

THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS
ON INTERNATIONAL CIVIL SERVICE LAW

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President of the European Court of Human Rights since 1 November 2015.

He assumed the duties of judge on 5 May 2010 and, in September 2012, and was elected section president and Vice-President of the Court.

A former adviser to the Italian Court of Cassation, he has been a magistrate since 1977, first in the courts of first instance and then in the Legal Service of the Ministry of Foreign Affairs (Servizio del Contenzioso diplomatico). Between 1989 and 1997, he was co-representative of the Italian Government to the European Court of Human Rights. Between 1997 and in 2003, he was appointed to the Court of Cassation, first to the Public Prosecutor's Office and then to the Court as counsel.

Between May 2003 and May 2010, Mr Raimondi worked at the International Labour Office as a Deputy Legal Adviser and Legal Adviser of the Organization.

The law of the international civil service has an importance that goes beyond the strict need to ensure a justice system for a group of people who otherwise, because of the immunity regime of the organizations that are their employers, would be deprived of it. Indeed, it is the justice system of the international public which makes that the international organizations, this fundamental component of the international relations of our time, may affirm to act in accordance with the rule of law. This justice system is therefore essential for the credibility, I would even say for the existence, of international organizations.

Let me emphasize this point because I am well aware that, from the perspective of the management of an international organization, one might sometimes be tempted to view this system as an obstacle to the effectiveness of the organization's action. I do not need to emphasize the dangerousness of such a notion in this article, and I therefore allow myself to express the wish that the awareness of the absolute necessity of fidelity to the rule of law be always present in the minds of the leaders of the organizations, which implies the duty - a duty that fully corresponds to the interest of the same organizations - to ensure that the internal justice systems have the best possible operating conditions.

My intervention aims to open a window on the case law of the European Court of Justice concerning the human rights law of international civil service law. In a system where the application of national law is in principle excluded, and whose main sources are the internal standards of the organizations as well as the relevant contracts, it is quite natural that the Tribunal's jurisprudence has given an important place to general principles in its jurisprudence.

As the Administrative Tribunal of the International Labour Organization (hereinafter the Tribunal or ILOAT) said, in particular in Judgment 1333, Franks and Vollering, of 1994 (para. 5), the law that the Tribunal applies when deciding on requests addressed to it does not only include the texts in force within the defendant organisation (to which we must obviously add contractual rules), but also the general principles of law and *fundamental human rights*¹.

¹ Judgment 1333 (1994), consid. 5

The Tribunal has sometimes referred to the 1948 Universal Declaration of Human Rights - as in Judgment 848², Pilowsky, 1987 - and to the European Convention on Human Rights - as in Judgment 1144³. It has been observed in doctrine that in both cases the Tribunal remained very cautious⁴.

With regard to the latter instrument, this caution is all the more understandable since the European Convention, which of course does not directly bind any of the organizations that benefit from the jurisdiction of the Tribunal, is precisely a regional instrument that is intended to apply on the European continent, whereas the jurisdiction of the Tribunal goes far beyond this territorial dimension. In any event, as the Tribunal stated in Judgment 2292, this Convention affirms certain general principles, such as the principle of non-discrimination and respect for the right to property, which are part of human rights and which, according to the jurisprudence of the Tribunal, apply to relations between the organizations which have recognized the jurisdiction of the Tribunal and their staff⁵. Having said that, it is only natural that the Court of First Instance should be "in tune" with the case-law of the Strasbourg Court, given the responsibilities of the European Court of Human Rights to ensure respect in Europe for the right of access to a court and the right to a fair trial. A right which may of course be limited to enable Contracting States to comply with their international obligations, in particular as regards immunity from the jurisdiction of international organisations, but provided that these rights are not nullified and certain guarantees are provided. That is why the Strasbourg Court cannot confine itself to finding that an immunity regime exists for an international organisation, but must verify in what way the rights of individuals who, because of the immunity regime do not have access to a national jurisdiction, are protected within the framework of the competent international justice system. As for the case law of this Court in the field of international administrative tribunals, it is scarce. However, a few principles emerge. First, it seems important to me to recall that, according to well-established case law, we do not recognise applications against international organisations, which, as I have just said, are not parties to the European Convention on Human Rights (ECHR). Applications against international organizations are therefore declared inadmissible *ratione personae*. In addition, international organizations enjoy immunity from jurisdiction, usually under their General Agreement on Privileges and Immunities. This immunity has the effect of preventing litigants from complaining

² For instance in Judgment 848 (1987)

³ For instance in Judgment 1144 (1992)

⁴ Laurent Germond, *Les principes généraux selon le Tribunal administrative de l'O.I.T.* (Paris, Pedone, 2009).

⁵ Judgment 2292 (2004), consid. 11

about the decisions of these entities before this Court. Thus, in the cases *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* (judgment of 18 February 1999), which concerned the actions of applicants claiming immunity from the jurisdiction of the European Space Agency, the Court recognised the indispensable nature of the immunity from jurisdiction of an international organisation, provided, however, that the restriction which it engenders was not disproportionate⁶. Thus, in the cases I have just cited, we were able to verify that the applicants had another way of protecting their rights. Let me explain: we fully accept the immunity of the international organization from jurisdiction, provided, however, that the applicant can benefit from an accessible alternative internal remedy.

I note, however, that our jurisprudence is nuanced and adapts to the circumstances, as we showed in the case of *Stitching Mothers of Srebrenica v. the Netherlands* (decision of 11 June 2013)⁷. In this case, we accepted immunity from the jurisdiction of the United Nations, despite the absence of domestic remedies. In this specific case, it seemed inappropriate to us to bring United Nations operations under the jurisdiction of national jurisdictions, because that would have allowed States to interfere in the accomplishment of the United Nations mission.

With regard to decisions rendered by the administrative tribunals of international organizations, it was in the *Boivin* case of 9 December 2008 that the Court ruled for the first time in its jurisdiction *ratione personae* in respect of a labour dispute⁸. The application had been brought against 34 member States of the Council of Europe and the applicant complained of an ILOAT judgment refusing an appointment; in short, a classic case. The application was examined only in respect of France and Belgium, as it was declared inadmissible for the other 32 Member States for failure to comply with the six-month time limit.

As regards France and Belgium, we considered that the applicant did not fall within the jurisdiction of those two States and concluded that the application was incompatible *ratione personae*. We have since reaffirmed this case law in cases involving labour disputes in other international organisations, be it the European Union or the Council of Europe⁹. In all these cases, whether the complaint is brought against more than one member State of an international organization, such as the Council

⁶ *Beer and Reagan vs Germany*, no. 28934/95, 18 Feb. 1999, *Waite and Kennedy vs. Germany*, no. 26083/94, 18 Feb. 1999, ECHR 1999-1.

⁷ *Stitching Mothers of Srebrenica and others vs. The Netherlands*, no. 65542/12, ECHR 2013.

⁸ *Bovin vs. 34 States of the Council of Europe*, no. 73250/01, ECHR 2008.

⁹ For instance, concerning the Council of Europe, in the decision of 16 June 2009, *Beygo vs. 46 States of the Council of Europe*.

of Europe, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for the former Yugoslavia, the Europe or the ILO, or whether it is directed against the host State of the organization, we come to a comparable conclusion. It is clear, from our point of view, that the contested decisions fall within the internal legal order of the organization in question and that the territorial link is not sufficient for the acts of the administrative tribunal of the organization to be attributable to the host State.

However, we went further in *Gasparini v. Italy and Belgium*¹⁰ (decision of 12 May 2009), in which we accepted that an internal labour dispute of an international organization could engage the responsibility of its Member States. The organisation in question was NATO and the procedure concerned its Appeals Board. In this case, the applicant complained of a structural flaw in NATO's internal mechanism. We reviewed this internal settlement mechanism and concluded that it was not manifestly inadequate as long as it met the requirements of a fair procedure. Should this not be the case, and this reminds us of the method adopted for the European Union in the *Bosphorus* judgment, the responsibility of the organization's member States could have been engaged¹¹. It would furthermore be necessary that the contradiction between the appeal system set up within the organization in question and the Convention be egregious. This was not the case here, but we did verify that the rights guaranteed by the Convention received equivalent protection within NATO.

I would now like to take a closer look at two recent cases, namely *Perez v. Germany*, decision of 6 January 2015, and *Klausecker v. Germany*, decided by a decision of the same day.

In *Perez v. Germany*, the Court was once again called upon to consider the conventionality of a mechanism for settling labour disputes internal to an international organization¹². In this case, the applicant was a former employee of the United Nations Volunteers Programme (UNV), a subsidiary body of the United Nations with headquarters in Bonn, Germany. Following a poor evaluation by her superiors, she was asked to seek a new position within the UN. Failing to find one, she was dismissed on 3 December 2002 as part of a massive wave of job cuts. She unsuccessfully appealed her decision to the United Nations Administrative Tribunal (UNAT). In particular, the applicant requested her reinstatement, payment of salaries not received since her dismissal and finally access to certain documents submitted by her former employer to the bodies examining her appeals. In 2007, UNAT awarded her compensation equivalent to three

¹⁰ *Gasparini vs. Italy and Belgium*, no. 10750/03, 12 May 2009.

¹¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs Ireland*, no. 45036/98, ECHR 2005-VI.

¹² *Perez vs Germany*, no. 15521/08, 6 Jan. 2015.

months' salary and dismissed the rest of the claim. Before the Strasbourg Court, the plaintiff complained both of the violation of the right to a court because of the immunity from jurisdiction granted by the German courts to international organisations and of the shortcomings of the UN's internal dispute settlement mechanisms.

These two grievances correspond in fact to the two routes already taken in the past (most often alternately) by applicants in more or less comparable situations. Some of them chose to invoke the responsibility of the State in which the organization had its headquarters, inasmuch as their domestic courts had refused to hear the dispute between them and the organization that employed them, because of the rule of immunity from jurisdiction of international organizations. Other applicants have instead chosen to invoke the responsibility of one or more Member States of the international organization, because of the shortcomings of the domestic dispute settlement mechanism with regard to the requirements of the right to a fair trial. In either case, however, it must be admitted that the applicants have so far found it difficult to obtain satisfaction, since the Strasbourg Court's case law is largely self-contained in this area. This trend was confirmed by this case, which was finally declared inadmissible.

First of all, as regards the violation of the right to a court on account of the recognition by the German judges of the immunity from jurisdiction of the organisation to which it was opposed, the applicant could hardly have had much hope. **While the Strasbourg Court has not hesitated in the past to accept the principle of scrutiny of international immunities insofar as they could constitute an obstacle to the right of access to the courts guaranteed by Article 6, paragraph 1, of the ECHR, it has always been extremely measured as regards the intensity of its scrutiny: "interpreting restrictively the concept of "right to a court", it is [thus] satisfied that the alternative remedy offered by the Organisation broadly complies with the requirements of Article 6 of the Convention"**¹³.

In this case, the European Court did not even need to review the quality of appeals within the UN. Indeed, the applicant had failed to bring its complaint before the Karlsruhe Court, even though that action could be regarded as 'effective'. Consequently, this first part of the application is declared inadmissible for failure to exhaust prior remedies.

¹³ Julie Tavernier, Le mécanisme de règlement des litiges du travail interne à l'ONU devant la Cour européenne des droits de l'homme, Bulletin no. 421, of 08/02/2015, available at the address <sentinelle-droit-international.fr> (consulted 18 Aug. 2017).

The second part of the request appears more instructive. First of all, the Court recalls its classic case law: because of the international organisation's own legal personality, the shortcomings of its internal justice system cannot in principle be attributed to its Member States. This means "that a complaint concerning shortcomings in the Organization's internal procedures with regard to the requirements of a fair trial comes up against a finding of incompatibility *ratione personae* with the Convention if the applicant does not demonstrate that the State intervened, directly or indirectly, in the dispute or that the level of protection of human rights within the international organization is not 'equivalent' to that offered by the Convention" in application of the case law *Bosphorus v. Ireland*¹⁴. On the other hand, State intervention or lack of equivalence authorises the European Court to judge the conformity of internal settlement mechanisms in the light of the standards of the Convention, in particular Article 6.

However, the control exercised by the Court at that time remains relatively summary, since it is sufficient, in accordance with the principles of the *Bosphorus* jurisprudence, that the internal procedure of the Organization does not suffer from "manifest shortcomings"¹⁵. This explains the inadmissibility *ratione personae* of several past applications, either because the applicant does not question a structural shortcoming in the protection of human rights (as in the *Boivin v. 34 member States of the Council of Europe* case which I referred to a moment ago¹⁶), or because he did not succeed in demonstrating that the procedure was vitiated by a "manifest insufficiency" (as in the *Gasparini v. Italy and Belgium* case which I also cited¹⁷).

In the present case, the complainant could have hoped that her complaint would be upheld inasmuch as she alleged a number of violations of the right to a fair trial: failure to respect the equality of arms because her employer had not transmitted documents to the judges so that they could form an opinion, impossibility of being heard, lack of full jurisdiction of the United Nations Administrative Tribunal (UNAT) and lack of impartiality and independence of the members of the Tribunal owing to their short and renewable term of office.

Moreover, the European Court observes from the outset that there is strong evidence to suggest that the applicant has made substantiated allegations concerning the existence of manifest failures. She also notes that, in the past, a group of independent experts had confirmed that the internal justice system of

¹⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs Ireland*, no 45036/98, ECHR 2005-VI.

¹⁵ *Ibid.*

¹⁶ *Boivin vs. 34 States of the Council of Europe*, no. 73250/01, ECHR 2008.

¹⁷ *Gasparini vs. Italy and Belgium*, no. 10750/03, 12 May 2009.

the United Nations in place at the time had shortcomings and had therefore proposed improvements¹⁸. These recommendations were quickly followed by action, as in 2008 the United Nations General Assembly finalized the overhaul of the system by adopting the statutes of the two new United Nations judicial bodies: the United Nations Dispute Tribunal and the United Nations Appeals Tribunal¹⁹.

However, the Court will not decide whether Germany should be held liable for the alleged deficiencies, since it finds that the applicant, here again, has not exhausted domestic remedies. In reaching this conclusion, the Court reiterated the German argument that a constitutional remedy constituted an "effective remedy" to be exhausted. Several decisions of the Karlsruhe Court show that - despite the immunity of international organisations from jurisdiction before German courts - it admits its competence to verify whether the level of protection of fundamental rights in employment disputes within international organisations complies with the requirements of the Basic Law. **This competence is certainly only exercised under strict conditions.** Thus, the plaintiff must demonstrate that the contested act has a concrete effect within the German legal system, which could be the case for the dismissal of Ms Perez. Furthermore, the complainant must substantiate his allegations that the level of protection of fundamental rights by the organization concerned is manifestly lower than the level required by the Constitution, which again corresponded to Ms. Perez's allegations. Consequently, even if Germany did not put forward any example of decisions favourable to an individual, the Strasbourg Court considered that the direct appeal before the Constitutional Court was not deprived of any chance of success and should therefore be exhausted. *A contrario*, one could always "consider what the Court would have done if the question of exhaustion of remedies had not arisen. In any event, the scope of a finding of infringement of Article 6 - without diminishing its importance for individual applicants - would have been less in so far as the system to which the case related is now a thing of the past", as Professor Tavernier points out²⁰.

In a neighbouring register, the Klausecker case did not lead to a much happier solution for the applicant²¹. In this case, he had been disabled since the age of 18 as a result of an accident that caused him to lose one eye, one hand and part of the fingers of the other hand. Having

¹⁸ www.un.org/ga/president/62/issues/resolutions/a-61-205.pdf

¹⁹ AGNU Res 61/261 (4 April 2007), UN Doc A/RES/61/261; AGNU Res 62/228 (22 Dec. 2007, UN Doc A/RES/61/261; AGNU Res 63/253 (24 Dec. 2008), UN Doc A/RES/63/253.

²⁰ Julie Tavernier, Le mécanisme de règlement des litiges du travail interne à l'ONU devant la Cour européenne des droits de l'homme, Bulletin no. 421, of 08/02/2015, available at the address <sentinelle-droit-international.fr> (consulted 18 Aug. 2017).

²¹ Klausecker vs Germany, no. 15521/08, 6 Jan. 2015.

graduated with a degree in mechanical engineering, he worked as a research assistant at a university. After applying to work at the European Patent Office in Munich and passing the examinations to become a patent examiner there, he was not admitted to the post in 2005 on the grounds that he was not physically fit. He lodged an appeal against this decision with the European Patent Office and then with the Administrative Tribunal of the International Labour Organisation, which were rejected in 2005 and 2007 respectively in so far as candidates for a post are not entitled to lodge appeals of this type. Since the European Patent Organisation (EPO, of which the European Patent Office is a member) enjoys immunity from jurisdiction before the German civil and labour courts, the person concerned brought the case directly before the Constitutional Court, which, in 2006, ruled that his appeal was inadmissible and declared that it lacked jurisdiction to judge it. Subsequently, the European Patent Office proposed to the applicant to have the dispute decided by an arbitral tribunal, an option it refused in 2008 on the ground that this procedure would infringe essential procedural guarantees, in particular the right to a public hearing within a reasonable time. The applicant then brought the case before the Strasbourg Court on the basis of Article 6(1) of the ECHR.

As regards the lack of access to German courts, the Court finds, first of all, that granting the EPO immunity from jurisdiction before the German courts was intended to ensure the proper functioning of that international organisation and thus pursued a "legitimate aim". In determining whether limiting the applicant's access to German courts was proportionate to that objective, the Court considers it decisive to determine "whether there was any other reasonable means of effectively protecting his rights under the Convention". However, it considers that the applicant did have another means at his disposal, since he had been offered participation in arbitration proceedings. The Court notes in particular that, under the arbitration contract proposed by the EPO, the arbitrators would have decided the dispute on the basis of the rules which the ILO Administrative Tribunal would have applied had it been competent. In its view, the mere non-public nature of the hearing before the arbitral tribunal - where the parties could be represented by counsel - did not make the arbitration procedure a "poor substitute for proceedings before a national court".

Since the applicant had another reasonable way to protect his rights under the ECHR, the limitation of his access to the German courts was proportionate; this first part of the application is therefore rejected for manifest lack of foundation.

Turning then to the complaint concerning a lack of access to the procedures of the European Patent Office and the ILO Administrative Court and the shortcomings of those procedures, the Court notes that, in the light of its traditional case-law, Germany could be held liable in the present case only if the protection of fundamental rights offered by the EPO to the applicant had been "**manifestly**

deficient". However, by offering Mr. Klausecker to participate in an arbitration procedure, the EPO had provided him with another reasonable means of having his complaint examined on the merits. Consequently, the Strasbourg Court considers that the protection of fundamental rights within the EPO has not "manifestly failed" in this case and therefore also declares inadmissible the second part of the application.

This quick review of the case law of the European Court of Human Rights shows that in principle two avenues are open to those who are not satisfied with the internal justice systems of international organisations. On the one hand, one may choose to invoke the responsibility of the State in which the organization has its headquarters, in so far as the domestic courts of that State have refused to hear the dispute between the person concerned and the organization employing him, because of the rule of immunity from jurisdiction of international organizations.

On the other hand, the responsibility of one or more member States of the international organization may be invoked because of the shortcomings of the domestic dispute settlement mechanism with regard to the requirements of the European Convention on Human Rights, in particular its article 6.

We have seen that so far, in both cases, the European Court of Human Rights has exercised to the highest degree an attitude of self-restraint. What about this attitude? We know that a certain part of the doctrine is quite critical of this jurisprudence, which is considered not sufficiently protective of the fundamental rights of international civil service workers. For my part, I tend to believe that the independence of international organisations is such an essential value for these organisations to be able to carry out their respective missions, which are so important for the well-being of humanity and, ultimately, for the safeguarding of peace, that the Strasbourg Court only recognises its true value.

Moreover, the Strasbourg Court's case law has the flexibility and capacity to adapt sufficiently to deal with possible abuses by the domestic courts of international organisations. I believe that this is very much in the spirit of these courts, which, as I said, remain attentive to the case law of the European Court of Human Rights. I dare to think that the ILO Administrative Tribunal will continue to pay attention to this case law, which can only be beneficial for its mission of ensuring the rule of law in organizations that have recognized its jurisdiction and that, as I said at the beginning of my speech, have a duty not only to respect the decisions of the Tribunal, but also to be constantly concerned that the conditions so that it can work effectively and fully independently are always met.