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Litigating the Immunities of International Organizations in Europe: The 'Alternative-Remedy' Approach and its 'Humanizing' Function

RESEARCH ARTICLE

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ABSTRACT

There is a clear normative tension between the immunities of international organizations and the human rights to a court and to a remedy. Most national jurisdictions around the world have so far failed to recognize such a normative conflict and applied immunities irrespective of their consequences on individual claimants. However, following the *Waite and Kennedy* jurisprudence of the European Court of Human Rights, a number of European national jurisdictions have accepted the idea that applying international organizations' immunities may lead to breach the right to a court in case the claimants do not have access to an alternative remedy. This contribution focuses on the latter approach, which will be called 'alternative-remedy approach'. Drawing upon Gunther Teubner conceptualization of fundamental rights, it stresses the violence of the today's prevalent approach toward immunities, and maintains that, by refocusing the decision-making process on the situation of individual claimants, the alternative-remedy approach 'humanizes' a decision-making process otherwise blind to the fate of human beings in flesh and blood. The ambiguity of the European Court of Human Rights' jurisprudence as to the relevance of the alternative-remedy standard is also discussed, together with the consequences it had on the case-law of European national courts.

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1. INTRODUCTION

Cercavi giustizia,
ma trovasti la legge.
(You were looking for justice,
but found the law)[1]

The jurisdictional immunities that international organizations enjoy under international law, are generally considered necessary to protect the operational autonomy of these institutions.[2] Their application by national courts, however, may contradict and even breach, the obligations of States to respect the right to a court and the right to a remedy of the individuals subjected to their jurisdiction.[3] While this normative tension is particularly problematic and potentially immobilizing, most national jurisdictions around the world have so far ignored it, upholding immunities irrespective of the consequences they may have on human rights.[4] Nevertheless, this is not true for all national courts. Following and reinterpreting the *Waite and Kennedy* jurisprudence of the European Court of Human Rights (ECtHR), a number of European national jurisdictions have accepted the idea that applying international organizations' immunities may lead to breach the right to a court in case the claimants do not have access to an alternative remedy.[5] In several cases, they have even denied immunity to the organizations which had failed to put in place an effective dispute-settlement mechanism.[6]

While the former approach ignores the concrete consequences immunity may have for individual claimants, the latter approach – which I will call the 'alternative-remedy approach'-places them at the centre of the legal decision-making process. This difference is crucial, as it concerns the capacity of the legal interpreter to consider the position of human beings in flesh and blood when performing abstract legal operations and the responsiveness of the international legal system to human suffering. Denial of justice can indeed cause psychological suffering, and human rights exist with the specific purpose of protecting human beings against such painful experiences. Ignoring these norms and the interests they protect when applying immunity, as most national courts would do, clearly constitutes a violent act. However, by recentring the relevant decision-making process on the question of whether the claimants will have a concrete possibility to have access to justice, the alternative-remedy approach has the potential to 'humanize' the process by which legal interpreters (especially judges) apply immunities, i.e. to make it more responsive to the position of individuals and avoid the occurrence of denials of justice.

This contribution focuses on the 'alternative-remedy approach' to the normative tension between the jurisdictional immunities of international organizations and the right to have access to a court. The discussion proceeds as follows. Section 2 analyses the normative conflict between the immunities of international organizations, and the human rights to a court and to a remedy. It discusses how this conflict has been addressed by national courts, and stresses the violence implied in the practice of applying immunity irrespective of its consequences on individuals. Section 3 focuses on the alternative-remedy approach in the jurisprudence of the ECtHR, with particular attention to the 'reasonable alternative means' standard. Section 4 casts a glance at the relevant practice of European national courts, with particular regard to the way in which they have interpreted the case-law of the ECtHR. This jurisprudence has already been studied by legal scholars, especially in the first decade of this century. But while most authors have highlighted a tendency towards the limitation of immunities based on human rights considerations, this contribution highlights the ambivalent nature of Strasbourg case law with regard to the immunities of international organizations. It will stress that while *Waite and Kennedy* prompted a number of national courts to adopt the 'alternative-remedy approach', the jurisprudence of the ECtHR may also be invoked to call into question the importance of alternative remedies for claimants, especially after the decision *Stichting Mothers of Srebrenica v. the Netherlands*.[7] Section 5 offers some concluding remarks, drawing upon Gunther Teubner's idea that human rights mitigate the dangerous consequences of an autonomous legal rationality blind to the fate of human beings in flesh and blood.[8] This perspective may help explaining the importance of alternative remedies and their 'humanizing effects' when it comes to the application of jurisdictional immunities.

2. THE IMMUNITIES OF INTERNATIONAL ORGANIZATIONS AND THE RIGHT TO A COURT IN TENSION: THE INHERENT VIOLENCE OF THE 'NO-CONFLICT' APPROACH.

Jurisdictional immunities are traditionally seen as instruments necessary to guarantee the autonomy of international organizations from their members. If States could subject international organizations to the jurisdiction of their courts, it is generally submitted, they could unduly interfere with their activity.[9] Equality among members is also presented as a justification for immunity, as the free exercise of jurisdiction over international organizations would increase the capacity of the seat State – or other States on whose territory the organization physically operates – to determine the policy of the organization.[10] Operational autonomy has not always been the main justification of international organizations' immunity. Especially before WW2, but also later,

immunity has often been seen as a consequence of the sovereignty of the organization's members, or as flowing from the organization's international legal personality.[11] Despite the different explanations put forward by courts and authors, a general agreement seems to exist around the idea that immunity would preserve 'a space for the conduct of unencumbered politics without fear of legal ramifications'.[12] The idea that some degree of immunity is necessary for international organizations to perform their mandate is reflected in art. 105 UN Charter, which epitomizes the today's prevalent 'functional necessity' approach to organizational immunities.[13]

Despite a general agreement on their usefulness, immunities are at the centre of a debate on the accountability of international organizations. The preservation of a space for the free exercise of politics is indeed in tension with the idea that actors exercising some form of power should be called to account for their actions.[14] While isolating international organizations from their members' interference, immunities also isolate them from accountability, at least that particular form of accountability consisting in the judicial review performed by national courts.[15] What is more, from the point of view of human rights, this tension results in a normative conflict between the immunities of international organizations on the one hand and the right to have access to a court and the right to a remedy on the other.[16]

In its *Golder* judgment, the European Court of Human Rights defined the right to a court as the right of everyone 'to have any claim relating to his civil rights and obligations brought before a court or tribunal', stressing that such right presupposed a right of access to courts, or 'to institute proceedings before courts in civil matters'.[17] Since then, the importance of access to court has been repeatedly highlighted by different human rights treaty bodies. General Comment n. 32 of the Human Rights Committee, for instance, mentions a 'right of access to the courts in cases of determination of [...] rights and obligations in a suit of law', linking it to a broader 'right to claim justice'.[18] Similar language has been used by the Inter-American Court of Human Rights when holding that art. 8 ACHR 'upholds the right of access to courts', demanding that States 'shall not obstruct persons who turn to judges or the courts to have their rights determined or protected'.[19] This principle seems hardly compatible with the idea that a court may declare that it lacks jurisdiction in reason of the immunity enjoyed by the defendant. In case the claims relating to 'civil rights and obligations' are directed against an international organization therefore, the judge may have to choose between denying immunity in order to comply with the right to a court and denying access to justice in order to comply with the obligation to grant immunity.

The same kind of normative tension arises with regard to the right to an effective remedy, which mandates States to establish effective means whereby individuals can obtain relief at national level for violations of their fundamental rights.[20] If possible, in this case, the moral dilemma is even more complex, as the claims against the international organization will not only concern rights and obligations of a private-law nature, but the violation of human rights. A denial of justice would therefore imply a violation of human rights both at the substantive and the procedural level. This double violation is particularly serious in case of atrocities committed during armed conflicts or other gross violations of human rights. In these cases, individuals previously exposed to particularly violent and distressful experiences are additionally deprived of the possibility to seek justice in relation to them. However, given that international organizations such as the UN often run operations in conflict or post-conflict scenarios, it is not unlikely that immunity is invoked in relation to cases concerning grave violations of human rights. To be sure, national courts often recognize that immunity is needed precisely to allow international organizations to intervene in difficult operational fields without fear of legal consequences.[21]

The normative tension at stake is particularly problematic from the point of view of the legal officials having to decide whether to grant immunity, for two main reasons. First, the competing sets of norms follow opposite rationales (isolation from state jurisdiction on the one hand, activation of jurisdictional protection on the other), and point towards different solutions for the same practical problem (granting immunity or not). Second, the traditional principles on the resolution of normative conflicts (*lex superior*, *lex specialis*, *lex posterior*) are of no use here. The norms providing immunity to international organizations and the right to a court – be they treaty-based or customary in nature – are generally regarded as having the same hierarchical status within the international legal system.[22] Although some maintain that the right to a court would have acquired the status of jus cogens,[23] this circumstance appears highly controversial.[24] As to the *lex specialis* and *lex posterior* principles, they are 'presumptions as to the intent of the lawmaker or legislator' that presuppose the existence of a coherent legislative will and a shared system of priorities in the system in which they operate.[25] They are therefore unsuited to address normative interactions involving not only different treaties negotiated in different fora, but distinct areas of international law and sets of norms pursuing different goals.[26]

National and international courts have approached the conflict at hand in two principal ways. Most of them have interpreted the normative relationship between the right to a court and the immunities of international organizations as one of compatibility. In general, immunities are seen as limits incorporated into the notion of right to a court, which implicitly define the extent of the latter, so that immunity cannot possibly conflict with such right.[27] I will call this approach the 'no

conflict' one. According to a second approach, adopted initially by a small number of supreme courts and the ECtHR, and then by a number of European domestic jurisdictions, the grant of immunity to an international organization can violate the right to a court in case the claimants do not have access to an alternative remedy (alternative that is to national courts) to defend their rights.[28] I will call this approach the 'alternative remedy' one. Whereas under the no conflict approach the interest (and right) of the claimants to obtain justice do not play any role in the decision of upholding immunity, under the second approach, when granting immunity national courts should assess whether an alternative remedy is available in order not to violate the right to a court.

The 'no conflict' approach is a mode of interpretation harmonizing potentially conflicting obligations, but also a judicial policy having important consequences on the individuals concerned. In its study on Fragmentation, the ILC expressed its favour towards the harmonious interpretation of international obligations stating that 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[29] Moreover, as noted by Perelman, there is no formal limit to the possibility of interpreting two obligations as compatible to each other, as normative conflicts have no objective existence before the interpretative act that constitutes them.[30] However, declaring that two obligations are compatible with each other does not make the underlying competing interests and rationalities disappear. Rather, it invisibly resolves the tension in favour of some of them. Although conflict-avoidance through interpretation may serve the value of legal certainty, it is also an inherently violent process, as it makes one of the competing perspectives and sets of interests disappear from the radar of the legal interpreter. The 'no conflict' approach has always invariably led to recognize the immunity of international organizations irrespective of the denial of justice it may cause. Under the no-conflict approach, the position of the individual is thus silently deprived of legal relevance through a technical, seemingly neutral, act of interpretation.

For a system such as international law, which portrays itself as based on the idea of human dignity, losing sight of individuals when applying immunity is problematic, and not just from a theoretical perspective. Although they are general and abstract as all legal norms, human rights ultimately concern a concrete, physical problem: the suffering of human beings in flesh and blood. Ignoring human rights and the interests they protect makes the legal interpreter blind to the deleterious consequences that legal concepts and operations can have on individuals.

Admittedly, abstract technical operations – especially procedural ones, such as determining the jurisdiction of a court – do not seem to concern human beings in flesh and blood, but distant and impalpable concepts such as 'the law', the 'legal system' or 'legal certainty'. This makes such operations look remote, as if they did not concern anything outside the technical sphere of meaning to which they refer. Technical-legal processes, however, ultimately affect individuals; often in dramatic ways. As Robert Cover aptly pointed out:

> '[l]egal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others [...] When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by [...] organized social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.'[31]

Even as legal operations follow the autonomous logic of the legal system and seem unrelated to the physical and psychological dimension of human life, they can actually impact the latter. Teubner expressed a very similar idea, in sociological terms, discussing the relationship between specialized communicative processes and the 'body and mind' of individuals from the perspective of Social Systems Theory. As he put it:

> 'Communicative processes cannot penetrate body and mind; the latter are external to communication. But communication can irritate psycho-physical processes in such a way as to threaten their self-preservation. Or it may simply destroy them. This is the place where the body and mind of individuals [...] demand their 'pre-legal', 'pre-political', even 'pre-social' [...] 'latent intrinsic rights.'[32]

Specialized modes of communication (including legal communication) only have regard for their internal rationality: they create and follow chains of meaning that disregard human 'mind and body'. As a consequence, they can produce 'negative externalities' affecting their 'human environment'.[33] However, fundamental rights play a role in limiting the negative effects of autonomous social rationalities (including the legal rationality) on human beings. The function of these rights is to preserve the physical and psychic integrity of individuals irrespective of the discursive constructions that obscure the pre-political and biological dimension of human life: that of minds and bodies experiencing pain.

These reflections can help to understand the relationship between the immunities of international organizations and human rights. The law of immunities

follows an inexorable rationality – aimed at securing the independence of international subjects – which does not include human rights considerations. But applying immunities leads to situations where individuals are left without the possibility to seek justice and defend their rights. In turn, this generates extreme frustration and a sense of helplessness in those that are prevented from having their voice heard in a court of law.[34] These are the unintended but inevitable 'externalities' of the law of immunities and its self-referential logic. However, as noted above, concepts exist that bring the language of human suffering within the technical discourse of international law. They are called human rights, and among other things, they guarantee access to justice. Attributing legal relevance to these rights in the decision-making process leading to the application of immunities is arguably the only way to compensate the 'tunnel vision' of a rationality blind to the fate of individuals.[35] It is therefore particularly important that legal interpreters take the right to a court and to a remedy in due account to minimize the negative effects of jurisdictional exemptions on individual claimants.

From this standpoint, the alternative-remedy approach to immunities is particularly important, for several reasons. To start with, differently from the no-conflict approach, it attributes legal relevance to the position of individual claimants, and does so by reopening the normative conflict between immunity and human rights. Only by accepting that the application of immunity may under certain conditions violate the right to a court can one assign a legal weight to the interests protected by this right in the decision whether to uphold immunity or not. As an illustration, following this approach, several European national courts lifted immunity in cases concerning international organizations because the plaintiffs had no access to an alternative remedy.[36] At the same time, by acknowledging that mechanisms other than those in place in national judicial systems may satisfy the requirements of the right to a court, this approach shows a way-out of the conflict: immunity can be granted without violating human rights if the international organization puts in place internal mechanisms or offers the possibility to institute an arbitration. State obligations are thus compatibilized by creating alternative remedies rather than by assuming the absolute permissibility of immunity under the right to a fair trial. This seems a reasonable compromise between the right of international organization to a jurisdictional exemption and that of the individual to obtain jurisdictional protection.

In order to show how this approach has been applied in practice and what are the most problematic aspects of its application, the next section will discuss the *Waite and Kennedy* jurisprudence of the ECtHR.

3. THE ALTERNATIVE REMEDY APPROACH IN THE JURISPRUDENCE OF THE ECtHR

In 1999, in *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, the ECtHR suggested for the first time that granting international organizations immunity could violate the right to a court in case the applicants had no access to an alternative remedy. Before then, only a few domestic courts, notably in Cyprus and Argentina, had expressed a similar view.[37] The two ECtHR decisions concerned the grant of jurisdictional immunity to the European Space Agency in the context of two labour proceedings instituted before the Darmstadt Labour Court. In both of them, the ECtHR stated that 'it would be incompatible with the purpose and object of the Convention' if the Contracting States were 'absolved from their responsibility under the Convention' in relation to the field of activity of international organizations.[38] It then specified that in order to determine whether a grant of immunity to an international organization is permissible under art. 6, one should consider whether the applicants had available to them a reasonable alternative means – alternative that is to national courts – to protect their rights.[39]

This case-law was innovative because it departed from the previously prevailing idea that international organization immunities were 'unaffected by the adoption of article 6(1) of the European Convention of Human Rights',[40] and paved the way to a human rights exception to the immunity of international organization. Remarkably, it suggested that the application of immunities was not always permissible under art. 6(1) ECHR, but could become disproportionate in case the claimants did not have access to a 'reasonable' alternative remedy. While this case-law had a relevant impact on the subsequent jurisprudence of the ECtHR and European national courts, the ECtHR has nonetheless been ambiguous with regard to two key aspects of the application of the 'reasonable alternative means' standard, namely: i) the definition of what constitutes a 'reasonable means', and ii) the weight of the reasonable alternative means standard in the proportionality test under art. 6 ECHR, especially the consequences of granting immunity in the absence of alternative remedies. In the following pages, these questions are analyzed in turn.

3.1. WHAT IS A 'REASONABLE' ALTERNATIVE TO NATIONAL COURTS?

The right to a court presupposes the existence of a court or tribunal meeting certain requirements. According to the ECtHR, a 'tribunal' must be established by law, and have 'jurisdiction to determine all questions of fact and law relevant to the dispute before it',[41] on the basis of 'rules of law, following proceedings conducted in a prescribed

manner'.[42] Additionally, it must have the power to render a binding decision non revocable or modifiable by non-judicial authorities[43] and satisfy a series of further requirements such as 'independence of the executive and of the parties to the case, duration of its members' term of office, guarantees afforded by its procedure (...)'.[44] Finally, it must be effectively accessible, both *de jure* and *de facto*.[45] Similar standards have been developed and applied by other human rights treaty bodies and courts such as the Human Rights Committee,[46] the Inter-American Court of Human Rights[47] and the African Commission on Human and Peoples' Rights.[48] Now, while one would expect that these standards are applied to assess the effectiveness of the remedies put in place by international organization, one has to note that the ECtHR has so far considered all the dispute-settlement mechanisms submitted to its review as 'reasonable' alternatives to State courts. In doing so, it has attached more weight to the mere existence of a remedy than its compatibility with the safeguards of art. 6 ECHR. While the relevant case-law of the ECtHR is relatively small, it nonetheless shows the reticence of the Court to apply a strict control of compatibility of the remedies offered by IOs with ECtHR standards of effectiveness.

In *Klausecker v. Germany*, for instance, the Court held that the arbitration proposed by the European Patent Office (EPO) to the applicant was a 'reasonable opportunity' to examine his complaints, despite the fact that the procedural rules did not provide for public hearings and that the arbitral tribunal would have applied only EPO's internal law.[49] In *Gasparini v. Italy and Belgium* – a decision which did not concern the legality of a grant of immunity, but offered important insights concerning the ECtHR's view as to the effectiveness of international organizations' internal remedies – the Court attached little weight to the claim that a commission whose members are appointed by the decisional organ of the organization for just 3 years may not be inclined to effectively review the internal decisions of the organization.[50] It also considered that the lack of public hearings in a proceedings before the NATO Appeals Board did not affect the equity of the procedure.[51] In both *Waite and Kennedy* and *Beer and Regan*, the ECtHR considered that the applicants had the possibility to access a 'reasonable alternative means' even though, as the Court conceded, it was unclear whether they had standing before the ESA Appeals Board.[52] It seems, then, that in the ECtHR's view potential claimants have to content themselves with whatever mechanism the organization offers to them.

Particularly puzzling is the view suggested in *Stichting Mothers of Srebrenica v. The Netherlands*, that a remedy against a subject other than the international organization – in this case the contributing State to a UN-lead peace-keeping mission – may be considered as a valid alternative to a remedy against the international organization itself.[53] Already in *Waite and Kennedy* and *Beer and Regan* of 1999, the ECtHR had envisaged such an interpretation, noting that, even in the absence of a remedy against the ESA, it was 'in principle open to temporary workers to seek redress from the firms that have employed them and hired them out [to the organization].'[54] This same argument prompted the dismissal of a second application by Beer and Regan in 2003.[55] This approach completely neglects the accountability of international organizations and departs significantly from the view, shared by numerous authors and reflected in Section 29 Convention on the Privileges and Immunities of the UN (CPIUN), that an organization should offset immunity by providing meaningful remedies.[56] In addition, in litigations concerning peace-keeping operations or other instances of shared responsibility between an IOs and States, this interpretation could give rise to situations where immunity is granted to the organization because the claimants can sue the contributing State, while the State may try to 'evade its liability by laying all blame on the [immunized] organization'.[57] To be sure, this is exactly what happened in the litigation of the case *Mothers of Srebrenica* before Dutch courts: while the Netherlands, in the main proceedings before the District Court, had argued that the conduct of the Dutchbat was attributable to the UN, it had simultaneously supported the grant of immunity to the organization in the interlocutory proceedings before the Court of Appeals.[58] Attributing the wrongful conduct to a subject enjoying immunity from jurisdiction is indeed the perfect plan to avoid accountability.

While in *Waite and Kenendy* and *Beer and Regan* the ECtHR formulated important principles on how to address the relationship between the right to a court and international organizations' immunity, it has also been reticent to take them to their possible extreme consequences, i.e. to condemn States based on the application of the 'reasonable alternative means' standard. As a consequence, the Court stretched this standard to a considerable extent, depriving it of part of its humanizing potential, and disincentivizing the establishment of effective dispute-settlement mechanism by international organizations.

3.2. DOES GRANTING IMMUNITY WHEN NO ALTERNATIVE REMEDY IS AVAILABLE ALWAYS LEAD TO A VIOLATION OF THE ECHR?

Even adopting a broad interpretation of what may constitute a 'reasonable' alternative remedy, there are situations in which such a remedy is clearly unavailable. The question that emerges in such cases is thus: What are the exact consequences of granting immunity in the absence of an alternative remedy? In *Waite and Kennedy*, the Court defined the criterion of the 'reasonable alternative means' as a 'material factor' in determining the permissibility of granting immunity.[59]

According to certain commentators, this language would suggest that the existence of alternative remedies is not a necessary condition for granting immunity. Angelet and Weerts, for instance, contend that it would be just 'one important criterion among others in the assessment of proportionality'[60] which should be considered together with other circumstances, such as the legitimate aim pursued by the immunity, the practice of member States as to the grant of immunity, the extent of immunity *in abstracto* and whether immunity is prescribed by law.[61] This interpretation is problematic from the point of view of human rights, because among all the criteria proposed, that of the reasonable alternative means is the only one that reflects the interests of the claimants. Giving priority to other criteria would thus facilitate the occurrence of a denial of justice in the name of more 'weighty' political interests. This, however, would mean to load the burden of intergovernmental cooperation entirely on the shoulders of the individuals having the misfortune of being involved in a dispute against an international organization.

To be sure, the ECtHR's successive case-law reflects considerable ambiguity on this point. On the one hand, the Court seems generally to refer to the existence of alternative remedies as the main factor to consider in assessing the decision of national courts to uphold immunity. On the other hand, an assertion made in *Stichting Mothers of Srebrenica v. Netherlands* may pave the way to a different interpretation.[62] In this case – involving the responsibility of the Netherlands for granting immunity to the UN in relation to the conduct of the Dutchbat in Srebrenica, in 1995 – the Court first recognized that 'that no [...] alternative means existed either under Netherlands domestic law or under the law of the United Nations' where the relatives of the Srebrenica massacre's victims could have their rights protected under the ECHR.[63] While this could have settled the issue in the sense of a violation of art. 6 ECHR, the Court, quite surprisingly, went on: 'it does not follow [...] that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court.'[64] The application against the Netherlands was then dismissed as manifestly ill-founded. This decision indicates that according to the ECtHR the existence of a reasonable alternative means is an important factor, but not always conclusive of the question whether granting immunity violates the ECHR.

Such an approach, which reduces the relevance of the alternative remedy in the proportionality test under art. 6(1) ECHR, could once again be explained by the reticence of the ECtHR to take the 'reasonable alternative means' standard to its extreme consequences. The ECtHR, however, is not the only jurisdiction which has interpreted and applied the reasonable alternative means criterion in the last two decades. Numerous national courts, in Europe, equally faced the dilemma of how to balance international organizations immunities and the right to have access to a court, and did so by looking at the jurisprudence of the ECtHR. Interestingly, many of them have applied the standards of *Waite and Kennedy* in a way that seems to be different – and more human rights friendly –[65] than that envisaged by the ECtHR. At the same time, the ambiguity of the ECtHR's case-law regarding the two points analysed in this paragraph left considerable room to certain national courts to limit, or even neutralize, the relevance of the 'reasonable alternative means' test. The next section offers an overview of how European national courts have applied this standard in the last 15 years.[66]

4. *WAITE AND KENNEDY* APPLIED BY EUROPEAN DOMESTIC COURTS

Zagrebelsky and Brunello, a former judge at the Italian Constitutional Court and an acclaimed celloist respectively, remarked that musical and legal interpretation have many features in common, starting from the fact that every act of interpretation – be it a musical performance or the application of a legal provision – entails the appropriation of the text (legal or musical) by the interpreter.[67] Just as a composer cannot control how different conductors interpret her symphonies, the ECtHR lost control of the way national courts interpret the 'reasonable alternative means' standard at the exact moment in which it delivered *Waite and Kennedy*.[68] Remarkably, some of these courts applied the reasonable alternative means requirement in a way which departs from the ECtHR's case law with regard to the two aspects discussed in the previous paragraph, namely, the meaning of 'reasonable alternative remedy' and the consequences of granting immunity when the claimants do not have access to an alternative remedy.

4.1. THE MEANING OF 'REASONABLE ALTERNATIVE MEANS' AND THE EFFECTIVENESS CONTROL

It is worth noting that a number of national courts have assessed the effectiveness of the remedies provided by international organizations, setting immunity aside when they found them ineffective. In *Siedler v. Western European Union*, the Brussels Labour Court of Appeals confirmed a previous judgment denying immunity due to the inconsistency of the internal mechanism of dispute settlement with art. 6 ECHR.[69] In its judgment, the Court assessed the effectiveness of the Western European Union's *Commission des recours* against the ECtHR's notion of 'tribunal', noting that the applicable law contained no provisions on the execution of the decisions, the publicity of the hearings, and the publication of judgments.[70] The Court equally raised doubts as to the Commission's independence, given that an inter-

governmental committee appointed its members, who remained in charge for only two years. The Court also stressed that the complainant could not recuse a member of the Commission.[71] It therefore concluded that the remedy in question did not offer sufficient guarantees of a fair trial.[72] The Court of Cassation upheld the decision in 2009.[73]

In a case of 2007 (*Drago v. IPGRI*) the Italian Court of Cassation denied immunity to the International Plant Genetic Resources Institute, even as the latter had established an internal Appeals Committee for labour-related disputes.[74] The Court stated that the immunity of an international organization is compatible with art. 24 of the Italian constitution (right to a court) only if the organization 'ensures jurisdictional protection [...] before an impartial, independent judge, albeit chosen according to procedures and criteria other than those in national legislation'.[75] Subsequently, it held that the IPGRI Appeal Committee did not 'provide jurisdictional protection in the aforesaid sense' and lacked competence with regard to disputes concerning the expiry of a contract of employment.[76] Although the Court of Cassation did not reference the ECtHR's case law, its reasoning clearly drew upon *Waite and Kennedy*.

The *Tribunal des Prud'hommes* (labour court) of Geneva equally denied immunity to the Organization of Islamic Cooperation in a dispute of 2008.[77] The Court held that the organization's internal commission could not be considered an independent authority. Moreover, the recommendations of the Commission appeared not to bind the Secretary General of the organization.[78] But the Geneva Court of Appeals quashed the decision considering the organization's pledge that its Secretary General would have complied with the Commission's recommendations as a sufficient guarantee.[79]

Cases such as *Drago v. IPGRI* and *Siedler* are not very numerous. National courts seem reluctant to deny immunity on the basis of the procedural shortcomings of the dispute settlement mechanism put in place by international organizations. In a number of cases, however, they have granted immunity on the basis of a detailed effectiveness analysis. In *X. v. OECD*, for instance, the French Court of Cassation upheld the organization's immunity after having examined the OECD Administrative Tribunal's competence, composition, independence and impartiality, as well as certain relevant procedural issues, such as the publicity of hearings.[80] Similarly, the German Constitutional Court and the Belgian Court of Cassation have in different instances upheld the immunity of various organizations based on an assessment of different procedural aspects of the internal remedies they provided.[81]

In other instances, by contrast, national courts were satisfied with the existence e of a means of redress, and did not assess its effectiveness. In *SA Energies Nouvelles v. ESA*, for instance, a Belgian District Court considered an Ombudsman procedure as a reasonable remedy although it conceded that it did 'not constitute a judicial or administrative remedy in the strict sense'.[82] The Brussels Court of Appeals confirmed the decision in 2011.[83] In *Janyanagam v. Commonwealth Secretariat*, concerning the allegations of discrimination against a consultant, the UK Employment Appeal Tribunal held that the grant of immunity to the Secretariat was compatible with art. 6 ECHR, though it was unclear whether the claimant, who was formally not an employee of the organization, had access to the internal Administrative Tribunal.[84] More recently, in a case concerning the consequences of 2011 NATO bombings in Libya – including the killing of the wife and three children of one of the claimants – the Brussel Court of Appeals upheld the immunity of the NATO, affirming that the claimants could have seized Libyan courts, sued NATO member States or had resort to diplomatic protection. Such an argument is particularly perplexing, as it is doubtful whether Libyan courts were effective and accessible despite the civil war, and whether they would have had jurisdiction over such a dispute.[85] Moreover, just as a discretionary means such as diplomatic protection cannot be considered an effective legal remedy, a recourse against a member State is not equivalent to one against the organization.

It is striking to notice the difference of approach between the latter decision and *Siedler*, especially if one considers that they have been rendered by the same court. In general, in Europe, decisions performing a stricter control of equivalence have concerned small organizations with little political weight, such as the African Development Bank, the IPGRI or the ACP Group, and always with regard to employment disputes. European national courts seem reticent to apply the same degree of control to institutions bearing more political weight with regard to politically sensitive issues such as military operations. While this attitude can perhaps be explained in terms of political expediency, it is not understandable from the standpoint of human rights law. If the 'reasonable alternative means' is more than an empty formula, such a standard should involve a serious effectiveness assessment.

4.2. THE CONSEQUENCE OF THE ORGANIZATIONS' FAILURE TO PUT IN PLACE ALTERNATIVE REMEDIES

Despite some oscillation in the definition of what constitutes a 'reasonable' alternative remedy, most European national jurisdictions seem to accept the idea that in the absence of such remedy recognizing immunity entails a breach of art. 6 ECHR. The words of the Supreme Federal Court of Switzerland in *X v. ICRC* perfectly illustrates this view: 'art. 6 § 1 ECHR can only be respected if the litigant has available to them "other reasonable means to effectively protect his rights guaranteed by the Convention", which means *a contrario*

that this conventional provision would be violated in the absence of "equivalent protection" (…) offered within the same organization.'[86] This approach is more straightforward than that followed by the ECtHR, as it does not conceive of the reasonable alternative means as a 'factor' the interpreter should take into account, but as a necessary condition for a grant of immunity to be lawful under the ECHR.

Numerous national jurisdictions have espoused this view, either explicitly or implicitly. Particularly interesting is the jurisprudence of the French Court of Cassation, according to which recognizing the immunity of an international organization where reasonable alternative remedy are unavailable to the claimant would constitute a 'denial of justice' and a violation of the right to a court 'which is part of the international public order' ('qui relève de l'ordre public international').[87] Together with French courts, Italian and Belgian ones have denied immunity to international organizations which failed to provide reasonable alternative remedies.[88] Furthermore, in 2010, the Russian Federation's Supreme Court held that lower courts had erred in considering that the Eurasian Development Bank could plead immunity in the absence of alternative means of redress for its employees or contractors.[89] Other jurisdictions, for instance Germany, Switzerland, and Austria, granted immunity after having ascertained that such remedies were in place.[90]

Nevertheless, there are exceptions to this trend. The Supreme Court of Switzerland, in particular, has taken an ambivalent approach in this regard. While in two cases it had applied the reasonable alternative means as the decisive criterion,[91] in a case of 2010 concerning the Bank for International Settlements it ruled that even if the claimant '[did] not have direct access to legal protection', applying the proportionality test under art. 6 ECHR could not lead to 'an international organization being subjected to domestic jurisdiction' if that impeded the orderly conduct of its operations.[92] This interpretation builds upon para 72 of *Waite and Kennedy*, where the ECtHR stated that 'the test of proportionality cannot be applied in such a way to compel an international organization to submit itself to national litigation in relation to employment conditions prescribed under national labor law'.[93] This paragraph, which reflects the ECtHR's ambiguous stance, seems concerned, however, with the application of national labour law to the organization as opposed to national courts' jurisdiction as such. Moreover, if one had to interpret it literally, immunity could never be lifted, and it would make little sense to speak of a proportionality test in the first place.

Furthermore, British courts oscillate in regard to the application of *Waite and Kennedy*. In *Entico*, for instance, the High Court of England and Wales first held that it was unnecessary to find whether the claimant had access to a means of redress, but then stressed that the arbitration proposed by the organization would have fulfilled the alternative means requirement.[94] Among the arguments used by the High Court in *Entico*, there was that according to which the 'reasonable alternative means' standard would be inapplicable with respect to a universal organization constituted before the ECHR entered into force.[95]

Similarly, in *Mothers of Srebrenica v. the UN*, the Supreme Court of the Netherlands put forward the exceptional nature of UN immunity to exclude the application of *Waite and Kennedy*. In particular, the Court held that the standard of 'reasonable alternative means' was not applicable to the UN, explaining bafflingly that although para 67 of *Waite and Kennedy* 'refers to "international organisations" […], there are no grounds for assuming that the ECtHR's reference to "international organisations" also included the UN'.[96] Such a distinction appears arbitrary and unconvincing from the point of view of human rights law, as the risk of a denial of justice (and the distress it causes) in disputes involving universal organizations is the same as in disputes involving regional institutions. To be sure, granting immunity in the absence of alternative means seems particularly problematic in the case of the UN. In fact, not only 'promoting and encouraging respect for human rights' is one of the purpose of the organization,[97] but section 29 CPIUN mandates the organization to 'make provisions for appropriate modes of settlement of […] disputes of a private law character to which the United Nations is a party'.[98]

A more recent case, currently pending before the Supreme Court of the Netherlands, seems to confirm the ambiguous approach of Dutch courts towards *Waite and Kennedy*. In 2015, Supreme group (a private entity) brought proceedings against two entities belonging to the NATO before a Dutch district court for alleged non-payments under certain contracts for the supply of fuel.[99] The District Court held that

> the lack of a dispute settlement mechanism in the [contract], […] makes the claim of an impermissible violation of the right to a fair trial justified. The above applies unless it must be ruled that the alternatives available to Supreme comply with the standard in the Waite and Kennedy judgments: there must be "reasonable means to protest effectively rights". The District Court concludes that on the basis of the arguments put forward by the parties and on the basis of the documents submitted, it cannot be ruled that a reasonable alternative judicial process is available.[100]

In December 2019, however, the Court of Appeal of 's-Hertogenbosch took a different view, holding that the 'reasonable alternative means' standard had mainly been applied in employment-related cases and that, in any event, its relevance had been 'relativized' in more recent decisions.[101] The first instance of relativization it

referred to was the ECtHR decision in *Stichting Mothers of Srebrenica v. the Netherlands*, where the Court had held that the absence of an alternative remedy was not 'ipso facto constitutive of a violation of the right of access to a court.'[102] The second example was the ECtHR decision in *Nsayegamiye-Mporamazina v Switzerland* of 2019, where the Strasbourg Court had affirmed that the compatibility of a grant of immunity with art. 6(1) ECHR does not depend on the existence of reasonable alternative remedies.[103] The Court of Appeal of 's-Hertogenbosch thus concluded that NATO's immunity applied 'in an absolute sense', that is not limited by human rights.[104] To be sure, the reference to *Nsayegamiye-Mporamazina* is not particularly convincing, as the case concerned the immunity of States rather than that of international organizations.[105] Most importantly, however, the interpretation of the 's-Hertogenbosch Court of Appeal does more than simply 'relativizing' the 'reasonable alternative means' standard: it actually empties it of any relevance and meaning. One could wonder why one should consider such a standard, if in any case immunities must be applied in an 'absolute sense'. The Supreme Court of the Netherlands will hopefully address this question.

In conclusion, a majority of European national jurisdictions seem to have accepted the idea that upholding immunity in the absence of an alternative remedy violates the ECHR, thus exploiting the 'humanizing' potential of the *Waite and Kennedy* jurisprudence. At the same time, however, Strasbourg's jurisprudence is sufficiently ambiguous to allow a number of national courts to take an opposite view. Revisionist decisions such as that of the Appeal court of s'-Hertogenbosch practically 'abrogate' *Waite and Kennedy*, depriving it of any relevance. This is particularly problematic from a human rights perspective. Positing that international organizations immunities must be applied irrespective of the existence of an alternative remedy is tantamount to say that they must be applied irrespective of their impact on individuals. Equally problematic are those interpretations that relegate the application of the alternative-remedy standard to employment disputes only, or exclude the UN or other universal organizations from the scope of application of such standard. In different ways, these revisionist interpretations of *Waite and Kennedy* send us back to a pre-1999 'no conflict' approach.

5. CONCLUDING REMARKS: THE HUMANIZING EFFECTS OF THE 'REASONABLE ALTERNATIVE MEANS' CRITERION ON THE LAW OF IMMUNITIES

Denial of justice is itself an injustice; even a double injustice when it concerns the victims of human rights violations; and a painful experience. Whoever has experienced an injustice knows that being unable to see it recognized and remedied can cause intense psychological suffering. That such suffering is imposed on individuals through the application of a procedural notion – immunity – having a technical and neutral appearance, does not make it less violent. Technical processes can actually hurt human beings in flesh and blood. As Gunter Teubner rightly pointed out: 'communication [including legal communication] becomes autonomous from people, creating its own world of meaning separate from the individual mind. This communication can be used by people productively for their survival, but it can also (...) turn against them and threaten their integrity, or even terminate their existence. Extreme examples are: killing through a chain of command, sweatshops as a consequence of anonymous market forces, martyrs as a result of religious communication"[106] and, we should add, denial of justice as a consequence of jurisdictional immunity.

As noted by Teubner, one can limit the damaging effects of legal communication by re-entering the individual in the law.[107] While the legal discourse creates its own world and chains of meaning making abstraction from the human animals that we all are, notions should be created that symbolize humanity within the law and its operations. The recognition of fundamental rights performs precisely this function, particularly the right to have access to justice as a way of mitigating the suffering of those who have experienced an injustice. This is why, when it comes to the application of immunities, one should always take the right to a court seriously into account. Considering the availability of effective alternative remedies is arguably the only way to avoid a denial of justice when granting immunity; the only way to re-enter the individual in the technical process of deciding on jurisdiction.

However, as shown by the practice examined in this contribution, there are several ways to neutralize the right to a court's 'humanizing effects' on the law of immunities. The first is to find exceptions to its application. For instance, by holding that the alternative remedy standard does not apply in relation to the UNESCO, the UN, or the obligations deriving from the UN Charter. The legal technical discourse could well provide arguments to support such a view, for instance by insisting on the normative value of art. 103 UN Charter. However, from the perspective of the individuals involved and their suffering, such an interpretation is unreasonable and unjust, because it does not reflect the position of the claimants. A denial of justice remains a denial of justice also in disputes involving the UN.

The second way to ignore the consequences of immunity for individuals, is to apply the alternative remedy standard in a superficial way, ignoring the effectiveness of the remedies available to the claimants and considering any of them as a 'reasonable' alternative

to national courts. By reducing access to justice to a mere formality, emptying it of its humanizing force within the law, this attitude encourages international organizations not to provide effective legal means of dispute-settlement. Unfortunately, this is the attitude of numerous courts, including the ECtHR.

The most radical way to ignore the position of the individual is to apply immunity without considering human rights at all. This is the attitude of most national courts outside Europe, but it was also that of European courts before *Waite and Kennedy*. More recently, a number of European courts has interpreted *Waite and Kennedy* in a way that deprives the 'reasonable alternative means' test of any legal relevance, positing that immunity shall be granted also in the absence of an alternative remedy. Such an approach fails to consider the concepts symbolizing individual human beings within the legal system, leaving human beings in flesh and blood defenceless against the destructive tendencies of the autonomous legal rationality. *Dura lex* … sad *lex*.

Like Roman deity Janus, the *Waite and Kennedy* jurisprudence of the ECtHR has two faces looking in different directions. On the one hand, it has a considerable humanizing potential that a number of national courts were able to exploit in their case-law to reduce the occurrence of denials of justice. On the other, it contains ambiguities that other courts have used to neutralize the relevance of the alternative-remedy requirement, especially in cases concerning international organizations with a considerable political weight, or politically sensitive subject matters such as military or peace-keeping operations. Janus was the God of ambivalence and transitions. Looking at European national courts' practice, the situation seems far from settled, and open to new developments. Whereas until 2013 the tendency of recognizing the existence of alternative remedies as a condition of permissibility seemed well-established, the *decision Stichting Mothers of Srebrenica* of the ECtHR may provide a justification for the national courts willing to go back to the no-conflict approach.

NOTES

1 From the lyrics of 'Il bandito e il campione', a song by Luigi Grechi, first recorded in 1993, and principally performed by Italian singer Francesco De Gregori.

2 See J. Klabbers, *An Introduction to International Organizations Law* (CUP 2015) 130–139; A. Reinisch, 'Privileges and Immunities', in J. Klabbers and A. Wallendhall (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 132–155.

3 See A. Reinisch, 'To What Extent Can and Should National Courts 'Fill the Accountability Gap'?' (2013) 10 *International Organizations Law Review*, 572; A. Reinisch, A., 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', (2008) 7 *Chinese Journal of International Law* 285, 292–294; E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass' (2002) 51(1) *International and Comparative Law Quarterly* 1.

4 See for instance the chapters on Canada, India, Japan, Philippines, Russian Federation, United States of America, and United Kingdom in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013).

5 *Waite and Kennedy v. Germany*, App 26083/94 (ECHR 18 February 1999) para 68; *Beer and Regan v. Germany* (ECHR 18 February 1999) para 58. For a discussion of the relevant case-law of European national jurisdiction, see *infra*, paragraph 4.

6 See *infra*, paras. 4.1 and 4.2.

7 *Stichting Mothers of Srebrenica and others v. the Netherlands* App no 65542/12 (ECHR 11 June 2013).

8 G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', (2006) 69 *Modern Law Review* 327, 333–342.

9 J. F. Lalive, 'L'immunité de juridiction des États et des organisations internationales, (1953-III) 84 *Recueil des cours de l'Académie de droit international de La Haye* 205, 297–301; C. W. Jenks, *International Immunities* (Stevens 1961) 41; J. Klabbers, *An Introduction to International Institutional Law* (CUP 2009) 132; C. Dominicé, 'L'immunité de jurisdiction et d'exécution des organisations internationales' (1984-IV) 187 *Recueil des cours de l'Académie de droit international de La Haye* 145, 159.

10 P. H. F Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Status and Immunities* (M. Nijhoff 1994) 103–109.

11 See S. Dorigo, *L'immunità delle organizzazioni internazionali dalla giurisdizione contenziosa ed esecutiva nel diritto internazionale generale* (Giappichelli 2008) 8; F. Schröer, 'De l'application de l'immunité des Etats étrangers aux organisations internationales' (1971) 75(3) *Revue générale de droit international public* 712; R. Pavoni, 'Italy', in A. Reinisch (ed.), *The privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013) 158–159; A. Reinisch, *supra* note 2, at 139.

12 As Klabbers affirmed with regard to State immunity. The same rationale is commonly and often silently presupposed also with regard to international organizations' immunities. J. Klabbers, 'The General, the Lords, and the Possible End of State Immunity' 68 (1999) *Nordic Journal of International Law* 85, 94.

13 Charter of the United Nations, 1945, 1 UNTS XVI, art. 105.

14 On the concept of accountability, see P. A. Nollkaemper and D. Curtin, 'Conceptualizing Accountability in International and European Law', 36 *Netherlands Yearbook of International Law* (2007) 3, 4; I. F. Dekker, 'Accountability of International Organisations: An Evolving Concept?', in J. Wouters, E. Brems, S. Smis, and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 24; Norihito Samata, 'Reconsidering Access to Justice within the Broad Range of Accountability of International Organizations Quasi-Judicial Alternatives to the Judicial Review in UN Peacekeeping Operations' (2020) 23 *Journal of International Peacekeeping* 149, 152–161.

15 See M. Parish, 'An Essay on the Accountability of International Organizations' (2010) 7(2) *International Organizations Law Review* 277; A. Reinisch, 'Securing the Accountability of International Organizations' (2001) 7(2) *Global Governance* 131; C. Ryngaert, 'The Accountability of International Organizations for Human Rights Violations: The Cases of the UN Mission in Kosovo (UNMIK) and the UN "Terrorism Blacklists", in M. Fitzmaurice and P. Merkouris, *The Interpretation and Application of the European Convention of Human Rights* (Brill 2012) 79–91; International Law Association, Committee on the Accountability of International Organizations, *Final Report*, 2004.

16 See *supra* note 3.

17 *Golder v. UK* App no. 4451/70 (ECHR, 21 February 1975) para. 36.

18 UN Human Rights Committee (HRC), *General Comment no. 32, Article 14, Right to Equality before Courts and Tribunals and To Fair Trial*, 23 August 2007, UN doc. CCPR/C/GC/32, para. 9.

19 *Cantos v. Argentina*, Inter-American Court of Human Rights, 28 November 2002, IACHR Series C no 97, para 50.

20 See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 8; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 13; Organization

of American States, American Convention on Human Rights (ACHR), Costa Rica, 22 November 1969, art 25 ('right to judicial protection'); UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UNTS, vol. 999, p. 171, art. 2(3)(a); Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7.

21 See, as an illustration, *Mothers of Srebrenica v. Netherlands and United Nations*, Appeal Court in The Hague, judgment of 30 March 2010, LJN: BL8979, para. 5.7.

22 See J-F. Flauss, 'Immunités des organisations internationales et droit international des droits de l'homme', in Société Française pour le Droit International (ed.), *La soumission des Organisations internationales aux normes internationales relatives aux droits de l'homme, journée d'étude de Strasbourg* (Pédone 2009) 71; J-F. Flauss, 'Droit des immunités et protection internationale des droits de l'homme' (2000) 10 *Revue Suisse de Droit International et de Droit Européen* 299.

23 See in this regard C. Dominicé, 'Observations sur le contentieux des organisations internationales avec des personnes privées' (1999) 45 *Annuaire français de droit international* 638; C. Dominicé, 'Morgan v. World Bank (Ten Years Later)', in S. Schlemme-Schulte and K. Jung Tung (eds.), *Liber Amicorum Ibrahim F.I. Shihata: International Finance and Development Law* (Kluwer 2001) 165–167; *Goiburù and others v. Paraguay*, Inter-American Court of Human Rights, 22 September 2006, para. 131; *Anzualdo-Castro v Peru*, Inter-American Court of human Rights, 22 September 2009, para. 125; Concurring opinion of Judge Cançado Trindade in the case of *Lopez-Alvarez v. Honduras*, Inter-American Court of Human Rights, 1 February 2006, para. 54.

24 National and international judges generally do not consider the civil limb of the right to fair trial as forming part of jus cogens, and have expressed some doubts also with regard to the penal limb (see *Yassin Abdullah Kadi v Council and Commission*, Court of First Instance of the European Communities, Case T-315/01, 21 September 2005, para. 288; Partly Dissenting Opinion of Judge Sajò in *Al-Dulimi and Montana Management Inc. v. Switzerland* App. 5809/08 (ECHR 26 November 2013). The question is controversial, not least because the right to a fair trial is subject to derogation under different human rights conventions (e.g. art. 15 ECHR; art. 27 ACHR; art.4 ICCPR. The ACHPR does not contain a derogation clause, but the African Commission held that derogations are not allowed. See, in this regard, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. 218/98. para. 27). Certainly, derogations cannot concern judicial and other procedural guarantees necessary to secure the protection of non-derogable rights (HRC, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras. 11, 15; *Judicial Guarantees in States of Emergency*, Inter-American Court of Human Rights, Advisory Opinion OC-9/87, para. 41). However, this depends on the nature of the substantive rights concerned, rather than on the peremptory character of the right to have access to courts.

25 R. Michaels and J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 *DukeJComp&IntlL* 349, 353–54.

26 See in this respect L. Pasquet, 'De-Fragmentation Techniques', *Max Planck Max Encyclopedia of International Procedural Law* (2018), paras 26–31.

27 As an illustration, see the constant jurisprudence of US courts, according to which the Congress has the power to limit the jurisdiction of the lower federal courts. Consequently, jurisdictional immunities deriving from an Act of the Congress (such as the International Organizations Immunities Act) cannot possibly violate the constitutional right to a court. See *Georges v. the United Nations*, US Court of Appeals for the 2nd Circuit, judgment of 18 August 2016, case no. 15-455-cv, 22; *Weinstock v. Asian Development Bank and Others*, US District Court, District of Columbia, 05 Civ. 174 (RMC), 2005 WL 1964806, 13 July 2005.

28 See *infra* paragraphs 3 and 4.

29 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law — Report of the Study Group*, 18 July 2006, UN doc. A/CN.4/L.702, 8.

30 C. Perelman, 'Les antinomies en droit: essay de synthèse' (1964) 18 *Dialectica* 392, 404: 'l'antinomie n'est jamais purement formelle, car toute compréhension d'une règle juridique implique son interprétation. Il en résulte que, dans la mesure où plusieurs interprétations d'une même règle sont possibles, il faut admettre que, alors qu'une interprétation conduit à une antinomie, une autre puisse la faire disparaître'.

31 R.M. Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601, 1601.

32 G. Teubner, *supra* note 8, 335.

33 The expression is borrowed from A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999, 1006: 'Through their own operative closure, global functional systems create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment.'

34 Denial of justice is also a form of social exclusion which does not concern society as a whole, but its legal sphere more specifically. Human beings deprived of the possibility to access justice are in our society practically unable to participate in the legal dimension of society and to activate the legal protection to which they are theoretically entitled. See G. Verschraegen, 'System Theory and the Paradox of Human Rights', in M. King and C. Thornhill (eds.), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart 2006) 101–127, 120.

35 The expression 'tunnel vision' is used by Teubner to define the limited functional rationality of specialized modes of communication and their sphere of meaning. See G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 156.

36 See *infra* paragraph 4.

37 See *Charitos Stavrinou v. United Nations and Commander of the UN Force in Cyprus*, Supreme Court of Cyprus, Civil Appeal 8145, 17 July 1992, 10, para. 66, holding that the grant of immunity to the UN was compatible with the fundamental right to have access to a court, since the applicant had not been left without a remedy; see also *Washington Julio Efrain Cabrera v. Comision Técnica de Salto Grande*, Argentina, National Labour Chamber of Appeal, n. 44866, 31 July 1980, par. VII: declaring the unconstitutionality of the law 21.756 '*en cuanto establece 'inmunidad contra todo procedimiento judicial o administrativo' y priva al actor del derecho a la jurisdicción, es inconstitucional*'; see, finally, *Cabrera v. Comision Técnica de Salto Grande*, Argentina, Supreme Court of Justice, n. C 937, 5 December 1983, par. 9, holding that the right to a court constitutes a limit to the faculty of the State to grant jurisdictional exemptions.

38 *Beer and Regan v. Germany*, *supra* note 5, para 57; *Waite and Kennedy v. Germany*, *supra* note 5, para 67.

39 *Waite and Kennedy v. Germany*, *supra* note 5, para 68; *Beer and Regan v. Germany*, *supra* note 5, para 58.

40 As summarized by A. Reinisch, *International Organizations Before Domestic Courts* (CUP 2000) 283.

41 *Terra Woningen B.V. v The Netherlands* App no 20641/92 (ECHR, 17 December 1996) para. 52.

42 *Sramek v. Austria* App no 8790/79 (ECHR 22 October 1984) para. 36.

43 *Van de Hurk v. The Netherlands* App no 16034/90 (ECHR 19 April 1994) para. 45.

44 *Le Compte, Van Leuven and De Meyere v. Belgium* App no 6878/75 and 7238/75 (ECHR, 23 June 1981) para. 55; *Cyprus v. Turkey*, App no 25781/94 (ECHR 10 May 2001) para. 233.

45 As held in *Golder v. UK*, *supra* note 17, para 26.

46 HRC, General Comment n. 32, *supra* note 18, para. 18: 'the notion of a 'tribunal' in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature'.

47 See, for instance, *Castillo Petruzzi et al. v. Peru*, 30 May 1999, para. 50; *Palamara Ibarne v. Chile*, 22 November 2005, paras 145–146; *Herrera Ulloa v. Costa Rica*, 2 July 2004, para 174.

48 See, for instance, the case *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93, 15 November 1999, para

62; *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Comm No. 60/91, March 1995, para 14.

49 *Kalusecker v. Germany*, App 415/07 (ECHR 6 January 2015) paras. 71, 74.

50 *Gasparini v. Italy and Belgium*, App 10750/03 (ECHR 12 May 2009) p. 9.

51 *Ibid*.

52 See *Waite and Kennedy*, *supra* note 5, paras. 69–70.

53 See *Stichting Mothers of Srebrenica and others v. the Netherlands*, *supra* note 7, para 167.

54 *Beer and Regan v. Germany*, *supra* note 5, para 62.

55 *Beer and Regan c. Allemagne et les Etats members de l'Agence Spatiale Européenne* App no 70009/01 (ECHR 15 May 2003) para 10 (available in French only).

56 See inter alia C. Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent trends', (2010) 7 *International Organizations Law Review* 121; A. Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', (2008) 7 *Chinese Journal of International Law* 285; A. Reinisch and U. A. Weber, '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' (2004) 1 *Int'l Org L Rev* 59; E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass' (2002) 51 *International and Comparative Law Quarterly* 1.

57 As alleged by the applicants in *Stitching Mothers of Srebrenica*, *supra* note 7, para 125.

58 *Mothers of Srebrenica v. Netherlands and United Nations*, Appeal Court in The Hague, judgment of 30 March 2010, LJN: BL8979, paras. 2.1–2.5.

59 *Waite and Kennedy v. Germany*, *supra* note 5, para 68.

60 See N. Angelet and A. Weerts, 'Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme', (2007) 134 (1) *Journal du Droit International* 4, 9: 'un critère important parmi d'autres dans l'appréciation de la proportionnalité' (translation by the author).

61 *Ibid*., 13–18.

62 *Stichting Mothers of Srebrenica*, *supra* note 7.

63 *Ibid*., para. 163.

64 *Ibid*., para 164.

65 By that I mean that they resolve the tension between immunity and right to a fair trial by favoring the right to a court of the claimant over competing principles or interests.

66 The analysis is based mainly on the Oxford Reports on International Law in Domestic Courts (*https://opil-ouplaw-com*, last accessed on 16 June 2021) and on the cases discussed in the legal literature on immunities available in Italian, French, English, and Spanish. While such an approach gives a fairly comprehensive idea of the approach taken by the supreme courts of European States which have dealt with the immunities of international organizations, it is always possible to overlook decisions by lower courts.

67 M. Brunello and G. Zagrebelsky, *Interpretare: Dialogo tra un musicista e un giurista* (Il Mulino 2016) 10–14, 37–42,

68 *Waite and Kennedy v. Germany*, *supra* note 5.

69 *Siedler v. Western European Union*, Brussels Labour Court of Appeal, 17 September 2003, *Journal des Tribunaux* 2004, 617.

70 *Ibid*., paras 56–60: "*les réunions de la Commission de recours sont secrètes*…" (the meetings of the Claims Commission are secret).

71 *Ibid*., paras 60–61.

72 *Ibid*., para 62: 'Does not offer all the guarantees inherent in the concept of a fair trial and some of the most essential conditions are lacking' (translation by the author).

73 *Western European Union v. Siedler*, Belgium, Court of Cassation, 21 December 2009, Cass No S 04 0129 F, ILDC 1625 (BE 2009).

74 *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Italy, Supreme Court of Cassation, Final Appeal Judgment of 19 February 2007, Case No 3718, ILDC 827 (IT 2007).

75 *Ibid*., para. 6.5.

76 *Ibid*., para. 6.6.

77 *T v. E*, Tribunal des prud'hommes de Genève, judgment of 13 October 2008, TRPH/639/2008.

78 The decision is unpublished. The arguments of the first court have been summarized by the Court of Appeals in its Judgment. See in this regard *E v. T*, Geneva Court of Appeals, Juridiction des prud'homme, judgment of 25 March 2009, case no. C/18260/2005–4, CAPH/53/2009, para. H.

79 *Ibid*., p. 11, para. 3.

80 *X v Organisation for Economic Co-operation and Development*, France, Court of Cassation, Appeal judgment of 29 September 2010, no 09–41030, ILDC 1749 (FR 2010), paras. 4–5.

81 See for instance *Hetzel v. EUROCONTROL*, Germany, Federal Constitutional Court, 2 BvR 1058/79, BVerfG 59, 63. For a brief overview of the jurisprudence of the German Constitutional Court, see G. Novak and A. Reinisch, 'Desirable Standards for the Design of Administrative Tribunals from the Perspective of Domestic Courts', in O. Elias (ed.), *The Development and Effectiveness of International Administrative Law* (Nijhoff 2012) 288–292; B. Fassbender, 'Germany', in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations* (OUP 2013) 123–130. Concerning the Belgian Court of Cassation, see inter alia *MP v Belgium and North Atlantic Treaty Organization* (intervening), Cassation judgment of 27 September 2018, No C.16.0346.F, ILDC 3007 (BE 2018).

82 *SA Energies Nouvelles et Environnement v. Agence Spaciale Européenne*, Belgium, Court of First Instance, Judgment of 1 December 2005, *Journal des Tribunaux* 2006, No. 6216, 171, para 41.

83 *SA Energies Nouvelles et Environnement v. ESA*, Brussels Court of Appeals, 23 March 2011, case no 2011/2013, 2006/AR/1480.

84 *Janyanagam v. Commonwealth Secretariat*, United Kingdom Employment Appeal Tribunal, Judgment of 12 March 2007, Appeal no. UKEAT/0443/06/DM, ILDC 1763 (UK 2007).

85 *El Hamidi and Chlih v North Atlantic Treaty Organization (NATO) and Belgium (intervening)*, Belgium, Brussels Court of Appeals, appeal judgment of 23 November 2017, ILDC 3043 (BE 2017), JT 6772, para 33.

86 *X. v. ICRC*, Switzerland, Federal Supreme Court, judgment of 20 September 2012, case no. 5A_106/2012, para. 7.2.1: 'l'art. 6 (1) de la CEDH n'est respecté que si le justiciable dispose "d'autres voies raisonnables pour protéger efficacement ses droits garantis par la Convention", ce qui signifie a contrario que cette disposition conventionnelle serait transgressée à défaut de "protection équivalente (…) offerte au sein même de l'organisation' (translation by the author).

87 *African Development Bank v X*, France, Court of Cassation, Appeal judgment of 25th January 2005, case no 04–41012, ILDC 778 (FR 2005), para 3.

88 See *General Secretariat of the ACP Group v Lutchmaya*, Belgium, Court of Cassation, final appeal judgment of 21 December 2009, Cass nr C 03 0328 F, ILDC 1573 (BE2009); *General Secretariat of the ACP Group v BD*, Belgium, Court of Cassation, final appeal judgment of 21 December 2009, Cass nr C 07 0407 F, ILDC 1576 (BE 2009); Western *European Union v. Siedler*, *supra* note 69; *Drago v. IPGRI*, *supra* note 74.

89 *SN Ryabov v Eurasian Development Bank*, Russian Federation, Supreme Court, judgment of 9 July 2010, N 5-B10-49, ILDC 1559 (RU 2010).

90 See *E v King Abdullah bin Abdulaziz International Centre for Interreligious and Intercultural Dialogue*, Austria, Supreme Court, final appeal decision, 29 November 2017, ILDC 2903 (AT 2017), 8 Ob 53/17b; *Consortium X v Switzerland*, Switzerland, Federal Supreme Court, Final appeal judgment, 2 July 2004, BGE 130 I 312, ILDC 344 (CH 2004); *X. v. ICRC*, *supra* note 80; *A v European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)*, Germany, Hesse Higher Administrative Court, Appeal order, 17 February 2010, 7 E 2900/09, NJW 2010, 2680, ILDC 2247 (DE 2010); *Hetzel v. EUROCONTROL*, *supra* note 81.

91 See *Consortium X v Switzerland*, Switzerland, *supra* note 90; *X. v. ICRC*, *supra* note 86.

92 *NML Capital Ltd and EM Limited v Bank for International Settlements and Debt Enforcement Office*, Switzerland, Federal Supreme Court, Final appeal judgment, No 5A 360/2010, BGE 136 III 379 (partial), 12 July 2010, Para 4.5.

93 *Waite and Kennedy v. Germany*, *supra* note 5, para 72.

94 *Entico Corporation Ltd v UNESCO*, 18 March 2008, [2008] EWHC 531 (Comm), 97, paras. 23, 25.

95 *Ibid*., para. 19.

96 *Mothers of Srebrenica Association et al. v. The Netherlands*, Supreme Court of the Netherlands, judgment of 19 July 2019, ECLI:NL:HR:2019:1223 (English translation: ECLI:NL:HR:2019:1284), para 4.3.3.

97 UN Charter, *supra* note 13, art. 1(3).

98 Convention the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15, section 29.

99 See *Supreme Headquarters Allied Powers Europe et al (SHAPE) v Supreme Site Service GmbH et al*, Court of Appeal of 's-Hertogenbosch, Case No. 200/216/570/01, para 6.1.12.

100 Quotation in the Appeal Court's decision, *supra* note 93, para 6.1.14, translation provided in R. Gulati, 'The SHAPE v Supreme Litigation: The Interaction of Public and Private International Law Jurisdictional Rules' (Conflict of Laws, 13 January 2020) <*https://conflictoflaws.net/2020/the-shape-v-supreme-litigation-the-interaction-of-public-and-private-international-law-jurisdictional-rules/*> accessed 26 April 2021.

101 *Supreme Headquarters Allied Powers Europe et al v Supreme Site Service GmbH et al*, *supra* note 99, paras 6.7.8 and 6.7.9.1.

102 *Stichting Mothers of Srebrenica*, *supra* note 7, para. 164.

103 *Nsayegamiye-Mporamazina v Switzerland* App no 16874/12 (ECHR, 5 February 2019) para. 64.

104 *Supreme Headquarters Allied Powers Europe et al v Supreme Site Service GmbH et al*, *supra* note 99, para. 6.7.9.1.

105 Since the 2001, the ECtHR has treated the two types of immunities in different manners, and applied different standards to them. See *Al-Adsani v. The United Kingdom* App no 35763/97 (ECHR, 21 November 2001); *McElhinney v. Ireland* App no 31253/96 (ECHR, 21 November 2001); *Cudack v. Lithuania* App no 15869/02 (ECHR, 23 March 2010) paras. 60–75; *Guadagnino v. Italy and France* App no 2555/03 (ECHR, 18 January 2011); *Sabeh El Leil v. France* App no 34869/05 (ECHR, 29 June 2011), paras. 55–68.

106 G. Teubner, *supra* note 8, 335.

107 *Ibid*., 333–342.

COMPETING INTERESTS

The author has no competing interests to declare.

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