The Role of National Courts in Securing the Accountability of International Organizations

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Overview

I. International Responsibility, responsibility/liability under domestic law, accountability

II. Immunity from suit and its tension with the right of access to court

III. The *Waite and Kennedy* Case by the ECtHR and its domestic court progeny

IV. Judicial review of acts of international organizations by the ECJ – the *Kadi* Cases

V. Conclusion

Sources of privileges and immunities of international organizations

- Constituent instruments
- Multilateral general privileges and immunities treaties
- Bilateral “headquarters” or “host” agreements”
- Custom
- Domestic legislation

Constituent instruments – functional immunity

- “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”
- Article 105(1) UN Charter
- “The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions”
- Article VIII(2) Agreement Establishing the WTO

Multilateral privileges and immunities treaties – unqualified immunity

- “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”
- Article II Section 2 Convention on the Privileges and Immunities of the United Nations 1946

Custom

- “According to unwritten international law as it stands at present, an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization in question.”
- *A.S. v. Iran-United States Claims Tribunal*, Netherlands, Supreme Court, 20 December 1985, 18 NYIL (1987), 357, 360.

Domestic legislation

- “International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”
- Title I Sec 2 (b) US International Organizations Immunities Act 1945

The scope of immunity of international organizations

- Functional
- Absolute
- Relative

Absolute immunity?

- “The immunity accorded international organizations […] is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive.”
- UN Office of Legal Affairs, Memorandum to the Legal Adviser, UNRWA, UNJYB (1984), 188

IOIA: absolute or relative immunity?

- “In light of this text [of the IOIA] and legislative history, we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress’ intent was to adopt that body of law only as it existed in 1945 – when immunity of foreign sovereigns was absolute.”
- *Atkinson v Inter-American Development Bank*, 156 F 3d. 1335; (D.C. 1998)

IOIA: absolute or relative immunity?

- “If Congress wanted to tether international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA was passed, it could have used language to expressly convey this intent. For example, Congress could have simply stated that international organizations would be entitled to the “same immunity as of the date of this Act.” Or, it could have just specified the substantive scope of the immunity it was conferring. Because it did neither, we interpret the IOIA in light of the Reference Canon to mean that Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity.”
- *OSS Nokalva, Inc., Appellant v. European Space Agency*, Nos. 09-3601, 09-3640, 16 August 2010

Conflicting interests

- “On the one hand there is the interest of the international organization having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances; on the other there is the interest of the other party in having its dispute with an international organization dealt with and decided by an independent and impartial judicial body.”
- *A.S. v. Iran-US Claims Tribunal*, Supreme Court (Hooge Raad) of the Netherlands, 20 December 1985, 94 ILR (1994) 327, 329.

Conflicting interests

- “[A] conflict between, on the one hand, the immunities from jurisdiction and enforcement of international organisations and, on the other hand, the right to an equitable procedure insofar as it relates to the fundamental right of access to a judge.”
- *Consortium X. v. Swiss Federal Government (Conseil federal)*, Swiss Federal Tribunal (1st Civil Law Chamber), 2 July 2004, BGE 130 I 312, ILDC 344 (CH 2004).

Right of access to court

- “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”
- Article 10 Universal Declaration of Human Rights 1948, UN GA Res. 217(III)
- “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.”
- Article 6 ECHR

Alternative dispute settlement

- “The United Nations shall make provisions for appropriate modes of settlement of:
- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”
- Article VIII Section 29 Convention on the Privileges and Immunities of the United Nations 1946

Obligation to provide for alternative dispute settlement

- 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 it and them.”
- *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), 47, at 57.

Immunity as a human rights problem recognized

- “In the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations” and this situation “does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights.”
- *Manderlier c. Organisation des Nations Unies and État Belge (Ministre des Affaires Étrangères)*, Brussels Appeals Court, 15 September 1969, UNJYB (1969), 236, at 237.

Alternative remedies and immunity

- "[A] material factor in determining whether granting [an international organization] immunity from […] jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."
- *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13, para. 68.

Lenient Review

- “The proceedings before the ILOAT are independent of the internal appeals proceedings. The Tribunal decides on the basis of its legally defined jurisdiction and by way of a proper legal procedure, solely in accordance with legal principles and rules. Pursuant to Article III of the Statute of the ILOAT, its judges are under a duty to be independent and free from bias. Thus, the Federal Constitutional Court has decided that the status and the principles of procedure of the ILOAT satisfy both the international minimum standard of fundamental procedural fairness and the minimum rule of law demands of the Basic Law.”
- Federal Constitutional Court (Second Chamber), *B. et al. v. EPO*, 3 July 2006, 2 BvR 1458/03, para. 11.

Lenient Review

- “L'organo di risoluzione delle controversie, come si è constatato, è una vera e propria istanza giurisdizionale. La scelta dei membri della Commissione all'interno di un elenco formato da organismi giurisdizionali internazionali soddisfa i requisiti di indipendenza e terzietà dell'organo deputato alla risoluzione delle controversie tra il personale e l'Istituto, organo, come si è detto, considerato equivalente alla Corte di giustizia Cee.”
- *Pistelli v. European University Institute*, *Corte di Cassazione (Sez. Unite civili)*, 28 October 2005, No. 20995, para. 14.3.

Strict Review

- « Mais attendu que la Banque africaine de développement ne peut se prévaloir de l'immunité de juridiction dans le litige l'opposant au salarié qu'elle a licencié dès lors qu'à l'époque des faits elle n'avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges de cette nature, l'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France […]. »
- *Banque africaine de développement c. M.A. Degboe*, French Cour de Cassation (Chambre sociale), 25 January 2005, No. 04-41012, JDI, 2005, p. 1142

Strict Review

- « Le recours organisé par le statut du personnel de l'UEO n'offre donc pas toutes les garanties inhérentes à la notion de procès équitable et certaines des conditions des plus essentielles font défaut. Il échet de constater dès lors que la limitation d'accès au juge ordinaire en raison de l'immunité juridictionnelle de l'UEO ne s'accompagne pas de voies de recours effectives au sens de l'art 6, §1 de la CEDH. »
- *Siedler v. Western European Union*, Brussels Labour Court of Appeals (4th Chamber), 17 September 2003, Journal des Tribunaux, 2004, p. 617, para. 62.

Security Council action against terrorism

- UN SC Resolution 1267 (1999) denying landing rights to Taliban-connected aircrafts and freezing funds and other financial resources of the Taliban
- UN SC Resolution 1373 (2001) requiring States to criminalize funding of terrorist acts

Limits to targeted sanctions

- Question of judicial review and proper forum
  - ICJ, ECJ, national courts
- Question of substantive limits
  - *Jus cogens*, customary law, human rights and humanitarian law

Judicial review by the CFI

***Yassin Abdullah Kadi v. Council and Commission*, Court of First Instance of the EU, Case T-315/01, 21 September 2005**

- "225. It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.
- 226. None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."

CFI: *Jus cogens* limits to SC acts

- "228. […] the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person […] it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.
- 229. Those principles are binding on the Members of the United Nations as well as on its bodies […] the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations."

Judicial review of Community acts by the ECJ

Yassin Abdullah Kadi v. Council and Commission, European Court of Justice, Case C-402/05 P, 3 September 2008

- ECJ rejected CFI approach “to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.” (para. 287).
- However, “the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.” (para. 326).

Human rights limits to Community acts – the *Kadi* Case before the ECJ

- "[A]ll Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty." (para. 285).

Human rights limits to Community acts – enforced by the ECJ

- “[I]n the light of the actual circumstances surrounding the inclusion of the appellants’ names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.” (para. 334)

The Swiss *Nada* Case

- The obligation [of UN Member States] to apply Security Council resolutions is only limited by *ius cogens* […]
- The fundamental rights and procedural guarantees invoked by the applicant were not part of the internationally recognized *ius cogens*.“
- *Youssef Nada v SECO*, Swiss Federal Tribunal, 14 November 2007

The Swiss *Nada* Case

- Though the UN SC de-listing procedure was not in conformity with the standards of judicial control, it did not violate *jus cogens*
- However, the Swiss Supreme Court was not in a position to correct this situation
- This could only be achieved on the international level by introducing an effective control mechanism within the United Nations.
- *Youssef Nada v SECO*, Swiss Federal Tribunal, 14 November 2007

The risks of decentralized judicial review

- Divergent assessment of the content of jus cogens
- Fragmented implementation of UN sanctions
- Loss of authority of the UN Security Council

Chances of decentralized judicial review

- Safeguarding human rights
- Securing the accountability of the UN
- Forcing the UN to improve its internal system of human rights protection