.3 Application of Estoppel to Acts of the ILO(AT)

A statement made by the ILO during the 58th session of the United Nations General Assembly in New York makes abundantly clear that "human rights remain a central pillar in the ILO's work for social justice and decent work." Moreover, it pronounced that "decent work cannot be created or maintained without relying on the human rights expressed in the ILO's Conventions and the Declaration of Fundamental Principles and Rights at Work." There is no reason way this general statement should not apply to 'decent work' within the system of the ILO. By affirming that human rights norms are essential for decent work and taking account of the fact that the promotion and protection of international labour rights is central to the activities of the ILO, including the right to a fair system of adjudicating disputes with employees,[206] such declarations can give rise to estoppel. It would be in breach of good faith if the ILO would deny its own workers the right to the protections required by law which it considers itself as indispensable for decent work.

The judgements of the ILOAT are even more interesting in this respect. It must be noted, however, that it is not common to apply the concept of estoppel to international tribunals (but neither has this possibility been explicitly excluded by international law). Furthermore, the present authors are aware of the possible conflicts the application of estoppel to acts of the judicial organs might cause in the absence of international obligation of *stare decisis*.[207] Notwithstanding these preliminary considerations, the argument developed below should nevertheless be taking into account for the purposes of the present study.

[206] n 20.

[207] However, although *stare decisis* is no general principle of international law, practice shows that judicial organs should not depart from their own precedents without good reasons. See in this respect: *Prosecutor v Alekskovi* (n 185) para 97: "The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals."

The early practice of the tribunal shows that the internal law of the organisation is not the only source of law applicable to disputes: "The Tribunal is bound exclusively by the internal law of the organisation […] as well as by general principles of law."[208] Through time, the scope of the applicable law has broadened. Nowadays, human rights have acquired a prominent place in the case law of the Tribunal as the following extracts may illustrate:

In its judgment 1333 of 31 January 1994, the Tribunal stated that:

> "The law that the Tribunal applies in entertaining claims that are put to it includes not just written rules of the defendants organisation but the general principles of law and basic human rights."[209]

This view has been repeatedly expressed, which has resulted in a consistent line of precedent:

> "A firm line of precedent says that the rights under a contract of employment may be express or implied , and include any that follow from general principles of the international civil service or human rights […]."[210]

The Tribunal has furthermore given more specific content in a case-by-case approach to the above expression as the following passages demonstrates:

> "Discrimination on such grounds is contrary to the Charter of the United Nations, general principles of international law and those which govern the international civil service, as well as international instruments on human rights. The principles of Art. 26 of the International Covenant on Civil and Political Rights (1996), although not strictly binding on the Agency are relevant."[211]

In the same spirit, the ILOAT stated in a subsequent case:

> "In fact, the EPO as such […]is not bound by the [European] Convention in the same way as signatory states. Nevertheless, the general principles enshrined in the Convention […]are part of human rights, which, […], in compliance with the Tribunal's case law, apply to relations with staff."[212]

These judgements leave little doubt about the law applicable to disputes brought before it. They demonstrate a general opinion on the applicable law, in other words, on the law by which the organisations are deemed to be bound. With regard to human rights, one can conclude two things. First, in general, international organisations are bound by basic human

[208] *Mr John Albert Waghorn v International Labour Organisation (ILO)* [1957] judgment 28 (ILOAT) s A.
[209] *Mr Nigel Malcolm Franks against the European Patent Organisation (EPO)* [1994] judgment 1333 (ILOAT) para 5.
[210] *Mr Saliu Yinka Awoyemi v the United Nations Educational, Scientific and Cultural Organization (UNESCO)* [1998] judgment 1756 (ILOAT) para 3.
[211] *Mr R A-O v the United Nations Educational, Scientific and Cultural Organization (UNESCO)* [2002] judgment 2120 (ILOAT) para 10, subsequently repeated in *Mr R A.-O v the United Nations Educational, Scientific and Cultural Organization* (UNESCO) [2003] judgment 2193 (ILOAT) para 16.

rights. Second, provisions in international human rights instruments, although not strictly binding on the organisation, are relevant to a consideration of whether a particular internal rule offends fundamental principles of law.

The ILO(AT) can be bound in two ways to the statements of the ILOAT. First, the statements qualify as jurisdictional acts, i.e. unilateral statements by judicial organs.[213] They are made by the one body of the ILO that, by its legal nature, is qualified to make such determinations. As such, they may give rise to estoppel. Both the ILO and the ILOAT could consequently be bound to respect human rights norms in their practice. Second, although acquiescence in principle has been applied in relations between two legal subjects and not in the relations between two organs of one subject, it still could be argued that the ILO is bound by acquiescence, since it has never officially or implicitly contradicted or criticised the judgments and pronouncements on the applicable law by its own Tribunal. Thus, also by acquiescence the ILO could possibly be bound to respect basic human rights within its system.

2.4 Conclusion: Human Rights Binding by Virtue of the Principle of Estoppel

While recalling the preliminary considerations raised concerning this issue, the ILO could possibly be bound to human rights norms through the principle of estoppel, whether by act or acquiescence. Both statements of the ILOAT and the statements of the ILO itself make clear that the human rights of civil servants must be respected by the organisation. However, it should be noted that difficulties may arise in identifying specific human rights norms, such as the basic right to a fair trial,[214] from the statements cited above. Even though the judgments of the ILOAT appear broad enough to include such a right, one should be cautious in asserting a specific obligation by virtue of the principle of estoppel.

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[212] *Mr J M W v the European Patent Organisation (EPO)* [2004] judgment 2292 (ILOAT).
[213] M Virally (n 203) 143.
[214] see Geoffrey Robertson QC, Professor Louise Doswald-Beck and Dr. Ian Seiderman, claiming that the right to a fair trial is a fundamental right, possibly enjoying the status of *jus cogens*, <http://www.ilo.org/public/english/staffun/info/iloat/> (21 June 2004).

3. CONCLUSION: RESPONSIBILITY OF THE ILO?

The question whether international organisations and the ILO in particular can be held responsible for its own breaches of human rights norms, can be answered in the affirmative. This study has demonstrated that international organisations can be bound to human rights norms either by virtue of customary law or by estoppel. As a result of this, international organisations can be held responsible for breaches of human rights norms binding upon them through either of the two concepts.

A study of the practice and functions of the ILO(AT) leads to two conclusions. First, taking into account its specific purposes and functions, the ILO is bound by the right to a fair trial and the inherent due process norms which have acquired a customary law status. Consequently, in case of a breach of customary law, the ILO could be held responsible for these breaches before domestic courts, when immunity from domestic jurisdiction would be lifted due to the absence of reasonable alternative means within the organisation.

Second, it could be argued, though with care, that the ILO is bound by 'basic human rights norms' through the concept of estoppel, either by virtue of its own active statements or by mere acquiescence. As a result, it can be held accountable for breaches of those human rights norms which are binding upon it by virtue of estoppel. However, it has been noted that complications might arise when attempting to establish that the ILO is bound to *specific* human rights norms through the concept of estoppel, as statements made by the ILO(AT) often do not identify specific rights, except for the principle of non-discrimination and the protection of property rights. Nevertheless, the wording of these statements does not by any means exclude other rights. Practice will have to distil which rights are actually, in the Tribunal's view, included in the term "basic human rights". The right to a fair trial should certainly qualify.

Although it is possible to hold the ILO responsible for breaches of human rights norms binding upon it both by virtue of international customary law and estoppel, practical preference should be given to customary law. Since the concept of estoppel is more ambiguous in its application due to its interpretative nature, a legal argument should first be grounded in customary law if the right at issue could be binding upon the ILO based on both concepts. The estoppel argument would than function as an alternative to customary law.

In conclusion, both concepts are instruments to bind non-State entities such as international organisations to international human rights law, thereby fulfilling a precondition for responsibility. However, it must be recalled that this study does not examine the other conditions for responsibility such as attribution of the breach, causality and circumstances precluding wrongfulness, necessary for the determination of the responsibility of a legal subject as the ILO. Thus, under these circumstances, a final judgement on the responsibility of the ILO can not be given.

D. FINAL CONCLUSION: LEGAL AVENUES FOR ESTABLISHING RESPONSIBILITY FOR BREACHES OF INTERNATIONAL HUMAN RIGHTS NORMS BY THE ILO

Once the international legal personality of an international organisation such as the ILO has been established, one enters the ambit of enforcement of international obligations incumbent upon the organization as a legal subject. This study aimed to address the possible legal avenues available to international civil servants for establishing the responsibility for breaches of international human rights norms, either of a host State party to the European Convention, or of the international organisation itself.

Although international organisations have traditionally been afforded absolute immunity, the modern doctrine of functional necessity dictates that where the exercise of jurisdiction by domestic courts would not interfere with the independent functioning of the international organisation, no immunity should be granted. In the case of the ILO, functional necessity could lead to the lift of immunity by domestic courts, in this case the Swiss courts, provided that the ILO could continue to operate independently notwithstanding the exercise of domestic jurisdiction over the practice of the ILOAT. This could open the way to holding the ILO directly responsible for actions by the ILOAT. However, practice shows that domestic courts are reluctant to lift immunity, even in the case of alleged human rights breaches by the organisation. The case of *Waite and Kennedy* before the German courts demonstrates this.

With respect to the responsibility of the host State of the international organisation: where a host State is a party to the European Convention, and therefore has obligations to protect human rights norms embodied in the Convention, such reluctance may lead to State responsibility. In the case of the ILOAT, it is submitted that particular elements of Article 6 of the Convention concerning the right to a fair trial, are not respected. This means that, within the ILO, no reasonable alternative means are available to individuals to enforce their rights under the Convention. This could perhaps trigger the responsibility of Switzerland for not ensuring the right to a fair trial on its territory and within its jurisdiction. However, in this regard the European Court on Human Rights has set a high threshold for the responsibility of States parties to the Convention. Accordingly, it will take strong legal arguments to convince the Court that the ILOAT procedure does not qualify as a reasonable alternative means, thereby disallowing the grant of immunity from national jurisdiction to the ILO and triggering

the responsibility of Switzerland for not providing access to a court by granting such immunity.

However, if a domestic court would lift immunity due to the absence of a reasonable alternative means of redress within the organisation, the first question that must be answered by the court would be whether the organisation is indeed bound by such norms. Unless this can be established, there can be no violation under international law (this would, however, not necessarily preclude the possibility of suing the international organisation under domestic law). Despite the absence of existing human rights treaties binding upon international organisations, this study has shown that international organisations can be bound to human rights norms by means of customary law and estoppel. In particular, it has been established that the ILO(AT) is bound to certain human rights norms, including the right to a fair trial. Consequently, the ILO could be held responsible before the Swiss courts for violations of human rights obligations incumbent upon it.

International civil servants in practice encounter great difficulties in having their human rights enforced before internal administrative tribunals, as well as before domestic and international courts. This studies shows that there are at least two legal avenues available to them, either by directly suing the international organisation before domestic courts or, if this should fail, hold the Member State accountable for this failure before the European Court of Human Rights.

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