Immunity of International Organisations Discarded?

Elizaveta Samoilova 2022-12-12T08:00:27

Do international organisations enjoy immunity from jurisdiction under customary international law? In a recent ruling, Austria's Constitutional Court answered that question in the negative. The ruling arose in the context of an employment claim filed against the Organisation of the Petroleum Exporting Countries (OPEC). The Constitutional Court dismissed the argument that OPEC enjoys (absolute) immunity from the jurisdiction of Austrian courts under customary international law. This blogpost analyses this ruling and argues that, on the merits, the Constitutional Court was correct to do so. However, the Court has not sufficiently addressed the argument of immunity under customary international law.

Background of the Case

A former employee of the Organisation of the Petroleum Exporting Countries (OPEC) lodged a wrongful termination action before the Austrian civil courts. The court of first instance dismissed the claim for lack of jurisdiction. Pointing to Art. 9 of the Austria-OPEC Headquarters Agreement (AOHA), the court held that OPEC enjoys immunity from the jurisdiction of Austrian courts. Art. 9 AOHA provides that OPEC and its property is immune from "every form of legal process" unless OPEC has expressly waived its immunity in a particular case.

The claimant lodged a constitutional appeal ("*Parteiantrag auf Normenkontrolle*") before the Austrian Constitutional Court, essentially arguing that Art. 9 AOHA is irreconcilable with the right to a fair trial under Art. 6 of the European Convention of Human Rights (ECHR). Since the ECHR enjoys constitutional law status in Austria, the Austrian Constitutional Court has the power to review national law and international agreements concluded by Austria directly against the standard of the ECHR. The claimant requested that Art. 9 AOHA should be declared unconstitutional and set aside.

The argument that customary international law confers immunity to international organisations such as OPEC came into play at the admissibility stage of the appeal proceedings. In outline, the Constitutional Court accepts appeals only if they are admissible. As the defendant in the proceedings before the Constitutional Court, the Austrian government argued that the appeal is inadmissible. In that regard, it submitted that setting aside the relevant provisions of the AOHA would not affect OPEC's immunity, since its immunity was already enshrined in customary international law.

The Ruling of the Constitutional Court

In its ruling No. SV 1/2021, published on 20 October 2022, the Constitutional Court dismissed the government's argument that OPEC is immune from the national courts' jurisdiction under customary international law. Concluding that the appeal is admissible, the Court stated that "[i]t is not to be assumed that a general practice recognised as law […] exists according to which Austria would be obliged in any case to grant immunity to an international organisation of which Austria is not a member, if no adequate alternative legal remedy exists for the settlement of employment disputes" (para. 42, translation by the author). To that extent, the Constitutional Court was "unable to identify any customary international law that would prevent it – in line with the government's argument – from considering the applicant's concerns" (*ibid*., translation by the author).

On the merits, the Constitutional Court recalled the case law of the European Court of Human Rights (ECtHR) on access to a court in the context of the immunity of international organisations by paying special attention to the *Waite and Kennedy* doctrine (paras. 50-53). According to this doctrine, granting an international organisation immunity from national jurisdiction is permissible under the ECHR if it is "proportionate", meaning that "reasonable alternative means" must exist to effectively protect the rights of individuals under the ECHR.

Drawing on the ECtHR's case law, the Constitutional Court ruled that, as long as there is no adequate mechanism for the settlement of employment claims against the OPEC, Art. 9 AOHA was not "proportionate" (para. 57). The Court thus concluded that exempting the international organisation from national jurisdiction in the case at hand was not in accordance with Art 6 ECHR. As a result, the Constitutional Court declared Art. 9 AOHA as being unconstitutional (para. 58).

Remarkably, this was the very first time the Constitutional Court has done so with regard to provisions of an international treaty. Since the entry into force of the relevant provision of Austrian Constitution in 2012, the Constitutional Court seems to avoid making use of its power to declare international agreements concluded by Austria unconstitutional. With the presented ruling, the Constitutional Court has crossed this Rubicon, making this a truly historic decision.

Analysis

From the perspective of Art. 6 ECHR, the Constitutional Court's ruling is certainly commendable. The right to access to a court underpins the rule of law and is a salient feature of international (human rights) law. And while the Court's reasoning on Art. 6 ECHR is principled and builds on a comprehensive body of ECHR case law, its conclusion on the immunity of international organisations under customary law is insufficiently reasoned.

Indeed, the Constitutional Court's finding on OPEC's immunity comes as somewhat of a surprise, given that immunity of international organisations from national jurisdiction is a largely accepted principle of international law. In essence, it shall protect international organisations from interference and influence by state authorities (cf. the Austrian Supreme Court judgements 7 Ob 627/91 and 6 Ob 150/05k).

According to the prevailing legal opinion in Austria, the jurisdictional immunity of international organisations is absolute, i.e. – in contrast to the immunity of states – it is not limited to certain acts, because all acts performed by the international organisation must necessarily relate to its organisational purpose (cf. the Austrian Supreme Court judgement 10 Ob 53/04y; for a more detailed analysis of Austrian case-law see Schmalenbach and Reinisch).

The legal basis for the jurisdictional immunity of international organisations can usually be found in international agreements (such as headquarter agreements), but also in national laws or customary international law. The latter has been controversially discussed in the literature (cf. Okeke and Reinisch), with authors taking dissenting views on whether or not the abundance of relevant treaties reflected the emergence of a corresponding rule of customary international law. According to Wood, for example, "one cannot deduce from the treaties any general practice on conferring immunity (…) on international organizations, still less any widespread *opinio iuris* in the matter". In the jurisprudence, however, the existence of immunity of international organisations under customary international law has already been confirmed by the Austrian supreme court (cf. the Austrian Supreme Court judgement 6 Ob 150/05k) as well as numerous other courts, such as the Rechtbank Maastricht, the Italian Corte Suprema di Cassazione, the Netherlands' Hoge Raad and the Tribunal des Prud'hommes du Canton de Genève.

At first blush, the Constitutional Court's cursory statement on the immunity of international organisations under customary international law could be understood as a dismissal of the concept as a whole. This would mean that, in the eyes of the Constitutional Court, there is no customary international law at all that would grant international organisations immunity from national jurisdiction. The Constitutional Court did not engage with the argument put forward by the Austrian government and the above-mentioned case law in greater detail.

However, the Constitutional Court's statement could also be interpreted as a mere rejection of *unlimited* immunity of international organisations under customary international law. This would mean that customary international law does, in fact, confer jurisdictional immunity to international organisations; at the same time, however, it does allow for exceptions regarding legal protection in the sense of the ECtHR's case law. Ultimately, this would imply that the Constitutional Court has assumed that the *Waite und Kennedy* doctrine is also part of customary international law.

Conclusion

Even if one were to favour the second interpretation of the Constitutional Court's ruling, its standing on immunity of international organisations under customary international law remains unclear. After all, the Constitutional Court did not give further explanations as to why it assumed that there is no such customary international law. The overall result of the ruling, however, is very much to be welcomed, as it strengthens the right to access to a court as a core element of the rule of law.

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