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SCOPE AND LIMITS TO THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS

Master's Thesis

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## **ABBREVIATIONS**

IOs- International organizations

UN – United Nations

EC – European Community

EU – European Union

EP – European Parliament

EctHR – European Court of Human Rights

ECHR – European Convention of Human Rights

TFEU - Treaty on the Functioning of the European Union

ICJ - International Court of Justice

General Convention (CPIUN) –Convention on privileges and immunities of United Nations

ICCPR – International Covenant on Civil and Political Rights

SOFA – Status of the Force Agreement

ILC - International Law Commission

WTO – World Trade Organization

WHO – World Health Organization

NATO – The North Atlantic Treaty Organization

UNDP – United Nations Developing Program

UNICEF – United Nations International Children's Emergency Fund

UNCITRAL - United Nations Commission on International Trade Law

ILO – International Labour Organization

UNESCO - United Nations Educational, Scientific and Cultural Organization

ICC – International Criminal Court

IOM – International Organization for Migration

IMF – International Monetary Fund

## INTRODUCTION

With the growing number of International Organizations (IOs) their roles are increasing in a wide range of fields<sup>1</sup>, including International law, global politics and economics. Therefore, for the protection of IOs from the outside interference they were granted certain privileges and immunities by the member states.

IOs itself have borrowed an institute of jurisdictional immunity from the states and with regard to the officials of the organization from the diplomatic law. But if the principles of states and diplomatic immunities are equal and reciprocal according to the international law, the scope of privileges and immunities of IOs are different and depends on many factors such as size, membership, purpose and functions of the certain organization. Despite these differences, many of IOs have developed some standard set for their immunities.

The United Nations (UN) can be considered as a founder of nowadays standards as already in 1946 in the Convention on privileges and immunities of the UN, the Organization was granted immunities from “every form of legal process<sup>2</sup>”, with the only exclusion when such immunity was waived by the UN itself.

Such wording was repeated by many of other IOs, for instant by the North Atlantic Treaty Organization (NATO)<sup>3</sup> and later by the International Criminal Court <sup>4</sup>(ICC).

The main base for granting immunities to the IOs is the functional necessity principle. For instant, Article 105 of the UN Charter grants to the UN such privileges and immunities in the territory of each of its Members, that are “necessary for the independent exercise of their functions”<sup>5</sup>. As IOs have no their own territory and have to perform their functions situating in the territory of some of the member states, they should be independent from the jurisdiction of that state, its domestic judicial and executive bodies.

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<sup>1</sup> Gaillard, E., & Pingel-Lenuzza, I. ‘International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass’, *International and Comparative Law Quarterly*, (2002), 51(1), page 1.

<sup>2</sup> The Convention on privileges and immunities of the United Nations, 13.02.1946, e.i.f. 17.09.1946, Art. II.

<sup>3</sup> The Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa, 20.09.1951, e.i.f. 18.05.1954, Art. 5.

<sup>4</sup> The Rome Statute of the International Criminal Court, 16.01.2002, e.i.f. 01.07.2002, Art.48 (2).

<sup>5</sup> The Charter of the United Nations, 26.06.1945, e.i.f. 24.10.1945. Art. 105.

However, the problem is arising with the application of this clause. As it is not precise and depends on the functions of a certain organization; functions of an IO usually are not defined as a comprehensive list of rights and duties by meaning that an organization can act variously in order to achieve its purposes specified in the constituted document.

As the role of IOs have broadened, the situations when they interact with other persons of International law including individuals have increased, as well as the cases against IOs in domestic and international judicial bodies<sup>6</sup>. The practice of owning privileges and immunities by IOs and their officials rises many questions about injustice as they are exempt from the jurisdiction of domestic and international courts, when for example states have no immunities from the jurisdiction of their domestic courts<sup>7</sup>.

Moreover, IOs had a significant impact in the development of Human rights, the main human rights treaties such as the Universal Declaration of Human rights, International Covenants on Civil and Political, Economic and Social rights, the European Convention on Human Rights were accepted within the IOs framework. Despite this fact, most of IOs are not signatories to the human right treaties, as it is States who have accepted them. Jurisdictional immunity of IOs often contrasted with the human right of access to justice as because of the immunity of IOs, domestic and international courts are refuse to accept an individual claim against the organizations. The question arise whether IOs are binding by these human right treaties when they are not signatories, are they under the obligation to provide an alternative dispute settlement mechanisms in order to not violate the right of access to justice.

The subject of the current Thesis is the jurisdictional immunities of IOs and their officials. The problem arise within the determination of the scope of jurisdictional immunity of IOs. Because of IOs base their immunities on the functional necessity principle and their functions are not defined precisely, consequently the scope of their immunities are also vague. This uncertainty in practice might lead to the abuse of immunities by some of IOs. This view is supported by the Professor of international organizations law at the University of Helsinki Jan Klabbers when he says that the functional necessity thesis has an open texture<sup>8</sup> and might be interpreted in a different way by IO, state or individual.

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<sup>6</sup> Ferstman, C. (2017-07-27). (Ed.), *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap.* : Oxford University Press,. Accessible at: <http://www.oxfordscholarship.com/view/10.1093/oso/9780198808442.001.0001/oso-9780198808442>, page 1.

<sup>7</sup> Blokker, N.; Schrijver, N. (2014). *International Organizations Law Review* 10(2), 255-258, page 256.

<sup>8</sup> Klabbers, J. (2009). *An Introduction to International Institutional Law*. Cambridge: Cambridge University, page 134.

Therefore the objective of current Thesis is to ascertain the scope and content of jurisdictional immunities of different IOs, determine their common features, differences between them and from other types of immunity, examine existing dispute settlement mechanisms and possible remedies against abuses of immunities by IOs.

For this purpose, the Author will examine main international treaties that regulate privileges and immunities of IOs; constitutive treaties and internal legal acts of IOs which would help us to determine existing dispute settlement mechanisms and procedures created by IOs; important case law that had an influence to the development and interpretation of immunities.

In addition, we will study human right of access to justice in relation with jurisdictional immunity as these two rights in our view conflict with each other; how the right of access to justice can be exercised if an IO use its jurisdictional immunity. As there are big amount of IOs, we will not be able to cover all of them in this paper, thereby we will examine most powerful of them in our opinion, such as the United Nations, European Union, the North Atlantic Treaty Organization and some others.

The study is relevant for the field of the law of IOs, despite that the subject was already discussed by other authors, the issue is still unsolved. Criticism of IOs for impunity and the absence of an alternative dispute resolution mechanisms has even increased recent years, as well as the court practice towards such cases have slowly changing, therefore our findings and suggestions can be informative in a process of examining and solving this question.

The author puts forward two hypothesizes. First is that in current circumstances it is impractical and unrealistic to determine the scope of the jurisdictional immunities of IOs very precisely and write all cases when immunities are applicable. Since the scope of activities of IOs is very extensive, it is impossible to predict what kind of action will be covered by the immunity.

The second hypothesis is that it is possible to establish an impartial dispute settlement mechanism as an alternative to the jurisdictional immunities of IOs.

With regards to the first hypothesis the following research questions have been raised: what is the theoretical basis for the immunity of IOs? Is it possible to determine precisely the scope of the jurisdictional immunities of IOs? In a consequence immunity of IOs is absolute or

restricted? Therefore, we will study theoretical approach of the immunity of IOs and examine original sources of the immunity of some IOs in order to determine its scope.

As to the second hypothesis, the research questions to be answered are: what legal remedies can be used against IOs' abuses of immunity? And are current alternative mechanisms of IOs meet the standards set in the UDHR for the right of access to justice? According to the Article 10 of the UDHR the dispute settlement body should be impartial and independent<sup>9</sup>. So we will apply these standards during the examining the existing mechanisms.

In order to achieve the objective we will use different methods. First legal method will be Historical, as we need to search evolution and development of the immunity institute of IOs, chronological development of sources. Basic method of research is Analytical, as after the examining main international legal acts, treaties and other documents we will summarize important information in order to compare immunity status of different IOs, highlight their similarities and differences, determine dispute settlement mechanisms; empirical method will be reflected in case law that we will analyze during the research.

The main bibliography consists of international treaties, conventions on privileges and immunities (UN and specialized agencies), founding treaties of some IOs. Theoretical part of the study was well explored by such researchers, as Josef L. Kunz his book "Privileges and immunities of International Organizations" was published in 1947, also modern authors like professor Jan Klabbers "Introduction to International Institutional law" 2009, Niels Blokker "International Institutional Law. Unity within Diversity" 2011, we will refer on their works and numerous of other journal articles for relevant subject as well as for some interesting court practice in this field.

The structure of the current thesis is divided in three main chapters. The first chapter is the Concept of privileges and immunities of IOs, where we are examining the legal personality of IOs, origins of their privileges and immunities, sources of law and differences between immunities of IOs with other immunities.

The second chapter is focused on the jurisdictional immunity, the scope of immunities of different IOs, as well as the relations of jurisdictional immunity with the fundamental human right of access to justice. The third chapter is dedicated to the possible remedies against abuses

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<sup>9</sup> The Universal Declaration of Human Rights, 10.12.1948, Art. 10.

of immunities, we will collect all existing internal and external dispute settlement procedures of some IOs, and discuss waiving of immunities as a remedy.

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**Keywords:** International law, International Organizations, Immunity, Dispute settlement.

# I. CONCEPT OF PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

## 1.1. International organizations and their legal personality

Juridically the term “person” is taken from domestic law and classified in two groups: natural persons and juridical persons. The first group include a human being, who is an individual and have the capacity to assume obligations and holding rights. The second group represents entities with juridical personality who are also called as a collective person, social person, or legal entity<sup>10</sup>. We can say that those domestic legal entities were taken as a model for future IOs created by states.

During the 19<sup>th</sup> century and in the beginning of 20<sup>th</sup> century the prevailing view in the international law was that only states have international legal personality and so recognized as the persons in the international arena; but IOs already existed at that time, such as International Telegraphic Union was established in 1865, followed in 1874 by the universal postal Union and in 1890 by the international Union of Railway Freight Transportation<sup>11</sup>. In that sense, arising the question, how did these organizations operate in the international arena? <sup>12</sup>Off course, the early IOs had much less sovereignty then current and mostly all questions were decided by its member states.

Let us first define what the legal personality means. Legal personality is an acknowledgement that an entity is able to exercise certain rights and duties on its own account under the certain system of law<sup>13</sup>. It should be mentioned and separated two types of legal personality: domestic and international.

Domestic legal personality is performed within the state and as state has absolute sovereignty in its territory, the scope of legal personality of IOs is discussed and decided between concrete state and IO, usually by concluding special treaty (Headquarter agreement) or already in a

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<sup>10</sup> Elvia Arcelia Quintana Adriano ‘The Natural Person, Legal Entity or Juridical Person and Juridical Personality’, 4 Penn. St. J.L. & Int'l Aff. 363 (2015), page 365.

<sup>11</sup> Abate M., Tilahun A. ‘The Historical development of international organizations’ AbyssiniaLaw, 08.04.2012,

<sup>12</sup> Schermers H. G., Blokker N. M. ‘International Institutional Law. Unity within Diversity’ 5th Revised Ed., page 3.

<sup>13</sup> Menon, P.R. "The Legal Personality of International Organizations," *Sri Lanka Journal of International Law* 4 (1992): p. 79-98. *HeinOnline*, page

constituent document of IO by member states. If it is understandable with domestic legal personality and that it can vary from state to state, international legal personality is different. Further, we will discuss international legal personality of IOs.

There is no common definition to the concept of international legal personality of IOs, but some description and understanding was given by International Court of Justice (ICJ) in the case *Reparation for Injuries Suffered in the Service of the United Nations* in 1949. Shortly, as a consequence of the assassination in September 1948, in Jerusalem, of Count Folke Bernadotte, the UN Mediator in Palestine, and other members of the UN Mission to Palestine, the General Assembly asked the ICJ whether the UN has the capacity to bring an international claim against the State responsible to obtaining reparation for damage caused to the UN and to the victim.

The ICJ held that the UN was intended to exercise functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. It followed that the UN had the capacity to bring a claim and to give it the character of an international action for reparation for the damage that had been caused to it; also it can claim reparation not only in respect of damage caused to itself, but also in respect of damage suffered by the victim or persons entitled through him. Therefore it was found that the Organization has the capacity to claim appropriate reparation, including also reparation for damage suffered by the victim or by persons entitled through him<sup>14</sup>.

This case had a great impact to the standing of IOs as a full subjects of International law, even so the Advisory opinion did not give a wide description of the legal personality, it mentioning the scope of it. The ICJ mentioned that even if some rights of the organization are not written in the constituent document they “are conferred upon the Organization as being essential to the discharge of its functions<sup>15</sup>.” This statement is confirmed by some theories of powers of IOs that we will briefly look further.

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<sup>14</sup> ICJ *Case of Reparation for Injuries Suffered in the Service of the United Nations*, (1949), Advisory Opinion, 11 April 1949, Report, page 17.

<sup>15</sup> *Ibid.*, page 10.

The theory of powers of IOs includes:

1. The doctrine of attributed powers. The idea is that IOs and their organs, can only do those things for which they are empowered by founders in the constituent or other document.
2. The doctrine of implied powers , which generally says that treaty rules must be interpreted in such a way as to guarantee their fullest effect. In other words, the IO have powers that are essential to the performance of its duties.
3. The doctrine of inherent powers. Organizations, would possess inherent powers to perform all those acts which they need to perform to attain their aims, simply because they inhere in organizationhood.<sup>16</sup> Means, that IO has powers to perform all acts in order to achieve its aims and goals, except those acts that explicitly prohibited in the documents of IO.

All these doctrines have a right for existing. In our point of view, in reality the powers of IOs have something from each doctrine. The first and easiest to define source of power will be constituent document of certain IO; then if something is not mentioned in the constituent document, we can turn to implied and inherent doctrines, proceed from functions, aims and goals of IO.

Making the conclusion, we can affirm that IOs in our days are separate subjects of International law with uncertain but broad legal personality in international arena.

It was important to mention these theories, as the powers and functions of an IO determines the scope and limits to its immunity. Further we will examine the functional necessity test as the base for the IOs immunity.

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<sup>16</sup> Klabbers, J. (2009). *An Introduction to International Institutional Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511801013, page 66.

## 1.2. Origins and purpose of privileges and immunities of IOs

The law of immunity is already considered as a classical branch of International law<sup>17</sup>, starting from the state immunity and diplomatic envoy which rules became a customary law. However, the sources of privileges and immunities of IOs are different.

The universal IO, which first implemented the immunity of IOs was ‘predecessor’ of UN - the League of Nations. The term “Modus Vivendi” was concluded between Switzerland and the League of Nations in 1921 and meant that the League could not be sued before the Swiss courts without its consent. Also the officials were claiming the immunity from the cases brought against them<sup>18</sup>. The Covenant of the League of Nations provided with diplomatic privileges and immunities of its employees and the inviolability of its property.

There is no strict distinction between privileges and immunities. Usually, the word “Privilege” used for all cases where the local legislation is not, or is differently applicable (from tax legislation), the word “immunity” is used for the immunity from jurisdiction<sup>19</sup>.

Generally, privileges and immunities are a special rights and prerogatives, which are given as an exception from a common national law, from the jurisdiction of administrative, executive or adjudicatory powers of a state. As a common example of privileges of IOs we can bring exemption from: tax paying, customs; foreign exchange control, immigration rules; fiscal privileges, are reflected in the exemption of paying any direct taxes for IOs and for its employees. Immunity is reflected in inviolability of premises and archives, freedom of communication and of course, very important in practice are jurisdictional immunities: exception from “legal process”, from execution or any enforcement measures<sup>20</sup>. Sometimes, immunity from legal process does not include immunity from private civil cases, such as debt cases, compensation or car accident cases.

From the beginning till nowadays the purpose of granting privileges and immunities to IOs is basically the same and all authors came to the conclusion that IOs has to be independent legally

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<sup>17</sup> Ibid, page 131.

<sup>18</sup> Blokker, Niels. "International Organizations: The Untouchables," *International Organizations Law Review* vol. 10, no. 2 (2014): p. 259-275. *HeinOnline*, page 262.

<sup>19</sup> Schermers H. G., Blokker N. M., *op. cit.*, page 251.

<sup>20</sup> Reinisch, A. (2011/2011). "Privileges and Immunities". In *Research Handbook on the Law of International Organizations*. Cheltenham, UK: Edward Elgar Publishing. Edited by J. Klabbers and A. Wallendahl, page 133.

and practically in order to perform their tasks in a better way<sup>21</sup>. At first, the independence was need to the IOs from the intervention of the host states, as IOs were physically situated within the territory of a certain state.

The theory of “functional necessity” is the most popular theory for the granting privileges and immunities to the IOs. The idea is that organizations enjoy such immunities that are necessary for their effective functioning - “IO enjoy what is necessary for the exercise of their functions in the fulfillment of their purposes”<sup>22</sup>. First, such determination was used by the state founders of the UN in its Charter<sup>23</sup>.

There are several weaknesses of the functional necessity doctrine that were highlighted by J. Klabbers. First of all, is that IOs does not have their own sovereign territory, it is a hosting state who will deal with IOs immunities. And usually the scope of immunities is decided by mutual consent between hosting state and IO in a bilateral treaty. In a result, the scope depends on a negotiating process, where might be presented different ministries of the host states, which may hold widely different views on the desirability of certain provisions. Tax authorities might be reluctant to grant broad tax exemptions; social security authorities might not wish to see exceptions for international civil servants from domestic security schemes in the host states; the labour ministry might have its own views on the need for work permits for spouses of international civil servants, et cetera<sup>24</sup>.

Another weakness, which also can be considered as an advantage, is that the collocation “functional necessity” is not precise, and can be understand different by IOs officials, hosting state, court and other structures. So privileges and immunities of one organization might differentiate depending on a host country, despite that functions are the same.

The theory of functional necessity is by mean in favor of IOs, which is causing problems that we are examining in this Thesis. Violations of public order, or even of human rights by IOs can be committed under the shield of immunity.

Due to the ambiguity of the functional necessity test, the opinion of scholars is divided regarding the question of whether immunity of IOs is absolute or limited (restricted). As from

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<sup>21</sup> Kunz, J. (1947). Privileges and Immunities of International Organizations. *The American Journal of International Law*, 41(4), 828-862, page 836.

<sup>22</sup> Klabbers, J. (2002). *An Introduction to International Institutional Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9781139165051, page 148.

<sup>23</sup> Charter of the UN, Art. 105.

<sup>24</sup> Klabbers, J. (2009) *op. cit.*, page 133.

one side, it is functional which means is limited by the functions of the IO, so they can't act beyond their functions. But from another side, main sources of the immunity of IO's are formulated in an unqualified way<sup>25</sup> which is understood as an absolute immunity. In order to make own inference, we have to examine main sources and court practice in aggregate.

Nevertheless, the need to grant immunity to the IOs has been recognized also by domestic court practice, for example, case *Broadbent v. Organization of American States (OAS)*. It was a labour dispute as a result of which the United States court of Appeal decided to dismiss the application relying on the OAS's immunity.

The Court's opinion was that IOs "must be free to perform their functions and that no member state may take action to hinder the organization<sup>26</sup>". Idea is that the Organization had created some internal employment rules, which are valid within the Organization no matter on where the office of the OAS is situated; as the law of each of member state is different, applying the law of different countries would bring to divided decisions and undermine the Organization to function properly. Hence, IOs need immunity from jurisdiction of domestic courts with the purpose to fulfil their functions effectively.

It would be important further to study main sources of IOs immunity, in order to understand its applicability and case law that we would discuss in the next chapter.

### 1.2.1. Sources of the immunity

Privileges and immunities of IOs are based on international treaty law, inasmuch as IOs developed relatively recently and cannot rely on customary law. Thus, their immunities were clearly written in the treaties between states<sup>27</sup> as it started from the League of Nations. Till

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<sup>25</sup> Reinisch, A., Weber U.A., 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, *1 Int'l Org. L. Rev.* 59 (2004), page 60.

<sup>26</sup> United States Court of Appeals, District of Columbia Circuit 628 Fed.Rptr.2d 27 (1980), *Broadbent v. Organization of American States*, page 2.

<sup>27</sup> Wood M., 'Do International Organizations enjoy immunity under customary law?'. *International Organizations Law Review/Brill/Nijhoff*, 10 (2013) 287-318., page 288.

now states prefer to mention privileges and immunities of each IO in a treaty, usually in the foundation treaties, but there are also other ways which we would examine further.

Applicability and content of immunities of IOs together with privileges might be written in three ways: 1. In a constituent document (founding treaty); 2. Separately in a special additional treaty on privileges and immunities (convention). 3. When an IO concludes bilateral agreements with a hosting state (headquarters agreement)<sup>28</sup>.

The first way is used for example, by the UN in its Charter Article 105, which gives the UN such privileges and immunities that are necessary for the fulfillments of its purposes<sup>29</sup>. The UN Charter is a treaty with universal membership and has a primary force over all other legal acts (domestic or international) of a member state.

Almost the same form “for exercise of its functions” is mentioned in the Article VIII of the Agreement establishing the World Trade Organization (WTO)<sup>30</sup>. It is a very general wording which leaves a big gap for the interpretation.

As first two examples indicated their privileges and immunities in common for “functional needs”, the Statute of the Council of Europe Article 40 have written more detailly about the content of such rights: “These immunities shall include immunity for all representatives to the Consultative Assembly from *arrest and all legal proceedings* in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions”<sup>31</sup>.

One more important treaty is the Treaty on the Functioning of the European Union, Article 343 of which provides the European Union (EU), European Central Bank and the European Investment Bank with the privileges and immunities within the Member that are necessary for the performance of its tasks<sup>32</sup>. Also it refers to the special Protocol which regulates privileges and immunities of the EU more detailly.

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<sup>28</sup> Blokker, Niels., *op. cit.*, page 268.

<sup>29</sup> Charter of the UN, Art.10.

<sup>30</sup> Agreement establishing the World Trade Organization, 15.04.1994, e.i.f. 01.01.1995, Art. VIII.

<sup>31</sup> The Statute of the Council of Europe. London, 5.V.1949, Art. 40.

<sup>32</sup> Wessel, R. A. (2014). Immunities of the European Union. *International organizations law review*, 10(2), 395-418. DOI: 10.1163/15723747-01002009, page 7.

So, the second way of consolidation is a special treaties, which focuses primary only on the regulation of privileges and immunities of IOs. Some examples of important special treaties on privileges and immunities are:

- the Protocol 7 on the privileges and immunities of the EU to the Treaty on the Functioning of the European Union underlines the functional principle of the immunity and even concretizes the time actions of immunities<sup>33</sup>;

- Convention on the privileges and immunities of the UN (CPIUN) was accepted by the UN General Assembly in 1946. CPIUN sets out such an important issues as the immunities of the UN and its personnel, inviolability of its premises, archives and documents. This document concretizes such term like “juridical personality” (also legal personality) as a capacity of the UN to “contract; acquire and dispose of immovable and movable property; institute legal proceedings”<sup>34</sup>.

The Convention also details privileges of the UN as exemption from any financial control, from taxes and custom duties; communication freedoms. It differentiates and describes privileges and immunities depending on official status of the staff members of the UN, for example immunities of representatives of states, the UN officials, members of forces in missions and others. So the scope of immunities differs according to that and the procedure of waiving as well<sup>35</sup>. Besides the CPIUN, the UN accepted a special treaty for its specialized agencies;

- Convention on the privileges and immunities of the specialized agencies (Special Convention). It covers IOs such as International labour Organization, International monetary fund, International Bank for Reconstruction and Development, Universal Postal Union and many other organizations which are in a relations with the UN under its Charter<sup>36</sup>.

There are cases, when IO which is not mentioned in the list of specialized agencies make a reference to the Convention with regard to privileges and immunities. For example, Article VIII of the WTO establishing Agreement make a reference to the Convention on the Privileges and

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<sup>33</sup> Protocol #7 on the privileges and immunities of the European Union to the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326/1, 26.10.2012, Art. 9.

<sup>34</sup> Convention on the privileges and immunities of the United Nations, *op. cit.* Art. I.

<sup>35</sup> *Ibid.*, Article IV-VI.

<sup>36</sup> Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 21.11.1947, e.i.f. 07.02.1949, Art. 1, Section I.

Immunities of the Specialized Agencies, with regards to the status of Member to the WTO, its officials, and the representatives of its Members<sup>37</sup>.

Other significant IO, which is not covered by the UN Conventions such as the North Atlantic Treaty Organization (NATO), concludes international agreements with member states, to standardize the arrangements of privileges, immunities and claim procedures. NATO has no unified document, which regulates the scope of its immunities and privileges, it is distributed over several acts such as constituent treaty and force agreements.

IOs often conclude a bilateral treaties between the host state and the IO. It does not mean that such agreements are very different from each other, most of organizations have some common form of agreement with the host states about their status, privileges and immunities like a Headquarters agreement<sup>38</sup>. Such a separate agreement was for example concluded between the United States of America and the UN early in 1947<sup>39</sup>, despite that the Agreement refers to the CPIUN it regulates the status of the UN's headquarters within the state.

Bilateral agreements may also be concluded in addition to the conventions. For example, the Agreement between Austria and the UN regarding the seat of the UN in Vienna in Section 52 says that the Agreement is complementary to the Convention and both of them are applicable<sup>40</sup>.

Sometimes, as a source might be considered also domestic legislation. First of all, in the way of incorporation already existed international acts into domestic regulations; there are also other ways, when a state accepts general law which provides immunities to the IOs during meetings of their organs or conferences, for example in Finland two Laws on Privileges and Immunities for International Conferences and Special Representatives discuss granting immunities when such meetings take place in Finland<sup>41</sup>.

After the reviewing the main sources of privileges and immunities of IOs we can conclude that all of them mainly deriving from international treaty law and the interpretation might come from the court practice; international customary law is not used unlike with the state's and

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<sup>37</sup> Agreement establishing the World Trade Organization, *op.cit.*, Art. VIII.

<sup>38</sup> Schermers H. G., Blokker N. M., *op. cit.*, page 260.

<sup>39</sup> The UN and United States of America Agreement regarding the Headquarters of the United Nations (No. 147), 26.06.1947.

<sup>40</sup> Agreement between the Republic of Austria and the United Nations regarding the Headquarters of the United Nations Industrial Development Organization (Volume 2023, I-34923), 13.04.1967. Section 52.

<sup>41</sup> Klabbers J., (2009), *op.cit.*, page 150.

diplomatic immunities. More features, which distinct immunities of IOs from other types of immunities we will study in the next subchapter.

### 1.2.2. Distinctive features of immunity of International Organizations

Immunities of IOs should not be mixed with the state or diplomatic immunities, although they have many common features. Both, states and IOs are full subjects of international law, but the bases and sources of their immunities are differs. States has an immunity based on a customary international law and basic principles as sovereign equality principle<sup>42</sup>, which means that states immunity is multilateral as applicable to all states. States do not have immunity with regards to their commercial activities and can be sued.

IOs have different legal personality, they are created under international law usually by an international treaty, they don't have own territory and based in a member's state territory. Regarding commercial acts of the IOs, there is a section 29 of the General Convention, which states that the UN shall create its own module of settlement of disputes arising from a contracts<sup>43</sup>, same provisions have many other IOs, for example NATO. That means, IO can have a right to create dispute settlement mechanisms with regard to contracts on its own manner.

IOs cannot refer to the customary international law with regard to their immunities because of the following reasons: current concept of privileges and immunities of the IOs was created after the World War II, not so long ago, under international treaty law; as they don't have their territories, not all states are willing to recognize the immunities of IOs and especially nonmember states; as IOs are differs, there is no common practice for their privileges and immunities, so the customary law did not emerged<sup>44</sup>.

Immunities of IOs is more common with diplomatic immunities as they borrowed many from diplomatic customary law, such as functional necessity principle.

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<sup>42</sup> Collins, R., & White, N. D. (2011). *International organizations and the idea of autonomy: Institutional independence in the international legal order*. Abingdon, Oxon: Routledge, page 278.

<sup>43</sup> CPIUN, *op. cit.*, Section 29.

<sup>44</sup> Wood M., *op.cit.*, page 313.

There are some differences between immunity of IOs from diplomatic one. Officials of IOs are not representing a particular country (which they are nationals) and not accredited to one state; they are servants of an IO and can perform their functions in different states, sometimes even their own country<sup>45</sup>. I. Klabbers also mentioning as a distinction is the variety of IOs, they can be either universal or regional, open or closed as far as membership is concerned, functional or rather comprehensive in terms of proposed activities, and states are not. In diplomatic relations one of the most important principles is the reciprocity principle, which is not the case with IOs<sup>46</sup>.

Diplomatic immunity is based on a customary international law, which now is codified in the Vienna convention on diplomatic relations with almost universal participation of states. Over the years, diplomatic immunity, which covers both diplomatic missions and agents, has been founded on the following three principles: extraterritoriality, personal representation, and functional necessity<sup>47</sup>.

Principle of extraterritoriality was already developed by ancient writers, such as Hugo Grotius, and means that a diplomat is accredited to the receiving state but actually is situated within the territory of the sending state. Premises of IOs within the territory of a hosting state are usually also inviolable, however it is not considered as a sovereign territory of an organizations. Personal representation principle means that the diplomat is representing the sending state or its sovereign, so he is entitled to the same privileges and immunities as the sending state or its sovereign. With regard to the IOs the status of a diplomatic envoy usually applied only to high officials.

And the most reasonable principle, which is borrowed by the IOs is the functional necessity principle, which explains the purpose of privileges and immunities - for the efficient performance of the functions of the diplomat<sup>48</sup>.

Despite that diplomatic immunities based on a customary law, they are bilateral and based on the principle of reciprocity, as the relations are usually appears between the receiving and sending states. The reciprocity principle cannot be applied between the IOs and state relations,

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<sup>45</sup> Ahluwalia K., 'The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations', (1964), Springer Netherlands, page 105.

<sup>46</sup> Klabbers J., (2009), *op. cit.*, page 139.

<sup>47</sup> Okeke, E.C., 'Jurisdictional Immunities of States and International Organizations' (2018). Oxford University Press, page 342.

<sup>48</sup> *Ibid.*, page 341-342.

there are only member states and host state; the immunity regime of IOs usually depends on the state's will and therefore IOs are not able to use the reciprocity towards the state.

IOs borrowed not only functional necessity principle from the diplomatic immunities but also may directly refer to the diplomatic envoy status, for instant ILO in the Headquarters agreement provides that the organization "enjoys the immunities known in international law as diplomatic immunities"<sup>49</sup>. Similarly, Section 21 of the Specialized Agencies Convention provides that the executive heads of the specialized agencies shall be accorded the same privileges and immunities as diplomatic envoys<sup>50</sup>. This means that officials also benefit from the provisions of the Vienna Convention on diplomatic relations, the CPIUN and the Special Agencies Convention<sup>51</sup>.

The differences also emerge with regard to the jurisdictional immunities, when we analyze the purpose of the immunities of the IOs. Immunities are granted to the officials and other staff by an IO from the jurisdiction of all states with the purpose of performing their functions independently from states, including often the state of their residence. In case of diplomats, they don't have immunity from the jurisdiction of the sending state<sup>52</sup>.

Thus, despite the fact that the immunity of IOs is derived from state and diplomatic immunity, it has certain differences and in the next chapter we will examine the content of immunity on the example of several IOs and study related court practice.

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<sup>49</sup> Agreement between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland, 11.03.1946, e.i.f. 27.03.1936, Art.3.

<sup>50</sup> Convention on the privileges and immunities of the Specialized Agencies, *op. cit.*

<sup>51</sup> Okeke E.C., *op. cit.*, page 348.

<sup>52</sup> Okeke E.C., *op. cit.*, page 349.

## II. CONTENT OF JURISDICTIONAL IMMUNITY

### 2.1. The nature of the Jurisdictional immunity of IOs

There is no unique definition to the word Jurisdiction. Thus, some dictionaries define it as “Power or right of a legal or political agency to exercise its authority over a person, subject matter or territory<sup>53</sup>”, or “the authority of a court or official organization to make decisions and judgments<sup>54</sup>”. But making a summary we can come to the common understanding. Thus the Jurisdiction, in our view, is a power or legal right of some entity over another entity, human or territory. It can be related to the state and its authorities, as in general only states have absolute sovereignty (power) over its territory.

Usually the democratic state has a division of powers, also known as branches; there are legislative, executive and judicial branches<sup>55</sup>. In that sense, the jurisdictional immunity can be understood in a broad and narrow ways. In a broad way it might include immunity from all three branches of state’s jurisdiction and in a narrow way only immunity from domestic courts.

Therefore, the jurisdictional immunity also known as immunity from legal process, which includes the entire judicial process, from the initiation of proceedings, trials, and orders such as interim measures, to judgments and execution of judgments<sup>56</sup>. It was first granted to IOs by member states and now became a long-standing practice; the purpose of granting is to enable IOs to fulfil their functions independently and free from interference by government of the host and other states<sup>57</sup>.

However, it does not mean that the judicial organs have no jurisdiction at all; domestic judicial bodies first of all have to examine the question of immunity as a derogation from national jurisdiction<sup>58</sup>, which means they have to answer whether IO has a jurisdictional immunity in a certain case.

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<sup>53</sup> The Definition is accessible from: <http://www.businessdictionary.com/definition/jurisdiction.html>

<sup>54</sup> The Definition is accessible from: <https://dictionary.cambridge.org/dictionary/english/jurisdiction>

<sup>55</sup> Möllers, C. (2015). ‘The three branches: A comparative model of separation of powers’. Oxford: Oxford University Press, page 17.

<sup>56</sup> Okeke E.C., *op. cit.*, Page 4.

<sup>57</sup> Committee on Legal Affairs and Human Rights, Council of Europe, Report of Mr. Volker Ullrich, Jurisdictional immunity of international organizations and rights of their staff. Doc. 14443, AS/Jur (2017), Page 8.

<sup>58</sup> Okeke E.C., *op. cit.*, Page 5.

With this regard, we would like to bring an example from practice of Belgian court which would demonstrate the court's work in determining jurisdictional immunity of IOs.

Case *Lutchmaya v. ACP Secretariat (African Caribbean, and Pacific Group of States)* in a Belgian court of cassation. The organization relied on its jurisdictional immunity, but the Court found that the Headquarters agreement between the ACP and the Kingdom of Belgium which is a legal base for ACP's immunity, did not enter into force yet, as for that certain procedures need to be done according to Belgian law<sup>59</sup>. Thus, the jurisdictional immunity is a procedural right by nature and court no matter domestic or international has to decide its applicability in certain case.

Jurisdictional immunity does not include immunity from execution, for example the CPIUN distinguishes them in case of waiving jurisdictional immunity of the UN, the waiver is not extending to any measure of execution<sup>60</sup>. It highlights the procedural nature of jurisdictional immunity; in case of the UN, even if the proceedings will come to the official judgment there is no jurisdiction to execute the decision.

As we have studied, the jurisdictional immunity of IOs includes wide range of procedural exemptions, but their scope is not unified and differs depending on IO, further we will examine and compare the scope of jurisdictional immunity of some IOs.

## **2.2. The scope of the jurisdictional immunity of different IOs**

In order to determine the scope of immunity of IOs we have to answer on two main questions of who and what are covered by the immunity<sup>61</sup>. Despite that IOs are different by many features, including size, membership, structure, there is a common principle for justifying immunities which is used by all of IOs – it is a functional necessity test. Further, we will examine the scope of immunity of some IOs and try to define their common features and differences.

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<sup>59</sup> Reinisch, A. (2013). 'The privileges and immunities of international organizations in domestic courts'. Oxford: Oxford University Press, page 64.

<sup>60</sup> CPIUN, *op. cit.*, Section 2, Article II.

<sup>61</sup> Okeke E.C., *op. cit.*, page 293.

1) In the first group of IOs we have included the organizations which possess a broad jurisdictional immunity “from every form of legal process”, thus the UN and some of its specialized agencies, international courts and tribunals, military organization as NATO.

- The UN Charter grants to the organization “*such privileges and immunities as are necessary for the fulfillment of its purposes*”<sup>62</sup>. However, it is not specified what scope of privileges and immunities member states must grant to the UN, but it is clearly functional. Legally, it is not an absolute immunity approach; rather, it implies that the UN’s privileges and immunities are necessary to carry out its functions efficiently and without interference from member states<sup>63</sup>. More precisely, the scope and persons to whom immunities of the UN entitled written in the CPIUN.

General Convention sets absolute immunity for the property, funds and assets of the UN, they are immune from every form of legal process, premises and archives are inviolable<sup>64</sup>, such immunity can be waived only by the organization itself. The UN provides different immunity regimes for representatives of member states, officials of the UN and experts on missions.

- Representatives of member states including all members of the delegation, have immunities similar to diplomatic envoy, except custom and tax exemptions. Their immunities contains: immunity from personal arrest or detention and from seizure of their personal baggage; immunities from every kind of legal proceedings. Guaranteed freedom of speech and immunity from suit for acts, words and writings during exercising their functions.

There are some limitations for the representatives of member states, thus privileges and immunities are given not for their personal benefit but only for the performing functions in connection with the UN, therefore a member state is under the duty to waive the immunity of its representative in any case where it would impede the course of justice. An important moment is that mentioned immunities are timely limited and valid during the exercising functions, including the journey to and from the place of meeting.<sup>65</sup> In addition, mentioned immunities are not applicable in relations between a representative and his national state that sent him to perform functions.

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<sup>62</sup> The Charter of the UN, *op. cit.*, Art. 105.

<sup>63</sup> Papa M. I., ‘The Mothers of Srebrenica Case before the European Court of Human Rights : United Nations Immunity versus Right of Access to a Court’. *Journal of International Criminal Justice*, Volume 14, Issue 4, 01.09. 2016, pages 893–907,

<sup>64</sup> CPIUN, *op. cit.*, Art. 2.

<sup>65</sup> *Ibid.* Section 14.

- The next category is officials of the UN. The list of officials is set by the Secretary-General of the UN and can be renewed. Officials are entitled to the immunity from legal process during the performance of their functions. The Secretary-General and all Assistant Secretaries-General, their spouses and minor children granted immunities and privileges similar to diplomatic envoys<sup>66</sup>, which is absolute and valid in all circumstances.

- Experts on missions of the UN, have less privileges, but the immunity level is the same as during the period of their missions they are entitled to the immunity from every kind of legal process, which continues even when experts are no longer employed on missions<sup>67</sup>.

Considering that the UN Charter and the CPIUN have a binding force for member states, legally there is no measures that states can oppose to the immunities of the UN; the only remedies left are the waiver of immunity but it can be performed by the UN itself and the use of immunities strictly for functional needs, which might be interpreted in a broad way<sup>68</sup>.

Interesting that the CPIUN does not mentioning the immunity of the UN peace-keeping forces. This issue can be understood in two ways, thus the scope of immunities of the peace-keeping missions falls into the experts on the missions category or their immunities might be regulated by the separate Status of Forces Agreements ('SOFAS'), which are always concluded between the UN and the host state<sup>69</sup>.

The scope of the immunities of the UN is somehow detailed in administrative instruction of the UN Secretariat: "officials and experts on mission for the UN are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. This immunity extends to all stages of civil and criminal judicial proceedings, such as subpoena to appear as defendant or as a witness, judgement or execution. It also covers administrative proceedings of a quasi-judicial nature and administrative enforcement measures as well as personal arrest or detention<sup>70</sup>. Even so it is detailed, such scope cannot be considered as exhaustive list.

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<sup>66</sup> Ibid. Section 19.

<sup>67</sup> CPIUN, *op. cit.*, Art. 6, Section 22

<sup>68</sup> Ibid., Section 23.

<sup>69</sup> Szasz, P., & Ingadottir, T. (2001). The UN and the ICC: The Immunity of the UN and Its Officials: IN MEMORIAM: Paul C. Szasz 1929–2002. *Leiden Journal of International Law*, 14(4), 867-885. doi:10.1017/S0922156501000413, page 872.

<sup>70</sup> The UN Secretariat administrative instruction ST/AI/299, 10.12.1982.

- The UN specialized agencies.

There are numerous of IOs which are covered by or refers to the UN Special Convention. Their immunities are almost similar to the UN's, thus property, funds and assets have an absolute immunity and inviolability; immunity of representative of member states and officials of the agencies is functional<sup>71</sup>. Experts as a category are not mentioned in the document however, some organizations mentioned them separately in the annex.

- International courts and tribunals also enjoy broad immunities. For instant the International Court of Justice (ICJ) is the judicial body of the UN and its member states. Therefore, with regard to the immunities the ICJ can refer to the UN Charter Article 105 which grants functional immunity<sup>72</sup> to the organization, besides that diplomatic privileges and immunities are granted to the members of the Court according to the Statute of the ICJ<sup>73</sup>. Same immunities as to heads of diplomatic missions are granted to the prosecutor, deputy prosecutors and the registrar of the International Criminal Court (ICC) according to the Rome Statute<sup>74</sup>. Immunities of the ICJ and ICC are granted on the period when judges and other officials are engaged with the court process, so the purpose of granting is functional, however there is no any precise determination of the scope.

- NATO has an absolute immunity regarding its property, assets and premises, unless it was expressly waived by the NATO itself<sup>75</sup>. Immunities of the representatives of member states are very logical and equal to the diplomatic envoy in all other states except the state where he is national<sup>76</sup>. International staff and experts on missions have functional immunities that are necessary for the performing their tasks; high officials are entitled to the immunities similar to diplomatic envoy<sup>77</sup>. The NATO's forces are regulated by the separate agreement, where they are granted to the functional immunity, however, the document provides a case when a member of a force and civilian component can be sued with civil matters not related to the functions<sup>78</sup>.

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<sup>71</sup> Convention on the Privileges and Immunities of the Specialized Agencies, *op. cit.*

<sup>72</sup> The Charter of the United Nations, *op. cit.*, Art. 105.

<sup>73</sup> Statute of the International Court of Justice, Art. 19.

<sup>74</sup> Rome Statute *op. cit.*, Art. 48.

<sup>75</sup> Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff, *op. cit.*, Art. V.

<sup>76</sup> Ibid. Article XII-XVI.

<sup>77</sup> Ibid. Article XVII-XXI.

<sup>78</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces 19.06.1951, Art. VIII.

- The Organization for Security and Cooperation in Europe (OSCE) is also regional Organization, however it has members not only from European continent. The organization has several documents which set out the status of the OSCE. Privileges and immunities of the Organization are set out by the Istanbul document which was accepted in 1999. The OSCE can also establish peacekeeping missions, and inspectors of the Organization as well as the auxiliary personnel during such missions enjoy immunities according to the Vienna Convention on Diplomatic Relations<sup>79</sup>.

The other category is the Members of the team are also entitled to the same privileges and immunities according to the diplomatic envoy<sup>80</sup>, as well as the Inspectors and Transport Crew Members.

From the Istanbul Document it follows that all protected and mentioned staff entitled to the diplomatic envoy status without differentiation.

2) The European Community (EC) and Union (EU) have to be studied separately as it has some unique characteristics. The main feature of the EU is the integration of its law with the member states legal systems as well as the direct application of some legal acts of the organization to the member states.

The property and assets of the EU are inviolable, however it is not absolute condition and in case of the authorization of the European Court of Justice (ECJ) they can be subject to legal constraint<sup>81</sup>. There is a very interesting clause in the EU protocol on privileges and immunities, that immunity is not applicable to the members of Parliament when they found in the act of committing an offence<sup>82</sup>. The exclusion is precise, but the immunity in this case anyway officially should be waived by the Parliament.

According to the internal policy of the EU, their immunities are divided on absolute and non-absolute. Absolute immunity for opinions and votes (Article 8 of the Protocol) is belonged to the members of EP and cannot be waived by Parliament, it is strictly functional immunity. Immunities from prosecution, arrest and detention are governed by Article 9 of the Protocol and counted as personal immunity. The scope of this immunity depends on where the member

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<sup>79</sup> Istanbul Document, 1999, Art. (92).

<sup>80</sup> Ibid, Art. (125).

<sup>81</sup> Protocol #7 on the privileges and immunities of the EU to the Treaty on the Functioning of the European Union, *op. cit.*, Art. 1.

<sup>82</sup> Ibid., Art. 9.

of EP is, for example if he situated in some of member states territory he enjoys immunities according to the Article 9, but if the member is in his state of residence than the national law is applicable<sup>83</sup>. Officials and other servants of the EU have functional immunities from legal proceedings, which continues even after they have ceased to work<sup>84</sup>.

3) Third group of IOs constitutes organizations with restricted jurisdictional immunity, thus usually the organizations with a specific field of functioning, for example commercial activities. The practice of restricting the immunity by an IO itself is not common; from all of the agencies listed in the Special Convention only International Bank for Reconstruction and Development (Bank) had admitted the possibility of taking actions against it to the competent domestic courts of members where the organization has an office, appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities<sup>85</sup>.

This admission apparently connected to the nature of the Bank and its purposes, as it mainly has to deal with commercial activities where investors and partners wishes to have certain guarantees. Similar idea of restriction is used with regards to the other regional financial institutions as European Bank of Reconstruction and Development (EBRD)<sup>86</sup>. Immunities of the officers and other employees of the EBRD are functional with the exception of civil liability in the case of damage arising from a road traffic accident<sup>87</sup>.

- The European Space Agency (ESA) also has restricted jurisdictional immunity and in addition, in the next subchapter, we will examine the case involving ESA. Convention for the establishment of ESA provides certain privileges and immunities to the Organization. Thus the ESA have immunity from jurisdiction and execution, except cases when: - immunity was waived by the competent organ of the Organization (Director General, Council); - a civil action brought by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the ESA, or in respect of a motor traffic offence involving such a vehicle; - attachment, pursuant to a decision by the judicial authorities, of the

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<sup>83</sup> The immunity of members of the European Parliament. Directorate General for Internal Policies of the European Parliament Legal Affairs. In-depth analyses. PE 509.981 (2014).

<sup>84</sup> Protocol #7 on the privileges and immunities of the EU to the Treaty on the Functioning of the European Union, *op. cit.* Art. 11.

<sup>85</sup> *Ibid*, Annex VI.

<sup>86</sup> Agreement Establishing the European Bank for Reconstruction and Development, 29.05.1990, e.i.f. 28.03.1991, Article 46-47.

<sup>87</sup> *Ibid*, Article 51.

salaries and emoluments owed to a staff member; - state and ESA concluded an arbitration clause<sup>88</sup>.

The immunity of ESA is slightly different from the previous IOs as cases that are not covered by the immunity formulated more detailly. Furthermore, the restriction of immunity for some civil actions had not an adversely affect to the functioning of the Organization.

Summarizing the above mentioned we can conclude that IOs have a different scope of immunities; answering on a questions that we indicated in the beginning of this section, we can assert that in most of cases only one of them are precisely defined by the IOs and it is - who covered by the immunity. Thus the list of such persons and objects are defined in the international treaties or IOs are under the obligation to make such a list.

The answer on the second question of what actions are covered by the immunity makes the main difference between IOs, as it is based on the functions of each organization and here the main difficulties in the defining the scope of immunities arise. In practice, the functional immunity of IOs leaves a gap for a different interpretation and leads to the disputes whether it is absolute or restrictive. Some authors interpret the wording “for the fulfillment of its purposes” as a functional immunity<sup>89</sup> not absolute; we are agree, that the member states were meaning to grant functional immunity, however in practice it might be different.

Further, we will study case law concerning jurisdictional immunity of IOs in connection with the right of access to justice, as this right most often opposes with the jurisdictional immunity.

### **2.3. Jurisdictional immunity of IOs and the right of access to justice**

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<sup>88</sup> ESA Convention and Council Rules of Procedure, ESA SP-1317, December 2010, 7th edition, Annex 1, Article IV.

<sup>89</sup> Papa M.I. *op.cit.*, Para.2,

The concept of immunity from jurisdiction is by nature contradicts with the right of access to justice, one of the fundamental human rights. Therefore, we would like to explore whether IOs are bound by the international human rights treaties which contain among others the right of access to justice.

Main human rights treaties like the Universal Declaration of Human Rights (UDHR), International Covenants on Civil and Political rights (ICCPR) and on Economic Social and Cultural rights (ICESCR) are not signed by the IOs; exception is the European Union with regard to the European Convention on Human Rights (ECHR).

There is a view that as IOs are not signatories to the main human rights treaties, therefore they should not be bound by them<sup>90</sup>. This point of view is legally based on the Vienna Convention on the Law of Treaties, where is stated that treaties are bound only on parties and only with expressed consent<sup>91</sup>.

We are generally agree with this point, however, we should take into consideration, that many of human rights, formulated in the mentioned above treaties became a customary international law and jus cogens. As IOs are separate subjects of International law with separate legal personality, they have an obligations to comply with peremptory norms and accepted general principles of international law that apply to all subjects under international law<sup>92</sup>.

Considering the UN as an organization with wide range of tasks, its immunity might be restricted by its human rights obligations under Articles 1(3), 55, and 56 of the Charter, so the violation of human rights will contradict with purposes of the UN<sup>93</sup>. However, not many of the IOs have written such an obligations.

Despite that the right of access to justice is recognized under general international law and have a fundamental meaning, in practice it might not be considered as an absolute human right. Further we will examine main content of the right of access to justice and its interpretation within the case law review.

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<sup>90</sup> Zagel G. M. (2018) 'International Organizations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap', *Nordic Journal of Human Rights*, 36:1, 74-90, page 76.

<sup>91</sup> Vienna Convention on the law of treaties (No. 18232). Concluded at Vienna on 23.05.1969, e.i.f. 27.01.1980, Art. 11.

<sup>92</sup> Ferstman C., *op. cit.*, page 42.

<sup>93</sup> Freedman R., "UN Immunity or Impunity? A Human Rights Based Challenge" *European Journal of International Law*, Volume 25, Issue 1, 01.02. 2014, Pages 239–254, page 243.

### 2.3.1. The right of access to justice

The right of access to justice is an effective judicial remedy, which availability can guarantee respect and protection of other human rights in the domestic legal system as well as in the international. When the certain human right is infringed the right of access to justice is used as protection and enforcement measure.

The right of access to justice can be understood in two ways, first is the possibility for the individual to bring a claim before a court and the second when court adjudicates it<sup>94</sup>. But in this case, the violated right, to which protection the individual is applying to the court, might not be restored, as the court may return the claim without full adjudication or reject to accept it. The second and more precise understanding is that the right of access to justice is the right of an individual not only to enter a court of law, but also to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice<sup>95</sup>. In that sense, the Right can be considered as provided for the individual.

The right of access to justice is recognized under general international law and mentioned in main human rights documents. First of all, it is the UDHR Article 8, which states that everyone has a right for “an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>96</sup> This formulation begets some questions and might be interpreted not in favor of claimants; thus it is restricting remedies by the national level and determines violations of only fundamental human rights.

More general and favorable the Right is described in the Article 6(1) of the European Convention on Human Rights (ECHR): “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law<sup>97</sup>”, however we should not forget that the ECHR is a regional document and have a force only on signatory countries. But almost similar formulation is provided in the Article 14 of the ICCPR<sup>98</sup> and it is considered as universal document. Another regional documents, which contain provisions

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<sup>94</sup> Francioni, F. (Ed.), *Access to Justice as a Human Right*. Published to Oxford Scholarship Online: March 2012, page 1.

<sup>95</sup> *Ibid.*, page 1.

<sup>96</sup> The UDHR, Art. 8.

<sup>97</sup> The ECHR, Art. 6 (1).

<sup>98</sup> The ICCPR, Art. 14.

regarding the right of access to justice is also the African Charter on Human and Peoples' Rights, Article 7 provides everyone with the “right to have his cause heard<sup>99</sup>” and the American Convention on human rights, Article 25 of which provides everyone with the right to judicial protection<sup>100</sup>.

Despite these international acts, the right of access to justice is often mentioned in the national law of the states, their constitutions. For example, the Constitution of Estonia §15 provides everyone whose rights have been violated with “the right of recourse to the courts<sup>101</sup>.” Hence, we can conclude that the right of access to justice is a basic guarantee for the respect and protection of fundamental human rights, which also can be considered as a customary international law.

The wording of the discussed right can be different depending on the legislation; it can be written as “the right of access to justice” or to “court”, “the right for a fair trial” or “hearings”, the very essence of the right is the same and in the next subchapter we will bring a court’s assessment to this right.

### 2.3.2. Case law concerning jurisdictional immunity of IOs and the right of access to justice

In relations between IOs and private persons the right of access to justice is limited by the jurisdictional immunity of IOs. As an example, we can explore some famous cases.

- The case of *Waite and Kennedy Vs Germany* in the European Court of Human Rights (ECtHR). The case is very interesting as it estimates relations between jurisdictional immunity and the right of access to justice. Thus, Mr. Richard Waite and Mr. Terry Kennedy are British nationals, systems programmers by profession employed by the British company SPM, and were placed at the disposal of the European Space Agency (ESA) to perform services at the European Space Operations Centre in Darmstadt<sup>102</sup>.

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<sup>99</sup> The African Charter on Human and Peoples' Rights, 1998, e.i.f. 25.01.2006, Art. 7.

<sup>100</sup> American Convention on human rights, 22.11.1969, Art. 25.

<sup>101</sup> Constitution of the Republic of Estonia, 28.06.1992, e.i.f. 03.07.1992, Para. 15.

<sup>102</sup> ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgement of 18 February 1999.

Further, their contracts were taken from SPM by a limited company CDP and in October 1990 they got a letter from CDP about the termination of their contracts from the 31 December 1990 (after the expiration date). The applicants decided to start proceedings in the German local labour court against the ESA; they relied on the German Provision of Labour Act (temporary staff), according to which the staff hired to third persons have labor relations with that third employer<sup>103</sup>.

The ESA relied on its jurisdictional immunity, which is backed up by the following legal acts: The ESA Convention Article IV of which states that the ESA shall have immunity from jurisdiction and execution;<sup>104</sup> Domestic German Courts Act which recognizes the jurisdictional immunity under International law; and the Agreement between the Federal Republic of Germany and ESRO for the purpose of establishing a European Space Operations Centre, article 6 of which states that disputes between the Organization and its staff shall be subject to the German law if it is not regulated by the Organization's staff regulations or not within the competence of the Organization's Appeal board<sup>105</sup>.

The application was dismissed on the all levels of the German courts on the basis of jurisdictional immunity of the ESA, so the applicants turned to the European Commission of Human Rights (Commission) claiming that their rights of access to court under the Article 6 (1) of the ECHR was violated by German courts; The Commission accepted the application and found that there was no violation of the Article 6 (1), so the applicants further applied to the ECtHR with the same rationale.

The ECtHR repeated the decision of the Commission; now we will summarize the most important conclusions in our view, which formed the basis of the Court's judgement:

- the Court confirmed that the right of access to court is not an absolute right and can be limited. States as guaranty for the regulation of this right have a certain margin of appreciation in this question.
- the very essence of the right of access to court shall not be infringed; the limitation shall pursue a legitimate aim and be proportional between the means employed and the aim sought to be achieved.

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<sup>103</sup> Ibid., Para 14.

<sup>104</sup> Convention for the establishment of a European Space Agency, 30.05.1975, e.i.f. 30.10.1980, Annex I.

<sup>105</sup> ECtHR, *Waite and Kennedy v. Germany*, *op. cit.*, Para. 25, 26.

- the attribution of privileges and immunities to IOs is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments. States concluding treaties with IOs, granting them immunities and it is a long standing practice which deemed to develop important international cooperation.
- Immunities of IOs have a legitimate aim and the submission of IOs to the labour litigations under national laws will be not proportional to the proper functioning of IOs.
- regarding ESA, its Convention provides modes of settlement of private law disputes, thus the Appeals Board has jurisdiction in labour disputes and applicants could turn there<sup>106</sup>.

The case have a significant impact in the defining relationships between the two contradicting rights such as the right of access to justice and jurisdictional immunity. However, the Court did not stated ultimately that the jurisdictional immunity overrides the right of access to justice, but it used the proportionality test; as well as applicants had an alternative dispute settlement mechanism. We agree with the Court that the labour disputes might not be proportional to the proper functioning of IOs, but what to do in case of grave human rights violations which caused human death? Further we will analyze some of such cases.

- *Srebrenica case*. Mothers of Srebrenica Association and ten relatives of genocide victims sued the UN and Netherlands before the Dutch court as a liable for the genocide. Although Serbian leaders was found responsible for the genocide, a certain amount of responsibility rests with the Dutch Battalion (Netherlands) who at that time was serving with the UN Protection Force.

According to UN Security Council resolution, the United Nations Protection Force was created with the purpose “to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis<sup>107</sup>”. Both actors have been accused of failing to protect civilians which were entrusted to them by the UN and of failing in their duty to prevent genocide<sup>108</sup>.

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<sup>106</sup> ECtHR , *Waite and Kennedy v. Germany*, *op. cit.*

<sup>107</sup> The UN Security Council Resolution 743 of 21.02.1992.

<sup>108</sup> UN immunity overrides jus cogens norms of international law. 23.07.2013. Accessible at: <https://strasbourgobservers.com/2013/07/23/un-immunity-overrides-ius-cogens-norms-of-international-law/#more-2135>

The UN relied on its jurisdictional immunity and the Netherlands's courts dismissed the application based on it; after exhausting all domestic remedies, on 8 October 2012 Mothers of Srebrenica lodged an application to the ECtHR against the Netherlands. The Court was asked to decide whether the Netherlands had violated the applicants' right of "access to a court", as guaranteed by Article 6 of the ECHR, by granting the UN immunity from domestic jurisdiction; in addition Article 13, of the Convention the Court was asked to assess whether the granting of immunity to the UN allows the Netherlands to evade its liability towards the applicant's right for a remedy.

According to the Court's summary, the applicants argument rests on three pillars: the first is the nature of the immunity from domestic jurisdiction enjoyed by IOs, which is functional, so they argue, it contrasts with the sovereign immunity enjoyed by foreign States, which is grounded on the sovereign equality of States among themselves. The second is the nature of a claim, which derives from the act of genocide in Srebrenica, for applicants this fact has a higher order than any immunity which the UN may enjoy. The third is the absence of any alternative jurisdiction competent to entertain their claim against the UN<sup>109</sup>.

In the Decision the ECtHR used as justification many international legal acts as the UN Charter, CPIUN and number of precedents. Further, we will bring the most important conclusions of the ECtHR in our view.

- First of all, the Court refers to the case of Waite and Kennedy with regard to that the right of access to justice is not absolute and can be limited.
- The UN Charter have such provisions as "the obligations of the Members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement" and according to the CPIUN the UN have immunity from every form of legal proceedings unless the immunity was waived.
- Regarding that the act of genocide is related to jus cogens norms which should prevail over jurisdictional immunity, the Court used Advisory Opinion of the ICJ concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, where is distinguished immunity from legal process and the issue of compensation for any damages and stated that such claims should not be subject to national jurisdiction but shall be settled according to the Section 29 of the

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<sup>109</sup> ECtHR, *Stichting Mothers of Srebrenica and others against the Netherlands*, Application no. 65542/12, Decision 11 June 2013.

CPIUN. Thus the applicants claim is related to civil law and compensations but not to the individual criminal responsibility for the act of genocide.

- However, the Court acknowledged that the UN did not create modes of settlement disputes under the Section 29 of the CPIUN within the SOFA in former Yugoslavia, but that fact cannot be imputable to Netherlands; The absence of an alternative remedy does not follow that the recognition of jurisdictional immunity violates the right of access to justice.
- The Court, as in *Waite and Kennedy* case, found that the granted immunity to the UN has a legitimate purpose and not disproportional, so the application shall be rejected on the basis of Article 35 (§§ 3a and 4) of the ECHR.

The case is very interesting and complicated. The Court has done a great job in the justification of its decision, however some moments remained unclear; thus the court admitted that the very essence of the right of access to justice should not be infringed, however in a consequence applicants were left without a judicial remedy as the UN did not provide any alternative dispute settlement mechanisms.

After the studying the case, we can conclude that the UN's obligation to create modes for settlement disputes in practice is more right than obligation as there is no any remedy for non-fulfillment of this obligation.

- The third case we will analyze is the *Haiti cholera case*. It is important to study this case, as it is discussing whether the immunity of the UN should depend on its obligation to provide alternative modes of settlement the disputes under Section 29 of the CPIUN.

In 2010, after the earthquake that happened in Haiti, the UN arranged the peacekeeping mission and peacekeepers from Nepal were sent within the mission. After that the cholera epidemic began in Haiti, that killed around ten thousands of people and continues to sicken people across the country. A panel of experts appointed by the UN found that the strain of cholera that began in Haiti was "a perfect match" for a strain found in Nepal. Nepalese peacekeepers were staying at the UN camp, and because of poor sanitation the disease has spread into local waterways<sup>110</sup>. So the fact that the UN mission was responsible for the epidemic was proved.

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<sup>110</sup> Domanoske C. 'U.N. Admits Role In Haiti Cholera Outbreak That Has Killed Thousands'. 10.08.2016. Accessible at: <https://www.npr.org/sections/thetwo-way/2016/08/18/490468640/u-n-admits-role-in-haiti-cholera-outbreak-that-has-killed-thousands?t=1539069421472>

According to the SOFA agreement between the UN and Haiti, parties had to establish claims commission, which would be an alternative dispute settlement mechanism provided by the Section 29 of the CPIUN<sup>111</sup>. Nevertheless, such Commission was not created, so the victims of the epidemy submitted claims directly to the UN and called for the UN to establish the claims commission according to the SOFA agreement. Their claims were dismissed by the UN as “not receivable<sup>112</sup>”.

Victims then turned to the District court of the Unites States (US), because of the place of the UN headquarters. Their application was dismissed by the District court on the basis of the Article 2 of the CPIUN, which provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity<sup>113</sup>.”

Applicants appealed the decision of the District court to the Appeal court. The plaintiffs main arguments were that: 1). the UN breached its obligation under Section 29 of the CPIUN which was a precondition to the UN’s immunities under Article II. 2) the District court violated their right of access to court.

The US Appeal court in its decision started from the interpretation of the CPIUN, referring to the case law.

Thus, it used the principle of interpretation “express mention of one thing excludes all others<sup>114</sup>”, which refers to the Article II of the CPIUN, where written that the UN “shall” enjoy immunity from every form of legal proceedings unless it was expressly waived; the word “shall” is imperative which excludes other circumstances and there is no words which would connect the Article II with Section 29, or directs it as a precondition. In consequence, the US Appeal court affirmed the decision of the District court.

In our opinion, this case had a great importance in the interpretation of the CPIUN. It confirms the absolute character of the UN’s immunity regarding to its other obligations. There is no any precondition to the UN’s jurisdictional immunity “from every kind of legal proceedings” unless the Organization itself will waive its immunity. Applicants claim was dismissed without providing an alternative dispute settlement mechanisms. The UN is still criticized for the Haiti

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<sup>111</sup> Freedman, R. and Lemay-Hebert, N. (2015) Towards an alternative interpretation of U.N. immunity: a human rights- based approach to the Haiti cholera Case. *QIL - Questions of International Law*, Page 9.

<sup>112</sup> Cholera accountability. Institute for justice and &Democracy in Haiti website. Accessible at: <http://www.ijdh.org/cholera-litigation/>

<sup>113</sup> CPIUN, Art. II.

<sup>114</sup> United States Court of Appeals *Georges v. United Nations*, (No. 15-455) 18.08.2016.

case. Despite that in 2016 the UN Secretary-General admits the role of the Organization in the cholera outbreak and expresses its deepest apologies for the UN's role<sup>115</sup>, the Organization itself refused to take any legal or political responsibility.

Despite the fact, that an alternative dispute settlement mechanism of IOs as an obligation has no any enforcement measures and in practice of some of IOs may not be even existed, it is a very important alternative to the lawsuit.

Availability of such modes in the Waite and Kennedy's case was one of the reasons of why the application was rejected by the court. In addition, judicial bodies have agreed that the very essence of the right of access to justice should not be infringed. Based on this we can assume that the practice towards an obligation to provide alternative dispute settlement mechanisms is slowly changing.

The changing practice can be proved by some of domestic courts decisions. For instants, the French court of cassation in the case *Degboe v. African Development Bank*. It was an internal labour dispute, where M.A. Degboe a former employee of the African Development Bank, could not claim to the administrative tribunal of the organization because it was set up after his dismissal and so he was left without a proper dispute settlement mechanism.

As France is a member of the African Development Bank application was accepted by the court. In a consequence, the French court of cassation decided that absence of access to the established administrative tribunal will be a denial justice, therefore the Organization was denied immunity from suit. In the justification of the Decision the French Court of Cassation did not used the Article 6 of the ECHR, as it was not applicable to the African region, but it used domestic principle "ordre public international" which prohibits denial of justice<sup>116</sup>. It can be interpreted as a customary international law or general principles of International Law.

In the next chapter, we will examine the obligation of IOs to provide alternative modes for settlement disputes more detailly and examine current mechanisms of different IOs.

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<sup>115</sup> Secretary-General's remarks to the General Assembly on a New Approach to Address Cholera in Haiti, 01.12.2016, accessible at: <https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>

<sup>116</sup> Reinich, A. The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals. International Law and Justice Working Papers. Institute for International Law and Justice New York University School of Law. 2007/11.

### **III. REASONS AND REMEDIES AGAINST MISUSES AND ABUSES JURISDICTIONAL IMMUNITY**

#### **3.1. The obligations to provide an alternative dispute settlement mechanism**

As we acknowledged from the case law analyses in the previous chapter, jurisdictional immunity of IOs usually prevails over the right of access to justice; however, the very essence of the right should not be infringed. Thereby, many of IOs provides an alternative dispute

settlement mechanisms as a counterbalance for the jurisdictional immunity<sup>117</sup>. For some of IOs state members have determined abuses of immunities, for instant the UN agencies. The procedure in case of abuse includes consultations between state party and the organization, if it will not achieve a result the question can be submitted to the International Court of Justice<sup>118</sup>. Parties off course have a right to conclude a different dispute settlement procedure.

Conditionally dispute settlement mechanisms can be divided on two categories: internal and external dispute settlement mechanisms. The first and most common type of disputes are the labour disputes, between the organization and its staff. ICJ in the Effect of awards case highlighted the importance of an alternative dispute settlement mechanism, by referring to the UN's Charter, which is aimed to promote freedom and justice for individuals, and it would be inconsistent to deprive own staff from the judicial or arbitral remedy<sup>119</sup>.

The second category and the obligation itself is provided in the CPIUN, Article VIII, Section 29 states that the UN shall make provisions for appropriate modes of settlement of disputes: 1. arising out of contracts or other disputes of a private law character to which the UN is a party; 2. Disputes involving any official of the UN who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General<sup>120</sup>.

The same article exists in the Convention on specialized agencies. The word "shall" means an imperative norm, obligation for the IO to provide certain mechanism. Nevertheless, from the Haiti case we know that this obligation is not a precondition to the jurisdictional immunity and its absence cannot exclude jurisdictional immunity of the UN. Even so, existence of an alternative modes of dispute settlement is essential for the fulfillment of the right of access to justice<sup>121</sup>.

It seems understandable with the disputes, where involved an official of the organization, as well as with the disputes arising from the contracts; the question appears with the "other disputes of a private law character", there is no any definition or explanations of this category in the CPIUN or other international treaties.

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<sup>117</sup> Freedman R., "UN Immunity or Impunity? A Human Rights Based Challenge" *European Journal of International Law*, Volume 25, Issue 1, 01.02. 2014, Pages 239–254.

<sup>118</sup> Convention on the Privileges and Immunities of the Specialized Agencies, *op. cit.* Art. VII.

<sup>119</sup> ICJ, *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion of July 13th, 1954, Report, page 47.

<sup>120</sup> CPIUN, *op. cit.*, Section 29.

<sup>121</sup> Freedman R., *op. cit.*

Not all of the claims against IOs reach the courts; IOs are trying to avoid the need for using immunity. Many claims resolved amicably, for example the UN has reached to the consensus in many sensitive cases such as: a wrongful death claim by a defendant before the International Criminal Tribunal for Yugoslavia who was in the custody of a jail operated by a member state on behalf of the UN at the time of his death; a wrongful death claims against the UN by relatives of passengers on an aircraft chartered on behalf of the Organization by the World Food Programme that crashed allegedly due to negligence by NATO air controllers operating as part of the UNPROFOR mission; in connection with the bombing of the UN headquarters in Bagdad, for example, claims by visitors to that headquarters at the time of the bombing. All of these cases were, in the end, settled amicably<sup>122</sup>.

Besides that, the Secretary-General of the UN reported which disputes are fall into the category of private disputes and mechanisms of settlement these disputes; in the next subchapters we will define international standards applicable to the dispute settlement and explore existing mechanisms of some IOs.

### 3.1.1. International standards for dispute settlement

There are several international treaties which set the minimum standards for the dispute settlement procedure that must be secure by the contracting states to everyone<sup>123</sup>.

- The UDHR Article 10 provides everyone with the right “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<sup>124</sup>.” Even so it is not legally binding document, it sets out an important fundamental rights and became a base for development of other human rights treaties.
- Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a regional document that adopted by the Council of Europe, Section I Article 6 of the ECHR sets out the right for a fair trial, thus:

“everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced

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<sup>122</sup> Bruce C. Rashkow, Immunity of the United Nations: Practices and Challenges.: *10 Int'l Org. L. Rev.* 332 (2014), page 341.

<sup>123</sup> Reinisch, A., Kodek, G. Immunity of International Organizations and alternative remedies against the United Nations. Seminar on State Immunity Summer Semester. 2006. Page 11.

<sup>124</sup> UDHR *op.cit.*

publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice<sup>125</sup>”.

The ECHR is built on the UDHR, however the procedure is supplemented. Thus the time requirement added, tribunal shall be established by law; moreover, requirements to the public proceedings are modified, means that trial can be closed for publicity and media in certain cases when sensible private issues for parties are touched or .for the protection of national security. Added requirements are reasonable and exists in the domestic law of many states.

- International Covenant on Civil and Political Rights (ICCPR), even so the ICCPR reached the required number of ratification only in 1976 and entered into force ten years after it was adopted, nowadays it can be considered as the universal treaty as the amount of members has reached to 172.

The Covenant requires two levels procedural safeguards to be provided by the Member states<sup>126</sup>. First, according to the Article 2.3, if any right provided in the Covenant was violated, State Parties have to ensure that an effective remedy is accessible. In addition, such right shall be determined by a judicial or other competent authority<sup>127</sup>.

Secondly, the Article 14.1 of the Covenant sets the standards for the court, thus the main requirements are the equality of parties to the dispute; hearings shall be fair and public; tribunal is established by law and have to be a competent, independent and impartial<sup>128</sup>. Publicity moment is described same as within the ECHR.

Summarizing the requirements provided in the mentioned above treaties, we can compile a common standard for the dispute settlement mechanism, thus it should contain following features:

- a) a tribunal shall be established by law
- b) public proceedings
- c) competence, independence and impartiality of the tribunal

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<sup>125</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 04.11.1950, e.i.f. 03.09.1953.

<sup>126</sup> Reinisch, A., Kodek, G. Immunity of International Organizations and alternative remedies against the United Nations. *Op.cit.* page 13.

<sup>127</sup> ICCPR, *op.cit.* Art. 2(3).

<sup>128</sup> Ibid, Art. 14(1).

- d) fairness and equal rights in the procedure and
- e) a decision within a reasonable time<sup>129</sup>.

Further we will examine existing dispute settlement mechanisms of some IOs and try to apply these standards on them.

### 3.1.2. Alternative dispute settlement mechanism of IOs

1. The UN system of justice can be conventionally divided into two parts: internal dispute settlement mechanism and external dispute settlement mechanism under Section 29 of the CPIUN (including dispute settlement within the UN missions).

a) The UN internal justice was created for resolving internal disputes with the members of staff. The reason is that the staff members cannot take their complaints against the UN to the national courts of the state, where they are working, because of the jurisdictional immunity of the organization. Before the 2006 the UN had an administrative tribunal for solving work-related disputes, but than it was abolished. The new system includes UN Dispute Tribunal and UN Appeals Tribunal.

The UNDT operates on a full-time basis. It consists of five professional independent judges, three full-time and two half-time. It also has three professional independent temporary judges to strengthen its capacity in resolving cases<sup>130</sup>.

After the staff member files the application, the UNDT examines the facts of the case, and conducts, when necessary, oral proceedings. These are normally held in public and can be attended by interested individuals. Cases before the UNDT are usually considered by a single judge. For certain complex or important cases, a three-judge panel may be convened. The judgments of the UNDT are binding on the parties, the staff member and the Secretary-General. Both parties have the right to appeal a judgment to the UN Appeals Tribunal<sup>131</sup>.

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<sup>129</sup> Reinisch, A., Kodek, G. Immunity of International Organizations and alternative remedies against the United Nations. *Op.cit.* page 14.

<sup>130</sup> The UN staff members guide to resolving disputes, *op. cit.* Chapter IV, page 3.

<sup>131</sup> The UN staff members guide to resolving disputes, *op. cit.*, Chapter IV, page 23.

The judgment of the UNDT can be appealed to the UN Appeals Tribunal only by the staff member who has filed the case or by the Secretary-General. UNAT is composed of seven professional independent judges, and its Registry is based in New York. It normally holds three sessions a year. Besides the UN, the UNAT can accept appeal also from other institutions, such as International Civil Aviation Organization, ICJ, International Tribunal for the Law of the Sea etc.<sup>132</sup>

The UN intended that current internal system of justice was independent and separate as much as possible. For that reason, was created the Office of administration of justice (OAJ). It has operational and budgetary autonomy and besides two tribunals also includes the Office of Staff Legal Assistance, which can assist and help to the staff members in legal issues gratuitously. However, the chief of the OAJ Executive Director is appointed by the Secretary-General of the UN who generally represents the UN as an organization<sup>133</sup>.

b) External dispute settlement mechanisms of the UN and types of disputes are described in the report of the Secretary-General of the UN about the implementation of the Section 29 of the UN Convention on privileges and immunities, where is more detailed the concept of private law character disputes.

First type of external disputes - *disputes arising out of a commercial contracts and lease agreements* to which the UN is a party. In this case, the UN created a practice (also followed by UNDP and UNICEF) where is used the jurisdiction of the United Nations Commission on International Trade Law (UNCITRAL) rules<sup>134</sup>.

The UNCITRAL is accepted by a special arbitration clause, which is used by the UN in all commercial contracts and purchase orders as well as lease agreements. For such cases was created a standard arbitration clause and it might be amended by parties taking into account the features of the contract<sup>135</sup>. Along with this arbitration clause the UN make a standard clause on

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<sup>132</sup> The UN Internal Justice System. The table of judicial bodies are accessible at: <http://www.un.org/en/internaljustice/overview/who-can-use-the-system.shtml>

<sup>133</sup> Ibid, about OAJ.

<sup>134</sup> Report of the Secretary-General of the UN A/C.5/49/65 24 .04.1995. Accessible at: [http://dag.un.org/bitstream/handle/11176/174260/A\\_C.5\\_49\\_65-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/174260/A_C.5_49_65-EN.pdf?sequence=3&isAllowed=y)

<sup>135</sup> Standard arbitration clause: "Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall, unless it is settled amicably by direct negotiation, be settled by arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. Such arbitration shall be conducted under the auspices of the International Chamber of Commerce (ICC) 3/ which shall also serve as the Appointing Authority under the Rules. The Parties agree to be bound by the arbitration award rendered in

privileges and immunities, which used like this "Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the United Nations, including, but not limited to, immunity from any form of legal process."<sup>136</sup>

What that standard clause might mean for contractors? Maybe that the UN may any time use it and refuse the jurisdiction of the UNCITRAL? The answer is no; the UN itself concretizes this clause, by saying that such clause does not affect the commitment to the arbitration, but it provides protection to the Organization against possible court proceedings initiated prior to or after the award.

The arbitration clause doesn't mean that the UN is waiving or refusing its immunity with regard to the certain contract and its confirmed by the immunity clause. In practice, there were no serious difficulties with these clauses and the UN has always performed its duties about accepting the UNCITRAL's jurisdiction in dispute settlement. In cases, when the contract was concluded without the arbitration clause, parties still can turn to it by simple compromise.

Bidding procedures are also fall into the scope of the first type of disputes. Such competitive procedures are required by the financial regulations and rules of the UN. The Organization is very careful with the bidding procedures in order to make it fair, however some unsuccessful participants always appear trying to prove their rightness. But, the UN have not established modes for settlement this type of dispute and there is no any judicial alternative for the claimants, except negotiations with the Organization<sup>137</sup>.

Second type of disputes, mentioned in the Section 29 of the UN Convention is - *other disputes of a private law character*. According to the report of Secretary-General disputes of a private law character includes (a) third-party claims for personal injuries (arising outside the peace-keeping context), (b) claims related to United Nations peace-keeping operations, (c) claims related to operational activities for development and (d) other claims<sup>138</sup>.

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accordance with such arbitration, as the final adjudication of any such dispute, controversy or claim." - Report of the Secretary-General *op. cit.*

<sup>136</sup> *Ibid.*, page 3.

<sup>137</sup> Reinisch, A., Kodek, G. Immunity of International Organizations and alternative remedies against the United Nations. *Op.cit.* page 23.

<sup>138</sup> *Ibid.*, page 4, Para. 9.

- Third-party claims for personal injury (arising outside the peace-keeping context). This category includes claims submitted by persons for injuries incurred on the UN premises or caused by vehicles owned by the UN or operated by its personnel for official purposes.

For the third-party claims for personal injuries the UN has created good practice of compensation, however there are some financial and procedural limits. The UN GA adopted a resolution about temporal and financial limitations in such cases.

Thus, the UN will not pay compensation if such claims were submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation<sup>139</sup>.

Furthermore, compensation for injury or loss is limited to only economic loss, which means that it would be paid only for: medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses. Compensation for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages will not be paid. Also no compensation paid for services or damages which is impossible to verify or which are not related to the dispute.

The UN GA is also fixed the maximum amount of such payment within 50 000 US Dollars<sup>140</sup>. Regarding accidents involving vehicles, in practice such compensations are paid by insurance companies, because the UN always concludes insurance agreements based on a national or international law.

- Claims related to the UN peace-keeping operations. This type is divided into two main categories:
- claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of the UN peace-keeping operation within the "mission area"<sup>141</sup>.

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<sup>139</sup> The UN GA Resolution, Third-party liability: temporal and financial limitations, (52/247 A/RES/52/247) 17.07.1998. Accessible at: [http://dag.un.org/bitstream/handle/11176/178598/A\\_RES\\_52\\_247-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/178598/A_RES_52_247-EN.pdf?sequence=3&isAllowed=y)

<sup>140</sup> Ibid., Para. 8.

<sup>141</sup> Report of the Secretary-General of the UN, *op.cit.*, page 4, Para. 15.

Mechanisms of settlement this type of disputes provided in the Status of the Force Agreement ('SOFA') agreements, that we briefly discussed in the previous chapters. The UN have a practice to conclude bilateral treaties with the hosting governments during the peacekeeping missions, such as the with the Egyptian Government in 1990 or SOFA with the South Sudan in 2011.

Parties to the agreements have agreed that the UN mission as a subsidiary organ of the UN enjoys the same privileges and immunities as the UN. Along with that, both agreements have an article about the settlement of disputes procedure between parties, where they provided a creation of Claim commission. The claim commission shall settle any dispute or claim of a private law character, not resulting from the operational needs of the mission<sup>142</sup>.

One member of the commission shall be appointed by the Secretary-General of the UN, another member to be appointed by the hosting government, and a chairman to be jointly appointed by the Secretary-General and the Government. When they fail to agree on the appointment of a chairman, the President of the ICJ shall be asked by either party to make the appointment<sup>143</sup>.

Instead of establishing a standing claims commission according to the SOFA, the UN has handled claims from local citizens through the 'claims review boards'. Although they appear to be similar to a claims commission, the fundamental differences between these two mechanisms prevent us from assimilating one with the other.

First, a claims review board, unlike the commission in the SOFA, is established as an internal body, and therefore the examination of claims is left entirely in the hands of the UN itself. A typical claims review board consists of a minimum of three staff members performing significant administrative functions. The internal and administrative (rather than judicial) mechanism is criticized for its lack of impartiality.

The problem is that it is the only mechanism available to victims, and decisions made by a claims review board are final, without any possibility for appeal. In this regard, the Human

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<sup>142</sup> The status of forces agreement between the UN and the Government of the Republic of South Sudan concerning the UN mission in South Sudan ('SOFA') 08.08.2011.

<sup>143</sup> The Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan ("SOFA"), 8th August 2011, Art.VIII.

Rights Advisory Panel ('HRAP) that was established in 2006<sup>144</sup> to investigate individual complaints of alleged human rights violations committed by, or attributable to, the UN Interim Administration Mission in Kosovo, cannot be equated with the claims review boards.

The HRAP consists of three members who act in their individual capacity and not as officials of the UN. The members are appointed by the Special Representative of the Secretary-General upon the proposal of the President of the ECtHR. Thus, the mechanism should be distinguished from the claims review boards in its impartiality.

Nevertheless, it must be noted that the UN considered the impartiality of the HRAP as acceptable since its findings and recommendations are advisory in nature. In other words, the UN is not obliged to follow the panel's recommendations. Since the findings are recommendatory and not binding, as examined below, some victims were unable to obtain redress notwithstanding the HRAP's recommendations in their favor<sup>145</sup>.

- Third-party claims arising from commercial agreements of the UN peace-keeping operation.

These type of claims are set same way as ordinary disputes arising from the commercial contracts, with exclusion, that they might be conclude by the UN or by a peace-keeping mission's administration. Nevertheless, the procedure of dispute settlement is generally amicable and if parties did not reached the consensus, dispute can be referred to the arbitrage.

- Claims related to operational activities for development.

This type is related directly to the UNDP and UNICEF in their activities in assisting in a governments developing programs. Usually parties are concluding a special agreement, where the responsibility for the third-party claims are taken by the government, because the state is the beneficiary in such programs<sup>146</sup>.

- Other claims.

In this category of disputes the UN includes claims from third-parties, who are usually litigate some political or policy-related decisions of the UN bodies such as the SC or GA. Practice

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<sup>144</sup> The Human Rights Advisory Panel, overview from the webpage <http://www.unmikonline.org/hrap/Eng/Pages/default.aspx>

<sup>145</sup> Okada Y., Interpretation of Article viii, Section 29 of the Convention on the Privileges and Immunities of the UN. Legal Basis and Limits of a Human Rights-based Approach to the Haiti Cholera Case. *International Organizations Law Review*, Volume 15, Issue 1, page 52.

<sup>146</sup> Report of the Secretary-General of the UN, *op. cit.*, page 4, Para. 22.

showed that in most of the cases they seek for a financial compensations for losses they suffer from that decisions. Also, the category includes numerous claims from job candidates, who were not selected for the UN positions. The Secretary-General in his report sets the UN's policy towards such kind of claims as refusing to engage to such litigations. The UN will answer on them but without involving into any arbitration<sup>147</sup>.

2. Within the second group we would like to bring examples of some of the UN specialized agencies, to demonstrate how their dispute settlement mechanisms are developed.

- The IMF related to the UN specialized agencies so the UN Convention on immunities of specialized agencies is applicable here. For the resolving work-related disputes IMF have created certain procedures. The internal dispute settlement system of IMF constitutes of informal and formal procedures.

Informal procedure means the Office of the Ombudsperson which serves to the staff for the informal dispute settlement. The use of the Office is voluntary, so it won't be an obstacle to use formal procedure at first.

The formal procedure is the Administrative tribunal which is a judicial organ for resolving disputes between the IMF and its staff. The Tribunal is consists of five members, including the President. The decisions of the Tribunal in a case are taken by a panel composed of the President and two other members designated by the President.

The IMF asserts the Tribunal is an independent in performing their duties. This confirms also by the election procedure of the members of Tribunal. According to the Statute of the Tribunal, the President is appointed for four years by the Managing Director after consultation with the Staff Association and with the approval of the Executive Board and other members are appointed for four years by the Managing Director after appropriate consultation<sup>148</sup>. Such system of election seems more fair, than the UN's one.

- The ILO.

It would be inappropriate not to mention here the ILO system of internal dispute settlement, the organization which at first hand sets international labor standards and work with other labour issues is also the UN's specialized agency. ILO created an Administrative Tribunal for

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<sup>147</sup> Ibid., page 4, Para. 23.

<sup>148</sup> Statute of the Administrative Tribunal of the International Monetary Fund (as amended 2009).

resolving work-related disputes. Interesting fact is that besides ILO staff the compliant to the Tribunal can be filled also by other IOs staff, which accepted the jurisdiction of the ILO Tribunal. Among them such IOs as WHO, UNESCO, WTO, IOM, even ICC and many other world known organizations<sup>149</sup>.

The Tribunal is composed of seven judges who must be of different nationalities, they are appointed by the International Labour Conference on a recommendation of the Governing Body of the International Labour Office for a renewable period of 3 years. The Tribunal meets normally twice a year, in spring and autumn, for a period of 3 to 4 weeks, at the headquarters of the ILO in Geneva. At each session it delivers approximately 90 judgments<sup>150</sup>. The procedure is timely fixed and to exhaust all internal remedies of the organization is obligatory before the filling complaint to the Tribunal<sup>151</sup>.

### 3. EU.

The justice system of the EU is differs from that we looked above. It has not strictly internal mechanisms, it is more common for internal and external disputes.

The European Ombudsman is one of the EU bodies, which investigates complaints against EU institutions, bodies, offices and agencies. Such complaints may be lodged by citizens or residents of EU countries or by EU-based associations or businesses. After the investigation, the Ombudsman can make recommendations to the EU institution and if these are not accepted, even make a report to the EU Parliament for taking an appropriate action. Ombudsman is selected by EU Parliament for 5 years term<sup>152</sup>.

Court of Justice of the European Union (CJEU) is working strictly with the EU law, it interprets it to make sure that the law is applied same way in all EU countries. Besides interpretation, the CJEU can also enforce the law, annual legal acts, ensure the main EU institutions taking action and even sanction EU institutions (for damages) protecting interests of any person or company which interests were harmed<sup>153</sup>.

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<sup>149</sup> ILO Administrative Tribunal. Membership. Table is accessible at: <https://www.ilo.org/tribunal/membership/lang--en/index.htm>

<sup>150</sup> ILO Administrative Tribunal. Information accessible at: <https://www.ilo.org/tribunal/about-us/lang--en/index.htm>

<sup>151</sup> Practical guide to the procedure before the ILO Administrative Tribunal. Internal information is accessible at: <https://www.ilo.org/tribunal/advice-to-litigants/lang--en/index.htm>

<sup>152</sup> European Ombudsman. An overview. Accessible from the European Union website [https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman_en)

<sup>153</sup> Court of Justice of the European Union. Overview. Accessible at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en)

Despite that the court is working only on EU law, the variety of applicants can be extensive, such as national courts of the member states, private persons and companies, EU institutions. Application to the court may be lodged directly in certain circumstances or indirectly through the national courts. The court consists of 52 judges, 2 per each member state.

European Court of Human Rights (ECtHR) is dealing with interstate and individuals applications regarding the violations of the European Convention on Human Rights<sup>154</sup>.

#### 4. NATO.

The Agreement on the status of the NATO contains the same provision as the UN's Convention Section 29 about the obligation to settle the disputes. Article 24 of the Agreement sets out the obligation to the NATO's Council to make an appropriate modes of settlement disputes arising out of contracts or other disputes: of a private character to which the NATO is a party; involving any official or expert of the NATO<sup>155</sup>.

For disputes arising from the commercial activities the NATO have created a special arbitration clause, which provides that in case of a dispute was not settled amicably, it will be settled by the arbitration tribunal. The tribunal consists of three arbitrators, two of them appointed by the parties and the third one by these two arbitrators. In case of the third arbitrator will not be appointed the right to appoint him is delegated to the Secretary General of the Permanent Arbitration Court in The Hague<sup>156</sup>. However, the procedure of settlement of other disputes of a private law character, which were defined by the UN, is not defined by the NATO Council.

As an example of negative practice, we can bring the case *El Hamidi v. NATO*. The application was submitted to the Belgian courts as the host state for the NATO headquarters. El Hamidi is a Libyan national who lost his entire family, children in a raid conducted by NATO warplanes against his home in Sorman Libya on June 20, 2011<sup>157</sup>.

The applicants used the NATO Ottawa agreement article about "abuse of immunity" and the ECHR in particular on Article 2 and Article 6 - deprivation of the right to life claim and the right to fair trial. Argue for the legal process was the NATO's lack of an internal mechanism for resolving his claim against it.

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<sup>154</sup> European Convention on Human Rights, *op.cit.* Art. 34.

<sup>155</sup> Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa, *op. cit.*

<sup>156</sup> NATO General Administrative Clauses. Accessible at: <https://www.nato.int/structure/procurement/gac.html>

<sup>157</sup> Press Release, Khaled El Hamedi will not stop his fight against NATO, 20.01.2018. Accessible at: <https://arretsuri.ch/khaled-el-hamedi-will-not-stop-his-fight-against-nato/>

However, the court declined the claim holding the NATO's immunity and referring that the claimant have no right to refer on Ottawa convention as only parties can; also regarding the ECHR the claimant is not a resident of a member states to the ECHR, so he cannot refer on it either<sup>158</sup>. The applicant is still trying to bring NATO under responsibility using different ways; despite that case, NATO is still did not settle alternative dispute mechanisms in order to deal with such claims and the proper remedy against abuses is absent.

One more case against NATO, which is connected to the international standards of dispute settlement is Gasparini v Italy and Belgium in the ECtHR. It is a labour dispute, as the applicant was recruited by the NATO in 1976 till 1999 when the Organization decided to raise the rate of staff contributions to the pension scheme<sup>159</sup>. So the applicant claimed to the internal Appeals board of the NATO, which later rejected his claim. Applicant challenged the procedure of the internal body before the ECtHR, according to the Article 6 of the ECHR he claimed that the internal procedures was not fair, not held in public and the members of the Appeal board were lack of impartiality<sup>160</sup>.

The ECtHR had examined the case and applied international standards for the dispute settlement. In consequence the application was declined, because the existing procedures were not found "manifestly deficient<sup>161</sup>", thus the members of the Appeal Board even so were selected by the NATO Council, are outside the Organization and had to be competent in a required field. In our view, the fact that members of the dispute settlement body are selected only by the Organization already does not meet the standard of impartiality.

Estonia is a Member of NATO and even hosts a military forces of the Organization. Thus, Estonia have signed an agreement with the government of the USA on Defense cooperation, regarding the US forces represented in the territory of Estonia within the NATO framework; the agreement was ratified by the Riigikogu (Estonian parliament) in the June 2017. According to the Article XII of this Agreement, with the request of the US, Estonia have waived its primary right to exercise on its territory criminal jurisdiction over members of the US forces; but this waiver might be withdrawn by providing a written statement<sup>162</sup>.

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<sup>158</sup> Olson P., Immunities of International Organizations: A NATO View. *International Organizations Law Review*, Volume 10, Issue 2, (2014), page 425.

<sup>159</sup> Case ECtHR Gasparini v. Italy and Belgium - 10750/03 Decision 12.5.2009.

<sup>160</sup> Ibid, Information Note on the Court's case-law No. 119.

<sup>161</sup> Case ECtHR Gasparini v. Italy and Belgium - 10750/03 Decision 12.5.2009.

<sup>162</sup> Agreement on the defense cooperation between the Government of the USA and the Government of the Republic of Estonia 17.01.2017.

This case of the delegating criminal jurisdiction is not new, it was already provided within the NATO status of the forces agreement, where Article VII states that “the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction over all persons subject to the military law”; however, if the offence is not punishable by the law of the sending state, the receiving state has an exclusive jurisdiction in such cases<sup>163</sup>.

There is nothing about the civil jurisdiction in the bilateral agreement on Defense cooperation, but in the NATO Status of forces agreement is stated that the civil jurisdiction over the members of forces and civilian component is belonged to the receiving state, except “in a matter arising from the performance of his official duties”<sup>164</sup>.

That means the functional immunity and as we passed from the previous chapters, regarding the NATO, it has not set a procedures about the resolving disputes of a private law character, which may cause a collision between parties, as functional immunity term can be understood in a broad way not in favor of the receiving state. In practice, there were no accidents with the US forces in Estonia yet, as just one year passed. Nevertheless, it is always good to prevent such collisions and set the list of possible civil disputes and their settlement mechanisms in advance; to determine such kind of disputes can help the UN model that we already described.

The next subchapter will explore waiver of immunities as the remedy against abuses, it is mentioned separately as the procedures are somehow similar between IOs.

### **3.2. Waiver of immunities**

One of the remedies against abuses can be considered the institute of waiving jurisdictional immunity. Waiver means a relinquishment of a certain right, in our case a jurisdictional immunity. Usually, the relinquishment of a certain right may be voluntary or implied, but in

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<sup>163</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces 19 June 1951.

<sup>164</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces 19 June 1951. Article VIII & 5g.

case of the UN and majority of IOs the procedure of waiving the immunity is always voluntary and implied waiving may not be maintained<sup>165</sup>.

Immunity does not exempt officials of the IOs from local laws, it is given to protect from prosecution. It means that IOs staff are obliged to follow domestic regulations the same as local citizens do. They must respect local laws and fulfill their private legal obligations. Immunity should be used only when the interests of the organization so require. If an international civil servant violates the law by committing an act in respect of which he enjoys immunity, the state in question may ask the organization to waive the immunity. Such a waiver will often be granted<sup>166</sup>.

In the CPIUN the waiving of immunity is mentioned several times: Member states have a right to waive immunity of its representatives; the Secretary-General have a right to waive immunity from the UN's officials and experts, in case of Secretary-General the UN SC have a right to waive an immunity; even immunity of the UN's property, funds and assets may be waived by the UN itself<sup>167</sup>. The procedure of waiving and form is not described in the CPIUN. But the waiver should be in every particular case and must be made expressly, such permission is also limited by the restriction that waiver cannot extend to any measure of execution<sup>168</sup>. That is also mean, waiver cannot be given for future and should be expressed in each case carefully.

According to the CPIUN the UN's Secretary-General not only have a right to waive the immunity of the UN but he is under the duty to waive it when, in his opinion, failure to do so would impede justice without prejudicing the interests of the UN. Some might think that it is an imperative norm and it is an obligation to waive immunity involving serious human rights violations, but as we learned from practice and Haiti cholera case, the waiving of immunity of the UN is the right without an appeal.

However, this case proceed from the functions of the UN mission, with regard to the cases which are not directly proceed from functions it is different. For instants, the Secretary-General has indicated that in certain serious cases like child abuses an investigation is required, and waiver is obligatory, when an internal investigation has determined that the accused is "guilty."

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<sup>165</sup> Singer, M. (1995). Jurisdictional immunity of international organizations: Human rights and functional necessity concerns. *Virginia Journal of International Law* 36(1), 53-166, page 73.

<sup>166</sup> Schermers H. G., Blokker N. M., *op. cit.*, page 387.

<sup>167</sup> CPIUN, *op. cit.*, Section 2,14,20, 23.

<sup>168</sup> *Ibid.* Article 2.

In that case investigation are most often conducted by the UN Board of Inquiry (BOI). A BOI generally consists of a small number of international staff appointed by a civilian commissioner. Than a BOI may make a recommendation about immunity to the Special Representative of the Secretary-General who, if the facts warrant, would pass that finding on to the Secretary-General<sup>169</sup>.

Despite that, the practice of waiving the UN's officials immunity is very poor. The only precedent that we have found was in 2005 when the former Secretary-General Kofi Annan had waived the immunity of the chairman of a General Assembly advisory committee who was arrested by United States officials in connection with the investigation of a former procurement officer accused of soliciting kickbacks during UN's Iraq Oil-for-Food-program<sup>170</sup>.

Car accidents are one of the most frequent violations by IOs staff, therefore some of IOs excluded these violations from their immunity. For example Netherlands, one of the countries, who are more often not willing to grant immunities from traffic violations and car accidents. Their position is that all privileged persons are liable for traffic offences and obliged to pay fines<sup>171</sup>. Moreover, they have achieved the exclusion of the immunity of staff members of IOs for traffic violations under administrative, civil and criminal law from many of bilateral headquarter agreements<sup>172</sup>. Thus by the domestic law, the states achieved the exclusion of this type of violations for all of IOs headquarters situated within the Netherlands.

Concerning the UN, they refused to make a general waiver for traffic violations. For states, it is sensitive issue, and immunity for such violations is very unpopular among states. There was a case in 1946 *Complaint of Donnelly v. Ranollo* in the US court. The UN's chauffeur was sued for the exceeding the legal speed limit. The US court did not recognized the immunity, considering that it would be unfairly to be immune from punishment for violation for which average american would be punished and create a preferred class<sup>173</sup>.

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<sup>169</sup> Rawski, F. (2002). To waive or not to waive: Immunity and accountability in UN. peacekeeping operations. *Connecticut Journal of International Law* 18(1), 103-132, page 114.

<sup>170</sup> Secretary-General waives immunity of Assembly committee chairman arrested by US, 2.09. 2005. The UN news – Accessible at: <https://news.un.org/en/story/2005/09/151242-secretary-general-waives-immunity-assembly-committee-chairman-arrested-us>

<sup>171</sup> Protocol Guide for International Organizations. Protocol and Host Country Affairs Department Ministry of Foreign Affairs of Netherlands, June 2018 , page 24.

<sup>172</sup> Agreement between the Organization for the Prohibition of Chemical Weapons and the Kingdom of the Netherlands concerning the Headquarters of the OPCW (33757), 29.04.1997, Art. 4.

<sup>173</sup> The USA City Court of New Rochelle *County of Westchester v. Ranollo.*, 08.11.1946

Legally, the judgment seems to be wrong, as the UN did not waive the immunity from the employee.

The Convention of the specialized agencies also contains the waiving of immunity provisions, almost similar to UN's, except the person who has a right to waive, usually it is a president of a certain organization, but we will look more detailly further.

Existence of certain privileges and immunities of IOs also imposes certain obligations on member states, mostly to refrain from some actions, for example not to start legal proceedings with respect to the General Convention or other headquarter agreements.

For example, the case, when the ICJ gave its Advisory opinion on the legal question of the applicability of Article VI, Section 22 of the General Convention to a Special Rapporteur of the Commission on Human Rights, and on the legal obligations of Malaysia in that case<sup>174</sup>. Mr. Cumaraswamy was the UN's Special Rapporteur in Malaysia, where he was facing several lawsuits from plaintiffs who asserted that he had used defamatory language in an interview, but as Mr. Cumaraswamy was giving that interview during the performance of his official functions the court held that he has privileges and immunities according to the Section 22 of the General Convention and the Government of Malaysia had not acted in accordance with its obligations under international law<sup>175</sup>.

Thus, the Court stated that the national courts knew the case involved the UN's agent, but they had no any communication with the UN Secretary-General about the immunity and its waiving.

The EU applies the same principle, and right to waive an immunity belongs to the each institution management to decide and such a waiver should not be contrary to the interests of the EU. For example, with regards to the members of the Parliament, it is the European Parliament who have a right to waive an immunity of its members<sup>176</sup>. There is a clause, which provides compulsory waiving, Article 9 states that "Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members."<sup>177</sup> We can

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<sup>174</sup> ICJ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory opinion (100), 29.04.1999.

<sup>175</sup> Ibid. page 88.

<sup>176</sup> Protocol #7 on the privileges and immunities of the European Union, *op.cit.* Art 9.

<sup>177</sup> Ibid. 9 (5)

interpret it as the Member of Parliament still have immunity, even so he was found in the act of committing the offence.

The procedure of waiving can be ordinary and urgent. Requests for the waiver or the defense of immunity are announced in plenary and dealt with in camera by the Committee on Legal Affairs, (CLA) than the decision is taken by the Parliament itself. The urgent procedure allows the President of the EP to take an initiative when the member has been arrested or had his freedom of movement curtailed in apparent breach of his privileges and immunities. Before taking such a decision, the President must consult the chair and rapporteur of the CLA, than notify the committee of that initiative and inform Parliament.<sup>178</sup> But, to the present days there were no cases of waiving immunity from EU officials.

In NATO the obligation to waive immunity is belonged to the Chairman of the Council Deputies. As in UN case, the waiver is not extended to the execution and in addition NATO had precisely mentioned that is not extending the waiver on detention of property<sup>179</sup>.

Drawing the conclusion from the above, we can consider the waiver of immunities as a conditional remedy against abuses for the following reasons:

first of all, the waiver is carried out literally by the organization itself and its officials, who legally have the right to waive and represents IO which might be understood as lack of impartiality. Moreover, IOs usually mention that the waiver shall be made when it is not contrary with the interests of the organization. Secondly, there is no any remedy in case of IO refuses to waive immunity.

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<sup>178</sup> Directorate General for Internal Policies of the European Parliament The immunity of members of the European Parliament. Legal Affairs. In-depth analyses, *op. cit.*, page 25.

<sup>179</sup> Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa, *op. cit.*, Art. V.

## CONCLUSION

Current Thesis was aimed at first to establish the scope and content of the jurisdictional immunity of IOs. During the research, we have explored numerous of IOs and revealed most important and interesting of them for our field of study. Summarizing the information, we can conclude that IOs have a limited legal personality, which depends on the purposes of the organization and for the fulfillment of its purposes IOs have their functions (rights and obligations).

After the reviewing constituent documents of some of IOs we have found that IOs usually have a specific aim and goals for which they were created, but the listed functions are uncertain. Indeed, to make a closed list of functions for such organizations like the UN, NATO or EU would be problematic as the spheres they cover are very wide and global. Even less powerful IOs for the fulfillment of their purposes act in a different fields, thus they have to hire personal, order some goods and services, deal with transport issues and it is the very minimum of acts that every legal entity usually do. Hence, the task to make a closed, strict and precise list of rights and duties of IO beyond which it cannot act is extremely difficult and inappropriate in current quickly changing realities.

As a jurisdictional immunity of an IO based on its functions, which are uncertain, the problem that we mentioned in the introduction arises. The author briefly explored the functional necessity theory of the granting jurisdictional immunity to the IOs. The theory is accepted by majority of scholars, IOs and courts as a main reason why immunities were granted to the IOs. Some of IOs, as the UN, have a global functions, which might include certain interference in the domestic issues of the states, so the purpose of granting the immunity is to secure IOs from the interference of states and other persons.

We agree with the statement that IOs need jurisdictional immunity for the fulfillment of its purposes and for independent exercise of their functions. The answer to the first research question whether IOs need a special protection is yes, IOs have to be independent from the influence of state-members and other states; provided immunity from jurisdiction of domestic courts and other authorities as well as international judicial organs helps IOs to perform their functions properly.

After we have figured out, that the list of IOs functions cannot be exhaustive, we can understand why the scope of their immunities is not precisely mentioned. By pointing that an IO shall have such immunities that are necessary for the fulfillment of its functions, the member states make the scope of immunity dependent from the functions of IOs. This is the most common wording among IOs with regard to the granting immunities.

Summarizing the scope of jurisdictional immunity of reviewed IOs we can conclude that in general IOs have an absolute immunity regarding their premises, assets, funds and archives; all of them are inviolable and exempt from any procedural actions of a state. High officials of the IOs have a status similar to diplomatic envoy which also implies an absolute immunity

approach; in addition diplomats as we know have no jurisdictional immunity from the state where he is national, but it is not applicable to the high officials, as IOs have no their own territory. Other officials and experts of the IOs in majority have purely functional immunity from every form of legal process, unless it was expressly waived by the organization. Here, we can answer on the second research question of whether current immunities of IOs considered as absolute or restrictive?

Theoretically IOs and states prefer to use functional immunity, with regard to the jurisdictional immunity of IOs. Functional immunity might be considered as restrictive one, as it is limited by the functions of a certain IO. Indeed it is functional, however it does not mean that immunity is not absolute. If we proceed from the treaties for example CPIUN or the NATO Ottawa agreement, we can conclude that immunity of these IOs is absolute.

There are at least three reasons of why we came to this conclusion. First of all, as we already revealed, the scope of jurisdictional immunity of the UN, NATO and most of other IOs is unspecified as based on their functions; secondly, international treaties that regulate immunity use such absolute wordings like inviolability, “from every form of legal process” and diplomatic envoy; Third is that the only remedy to sue IO and hold it accountable based on the studied treaties is the waiver of immunity, and this procedure can be exercised only by the organization itself.

The first part of our conclusion is confirming the hypothesis about that precise determination of the scope of immunities is impractical and unrealistic in a current circumstances.

There is a common obligation for IOs to create modes of alternative dispute settlement mechanism for certain types of disputes. It is seen as an option in case of IOs abuses of immunity. The author agrees that these mechanisms may be a good alternative to the jurisdictional immunity, however, they are not fully effective because of the following shortcomings we have revealed:

- Category of disputes, that fall into the obligation of IOs to provide modes of alternative settlement mechanisms are not defined by all of the organizations, for example they are worked out for the UN and its agencies, but not in case of NATO.
- Even in case of such alternative mechanisms are legally defined, in practice they may not be created. For instant, claim commissions within the UN Status of Force Agreements have never been created in history of the UN peacekeeping missions.

- Some of existing alternative mechanisms are criticized for the lack of impartiality, as the UN's claims review board which replaces claims commissions; claims review board is an internal body which members are appointed by the UN.
- The last shortcoming is related with the court practice which we will discuss further.

To provide an appropriate modes of settlement disputes is a legal obligation of IOs not only under their treaties, but also under international human rights law. Despite that majority of IOs are not signatories to the core human rights treaties, like the UDHR or ICCPR, they are separate subjects of the International Law possesses legal personality, hence they are under obligation to respect human rights. Moreover, many of fundamental human rights became a customary international law, which is obligatory to follow by all persons of International law. The only exception is the EU in connection with the ECHR, as the Convention is binding for the EU.

We have examined the jurisdictional immunity of IOs in relation with the human right of access to justice as one of the fundamental human rights. The right is mentioned in all of the core Human Right documents as well as in the domestic legal system of many states. Even so it is not clear whether the right become a customary international law, from the court practice we can assume that it is so, as courts are unanimous with that the very essence of the right should not be infringed. Many of IOs have among functions to respect and protect human rights, which means that they should act in a way not to violate such rights.

The obligation to provide an alternative dispute settlement mechanisms of IOs can be considered as a guarantee of the right of access to justice, however, after analyzing the court practice we can conclude that there is lack of any measures for failure to fulfill this obligation. Moreover, international courts are not always coherent in their decisions regarding jurisdictional immunity, the right of access to justice and the obligation to provide alternative dispute settlement mechanisms.

Thus, in the case of *Wait and Kennedy v. Germany* one of the reasons of why ECtHR rejected the claim was the existence of alternative dispute settlement mechanism provided by the organization such as Appeal Board. In case of *Stichting mothers of Srebrenica v. Netherlands* the ECtHR admitted the fact that the UN had not made an alternative modes of settlement disputes, however decided that the absence of such modes and recognition of the jurisdictional immunity does not follow the violation of the right of access to justice; similar decision was in

Haiti cholera case in the USA courts. In our view, the differences in the court decisions are also linked to the type of the Organization. The UN can be considered as most powerful IO, even so the violations in Srebrenica and Haiti Cholera cases was connected to grave harm, courts are still not willing to refuse its immunity.

Nevertheless, the practice is slowly changing in some domestic courts, as the cases in French and Belgium courts, which says that the absence of alternative mechanisms is infringing the right to justice. The practice of international and domestic courts is not coherent, and decisions towards most powerful organizations like the UN, NATO did not change.

The case law confirms an absolute character of the jurisdictional immunity of the UN by deciding that the obligation to provide appropriate modes of settlement disputes is not a precondition to the applicability of the jurisdictional immunity.

Alternative dispute settlement mechanism of IOs even if it exists usually does not corresponds to the standards of human right of access to justice, as the very essence of this right includes a “fair hearing by an independent and impartial tribunal<sup>180</sup>”, whereas current modes are lack of impartiality as settled in majority by the IOs itself and governed by its internal rules. However the Un have a good practice here, as for example judges of the UN administrative tribunal are selected from the representatives of different member states.

The impunity of IOs for failure to comply with the obligation to make provisions for appropriate modes of settlement disputes may be the reason of why some IOs still did not provide such an alternative. Nevertheless, the different views of the above mentioned courts towards a jurisdictional immunity and the right of access to justice might be also interpreted in a positive sense. As there is no a hierarchy between international judgments, we can assume that in the case of Waite and Kennedy court have highlighted the importance of the alternative mechanisms.

There are also other positive moments of the alternative mechanisms, for example, disputes arising out of a commercial contracts and lease agreements of the UN are well decided under the UNCITRAL rules. Disputes arising out of vehicle accidents are decided with the UN’s insurance. Other IOs are also actively using arbitration with regard to the contracts. There is

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<sup>180</sup> UDHR, *op.cit.* Art. 10.

also a tendency when some of IOs are limiting their immunity in case of vehicle accidents and some civil actions.

The obligation to provide alternative mechanism is mentioned in most of legal documents of IOs, even so it might not be a precondition to the jurisdictional immunity, the obligation itself is provided. Even if the claims commission within the UN SOFA agreements was never established, the commission itself and the procedures are well written. As such agreements are bilateral it is up to states to insist on creating such impartial bodies. For instant, the NATO and Estonia agreement regarding the US forces represented in the territory of Estonia within the NATO framework. Alternative mechanism was not set by the parties, despite that its creation is provided by the NATO Ottawa agreement.

This positive practice and the fact that the obligation to provide alternative mechanisms set in the legal documents confirms our second hypothesis about the possibility to establish an impartial dispute settlement mechanism as an alternative to the jurisdictional immunities of IOs. It might be that IOs are not interested in the establishment of such bodies, so the states have to insist on that, as the states are direct members to the human rights treaties and states must secure human rights.

Therefore, we would like to recommend first of all that states negotiate with IOs within bilateral Headquarter agreements in order to set independent and impartial bodies as an alternative mechanism for dispute settlement, as states have certain advantage - absolute sovereignty within the territory, eventually it is states who host IOs. Good example that we mentioned before is the Netherlands, which achieved certain exclusions from the IOs immunity.

Secondly, to create alternative modes for settlement disputes is in favor of IOs, as the practice in domestic courts is slowly changing towards the right of access to justice, in order not to deal with courts as in Waite and Kennedy case IOs should establish such modes.

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