IN THE SHADOW OF WAITE AND KENNEDY

THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS,
THE INDIVIDUAL’S RIGHT OF ACCESS TO THE COURTS AND
ADMINISTRATIVE TRIBUNALS AS ALTERNATIVE MEANS OF DISPUTE
SETTLEMENT

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I. THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS

International organizations are said to enjoy functional immunity, the immunity necessary to ensure their independent functioning. However, what appears like a rather restrictive concept of immunity, in practice turns out to be a fairly broad and almost unlimited immunity from the jurisdiction of national courts. The reason for this seemingly paradoxical state of affairs can be explained easily with regard to the paradigmatic international organization, the United Nations. While the UN Charter speaks of a mere functional immunity to be enjoyed by the organization before national courts, this standard is nowhere clearly

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2 Art. 105, UN Charter, provides: “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.”
defined. Rather, the General Convention,\(^3\) the multilateral treaty regulating, *inter alia*, the scope of the UN’s jurisdictional immunity, speaks of “immunity from suit” in an unqualified way.\(^4\) This unqualified, hence unlimited immunity has been generally, and particularly by the UN itself, understood to mean absolute immunity.\(^5\)

The UN is not the only international organization where this is the case. In fact, a large number of international organizations enjoy functional immunity which is not defined either in their constituent instruments or elsewhere.\(^6\)

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\(^4\) According to Art. II, 2 General Convention the organization “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”. The same broad grant of immunity can be found in Art. III, 4 Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

\(^5\) According to the UN Office of Legal Affairs, “[t]he 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), p. 188. Similarly the UN argued in an *amicus* brief before American courts that “the immunities of States are those attributable to sovereigns and thus reflect those that States reserve to themselves, whether absolute or relative; those of international organizations are functional and thus reflect their needs, which require complete protection from national jurisdiction”. The UN as *amicus curiae* in *Marvin R. Broadbent et al. v. OAS et al.* UNJYB (1980), pp. 224, 230. See also Gerster and Rotenberg, Article 105, in: Simma (ed.), *The Charter of the United Nations: A Commentary* (2d ed., 2002), pp. 1314, 1318; Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, Virginia JI of International Law (1995), pp. 53, 84; Reinisch, *International Organizations Before National Courts* (2000), p. 158.

\(^6\) See, e.g., Art. 133, OAS Charter (“The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes”); Art. 67 (a), WHO Constitution (“The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.”); Art. VIII, para. 2, Agreement Establishing the WTO (“The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions”); Art. 40 (a). Statute of the Council of Europe, 5 May 1949, ETS No. 1 (“The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions.”).