Right of access to courts—labor dispute with international organization—immunity from jurisdiction of municipal courts—alternative remedies for employees of international organization

WAITE AND KENNEDY V. GERMANY, Application No. 26083/94;
BEER AND REGAN V. GERMANY, Application No. 28934/95.
European Court of Human Rights, February 18, 1999.

In a unanimous judgment, a Grand Chamber of the European Court of Human Rights (the Court) rejected attempts to question the compatibility with human rights obligations of the sweeping immunity from jurisdiction enjoyed by most international organizations under their constituent instruments or municipal law. In a case arising from domestic litigation before German labor courts that was instituted by the applicants against the European Space Agency (ESA),[1] the Court held that Germany did not violate Article 6(1) of the European Convention on Human Rights (hereinafter the Convention) by granting the ESA immunity from suit. It reaffirmed its earlier, related case law holding that the right of access to the courts is not absolute, but may be subject to limitations. The Court regarded immunity from jurisdiction granted for the purpose of ensuring the proper functioning of international organizations as serving a legitimate objective and found that the concomitant limitation of the applicants' right of access to court was not so disproportionate as to impair the essence of their "right to a court" because they did have alternative means of redress.

The two cases were heard together and decided identically by the Court. They arose from the unsuccessful efforts of the applicants to bring suit before German courts against the ESA, for which they had rendered services for a number of years at the European Space Operations Centre in Darmstadt, Germany. This work was performed while they were placed at the disposal of the ESA by their actual employers, a number of British, Irish, French and Italian companies. When their employment contracts came to an end or were likely to terminate, the applicants sought recognition before the German labor courts that they had

[20] *See* P.H.F. Bekker & Paul C. Szasz, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 91 AJIL 121, 125–26 (1997). In its Order of April 8, 1993, the Court merely stated that the solution adopted by the General Assembly in resolution 47/1 was "not free from legal difficulties." *See* 1993 ICJ REP 3, 14 para. 18.

[1] *See* Convention for the Establishment of a European Space Agency, May 30, 1975, 1297 U.N.T.S. 161, *reprinted in* 14 ILM 855 [hereinafter ESA Convention]. The ESA is a successor to the organizations established by the Convention for the Establishment of a European Space Research Organization, June 14, 1962, 528 U.N.T.S. 33, and the Convention for the Establishment of a European Launcher Development Organization, Mar. 29, 1962, 507 U.N.T.S. 177.

acquired the status of employees of the ESA pursuant to the German Provision of Labor (Temporary Staff) Act. This act provides, inter alia, that—in the absence of official permission—contracts between the hirer-out and the employee hired out (as well as between a hirer-out and a hiring employer) are void, and that in such a situation a contract between the hiring employer and the employee hired out is deemed to have been concluded. The German labor courts, in decisions affirmed on appeal by the Federal Labor Court, dismissed the actions as inadmissible because of ESA's immunity from jurisdiction.[2]

The applicants then petitioned the European Commission of Human Rights (the Commission), arguing that they had been denied access to a court for a determination of their dispute with the ESA (arising under German labor law). The Commission—by a very close vote (17 to 15)—found that there had been no violation of Article 6(1) of the Convention.[3]

The Court accepted the applicants' view that the issue whether a contractual relationship between them and the ESA existed involved the determination of their civil rights and obligations and that it triggered the applicability of Article 6(1), which provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The issue was whether Germany complied with this provision when granting immunity to the ESA.

The Court initially stressed that Article 6(1) does more than guarantee the fairness of judicial proceedings available to individual litigants. It reaffirmed that Article 6(1) "embodie[d] the right to a court" because it "secure[d] to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal."[4] The fact that the issue of the ESA's immunity was litigated at three levels of German courts obviously did not satisfy the applicants, who had argued that the right of access to a court would require that the courts address the merits of their claims. Against this background, the Court recognized the need to examine "whether this degree of access limited to a preliminary issue was sufficient to secure the applicants' 'right to a court'."[5] It refrained, however, from giving a simple answer.

The Court recalled its earlier jurisprudence as to the inherent limitations of Article 6(1).[6] It reaffirmed the principle that the States Parties to the Convention are permitted to regulate the right of access to court, stressing, however, that any resulting limitations must not impair the essence of the right. In particular, the Court noted that a limitation would not be compatible with Article 6(1) if it did not pursue a legitimate aim and if there were not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The Court acknowledged the well-recognized view that the immunity from suit enjoyed by international organizations was "an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments."[7] It regarded this purpose as a legitimate objective in restricting the right of access to court. The

[2] According to Article IV (1)(a) of Annex I to the ESA Convention, the Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such immunity in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency. *See* ESA Convention, *supra* note 1, at 199.

[3] Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Comm'n H.R. (Dec. 2, 1997) *available at* <http://194.250.50.201/eng/26083R31.E.html> (visited Nov. 3, 1999) [hereinafter Report].

[4] Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. at para. 50 (Feb. 18, 1999) *available at* <http://www.dhcour.coe.fr/hudoc> (visited Nov. 3, 1999) [hereinafter Judgment], relying on Golder v. United Kingdom, Eur. Ct. H.R. (ser. A no. 18) at para. 36 (Feb. 21, 1975), and the recent Osman v. United Kingdom, Eur. Ct. H.R. at para. 136 (Oct. 28, 1998). R.J.D. 1998-VIII, 3124–3213.

[5] Judgment, *supra* note 4, at para. 58.

[6] *See* Osman, *supra* note 4, at para. 147; Fayed v. United Kingdom, Eur. Ct. H.R. (ser. A no. 294) at para. 65 (Sept. 21, 1994).

[7] Judgment, *supra* note 4, at para. 63.

crucial issue was the proportionality of the limitation. The Court emphasized the need to consider the particular circumstances of the case. Invoking the object and purpose of the Convention, the Court emphasized that States, when establishing international organizations to which they attribute and accord certain powers and immunities, cannot be "absolved from their responsibility under the Convention,"[8] in particular their duty to provide a right to access to courts. On this basis, the Court held that "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[9] The Court found that access to the ESA Appeals Board, which has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member,"[10] provided such an alternative. In the Court's view it would have been for the Appeals Board to decide whether applicants were to be regarded as employees of the ESA. As a result, no violation of Article 6(1) of the Convention could be found.

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As suggested by the fundamental rights jurisprudence of the European Court of Justice (ECJ), small steps and individual defeats ultimately may advance the cause of human rights protection. It took the cases lost by Mr. Stauder,[11] Mrs. Hauer,[12] Nold,[13] Internationale Handelsgesellschaft,[14] and others to establish and develop the principle that the ECJ is called upon to safeguard the "fundamental rights enshrined in the general principles of Community law"[15] which are "inspired by the constitutional traditions common to the Member States"[16] and for which "international Treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines."[17] By not finding violations of fundamental rights in these cases, the ECJ implicitly affirmed their relevance for purposes of judicial review.

Similarly, the judgment in *Waite and Kennedy* may be viewed as a step towards scrutinizing more closely the grants of immunity from the jurisdiction of national courts which deprive claimants of access to dispute settlement institutions. It embodies a clear departure from the Commission's earlier jurisprudence, which viewed immunity issues as being outside the jurisdiction of the Strasbourg organs. In *Spaans v. The Netherlands,*[18] the Commission treated the grant of immunity by the Netherlands to the Iran-United States Claims Tribunal as a restriction of national sovereignty that did not raise an issue under the Convention.[19] This reasoning assumes that the limitation of a state's jurisdiction—which exists as a corollary of its grant of immunity—relieves a state of its responsibility to provide access to court for claims against the entities that the state has endowed with immunity. The departure from

[8] *Id.* para. 67.

[9] *Id.* para. 68.

[10] Regulation 33 Chapter VIII ESA Staff Regulations. (on file with author).

[11] Case 29/69, Stauder v. City of Ulm, Sozialamt, 1969 ECR 419.

[12] Case 44/79, Liselotte Hauer v. Rheinland-Pfalz, 1979 ECR 3727.

[13] Case 4/73, Nold v. Commission, 1974 ECR 491.

[14] Case 11/70, Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 ECR 1125.

[15] *Stauder,* 1969 ECR 419, at para. 7.

[16] *Internationale Handelsgesellschaft,*1970 ECR 1125, at 1134.

[17] *Nold,* 1974 ECR 491, at 507.

[18] App. No. 12516/86, 58 Eur. Comm'n H.R. Dec. & Rep. 119 (1988).

[19] "The Commission notes that it is in accordance with international law that States confer immunities and privileges to international bodies like the Iran-United States Claims Tribunal which are situated in their territory. The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the Convention." *Spaans,* 58 Eur. Comm'n H.R. Dec. & Rep 119, 122.

such a view was already implicit in decisions like *Dyer v. United Kingdom*,[20] where the Commission reasoned that if Article 6(1) were to be interpreted as enabling a State Party to "remove the jurisdiction of the courts to determine certain classes of civil claim or to confer immunities from liability on certain groups in respect of their actions, without any possibility of control by the Convention organs, there would exist no protection against the danger of arbitrary power."[21] By taking the applicability of Article 6(1) of the Convention for granted, the Court in *Waite and Kennedy* recognizes that any limitation of the jurisdiction of a Contracting State's judiciary raises issues that implicate fundamental rights.[22]

When assessing the compatibility of the grant of immunity to the ESA with Article 6(1), the Court largely relied on an alternative remedies theory—which was not an entirely new concept for the Strasbourg treaty organs—but it did not explicitly invoke such a theory. Both the Court and the Commission apparently have recognized the participation in private arbitration as an acceptable alternative to access to court as long as it sufficiently provides for judicial guarantees of independence and impartiality.[23] In other words, private arbitration may deprive claimants of their "day in court" because it provides an alternative means of redress. From a similar point of view, the Court and the Commission seem to consider the agreement to arbitrate as an acceptable waiver or renunciation of one's right of access to a municipal court.[24] Although the element of agreement to an alternative forum may be absent in the present case, once privately selected arbitrators have been accepted as substitutes for the Contracting States' judiciaries, it does not seem bold to embrace the institutionalized fora of appeals boards and administrative tribunals of international organizations.

There is another implicit rationale that may have been instrumental in persuading the Court to accept the alternative remedy solution provided by the ESA's Appeals Board. The effective alternative forum requirement was a prominent feature of the German Constitutional Court's *Solange* jurisprudence. There, in the context of European Community law, the Constitutional Court generally accepted a division of competence among the ECJ and national courts in the field of human rights protection. While *Solange I*[25] upheld the German Constitutional Court's human rights scrutiny of acts of Community organs "as long as" Community law did not contain a comparably adequate fundamental rights protection, *Solange II*[26] stated the proposition in reverse and concluded that the German judiciary lacked competence to review acts of Community organs "as long as" equal human rights protection was guaranteed by the ECJ. In its decision in the *Melchers* case,[27] the European Commission of Human Rights relied on the same idea to deny the admissibility of a com-

[20] App. No. 10475/83, 39 Eur. Comm'n H.R. Dec. & Rep. 246 (1984).

[21] *Dyer*, 39 Eur. Comm'n H.R. Dec. & Rep. 246, 252.

[22] The Court expressly refers to this problem when stating that when States accord immunities to international organizations, "there may be implications as to the protection of fundamental rights." Judgment, *supra* note 4, at para. 67.

[23] *See* Olivier Jacot-Guillarmod, *L'arbitrage privé face à l'Article 6, § 1er de la Convention européenne des droits de l'homme*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION. STUDIES IN HONOUR OF GÉRARD J. WIARDA 281–95 (1988); Franz Matscher, *Schiedsgerichtsbarkeit und EMRK*, *in* BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT NAGEL 227–45 (1987).

[24] Taking into account that parties to arbitral proceedings regularly freely consent to arbitration in advance, the Court held in the Deweer Case, Eur. Ct. H.R. (ser. A no. 35) at para. 49 (Feb. 27, 1980), that a "waiver" of one's right of access to court "frequently encountered . . . in the shape of arbitration clauses in contracts . . . does not in principle offend against the Convention." In *X. v. Federal Republic of Germany*, the Commission said that "the inclusion of an arbitration clause in an agreement between individuals amounts legally to partial renunciation of the exercise of those rights defined by Article 6 (1); [however] nothing in the text of that Article nor of any other Article of the Convention explicitly prohibits such renunciation." App. No. 1197/61, 5 Y.B. EUR. CONV. ON H.R. 88, 94 (1962) (Eur. Comm'n H.R.).

[25] Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel, Federal Constitutional Court, B VerfGE 37, 271, *translated in* 2 COMMON MKT. L. REP. 540 (1974).

[26] In re application of Wünsche Handelsgesellschaft, Federal Constitutional Court, B VerfGE 37, 271, *translated in* 3 COMMON MKT. L. REP. 225 (1987).

[27] M & Co. v. Federal Republic of Germany, App. No. 13258/77, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990).

plaint directed against a Community act by finding that the Community legal order contained a sufficiently developed system for protecting fundamental rights.

The Court in *Waite and Kennedy* only indirectly hinted at this reasoning when it stated that:

> [i]t would be incompatible with the purpose and object of the Convention, however, if the Contracting States were, [by establishing international organizations in order to pursue or strengthen their cooperation in certain fields of activity and by attributing to these organizations certain competencies and according them immunities,] absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[28]

Yet the Commission was more explicit in its report, as it expressly cited *Melchers* when concluding that "States may transfer to international organisations competences . . . and may also grant these organisations immunity from jurisdiction . . . provided that within that organisation fundamental rights will receive an equivalent protection."[29]

Whatever the precise origin of this concept of alternative remedies may be, it embodies an important step in fostering the effectiveness of the right of access to court. It should be noted, however, that in upholding the validity of the ESA Appeals Board as an alternative means of legal process available to the applicants, the Court may not have been entirely consistent with its own strict commitment to guarantee rights that are "not theoretical or illusory rights, but rights that are practical and effective."[30]

The Court views the applicants' access to the internal ESA staff dispute settlement mechanism as unlikely to give rise to any practical problems. This seems to be an extremely optimistic perspective since the Appeals Board's jurisdiction is expressly limited to staff members and experts of the ESA. While the claim before the German Court raised the question of whether the applicants fell within the notion of "staff members," it is far from certain that the ESA Appeals Board would entertain a similar complaint brought by the applicants. The fact that in the past some administrative tribunals of international organizations have espoused a broad approach as to their jurisdiction in order to prevent what they viewed as a possible denial of justice[31] does not imply that the Board clearly would have affirmed its jurisdiction. According to the dissenters on the Commission, the applicants, in asserting a right to employment under German labor law, were not covered by the internal remedies of the ESA.[32]

This leads to one of the central issues of the case and in part explains why the Court ruled against the applicants. It is submitted that the Court accepted the ESA's immunity from German jurisdiction less because it was satisfied that applicants would have alternative remedies available than because it feared that the ESA might be exposed to German labor legislation. A crucial passage of the judgment confirms that:

> [t]he Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisations . . . the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 §1 of the Convention and its guarantee of access to court as necessarily

[28] Judgment, *supra* note 4, at para. 67.

[29] Report, *supra* note 3, at para. 73.

[30] Judgment, *supra* note 4, at para. 67.

[31] In Zafari v. UNRWA, U.N. Administrative Tribunal, 10 November 1990, Judgment No. 461 (unpublished, on file with author), and Salaymeh v. UNRWA, U.N. Administrative Tribunal, 17 November 1990, Judgment No. 469 (unpublished, on file with author), the U.N. Administrative Tribunal extended its jurisdiction to claims brought by local UNRWA staff for whose complaints neither it nor the Special UNRWA Panel of Adjudicators had competence. The tribunal decided to fill the legal gap that the existing Staff Regulations and Staff Rules had left and, in the latter case, it expressly held that "the Tribunal's competence is derived from the lack of any jurisdictional procedure laid down by the UNRWA Staff Regulations and Staff Rules applicable to the Applicant." *Salaymeh, supra,* para. III.

[32] Report, *supra* note 3, at para. 2 (dissenting opinion of Mr. G. Ress).

> requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.[33]

This clearly reflects the Commission's reasoning in its earlier report on the case[34]—omitting, however, the Commission's critical acknowledgment that the applicants "did not . . . receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts.[35]

The apparently decisive issue of whether German labor legislation would be binding on an international organization is not an issue of immunity from suit or jurisdiction of courts, but rather a question of the applicable law.[36] There are valid reasons for challenging, namely the assumption on which the applicants based their claims, that German labor law, and the particular rule invoked, should govern the ESA's employment relations. This indeed would interfere with the autonomy and independence required for the organization to function properly. However, there is no intrinsic reason to deny a German court the opportunity to answer this "choice of law" question.[37] Other national courts have decided cases which demonstrate that it is possible for domestic courts—while denying immunity—to apply the employment rules of an international (or at least a regional) organization without distorting or replacing municipal law.[38]

Thus, taking the "equivalent legal protection" requirement seriously could have resulted in a different finding without necessarily opening the door to unilateral interference in an international organization's internal affairs. In the end, an international organization should establish its immunity by providing truly equivalent protection.

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