The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity

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4 THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS IN THE NETHERLANDS AND THE VIEW FROM STRASBOURG

4.1 Introduction

This chapter returns to the starting point of the study in chapter 2 of this study. That is, international organisations typically are endowed with domestic legal personality, but their privileges and immunities restrict the application of domestic laws and the exercise of jurisdiction by domestic courts. In the case of the UN, immunity from jurisdiction is bestowed on it under Article II, Section 2 of the General Convention:[1064]

> 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

The rationale of jurisdictional immunity, as for privileges and immunities generally, is to protect international organisations against domestic interference in their independent and efficient functioning. As discussed further in this chapter, that rationale continues to apply at present.

As to the effectiveness of jurisdictional immunity, it largely depends on whether it can be reconciled with the claimants' rights under Article 6(1) of the ECHR, that is, the right of 'access to court'. Such reconciling can be done through alternative remedies. This is evidenced by the jurisprudence of the Dutch courts and the ECtHR on the jurisdictional immunity of international organisations.[1065] The present chapter examines that jurisprudence, and the law concerning the jurisdictional immunity of international organisations in the Netherlands, by way of a case study. This serves the broader purpose of the study for several reasons.[1066] First, the relevant jurisprudence of the ECtHR, which is discussed comprehensively, concerns a broad variety of international organisations and domestic jurisdictions.

[1064] Reinisch (2016, 'Immunity'), para. 1 ('core provision of the General Convention dealing with the organization's immunity from legal process').

[1065] The chapter is limited to immunity from jurisdiction of international organisations. It does not concern immunity for jurisdiction of the officials of international organisations. It only incidentally refers to immunity from execution, which—as Blokker asserts, and the Netherlands' Advisory Committee on Issues of Public International Law endorses—is of a fundamentally different nature than immunity from jurisdiction. See N.M. Blokker, 'Korte Reactie Op: "Fundamentele Arbeidsrechten en Immuniteit", NJB 2015/1326; Advisory Committee on Issues of Public International Law, 'Advisory Report on Responsibility of International Organisations' (No. 27, 2015), at 25.

[1066] The chapter builds on previous publications by the present author: T. Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 279; T. Henquet, 'The Supreme Court of the Netherlands: Mothers of Srebrenica Association et al. v. the Netherlands', (2012) 51 ILM 1322; and T. Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts', (2010) 57 *Netherlands International Law Review* 267. On the immunity from jurisdiction of international organisations in Netherlands, see also R. van Alebeek and A. Nollkaemper, 'The Netherlands', in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013), 179.

Second, host to about 40 international organisations,[1067] the Netherlands is a representative jurisdiction for present purposes—many of the issues that arise concerning the jurisdictional immunity of international organisations arise elsewhere as well.[1068] Third, the *Mothers of Srebrenica* case before the Dutch courts and the ECtHR is a leading case worldwide concerning the UN's jurisdictional immunity.[1069]

In sum, *Spaans v. IUSCT* was the first of nine cases identified in this study concerning the jurisdictional immunity of international organisations decided by the Dutch Supreme Court to date. It upheld the immunity in each of them. Similarly, in the nine cases before the ECtHR to date, as identified in this study, starting with the landmark case of *Waite and Kennedy* (1999), the Court found that upholding the immunity was not in breach of Article 6 of the ECHR. Alternative remedies were available in each of the cases before the Supreme Court and the ECtHR—except in *Mothers of Srebrenica*. That case arose from the Dutch courts having upheld the UN's immunity from jurisdiction. Though there were no alternative remedies available to the claimants, the ECtHR held that this did not amount to the Netherlands breaching Article 6 of the ECHR. As will be seen, the circumstances of the case are particular, not least as the priority rule under Article 103 of the UN Charter was at issue.

An important preliminary question arises, namely whether the right of access to court applies. That turns on the application of Article 6 of the ECHR; it will be submitted that this is to be assessed by reference to the internal law of the international organisation (that is, in the case of the UN, Section 29 of the General Convention). Where there is such a conflict (and leaving aside Article 103 of the UN Charter in the case of the UN), there may be good arguments to prioritise the obligation to confer jurisdictional immunity over the obligation to grant access to court. However, the lower Dutch courts not infrequently hold the opposite. That is, absent alternative recourse, the jurisdictional immunity of an international organisation comes under pressure (as does its legitimacy). Therefore, international organisations and their members ought to invest in international remedies. National courts contribute to filling 'accountability gaps' by incentivising the development of alternative remedies.

This chapter is structured as follows. It begins by discussing the rationale of the jurisdictional immunity of international organisations, and the interpretation and application of that immunity by the Dutch courts (section 4.2). Thereafter follows a discussion of the right to jurisdictional immunity versus the

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[1067] <rijksoverheid.nl/onderwerpen/internationale-organisaties-in-nederland> accessed 21 December 2021.
[1068] This chapter contains mere incidental references to the case law of other jurisdictions. For UK, Austria, Belgium and Italy, see the respective contributions in Blokker and Schrijver (2015). See also A. Reinisch (ed.), The Privileges and Immunities of International Organizations in Domestic Courts (2013), discussing a broad range of jurisdictions.
[1069] For studies specifically regarding the jurisdictional immunity of the UN, WHO, WIPO, EU and NATO, see the respective contributions in Blokker and Schrijver (2015).

right of access to court (section 4.3). That discussion begins by examining the ECtHR's landmark ruling in *Waite and Kennedy* (subsection 4.3.1), followed by cases in which 'reasonable alternative means' were available to claimants (subsection 4.3.2). On the basis of the *Mothers of Srebrenica* case, it then discusses separately the situation in which 'reasonable alternative means' are absent (subsection 4.3.3). The extent to which national courts play a role in closing 'accountability gaps' is addressed next (section 4.4), which is followed by the conclusion (section 4.5).

4.2 Immunity from jurisdiction

In discussing the immunity from jurisdiction of international organisations, this section is structured as follows. It begins by briefly recalling the rationale underlying the immunity (subsection 4.2.1). With specific reference to the Netherlands and the case law of the Dutch courts, it then discusses sources (subsection 4.2.2), procedural aspects (subsection 4.2.2) and the 'functional immunity' test (subsection 4.2.4).

4.2.1 Rationale

The starting point is a fundamental one: international organisations belong to their member states collectively and the involvement of those states with the organisation is governed by its constitutional arrangements. To enable an organisation to carry out the functions for which it was established in accordance with said framework, it needs to be independent, including from its host state.

International organisations share the essential need for independence with states. As recalled by Max Huber in the 1928 Island of Palmas arbitration between the Netherlands and the USA: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[1070]

The independence of states is therefore inherently linked to their territories. In contrast to states, international organisations not only lack territories, they operate on the territories of states. The independence of international organisations is instead safeguarded through a legal construct: privileges and immunities. This notably includes their immunity from the jurisdiction of domestic courts.

[1070] *Island of Palmas case (Netherlands v. USA)*, 4 April 1928, Reports of International Arbitral Awards, Vol. II (2006), 829-871, at 838.

There is a wealth of literature regarding the immunity from jurisdiction of international organisations.[1071] Amongst the many explanations of the rationale and justification for jurisdictional immunity,[1072] Schermers and Blokker recall three explanations articulated early on by McKinnon Wood. These are, in sum:

> '(1) National courts may be prejudiced . . .
> (2) International organisations must be protected against baseless actions . . .
> (3) The legal effects of acts performed by international organizations should not be determined, quite possibly in divergent ways, by national courts.'[1073]

According to Schermers and Blokker:

> 'This is still largely true today. Immunity rules belong to the traditional standard rules of international organizations. They were codified in the 1940s for the UN and the specialized agencies, remained unchanged since then, and were more or less copied when new organizations were created. It is generally recognized that international organizations need immunity from jurisdiction in order to be able to perform their functions. While state immunity is based on the *par in parem non habet imperium* principle, the immunity of international organizations is generally founded on the principle of functional necessity. They would not be able to do what they are asked to do if a national court could interfere in their work. Member States would not accept the exercise of jurisdiction by a court of one of them over acts or activities of "their" organization.'[1074]

In other words, national courts are not well placed to adjudicate cases against international organisations. To do so would be to interfere in their independent and efficient functioning. Thus, as explained by Reinisch: 'It has been generally accepted that international organizations enjoy immunity from suit and enforcement measures in order to be able to operate independently and efficiently.'[1075]

[1071] See, e.g., Schermers and Blokker (2018), paras. 1610-1612A ; Blokker and Schrijver (2015); Reinisch (2013); Miller (2009); Amerasinghe (2005), at 315 ff; J. Klabbers, *An Introduction to International Institutional Law* (2009), chapter 8; Muller (1995); P.H. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994).

[1072] On the origins of, and attempts at, codification of immunity rules, see N.M. Blokker, 'International Organizations: The Untouchables?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 1.

[1073] Schermers and Blokker (2018), para. 1611.

[1074] Ibid., para. 1611 (fns. omitted). See also L. Diaz-Gonzalez, Fourth Report on Relations between States and International Organizations (second part of the topic), UN Doc. A/CN.4/424 (1989), reproduced in Yearbook of the International Law Commission (1989), Vol. II (Part One), 153–168, at 157, para. 24 ('It is undeniable that, in order to guarantee the autonomy, independence and functional effectiveness of international organizations and protect them against abuse of any kind, and because national courts are not always the most appropriate forum for dealing with lawsuits to which international organizations may be parties, some degree of immunity from legal process in respect of the operational base of each organization must be granted'). On the work of the ILC regarding the immunity of international organisations, see generally J.G. Lammers, 'Immunity of International Organizations: The Work of the International Law Commission', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 18.

[1075] Reinisch (2016, 'Immunity'), para. 11.

Stating that '[i]nternational organization immunity serves a useful and essential purpose which is often too easily ignored',[1076] De Brabandere explained:

> 'The grant of privileges and immunities to an international organization and its staff is based on functionalism, namely to preserve and ensure the independence of the organization, and to enable it to fulfil its functions which could otherwise be compromised by unwarranted interference from the host state.'[1077]

Such interference is unlikely to be direct, that is, through enforcement of a domestic court judgment against the assets of an international organisation. This is because of the immunity from *execution*, which international organisations typically enjoy separately from their jurisdictional immunity. However, a domestic court judgment against an international organisation could complicate its legal transactions.[1078] For example, the successful claimant, or assignee of the claim awarded in the judgment, could seek to off-set the claim against a claim by the international organisation. Furthermore, where an international organisation is found liable by a domestic court, this may complicate the organisation's relationship with the forum state. This would be particularly so where this is its host state, with which an international organisation has constant interactions and on the cooperation of which it depends.[1079] A domestic judgment against an international organisation may moreover impact the position of the forum state, and possibly other states, as members of the organisation. For example, they may internally pressure the organisation to comply with the judgment, such as by requiring it to waive its immunity from execution. Yet other states may be deterred by the potential for liability with respect to the actions scrutinised in the domestic judgment and this may influence their decision-making. Not least, finally, a judgment against an international organisation may impact its reputation and thereby undermine its effectiveness.

[1076] E. de Brabandere, 'Belgian Courts and the Immunity of International Organizations', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 206 at 207. See also De Brabandere (2010), at 81 ('the functional and other reflections that lie at the basis of the immunities system of international organizations seem to remain extremely pertinent, even when organizations exercise administrative duties in place of a state. The functional underpinning of institutional immunity is perhaps even more crucial under these circumstances, in order to guarantee the independent accomplishment of such intrusive and comprehensive mandates by an organization's subsidiary organ. We therefore claim that there is a need to maintain immunities in order to preserve institutional autonomy, even when the UN or another international organization has taken up administrative duties in a state or territory.').

[1077] De Brabandere (2015), at 211. For a critical discussion of functionalism, see, e.g., J. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', (2014) 25 *European Journal of International Law* 645.

[1078] In addition, as a further example of indirect interference, if multiple litigations were initiated before various domestic courts, the resource implications for the international organisation could be significant and impact on the performance of its functions.

[1079] Cf. *United States Diplomatic and Consular Staff in Tehran of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 73, para. 43 ('As a result the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith'. [emphasis added]).

The rationale underlying the jurisdictional immunity continues to apply today as it remains necessary to protect international organisations from interference. As explained by Blokker and Schrijver, there does not seem to be a

> 'development that would urge an adaptation of the fundamentals of the current regime of immunity rules. International organizations continue to need such rules. It is therefore not surprising to see that organizations created in recent years have been given immunity rules that are more or less similar to those given to almost all international organizations established since the Second World War.'[1080]

And, 'the regime of immunities rules is and continues to be a key part of the law of international organizations, essential for their independent functioning, generally accepted and respected in practice.'[1081]

Writing in 1961, Jenks stated that immunities are essential '[i]n the present stage of development of world organisation' to enable international organisations properly to discharge their responsibilities.[1082] This applies all the more today as multilateralism through international organisations is indispensable to address ever-increasing international challenges.

Indeed, the rationale for the jurisdictional immunity of international organisations is recognised in contemporary jurisprudence. For example, in one of the key cases discussed in this chapter, *Mothers of Srebrenica*, concerning claims against the UN for its role in connection with the genocide, the ECtHR stated in connection with the UN's immunity:

> 'To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field including with the effective conduct of its operations.'[1083]

4.2.2 Sources

There is no general convention on the privileges and immunities of international organisations akin to the 2004 UN State Immunity Convention.[1084] However, a proposal for a general arrangement goes back decades. As explained by Blokker,

> 'in the interbellum period, the question sometimes arose as to whether each international organization should have its own specific rules on privileges and immunities, or whether a *general* set of rules on the privileges and immunities of international organizations should be developed. This question was discussed most extensively in 1936 by Åke Hammerskjöld, the first Registrar, and subsequently a

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[1080] Blokker and Schrijver (2015), at 343 (emphasis added).
[1081] Ibid., at 345. Otherwise put: 'While a regular update of the immunity regimes is recommendable, there does not seem to be a need for a complete overhaul of that regime.' Ibid., at 357.
[1082] Jenks (1961), at xiii.
[1083] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 154.
[1084] The nearest equivalent is the Specialized Agencies Convention.

> judge, of the Permanent Court of International Justice. He concluded that a *"réglementation générique est dans l'air et que la tendance dominante y est favorable"*.'[1085]

In 2006, the idea of a general convention was put forward in a paper by Gaja, at the time a member of the ILC. The paper was drawn up in connection with the topic 'Jurisdictional immunity of international organizations', which is part of the 'long-term programme of work since the forty-fourth session of the Commission (1992)'.[1086] According to the paper:[1087]

> 'The recent adoption through UNGA resolution 59/38 of the UN Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.'[1088]

More specifically, according to the paper: 'Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the Convention on jurisdictional immunities of States and their property.'[1089] To date, however, the topic 'Jurisdictional immunity of international organizations' has remained on the ILC's long-term programme of work.[1090]

Absent a convention for international organisations generally, the jurisdictional immunity of an international organisation is typically provided for in one or more applicable treaties specifically with respect to that organisation. Building on a general provision on privileges and immunities in an organization's constituent treaty,[1091] this may be a protocol to that treaty,[1092] or a separate treaty.[1093]

Although international organizations are typically not parties to such multilateral treaties, in the Netherlands they may rely on treaty provisions that are 'self-executing', provided the treaty has been published. This follows from Article 93 of the Constitution of the Netherlands: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.'[1094] In addition, Article 94 of the

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[1085] Blokker 2015, at 9 (emphasis in original), referring to Å. Hammarskjöld, 'Les Immunités des Personnes Investies de Fonctions Internationales', (1936) 56 *Recueil des Cours de l'Académie de Droit International* 107, at 194.
[1086] UN Doc. A/61/10 (2006), para. 260, sub (m).
[1087] Ibid., Annex B, 'Jurisdictional immunity of international organizations', at 455-458.
[1088] Ibid., para. 1.
[1089] Ibid., para. 11.
[1090] <legal.un.org/ilc/status.shtml> accessed 21 December 2021. Webb concluded against the 2004 UN State Immunity Convention serving as a model or starting point for a future UN convention on the immunity of international organisations. See P. Webb, 'Should the 2004 UN State Immunity Convention Serve as a Model/Starting Point for a Future UN Convention on the Immunity of International Organizations?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 61.
[1091] See, e.g., Art. 48 of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3; Art. 3 of the 1973 Convention on the Grant of European Patents (European Patent Convention), 1065 UNTS 254.
[1092] See, e.g., the 1973 Protocol on the Privileges and Immunities of the European Patent Organisation, 1065 UNTS 500 ('EPO Protocol').
[1093] E.g. the General Convention or the APIC.
[1094] Translation available at <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021.

Constitution provides that statutory regulations—such as those granting jurisdiction to the Dutch courts—are inapplicable insofar as they conflict with such treaty provisions.

Provisions conferring immunity from jurisdiction on international organizations will typically qualify as self-executing. Thus, for example, although the United Nations is not itself a party to the General Convention, rights accrue directly to it under Article II, Section 2 thereof: 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'

This notwithstanding, the practical relevance of self-executing provisions of multilateral treaties nowadays is limited. This is because of a further type of treaty conferring privileges and immunities—headquarters agreements—which the Netherlands typically concludes with the international organisations that it hosts. Such bilateral treaties typically include a clause granting the international organisation immunity from jurisdiction, which the organisation can invoke as a party to the treaty.

But even absent a treaty provision to this effect, the Dutch Supreme Court held in *Spaans v. IUSCT*:

> 'It must be assumed that even in cases where there is no treaty [in which privileges and immunities are conferred upon the international organisations] it follows from unwritten international law that an international organization is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in [such treaties], in any event in the State in whose territory the organisation has its seat, with the consent of the government of that State.
> This means that, according to unwritten international law as it stands at present, an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performances of the tasks entrusted to the organisation in question.'[1095]

The case arose out of the IUSCT's dismissal of Mr Spaans. At the time, the IUSCT did not have a headquarters agreement with the Netherlands and the issue was whether it was entitled to immunity

[1095] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4. The District Court Maastricht earlier opined similarly in an employment case against the European Organization for the Safety of Air Navigation. See District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('since . . . the Parties to the [1960 International Convention Relating to Co-operation for the Safety of Air Navigation, 'Eurocontrol'] established a public international organization to whom they transferred a limited amount of sovereignty for the safety of air navigation over their territories, it follows that the Organization is entitled to immunity from jurisdictin [*sic*] on the grounds of customary international law to the extent that it is necessary for the operation of its public service'). However, the position is disputed as a matter of international law. See Wood (2015), at 59 ('There nevertheless remains a debate, particularly among writers, as to whether international organizations enjoy immunity under customary international law, at least vis-à-vis their member states. Notwithstanding certain pronouncements of domestic courts, generally *obiter*, to the effect that organizations do enjoy immunity under customary international law, on the basis of the materials examined in this chapter it would be difficult to conclude that any such rule exists.' [emphasis in original]).

under general international law. The Supreme Court concluded this was the case, however, without identifying the specific international law basis for the immunity[1096] or giving reasons for its conclusion.

In terms of the practical relevance of this finding by the Supreme Court, international organisations sued before the Dutch Courts are mostly able to rely on one or more treaties conferring immunity from jurisdiction on them. As for the IUSCT, it subsequently concluded a headquarters agreement with the Netherlands, as its host state.[1097]

But a treaty is not always in place, such that the Supreme Court's ruling in *Spaans v. IUSCT* provides important residual protection. This is illustrated by a 2017 case (*Supreme*) against NATO's Allied Joint Force Command Headquarters Brunssum ('JFCB'),[1098] based in the Netherlands, and Supreme Headquarters Allied Powers Europe ('SHAPE'), based in Belgium. Both entities were sued before the District Court of Limburg by private parties ('Supreme') in a dispute concerning the provision of fuel in connection with NATO's command over the International Security Assistance Force ('ISAF') in Afghanistan. In incidental proceedings, the respondents claimed immunity from jurisdiction. The District Court concluded that while such immunity did not result from a treaty, such as the 1964 headquarters agreement between the Netherlands and SHAPE,[1099] it did result from general international law as per the Supreme Court's conclusion in *Spaans v. IUSCT*.[1100]

On appeal, the Court of Appeal of 's-Hertogenbosch affirmed this part of the District Court's judgment. It added with respect to SHAPE that, though it was not based in the Netherlands, it nonetheless benefited from immunity from jurisdiction. In this respect, the Court of Appeal referred to the aforementioned passage in *Spaans v. IUSCT* according to which

> 'it follows from unwritten international law that an international organisation is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in [such treaties], in any event in the State in whose territory the organisation has its seat, with the consent of the government of that State.'[1101]

[1096] The Supreme Court referred to 'unwritten international law', see Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.

[1097] Headquarters agreements were concluded subsequently, see, e.g., 1990 Exchange of letters constituting an Agreement between the Kingdom of the Netherlands and the Iran-United States Claims Tribunal on the granting of privileges and immunities to the Tribunal, 2366 UNTS 445 ('IUSCT Headquarters Agreement').

[1098] Editorial note: The District Court referred to Allied Joint Force Command Headquarters Brunssum as 'AJFCH', whereas the Court of Appeal of 's-Hertogenbosch referred to this entity as 'JFCB'. For the sake of consistency, the latter abbreviation will be used throughout this text, except when quoting the District Court judgment.

[1099] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), paras. 4.3-4.10.

[1100] Ibid., paras. 4.11-4.17. More specifically, given the heading of the relevant passage in the judgment, the District Court appears to have concluded that the immunity arises under customary international law.

[1101] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.7.9.1, referring to Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de

According to the Court of Appeal, the qualifier 'in any event' does not preclude that other international organisations benefit from immunity under customary international law. In the case in point, the Court found that there existed grounds to extend said 'privilege' to Belgium-based SHAPE. Otherwise, the jurisdictional immunity of JFCB would be nullified, given that it operated under the direction and responsibility of SHAPE.[1102]

In its judgment of 24 December 2021 in *Supreme*, the Supreme Court affirmed the Court of Appeal's judgment on this point,[1103] having confirmed that jurisdictional immunity applies under current unwritten international law, as per *Spaans*.[1104]

As noted above, the priority rule in Article 94 of the Dutch constitution is limited to self-executing provisions of *treaties* and to *resolutions* by international institutions. However, an international organization's immunity under *general international law* equally limits the jurisdiction of the domestic courts. This results from Article 13a of the *General Provisions (Kingdom Legislation) Act*, which provides: 'The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law'.[1105]

4.2.3 Procedural aspects

In the Netherlands, it is for the courts to decide whether the immunity of a defendant organisation applies in a given case. In this respect, Article 1 of the Dutch Code of Civil Procedure ('DCCP') provides:

> 'Without prejudice to what is regulated with regard to jurisdiction in treaties and EC regulations, and without prejudice to Article 13a of the General Provisions (Kingdom Legislation) Act, the jurisdiction of the Dutch courts is subject to the following provisions.'[1106]

The reference to Article 13a of the General Provisions (Kingdom Legislation) Act was added to this provision by way of an amendment in 2011. This amendment was meant to reflect the legislature's intention that the courts would consider on their own motion whether immunity applies under international law.[1107]

Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4 (emphasis added by present author).

[1102] Ibid. The Court of Appeal overruled the District Court and upheld the respondents' jurisdictional immunity.

[1103] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (*Supreme*), para. 3.1.2-3.1.3.

[1104] Ibid., para. 3.1.2.

[1105] Translation available at <cahdidatabases.coe.int/contribution/details/414> accessed 21 December 2021. In the original Dutch text: 'De regtsmagt van den regter en de uitvoerbaarheid van regterlijke vonnissen en van authentieke akten worden beperkt door de uitzonderingen in het volkenregt erkend.'

[1106] Present author's translation. In the original text: 'Onverminderd het omtrent rechtsmacht in verdragen en EG-verordeningen bepaalde en onverminderd artikel 13a van de Wet algemene bepalingen wordt de rechtsmacht van de Nederlandse rechter beheerst door de volgende bepalingen.'

[1107] See Kamerstukken II (2008–2009) 32 021, No. 3, at 39-40.

While that intention is rather subtly expressed in the text of Article 1 DCCP, it was recognized by the Supreme Court in a 2017 judgment concerning (state) immunity in default proceedings.[1108] The case arose out of a default judgment rendered in 2000 by the Hague Court of Appeal against, amongst others, the Republic of Iraq. In subsequent summary proceedings, Iraq sought suspension of the execution of the default judgment, arguing, amongst others, that under international law the Court of Appeal should *on its own initiative* have considered Iraq's entitlement to immunity.[1109] According to the Supreme Court in its 2017 judgment, the courts are indeed required to do so (though only in cases initiated after 1 January 2018, and not therefore in the case in point). The Court held that this results from Dutch civil procedural law, rather than international law.[1110] In this respect, it considered Article 1 of the DCCP and Article 13a of the General Provisions (Kingdom Legislation) Act.[1111] The Supreme Court explicitly held that this requirement applies not only in cases involving foreign states, but *also international organisations*.[1112]

The Supreme Court recognised that, to a certain extent, this was a departure from its previous case law,[1113] including *Azeta* v. *Republic of Chile*[1114] and the 1994 case of *Kingdom of Morocco v. De Trappenberg*, both regarding the immunity of foreign states.[1115] In the former case, which involved default proceedings, the Supreme Court had ruled that the courts were authorised but *not obliged*, to consider immunity from jurisdiction of foreign states in default proceedings. With the Supreme Court's ruling in 2017,[1116] this discretion no longer applies: in default cases against states and international organisations alike, the courts are required to consider on their own initiative whether the defendant would be entitled to immunity.

The latter case, *Kingdom of Morocco v. De Trappenberg*, concerned regular (i.e., non-default) proceedings. Morocco had appeared in court, though without invoking its immunity from jurisdiction. According to the Supreme Court at the time, under those circumstances there was no room for the courts to consider on their own initiative whether the immunity applied.[1117] While the Supreme Court 2017 judgment references *Kingdom of Morocco v. De Trappenberg*, the operative part of the 2017 judgment

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[1108] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*).
[1109] Ibid., para. 3.3.2.
[1110] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*), para. 3.4.3.
[1111] Ibid., para. 3.6.2.
[1112] Ibid., para. 3.6.2, 3.6.3.
[1113] Ibid., para. 3.4.5. and 3.6.3.
[1114] Supreme Court 26 March 2010, ECLI:NL:HR:2010:BK9154 (*Azeta v. Chili*), para. 3.5.3.
[1115] Supreme Court 25 November 1994, NJ 1995/650 (*Kingdom of Morocco v. De Trappenberg*).
[1116] On the judgment, see generally G.R. Den Dekker, 'Immuniteit van Jurisdictie en Verplichte Ambtshalve Toetsing—een Eerste Verkenning', O&A 2018/5.
[1117] Supreme Court 25 November 1994, NJ 1995/650 (*Kingdom of Morocco v. De Trappenberg*), para. 3.3.3.

explicitly concerns default proceedings.[1118] This raised the question as to whether in regular (i.e., non-default) proceedings, Article 13a of the General Provisions (Kingdom Legislation) Act could nonetheless lead the courts to consider on their own motion whether an international organisation would be entitled to jurisdictional immunity. In a 2019 judgment, the Supreme Court clarified this is not the case:

> 'A foreign state or international organisation who appears before the Dutch courts as a defendant in a case and does not wish to waive the immunity from jurisdiction to which it is possibly entitled pursuant to article 1 of the DCCP in conjunction with article 13a of the General Provisions (Kingdom Legislation) Act must invoke such immunity in accordance with the manner prescribed in Article 11 of the DCCP.'[1119]

Invoking immunity from jurisdiction pursuant to Article 11 of the DCCP ('exceptie van onbevoegdheid') is done by way of claiming, in incidental proceedings, that the court denies itself jurisdiction. Under Article 150 of the DCCP, the party asserting immunity—that is, the international organisation—bears the burden to prove that the immunity applies.[1120]

Lastly, as to waiving immunity from jurisdiction, in the case of the UN, Section 2 of the General Convention, requires that this be done 'expressly'.[1121] According to Reinisch: 'Apparently, no considerable practice of waivers of immunity on the part of the UN exists'.[1122] There is no known case law in recent years of Dutch courts having assumed jurisdiction in cases against the UN or other international organisations on the basis of a waiver. One question that remains, as seen (paragraph 3.4.3.1.3), is whether international organisations that have agreed to arbitration are deemed to have

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[1118] Supreme Court (summary proceedings) 1 December 2017, ECLI:NL:HR:2017:3054, NJB 2017/2343 (*Republic Iraq and Central Bank of Iraq*), para. 3.6.3.

[1119] Supreme Court 17 May 2019, ECLI:NL:2019:732, para. 4.1.4 (translation by present author). The Supreme Court added that the immunity must be invoked 'timely', on the understanding that it may be done at the same time as raising other defences, including defences on the merits. Id., para. 4.1.3. Of note, the procedural position of international organisation may be addressed in an applicable treaty. Thus, for example, Art. 4 of the IUSCT Headquarters Agreement provides: '1. If the Tribunal institutes or intervenes in proceedings before a court in the Netherlands, it submits, for the purpose of those proceedings, to the jurisdiction of the Netherlands courts. 2. In such cases the Tribunal cannot claim immunity from the jurisdiction of the courts in respect of a counterclaim if the counterclaim arises from the legal relationship or the facts on which the principal claim is based.' Art. 5 further provides: 'If the Tribunal appears before the courts in order to assert immunity, it shall not thereby be deemed to have waived immunity'.

[1120] That burden is to be taken seriously. In a case against the OPCW arising out of an employment dispute between the organization and one of its (former) security guards, OPCW did not appear in court but merely advised the court in a letter of its immunity. Under Art. 4 of the headquarters agreement between the OPCW and the Netherlands, that immunity is functional in nature. The court ruled that 'in view also of the case law cited by Claimant, the Defendant has not, or has in any event insufficiently, made clear why it would be entitled to rely on its immunity from jurisdiction in this particular Dutch employment dispute, in which diplomatic and the like interests do not play a role.' See District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo v. OPCW*), present author's translation.

[1121] The provision continues: 'It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

[1122] Reinisch (2016, 'Immunity'), para. 3.

waived their immunity from the 'supervisory jurisdiction' of national courts in connection with the arbitration.

4.2.4 'Functional immunity'

Moving from procedure to substance, this subsection will consider the test on the basis of which the courts decide whether to grant immunity. The judgment of the Supreme Court in *Spaans v. IUSCT* sets forth the benchmark test and it has been further explained, to some extent, in subsequent case law. In *Spaans v. IUSCT*, the Supreme Court clarified that the immunity that accrues to international organizations under international law is 'functional' in nature. That is to say, according to the Supreme Court, 'an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization in question.'[1123]

The Supreme Court upheld the immunity of the IUSCT on that basis. In so doing, the Supreme Court affirmed the judgment of the District Court of The Hague, which in turn had set aside the judgment of the Sub-District Court which had declared itself competent to hear the case.[1124]

The test developed by the Supreme Court in *Spaans v. IUSCT* may be referred to as a 'functional immunity' test. This is because it is linked to the functions that the member states entrusted to the international organization. Most treaty clauses granting immunity to international organizations provide for such a test.[1125]

By contrast, certain international organizations enjoy absolute (or unqualified or unconditional) immunity in the sense that the immunity applies irrespective of the nature of the dispute in point. This is notably the case with the United Nations under Article II, Section 2 of the General Convention (reproduced above). A case in point in the Netherlands is the IRMCT Headquarters Agreement, which provides in Article 10(1) (emphasis added):

> 'The Mechanism, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Secretary-General has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution'.

[1123] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.
[1124] Ibid., para. 1. The first instance court had done so on the basis of an analogy with the law on state immunity, that is, it had dismissed the immunity on the basis that the agreement orally entered into between Mr Spaans and the IUSCT qualified as *jure gestiones*.
[1125] See Reinisch (2000), at 140.

In this respect, according to Reinisch: 'The view that "immunity from every form of legal process" means absolute immunity is also widely adhered to by other courts and seems to represent the dominant opinion.'[1126] The test is rather straightforward insofar as the immunity applies at all times.[1127]

Conversely, where the immunity is qualified in functional terms, the *Spaans v. IUSCT* approach requires proof of two matters: (a) the tasks entrusted to the organization; and (b) the immediate connection of the dispute to the performance of these tasks. As to (a), it may be possible to prove what tasks are entrusted to an international organization by reference to its constituent instrument. However, as to (b), the question remains how to prove the requisite immediate connection. As to employment disputes, the Supreme Court clarified in *Spaans v. IUSCT* that such disputes 'between an international organization and those who play an essential role in the performance of its tasks in any event belong to the category of disputes which are immediately connected with the performance of these tasks.'[1128]

The question remains how to determine whether a person plays an essential role in the performance of the organization's tasks. Spaans had worked as a translator and interpreter of judicial documents from and into Farsi, one of the two working languages of the IUSCT. Whether this satisfies the aforementioned test is a factual assessment. In this respect, the Supreme Court recalled the finding on appeal of The Hague District Court that Spaans' work 'formed part of the essential work of the tribunal which was necessary in order to enable it to perform its duties properly'.[1129]

In a case against the EPO, upholding the jurisdictional immunity of the defendant, the Supreme Court in 2009 reiterated the *Spaans v. IUSCT* test concerning employment disputes, notwithstanding that

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[1126] Reinisch (2016, 'Immunity'), para. 82 (fn. omitted). But see District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*). Under Art. 3(1) of the PCA Headquarters Agreement, 'the PCA, and its Property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process' (except in case of waiver of certain traffic offences). *Pichon v. PCA* arose out of an employment dispute. The District Court rejected the PCA's jurisdictional immunity, which the PCA had invoked. Though the immunity is cast in absolute terms, the District Court stated that 'the purpose of the immunity is to allow the PCA to conduct the work for which it was established without hindrance. Litigation between the PCA and a former employee in the context of an employment contract cannot in any way influence that work. After all, the present case concerns a purely private law dispute'. Ibid., at 2 (present author's translation).

[1127] Cf. Blokker and Schrijver (2015), at 347 ('In cases in which the relevant immunity rules of an international organization provide for absolute immunity (such as those of the United Nations), there is indeed little room for national courts to exercise jurisdiction. This is limited to cases in which a dispute relates to the question of whether or not a particular act or activity of the organization was performed *ultra vires*. However, even in such cases it may be questioned whether this should be decided by a national court, given it involves a consideration of the organization as a whole and all of its members. It is indeed open to debate whether it is appropriate for a domestic court to engage in such a legal assessment of the functions and powers of an international organization.' [fn. omitted]).

[1128] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.

[1129] Ibid., para. 3.1, sub. 8.

EPO's immunity from jurisdiction is treaty-based.[1130] The case arose out of a dispute between the EPO and one of its former employees, who claimed the EPO was liable for damages in connection with his disability. The Court of Appeal, like the small claims court in first instance, had upheld the immunity of EPO.[1131] The Court of Appeal had ruled that as a patent examiner, the claimant had without doubt contributed to the performance of the tasks of the international organization.[1132] Before the Supreme Court, the claimant asserted that the Court of Appeal had applied an overly broad definition of 'employment dispute'. The Supreme Court rejected the appeal, reiterating that what matters is 'whether the impugned acts of the international organization are immediately connected to the performance of the tasks entrusted to it.'[1133] Furthermore, the Supreme Court held that to determine whether there is an employment dispute warranting immunity, the test is *not* 'whether the litigation would hinder the official functioning of the organisation.[1134]

In 2012, The Hague Court of Appeal relied on some of the subtleties in *Spaans v. IUSCT* in another employment case against the IUSCT. The case was brought by a former IUSCT 'Secretary/Registry Clerck [*sic*]'[1135] in connection with the abolition of her post. Under Article 3 of the IUSCT Headquarters Agreement, the tribunal enjoys functional immunity ('within the scope of the performance of its tasks'). The District Court had ruled that the IUSCT enjoyed immunity.

The claimant appealed and the issue on appeal was whether the dispute was 'immediately connected' with the performance of IUSCT's tasks. The court of appeal considered that the appellant performed administrative tasks: handling (litigation) documents, managing calendars of supervisors, managing the registry's database, and managing the tribunal's general email account.[1136] Against this backdrop, the Court of Appeal concluded that the appellant took part in the IUSCT's 'primary process' and that she played a 'necessary' role.[1137] The appellant conceded that she performed such a role; however, she argued that this did not meet the *Spaans v. IUSCT* test, according to which the issue is whether she

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[1130] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.2. The treaty-base consists of the 1973 Convention on the Grant of European Patents (European Patent Convention), 1065 UNTS 199, and its Protocol on Privileges and Immunities, 1065 UNTS 500.
[1131] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 1.
[1132] Ibid., para. 3.3.
[1133] Ibid., para. 3.3 (translation as per Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4.).
[1134] Ibid. But see District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*), at 2 ('the purpose of the immunity is to allow the PCA to conduct the work for which it was established without hindrance. Litigation between the PCA and a former employee in the context of an employment contract cannot in any way influence that work. After all, the present case concerns a purely private law dispute'. Present author's translation, emphasis added).
[1135] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition of post*), para. 2.
[1136] Ibid., para. 9.
[1137] Ibid., para. 10. Present author's translation of 'noodzakelijke rol' in the original Dutch text.

played an 'essential' role.[1138] The Court of Appeal dismissed this reasoning. It pointed out that according to *Spaans v. IUSCT*, disputes with 'those who play an essential role in the performance of its tasks in any event belong to the category of disputes which are immediately connected with the performance of [the tasks entrusted to the organization].'[1139] According to the Court of Appeal, this does not exclude other employment disputes,[1140] implying that the present dispute was included. In other words, where a claimant is merely 'necessary' and not 'essential', this does not mean that the dispute is not immediately connected with the performance of the tasks entrusted to the organization.

It would seem, however, that the case involved a play on words insofar as 'essential' is rather a synonym for 'necessary'. This is supported by the reasoning of the very same Court of Appeal in a judgment one year later in another employment dispute with the IUSCT.[1141] The 2013 case was initiated by the (former) secretary of the IUSCT's President in connection with the non–extension of her contract. The District Court had ruled that the *Spaans v. IUSCT* test was met (however, as discussed below, it had rejected the IUSCT's immunity as the claimant was denied access to an independent and impartial judicial authority). The Court of Appeal affirmed the District Court's ruling on the application of *Spaans v. IUSCT*, considering that disputes between an international organization and those who play a 'necessary'[1142] role in the performance of its tasks 'in any event' belong to the category of disputes which are immediately connected with the performance of the tasks entrusted to the organization.[1143] These cases raise more salient matters, which are discussed below.

Moving on from employment disputes, in a rare criminal case involving immunity from jurisdiction the Supreme Court further clarified what the *Spaans v. IUSCT* test does *not* entail. The case arose from a petition by Greenpeace to the competent Amsterdam Court of Appeal to direct the prosecution services to prosecute the European Atomic Energy Community ('Euratom') for breaching licence conditions and committing other environmental offences through its Joint Nuclear Research Centre in the Netherlands. The issue before the Court of Appeal was whether Euratom enjoyed immunity from the criminal jurisdiction of the Courts. The Court of Appeal decided that this was not the case, holding that the

> 'contraventions perpetrated by [Euratom] in this connection can never be deemed to fall within the fulfilment of its task, and therefore within the activities Euratom must be able to carry out in order to fulfil that task, since it cannot be argued that the fulfilment of Euratom's task would be impeded if it

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[1138] Ibid., para. 11.
[1139] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.5 (underlining added).
[1140] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition of post*), para. 11. It appears that the judgment was not appealed to the Supreme Court.
[1141] The Hague Court of Appeal 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*). It appears that the judgment was not appealed to the Supreme Court.
[1142] Present author's translation of 'noodzakelijk' in the original Dutch text.
[1143] The Hague Court of Appeal 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 4.2.

> were to be held liable under criminal law for compliance with these rules and regulations by the Centre.'[1144]

The Court of Appeal reached that conclusion having considered whether Euratom would have been able to fulfil its tasks without committing the offences in question.[1145] In other words, the Court applied a test as to whether it was *necessary* for Euratom to commit these offences. The Supreme Court held that this test was overly restrictive.[1146] Applying the 'immediate connection' test under *Spaans v. IUSCT* test, the Supreme Court held that Euratom enjoyed immunity from jurisdiction.[1147]

However, a 'necessity' test may apply to an international organization under applicable treaty law. The EPO is a case in point. Article 3(1) of the EPO Protocol provides: 'Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution.' Article 3(4) of the Protocol specifies that (emphasis added) 'the official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.'

In a 2011 judgment in summary proceedings, The Hague Court of Appeal applied those provisions in a case arising out of a dispute concerning the public procurement of catering services.[1148] The Court upheld the judgment of the District Court in first instance and rejected the EPO's immunity, ruling against EPO on the merits. Regarding the immunity, the Court of Appeal stated that

> 'insofar as there would be . . . any (and immediate) connection between offering a catering facility for (mainly) employees and for the benefit of gatherings and meetings, on the one hand, and the (technical or administrative implementation) of granting European patents, on the other, then in any event this facility (whether or not it is subsidized by EPO) cannot, in the preliminary opinion of the Court, be considered as 'strictly necessary' to that end.'[1149]

This illustrates that, at least in the perception of the Court of Appeal, a 'necessity' test is more stringent than the 'immediate connection' test set out in *Spaans v. IUSCT*.

In sum, in explaining the *Spaans v. IUSCT* test—including what it does *not* mean—the Supreme Court has in various cases adopted a broad interpretation of 'functional immunity'. The lower courts generally

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[1144] Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), para. 5, citing the judgment of the Court of Appeal, para. 6.4. See generally Wessel (2015), at 152-153.
[1145] As the Supreme Court understood the test applied by the Court of Appeals, Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), para. 6.3.
[1146] Ibid., para. 6.4.
[1147] Ibid.
[1148] Court of Appeal The Hague (summary proceedings) 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour*). The Court applied the test in the context of its determination of whether the limitation of the right of access to court was proportionate in relation to the aim served by the immunity. The Court held that it was not and that said limitation amounted to a violation of Art. 6 of the ECHR. Ibid., para. 3.14.
[1149] Ibid., para. 14 (present author's translation).

follow suit. Thus, for example, in *Supreme* in which the District Court of Limburg concluded that JFCB and SHAPE were entitled to functional immunity under general international law as per *Spaans v. IUSCT*, the issue was whether their functional immunity applied in the case in point. The question before the Court therefore was whether the dispute was 'immediately connected' to the performance of the tasks entrusted to the organisation. The Court ruled that this was indeed the case, dismissing the claimants' contention that the adequate provision of fuel was not part of the tasks entrusted to NATO in exercising command over ISAF.

More specifically, the District Court held that what is *not* determinative of the matter is the *nature* of the underlying legal relationship between the parties (commercial fuel supply contracts) or of the disputed act (failure to comply with agreements and/or failure to pay outstanding invoices). Of relevance, according to the Court, to ensure a strategically and operationally responsible supply of fuel is inextricably linked to the implementation of a military mission of any sort. The Court held that it would be an overly restrictive interpretation of the *Spaans v. IUSCT* criterion to dismiss an 'immediate connection' on the basis that the fuel was, or could have been, supplied by others, and that NATO merely deemed it desirable to arrange the fuel out of strategic, tactical, operational or other considerations.

The Court went on to consider that the UNSC established ISAF by resolution 1386 (2001) under Chapter VII of the UN Charter. Pursuant to that resolution, and subsequent ones, the Security Council authorised participating states to take all necessary measures for the success of ISAF's mission, without specifying what those measures entailed. In 2003, NATO took over from the individual states the command, and strategic and operational military implementation of the mission; the UNSC accepted this without detailing NATO's tasks. As of 2006, NATO coordinated the fuel supply for the troops of contributing states. In so doing, according to the District Court, NATO (and the JFCB and SHAPE) acted within the scope of the tasks assigned to individual states and subsequently transferred to it.[1150] The respondents' functional immunity was therefore engaged. However, as we will see, the court ultimately rejected the immunity defence for lack of an alternative remedy.

On appeal, the Court of Appeal of 's-Hertogenbosch ruled that procuring fuel in relation to ISAF activities, which is to be supplied in the relevant operational area in Afghanistan and beyond, is immediately connected with the performance of the mandate of SHAPE and JFCB in the context of ISAF, such that functional immunity applies in full.[1151] The commercial nature of the contract does not change the context within which the supplies were made.[1152]

[1150] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.18-4.23.
[1151] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.7.9.2.
[1152] Ibid.

The case of *Supreme* illustrates that the determination of whether a dispute engages the functional immunity of the defendant organisation is highly fact-specific.[1153] From a more theoretical perspective, it is challenging to define whether a dispute is immediately connected to the performance of the tasks entrusted to an international organization. The difficulties inherent in designing a workable functional immunity test are well known.[1154] The present author has submitted elsewhere that

> 'the rationale for the immunity is to ensure that the international organization can function independently in the interest of its collective membership. That interest is expressed in the constitutive document in which the members defined the tasks of the international organization, as well as during the decision-making within the organization in accordance with the procedure which the member states have agreed to this end. Upon joining the international organization, states may be said to subscribe to decision-making within the organization in accordance with this procedure. Member states must only partake in decision-making in respect of the organization in accordance with the agreed process. This applies equally to the host state of the international organization, which must not unilaterally, including through its courts, interfere with this process . . . In sum, in ruling on the immunity defence of an international organization the courts may look for evidence of the decision-making process in respect of the organization. The more intense that decision-making process is and the more the impugned act or omission of the international organization is connected thereto, the more the functionality of the organization is at stake and the more its immunity is warranted.'[1155]

That said, as Reinisch states, 'some, if not the majority of jurists, suggest that the notion of functional immunity is merely synonymous with absolute immunity'.[1156] Indeed, according to the same author, the fact is that 'even under a functional necessity concept international organizations regularly enjoy absolute immunity'.[1157] The case law of the Dutch Supreme Court supports this conclusion.[1158]

[1153] Concerning the related issue of the competence of the Dutch courts in this litigation, see De Brabandere (2020).
[1154] Reinisch (2000), at 205. See also Reinisch (2016, 'Immunity'), para. 17 ('broadly diverging interpretations of the inherently vague and general notion of functional immunity').
[1155] See Henquet (2010), at 282–283.
[1156] Reinisch (2000), at 205.
[1157] Reinisch (2000) at 341. See also U.A. Weber and A. Reinisch, '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 *International Organizations Law Review* 59, at 64 ('At the end of the day, most attempts to make functional immunity work in a way that does not lead to absolute immunity have not been very successful.') However, as Reinisch explained: 'Some recent privileges and immunities instruments contain specific exceptions from an organization's broad jurisdictional immunity, for example, for claims arising from car accidents.' Reinisch (2016, 'Immunity'), para. 19 (fn. omitted). A case in point in the Netherlands, by way of example, is Art. 3(1) of the IUSCT Headquarters Agreement: 'Subject to the provisions of Article 4 the Tribunal, within the scope of the performance of its tasks, shall enjoy in the Netherlands immunity from jurisdiction and execution, except: a. to the extent that the Tribunal shall have expressly waived such immunity in a particular case; b. in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Tribunal, or in respect of a motor traffic offence involving such a vehicle.'
[1158] But see District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo* v. *OPCW*). The case arose out of the non-extension of an employment contract of an OPCW security guard. Upon being sued, the OPCW relied on its jurisdictional immunity, which under Art. 4(1) of the OPCW Headquarters Agreement is formulated in functional terms: 'Within the scope of its official activities the OPCW shall enjoy immunity from any form of legal process'. The District Court held that 'the Defendant has not, or in any event insufficiently, made clear why it would be entitled to rely

In view of the strong policy rationale underlying the jurisdictional immunity of international organisations, that immunity is not lightly 'overcome'.[1159] In this respect, Reinisch wrote: 'Such 'functionalist', organization-centred thinking neglects the effect of a grant of immunity to international organizations, in that potential claimants may be deprived of their ability to raise claims against international organizations before the "natural forum" of domestic courts'.[1160]

4.3 Immunity from jurisdiction and 'access to court'

By suing an international organization before a domestic court, a claimant relies on the right of access to court. This right is enshrined, albeit implicitly,[1161] in Article 6(1) of the ECHR, as well as its global counterpart, Article 14(1) of the ICCPR. The wording of the former is as follows: 'In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

If in a case between a private claimant and an international organization the court determines that the latter is entitled to immunity, then by the same token it denies the former access to court. The Supreme Court in *Spaans v. IUSCT* recognised this conflict.[1162] Its reasoning may be deconstructed as follows:

- In principle, immunity from jurisdiction applies (para. 3.3.4);
- The question arises as to 'the extent to which exceptions may be made to this principle' (para. 3.3.4);
- That question 'may be disregarded here, as will appear from the findings at 3.3.5 and 3.3.6.' (para. 3.3.4);

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on its immunity from jurisdiction in this particular Dutch employment dispute, in which diplomatic and the like interests do not play a role.' Ibid., at 2 (present author's translation).

[1159] Also referred to as 'piercing of the immunity veil', see Reinisch (2015), at 320.

[1160] Ibid., at 314.

[1161] Smits (2008), at 31, para. 2.1.1 ('Het recht op toegang tot de (burgerlijke) rechter is het enige recht dat niet expliciet in art. 6 EVRM is opgenomen, maar uit dat artikel is afgeleid.'). According to Reinisch, 'most human rights treaties do not explicitly contain a right of access to court. Instead, instruments like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, or the European Convention of Human Rights (ECHR), provide for due process or fair trial guarantees. However, in the actual application of such standards it has become clear that the right to a fair trial requires not only a trial to be fair if one is provided for under national procedural law, but also the right to have a trial in the first place.' A. Reinisch, 'Privileges and Immunities', in J. Katz Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (2017), 1048 at 1062 (fns. omitted). With respect to the ICCPR, see UN Human Rights Committee (HRC), General comment no. 32, Art. 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 9: 'Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law.' (emphasis added).

[1162] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), paras. 3.3.2-3.3.6 (emphasis added).

- Those findings in 3.3.5 and 3.3.6. relate to a 'special procedure (either inside or outside the organization) for the resolution of disputes of this kind relating to employment relations which have been removed from the jurisdiction of the host State.' (para. 3.5, emphasis added);
- Earlier in its judgment the Supreme Court had explained what this 'special procedure' involved, that is,

> 'nowadays the Tribunal includes in its agreements with its employees a clause to the effect that disputes between the Secretary-General of the Tribunal, who represents the Tribunal in personnel matters, and the relevant employee will be dealt with and decided by the Tribunal as the final authority' (para. 3.1 sub (6))

- This procedure was open to Mr Spaans (para. 3.3.6); and
- The fact that he had not availed himself of that procedure does not detract from the conclusion that the IUSCT enjoys jurisdictional immunity.

In short, because Mr Spaans had access to the said special procedure, the IUSCT's immunity applied in full.[1163] The judgment has been criticised because this procedure lacked independence.[1164] This notwithstanding, at its core, the Supreme Court's reasoning foreshadowed the reasoning by the ECtHR a decade and a half later in its landmark judgment concerning Article 6 of the ECHR and the immunity of international organizations in *Waite and Kennedy*.[1165] The ECtHR's judgment in *Waite and Kennedy* is its first, and continues to be its leading, ruling on the immunity from jurisdiction of international organisations.

Spaans v. IUSCT and *Waite and Kennedy* are central to this section, the key theme being the tension between jurisdictional immunity and the rights under Article 6(1) of the ECHR. The discussion begins

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[1163] On appeal against the judgment of the court in first instance, the District Court held that the absence of legal recourse for IUSCT staff members would *not* have rendered the Dutch courts competent. District Court judgment (included in publication of Supreme Court judgment in NJ 1986/438, m.nt. P.J.I.M. de Waart), para. 8. In essence, the Supreme Court's reasoning is similar to that of District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('Eurocontrol uncontestedly argued that the ILO Administrative Tribunal was easily accessible because of the absence of procedural requirements and the element of costs, since no court fees were charged; that it was not necessary to consult the Geneva bar because of *ex officio* instruction, with possible review by the International Court of Justice, and that, in fact, the officials of Eurocontrol did apply to that Tribunal. All these considerations lead the Court to the opinion that the objection advanced by Eurocontrol is well-founded; that consequently . . . the judgment of the Local Court shall be reversed, that the District Court lacks jurisdiction').

[1164] In his annotation to the Supreme Court's judgment in *Spaans v. IUSCT*, De Waart criticised the 'special procedure' available to Mr Spaans on the basis that it lacked independence insofar as 'disputes between the Secretary-General of the Tribunal, who represents the Tribunal in personnel matters, and the relevant employee will be dealt with and decided by the Tribunal as the final authority'. Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), note De Waart, at 12. Following the Supreme Court judgment, Spaans brought his case before the European Commission of Human Rights, which was in existence at the time. However, the Commission declared the complaint inadmissible on the ground that it was incompatible with the scope *ratione personae* of the ECHR. *Spaans v. The Netherlands* (1988), 58 DR 119, at 3.

[1165] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*).

by examining the ECtHR's landmark ruling in *Waite and Kennedy* and the main ECtHR case law on which it builds (subsection 4.3.1). It then proceeds in two ways. First, it discusses in largely chronological order the case law of the Dutch courts and the ECtHR following *Waite and Kennedy* in which 'reasonable alternative means' were available to claimants (subsection 4.3.2). Second, principally on the basis of the ECtHR's key ruling in *Mothers of Srebrenica*, it considers the situation in which there are no 'reasonable alternative means' (subsection 4.3.3). *Mothers of Srebrenica* allows for a discussion of several broader themes, including the relationship between immunity from jurisdiction, access to court and alternative remedy; and the existence of 'civil rights' under Article 6(1) of the ECHR. The section thereafter discusses how, in the absence of alternative recourse, to resolve the conflict between the obligations to grant jurisdictional immunity to the respondent international organisations, and to grant access to court to the claimant. As will be seen, notwithstanding legal and policy arguments to prioritise the former over the latter, the lower case law not infrequently points in the opposite direction.

4.3.1 *Waite and Kennedy*

The case arose out of an employment-related lawsuit by Messrs. Waite and Kennedy against ESA before the German courts.[1166] The claimants argued that they had acquired an employment relationship with ESA, having worked for it for years through contracting firms.[1167] The German courts upheld the immunity of ESA, as an international organization, and dismissed the case. The claimants then sued Germany before the ECtHR, alleging that their right of access to court had been violated. According to the ECtHR,

> 'the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[1168]

[1166] *Beer and Regan v. Germany*, Judgment of 18 February 1999, ECHR (App. no. 28934/95) (*Beer and Regan*), as far as the Court's legal considerations are concerned, is materially identical to *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I). For a discussion of the opinions of the European Commission of Human Rights in these cases, as well as in *Spaans* and other cases concerning the immunity from jurisdiction of international organisations and the right of access to court, see Lawson (1999), chapter 9.3.

[1167] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), paras. 13-15.

[1168] Ibid., para. 59 (emphasis added).

The court dismissed the application, holding that there had been no violation of Article 6(1) of the ECHR.

Waite and Kennedy builds on a long line of cases concerning Article 6 ECHR, going back to the 1980s (though not concerning international organizations). For example, *Ashingdane* arose from the claimant's detention at a mental hospital and the authorities' refusal to transfer him to another hospital.[1169] The issue was whether Article 6 ECHR was breached because of the authorities' protection from suit before the domestic courts under the relevant mental health legislation. The Court dismissed the application, *inter alia*, since there was no complete bar from suit.[1170]

Lithgow arose from a dispute over compensation following an expropriation in the aircraft and shipbuilding industries.[1171] The applicable legislation provided for the collective settlement of such disputes before an arbitration tribunal. The claimant contended that this was in breach of Article 6 ECHR since this mechanism did not allow for individual claims. The Court dismissed the application on the basis that under the circumstances it was a legitimate aim to avoid a multiplicity of claims and that the collective system was a proportionate means.[1172]

The Court in *Waite and Kennedy* specifically mentioned *Fayed*,[1173] another case in which it had dismissed the application. The dispute in that case arose from the state-commissioned investigation into, and reporting on, the affairs of a public company in connection with its (indirect) acquisition by applicants. The investigation did not lead to criminal prosecution, but the reporting was damaging to the applicants' reputation. They argued, among others, that

> 'there was no opportunity under English law, whether by way of defamation proceedings or by way of judicial review, to challenge the Inspectors' condemnatory findings of fact or conclusions before a tribunal satisfying the requirements of Article 6 para. 1'.[1174]

Indeed, the Court held that 'it was common ground that any defamation action brought by the applicants against the Inspectors or the Secretary of State would have been successfully met with a defence of privilege'.[1175]

[1169] *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, ECHR (Ser. A no. 93) (*Ashingdane*).
[1170] The Court left unresolved whether 'civil rights' in the sense of Art. 6 ECHR were at stake. Ibid., para. 54.
[1171] *Lithgow and Others v. the United Kingdom*, Judgment of 8 July 1986, ECHR (Ser. A no. 102) (*Lithgow*).
[1172] Ibid., paras. 193-197. The Court held that the applicable right to compensation 'is without doubt a civil right'. Ibid., para. 192.
[1173] *Fayed v. the United Kingdom*, Judgment of 21 September 1990, ECHR (Ser. A no. 294-B) (*Fayed*).
[1174] Ibid., para. 64. Without making a judicial finding as to whether Art. 6 ECHR applied, the Court proceeded on the assumption that it did. Ibid., para. 67.
[1175] Ibid., para. 70.

Nevertheless, the Court considered that the investigation and reporting were in the public interest of the proper conduct of public companies and, thus, pursued legitimate aims. The Court continued:

> 'Having regard in particular to the safeguards that did exist in relation to the impugned investigation, the Court concludes that a reasonable relationship of proportionality can be said to have existed between the freedom of reporting accorded to the Inspectors and the legitimate aim pursued in the public interest.'[1176]

In *Stubbings* the claimants contended that a time bar for civil suits for damages in connection with child abuse violated Article 6(1) of the ECHR.[1177] The Court again dismissed the application, holding that the very essence of the right of access to justice was not impaired.[1178] The Court found that under the circumstances the time-bar served a legitimate aim, that is, protecting finality and legal certainty, and that it was proportionate as it prevented the courts from having to adjudicate events of long ago.

Conversely, in *Tinnelly* the court found that Article 6(1) of the ECHR had been breached by the state.[1179] The claimants alleged that they had been denied

> 'access to a court or tribunal for a determination of their claims that they had been unlawfully refused public works contracts or the security clearance necessary to obtain those contracts on account of their religious beliefs or political opinions.'[1180]

The Northern Ireland authorities had issued a document certifying national security concerns, which document was not reviewable in court. Whilst it was not in dispute that the protection of national security qualified as a legitimate aim, according to the Court, the means to achieve that aim lacked proportionality. It considered, among others, that

> 'the right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive'.[1181]

Similarly, in *Osman*,[1182] to which the Court referred in *Waite and Kennedy*, the Court concluded that Article 6(1) of the ECHR had been violated. The case arose out of allegations of police negligence. The claimants sued the police for negligence in connection with the deadly shooting of their relative. The case before the UK courts was barred on account of the police's immunity from civil suit. According to the Court, immunity from suit may be in the interest of the effectiveness of the police service and thus

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[1176] Ibid., para. 82.
[1177] *Stubbings and Others v. the United Kingdom*, Judgment of 22 October 1996, [1996] ECHR (IV) (*Stubbings*).
[1178] Ibid., paras. 47-57.
[1179] *Tinnelly & Sons Ltd. And Others and Mcelduff and Others v. the United Kingdom*, Judgment of 10 July 1998, [1998] ECHR (IV) (*Tinnelly*).
[1180] Ibid., para. 56.
[1181] Ibid., para. 77.
[1182] *Osman v. the United Kingdom* [GC], Judgment of 28 October 1998, [1998] ECHR (VIII) (*Osman*).

constitute a legitimate purpose.[1183] Yet, in the instant case the immunity served to

> 'confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.'[1184]

In other words, according to the Court, the immunity was a disproportionate limitation of the right of access to court. Of note, the UK Government had contended

> 'in defence of the proportionality of the restriction on the applicants' right to sue the police that they could have taken civil proceedings against [the killer]. Moreover, they had in fact sought to sue [the psychiatrist who had assessed the killer] but subsequently abandoned their action against him. In either case they had full access to a court.'[1185]

However, the Court was not

> 'persuaded either by the Government's plea that the applicants had available to them alternative routes for securing compensation . . . In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Neither an action against [the killer] nor against [the psychiatrist who had assessed the killer] . . . would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent [the killer] from exacting a deadly retribution against [the victims]. They may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.'[1186]

Thus, any such legal action would be against other parties than the intended respondent, and in relation to other actions or omissions, and they were therefore irrelevant in terms of proportionality.

Returning to the Court's *Waite and Kennedy* judgment, which built on the foregoing case law, the Court applied the usual test of legitimate aim and proportionality. As to the former, the Court opined that

> 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.
> The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.
> Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.'[1187]

[1183] Ibid., para. 150. The Court concluded that Art. 6 of the ECHR applied as the applicants' right was derived from the law of negligence. Ibid., para. 139.
[1184] Ibid., para. 151.
[1185] Ibid., para. 145.
[1186] Ibid., para. 153 (emphasis added).
[1187] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 63 (emphasis added).

On the latter issue, concerning proportionality, the Court stated that it 'must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case.'[1188] It then reached the following conclusions:

> 'The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial . . .
>
> For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.'[1189]

In other words, where there is an alternative remedy against the international organization, this goes towards the proportionality of the limitation of the right under Article 6 of the ECHR due to the immunity.

The ECtHR dismissed the application in this case, '[t]aking into account in particular the alternative means of legal process available to the applicants'.[1190] In this connection, the Court first stated:

> 'The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation . . .
> Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board. In accordance with Regulation 33 § 1 of the ESA Staff Regulations, the ESA Appeals Board, which is "independent of the Agency", has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staffmember"'.[1191]

The court added: 'As to the notion of "staff member", it would have been for the ESA Appeals Board […] to settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members".'[1192]

Of note, the ECtHR considered that, under the ESA's Staff Regulations, the appeals board is 'independent of the Agency' and that it 'has jurisdiction to "hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member"'.[1193] In this respect, the ECtHR referred back to paragraphs 31 to 40 of its judgment, in which it in turn cited regulation 33

[1188] Ibid., para. 64.
[1189] Ibid., paras. 67-68 (emphasis added).
[1190] Ibid., para. 73.
[1191] Ibid., para. 69.
[1192] Ibid.
[1193] Ibid., para. 68.

of the ESA Staff Regulations. That provision clarifies that the appeals board has the power to render binding decisions in staff disputes—as opposed to mere non-binding recommendations—including by rescinding impugned administrative decisions and ordering the administration to repair any damage sustained as a result of such decisions.

The ECtHR then proceeded to state the following:

> 'Moreover, it is in principle open to temporary workers to seek redress from the firms that have employed them and hired them out. Relying on general labour regulations or, more particularly, on the German Provision of Labour (Temporary Staff) Act, temporary workers can file claims in damages against such firms. In such court proceedings, a judicial clarification of the nature of the labour relationship can be obtained.'[1194]

At first glance, this might be taken to contrast with *Osman*, rendered shortly before *Waite and Kennedy*. As seen, in that case the Court held that the claimant's ability to sue another party than the one claiming immunity, and in relation to other actions or omissions, did not satisfy the right of access to court in relation to the latter party. In *Waite and Kennedy* the 'firms that have employed [the applicants]' were other parties than the ESA. However, as the Court went on to explain:

> 'The significant feature of the instant case is that the applicants, after having performed services at the premises of ESOC in Darmstadt for a considerable time on the basis of contracts with foreign firms, attempted to obtain recognition of permanent employment by ESA on the basis of the above-mentioned special German legislation for the regulation of the German labour market.'[1195]

Arguably, litigation against the ESA and the firms served the same purpose, namely, to clarify the employment status of the applicants. Thus, the Court stated that 'it would have been for the ESA Appeals Board . . . to settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members"'.[1196] Similarly, in court proceedings against the firms that had hired the applicants, 'a judicial clarification of the nature of the labour relationship can be obtained.'[1197] Therefore, in the specific circumstances of *Waite and Kennedy*, the similarity of the

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[1194] Ibid., para. 70.
[1195] Ibid., para. 71 (emphasis added).
[1196] Ibid., para. 69.
[1197] Ibid., para. 70 (emphasis added). In the parallel case of *Beer and Regan*, following the ECtHR's 1999 judgment in that case, the complainants proceeded to seize the ESA Appeals Board. The board dismissed the claims on the basis that the complainants did not qualify as staff members of the ESA. The complainants thereupon once more seized the ECtHR, again alleging a violation of Art. 6 of the ECHR. In its 2003 decision, the ECtHR recalled its 1999 judgment, specifically para. 60 (which is identical to para. 70 of its judgment in *Waite and Kennedy*). See *Beer and Regan v. Germany*, Judgment of 18 February 1999, ECHR (App. no. 28934/95) (*Beer and Regan*), at 10. The Court concluded that the complainants had in fact availed themselves of domestic recourse against the firms that had hired them. In the context of those proceedings, the complainants had reached amicable settlements with the firms, pursuant to which they had been indemnified for the loss of employment. According to the EctHR, 'les requérants ne peuvent passer pour avoir dû supporter, du fait de la décision de la Commission de recours rejetant leur demande, une charge disproportionnée'. The Court declared the application inadmissible. Ibid. Along similar lines, see District Court The Hague (summary proceedings) 3 October 2013, ECLI:NL:RBDHA:2013:16952

purpose of the potential litigation against ESA and the firms arguably is what distinguishes the case from *Osman*.

The ECtHR further stated

> 'that, bearing in mind the legitimate aim of immunities of international organisations . . . the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.'[1198]

The ECtHR concluded:

> 'In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.'[1199]

4.3.2 'Reasonable alternative means': beyond *Waite and Kennedy*

In its subsequent case law on the jurisdictional immunity of international organisations, the ECtHR has applied and refined its *Waite and Kennedy* judgment, particularly concerning 'reasonable alternative means'. It is significant to note from the outset that the immunity of the international organisation prevailed in all opinions by the ECtHR and the Dutch Supreme Court. This is because reasonable alternative means were deemed to be available. The one case in which reasonable alternative means were not available is *Srebrenica*—though the UN's immunity prevailed—which is the primary reason for discussing the case separately.

Shortly after *Waite and Kennedy*, in *A.L.* the ECtHR was called to consider the jurisdictional immunity of NATO in an employment dispute.[1200] The applicant was a (civilian) staff member of NATO and the case arose out of decisions in connection with the termination of his contract. He unsuccessfully challenged the decisions before NATO's appeals board. As per its arrangements with Italy, NATO

(*EPO*). The claimant sued the EPO, along with two private companies. He had worked for the EPO on the basis of contacts with the private companies in connection with which he sought payment of money. According to the Complainant, as he was not a staff member of the EPO, he did not have recourse to the ILOAT. The District Court ruled that there was no violation of Art. 6 of the ECHR as the complainant had recourse against the private companies. Ibid., para. 3.3.

[1198] Ibid., para. 72.

[1199] Ibid., para. 73. See M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (2010), at 144. ('The judgments of Waite and Kennedy v. Germany and Beer and Regan v. Germany . . . lack a critical assessment of the alternative remedies which were available to the applicants.').

[1200] *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) (*A.L.*).

enjoyed immunity from suit before the Italian courts in matters concerning employment contracts of civilian staff. The applicant, an Italian national, complained that by agreeing to the immunity, Italy had violated his right of access to justice under Article 6 of the ECHR.

The ECtHR recalled its considerations in *Waite and Kennedy*, including that the rationale for according jurisdictional immunity to international organisations is to protect their proper functioning. It then went on to consider the following:

> 'Pour déterminer si l'immunité d'une organisation internationale devant les juridictions de l'un des Etats contractants de la Convention est admissible au regard de celle-ci, il importe d'examiner s'il existe d'autres voies raisonnables pour assurer efficacement la protection des droits protégés par la Convention'.[1201]

The ECtHR noted at the outset that a problem could arise as to the application of Article 6 of the ECHR in the case in point.[1202] This is an important matter, which is discussed further below. For purposes of the present case, the Court assumed that Article 6 *did* apply and then proceeded to consider the Applicant's contention that the proceedings before the NATO Appeals Board lacked independence. In declaring the application inadmissible, it considered that:

> 'les membres de cette Commission ne sont membres ni de l'OTAN, ni des délégations parlementaires auprès du Conseil de l'OTAN, sont indépendants dans l'exercice de leurs fonctions, et sont nommés pour trois ans parmi des personnes possédant une compétence notoire.
>
> En outre, la procédure devant la Commission est contradictoire et ses décisions sont motivées. En l'espèce, le requérant était représenté par trois avocats et n'a pas mis en cause le déroulement de la procédure.
>
> S'il est vrai que les audiences devant la Commission de recours se tiennent à huis clos, l'exclusion du public et de la presse peut se justifier au sens de l'article 6 § 1 dans l'intérêt de l'ordre public et de la sécurité nationale dans une société démocratique, l'OTAN étant une organisation dont l'activité se déploie dans le domaine militaire.
>
> En conclusion, la Cour considère que la Commission de recours de l'OTAN remplit essentiellement les conditions prévues par l'article 6 de la Convention et n'a pas de raisons de douter que ladite Commission constitue une « voie raisonnable pour protéger efficacement » le droit du requérant à un procès équitable. Par conséquent, on ne saurait dire que la restriction de l'accès aux juridictions italiennes pour régler le différend du requérant avec l'OTAN ait porté atteinte à la substance même du droit de celui-ci à avoir accès à un tribunal ou qu'elle ait été disproportionnée sous l'angle de l'article 6 § 1 de la Convention.'[1203]

In *Mazéas*,[1204] the ECtHR considered the jurisdictional immunity of the Union Latine, an international organization whose General Secretariat was based in Paris. The case arose out of Ms Mazéas' dismissal

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[1201] Ibid., at 4, referring to *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), paras. 67-68 (the latter paragraph contains the 'material factor' consideration).
[1202] *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) (*A.L.*), at 4 ('la Cour observe en premier lieu qu'un problème pourrait se poser quant à l'applicabilité de l'article 6 en l'espèce').
[1203] Ibid., at 5 (underlining added).
[1204] *Mazéas v. France,* Decision of 13 November 2008, ECHR (App. no. 11270/04) (*Mazéas*).

by the organisation. Ms Mazéas sued the Union Latine before the French courts. The Supreme Court, in final instance, upheld the organisation's jurisdictional immunity under its headquarters agreement with France.

Ms Mazéas then sued France before the ECtHR, alleging a violation of Article 6 of the ECHR. In relying on *Waite and Kennedy* (and *Beer and Regan*), the ECtHR held:

> 'Les agents de l'Union latine sont dans une situation comparable. En effet, si en raison de l'immunité de juridiction dont jouit leur employeur ils ne peuvent en principe saisir les juridictions internes des litiges les opposant à celui-ci, ils ont un « droit de recours » spécifique (chapitre VIII du statut du personnel) : ils peuvent dans les soixante jours suivant la décision leur faisant grief adresser une réclamation à leur secrétaire général et, le cas échéant, dans les soixante jours, introduire un recours contentieux contre sa décision de rejet devant une « commission de recours » indépendante, laquelle peut prononcer l'annulation de l'acte contesté.'[1205]

The Court added that whilst the Appeals Board procedure was adopted after the dismissal of Ms Mazéas, it was nonetheless available to her on the basis of an ad hoc arrangement.[1206] That is, 'du fait d'une prorogation ad hoc du délai de saisine, la requérante avait la possibilité d'user de ce recours, ce qu'elle n'a pas fait.'[1207] The Court concluded:

> 'Dans ces circonstances et compte tenu des modalités dudit recours (cidessus), on ne saurait dire qu'il y a eu atteinte à la substance même de « droit à un tribunal » de la requérante du fait de la reconnaissance par la Cour de cassation de l'immunité de juridiction de l'Union latine ni que les moyens employés étaient disproportionnées par rapport au but poursuivi.'[1208]

The next year, the ECtHR decided *Lopez Cifuentes*, concerning the immunity of the International Olive Council ('IOC'), based in Spain.[1209] Mr Lopez was an IOC staff member who was dismissed following internal disciplinary proceedings. He challenged his dismissal before the ILOAT, which dismissed the complaint.

In parallel to the ILOAT proceedings,[1210] the applicant brought a case before a Spanish court against the IOC. The domestic court declined to hear the case on account of the organization's immunity. This, amongst others, led the applicant to contend before the ECtHR that Spain had violated Article 6 of the ECHR. The ECtHR declared the application inadmissible, finding that the limitation of the right of access to justice did not impair the essence of the right and that it was not disproportionate for purposes of Article 6 of the ECHR. In so doing, the Court referred to the passage in its judgment in *Waite and Kennedy* in which it considered the availability of alternative means. In the present case, such means

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[1205] Ibid., at 7.
[1206] Ibid., at 7-8.
[1207] Ibid., at 8.
[1208] Ibid., at 8.
[1209] *Lopez Cifuentes v. Spain*, Decision of 7 July 2009, ECHR (App. no. 18754/06) (*Lopez Cifuentes*).
[1210] Ibid., para. 31.

existed by way of the ILOAT, of which the applicant had in fact availed himself.[1211] The ECtHR stated the following with respect to the ILOAT:

> 'L'Organisation internationale du Travail, fondée en 1919 sous l'appellation « Bureau international du Travail », est depuis 1946 une agence tripartite de l'Organisation des Nations unies qui rassemble les gouvernements, employeurs et travailleurs de ses États membres. Son tribunal administratif connaît des requêtes formées par les fonctionnaires ou anciens fonctionnaires de l'Organisation et des autres organisations internationales qui ont reconnu sa compétence juridictionnelle. Les dispositions du Statut du TAOIT pertinentes en l'espèce sont les suivantes :
> Article II
> « (...)
> 5. Le Tribunal connaît en outre des requêtes invoquant l'inobservation, soit quant au fond, soit quant à la forme, des stipulations du contrat d'engagement des fonctionnaires ou des dispositions du Statut du personnel des autres organisations internationales satisfaisant aux critères définis à l'annexe au présent Statut qui auront adressé au Directeur général une déclaration reconnaissant, conformément à leur Constitution ou à leurs règles administratives internes, la compétence du Tribunal à l'effet ci-dessus, de même que ses règles de procédure, et qui auront été agréées par le Conseil d'administration. »
> Article VI
> « 1. Le Tribunal statue à la majorité des voix ; ses jugements sont définitifs et sans appel.
> 2. Tout jugement doit être motivé. II sera communiqué par écrit au Directeur général du Bureau international du Travail et au requérant.
> (...) »
> . . . L'article XII, paragraphe 1, de l'annexe au Statut du TAOIT se lit ainsi :
> « Au cas où le Conseil exécutif d'une organisation internationale ayant fait la déclaration prévue à l'article II, paragraphe 5, du Statut du Tribunal conteste une décision du Tribunal affirmant sa compétence ou considère qu'une décision dudit Tribunal est viciée par une faute essentielle dans la procédure suivie, la question de la validité de la décision rendue par le Tribunal sera soumise par ledit Conseil exécutif, pour avis consultatif, à la Cour internationale de justice. »
> . . . Par une lettre adressée au Directeur général du Bureau international du Travail du 19 septembre 2003, le COI reconnut la compétence du TAOIT. Cette reconnaissance fut approuvée par le Conseil d'administration du BIT.'[1212]

Of note, in March 2016, the ILO International Labour Conference adopted amendments to the ILOAT Statute. This notably involved the removal of Article XII of the Statute and Article XII of its Annex, under which the defendant organizations, but not the complainants, could challenge a decision of the ILOAT before the ICJ. According to the ILOAT website, 'these provisions had been criticized as being contrary to the principles of equality of access to justice and equality of arms.'[1213]

By way of further background, according to information on the ILOAT website, the tribunal

> 'It is currently open to more than 58,000 international civil servants who are serving or former officials of 58 international organisations. The Tribunal is composed of seven judges, all of different nationalities.'[1214]

[1211] Ibid.
[1212] Ibid., paras. 18-20.
[1213] <ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_498369/lang—en/index.htm> accessed 21 December 2021.
[1214] <ilo.org/tribunal/lang–en/index.htm> accessed 21 December 2021.

Under Article III of the ILOAT Statute, the Tribunal's judges are appointed by the International Labour Conference.

The Dutch Supreme Court in *EPO disability*, concerning a work-related injuries dispute, likewise pointed to the availability of the ILOAT. In that case, the EPO's 'Intern [*sic*] Appeal Committee'[1215] had dismissed the claim. Instead of lodging a complaint before the ILOAT, the claimant opted to sue the EPO before the domestic courts in the Netherlands. Both the District Court and the Court of Appeal of The Hague granted the EPO's claim for immunity. According to the Court of Appeal, the Dutch courts lack jurisdiction; however, an exception must be made if as a consequence of that immunity, the employee would be denied access to a procedure that offers protection comparable to Article 6 of the ECHR.[1216] The Court held the appellant could have availed himself of the ILOAT and that it had not been established that the procedure before that tribunal was not in conformity with the requirements of Article 6 of the ECHR.[1217] More specifically, the Court of Appeal held that whilst the claimant had contended that the ILOAT tends to reject requests for oral hearings, he had not contended, nor did it seem to be the case, that the ILOAT rejects reasoned requests for an oral hearing in cases where this is

[1215] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.1.

[1216] Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.'). The District Court The Hague had reasoned similarly in an early case arising out of an employment dispute with the International Service for National Agricultural Research (ISNAR). District Court The Hague 28 November 2001 (*ISNAR*), para. 5.10, cited in District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*) ('every person is entitled, under international law too, to an effective legal process in cases such as the present one. If it should therefore transpire that the legal process in accordance with the Staff Regulations is not effective in this specific case, the Dutch courts would have a function after all.' [emphasis added]).

[1217] See likewise District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*), para. 1.4 ('It is not in dispute that the [ILOAT] should be designated as an independent tribunal established by law'); District Court Maastricht 12 January 1984, English translation in (1985) 16 NYIL 464 (*Eckhardt v. Eurocontrol*), at 470 ('Eurocontrol uncontestedly argued that the ILO Administrative Tribunal was easily accessible because of the absence of procedural requirements and the element of costs, since no court fees were charged; that it was not necessary to consult the Geneva bar because of *ex officio* instruction, with possible review by the International Court of Justice, and that, in fact, the officials of Eurocontrol did apply to that Tribunal. All these considerations lead the Court to the opinion that the objection advanced by Eurocontrol is well-founded; that consequently . . . the judgment of the Local Court shall be reversed, that the District Court lacks jurisdiction'). But see Reinisch and Weber (2004) at 109-110 ('a closer scrutiny of the actual practice of the most important alternative dispute settlement mechanism in the context of cases brought against international organizations, various administrative tribunals, in particular, the ILOAT, reveals serious deficiencies with regard to their adequacy and effectiveness. In particular, the mechanism for appointing judges to the ILOAT and the regular denial of oral hearings fall short of internationally required standards of a fair trial, as expressed, inter alia, in Article 6 (1) ECHR. Furthermore, the law applied by these alternative means appears to lack the clarity required to enable an applicant to effectively defend his rights.').

warranted.[1218] It could not be concluded beforehand that the complainant would be denied an oral hearing if he would submit a reasoned request for such a hearing.[1219]

Before the Supreme Court, the complainant argued that the Court of Appeal's judgment on this point was incomprehensible (one of the limited grounds for quashing a judgment in cassation proceedings) as out of 2,200 cases decided at the time since 1992, ILOAT had only once held an oral hearing. However, the Supreme Court dismissed the appeal, finding that the Court of Appeal's reasoning was not in fact incomprehensible.[1220]

Returning to the ECtHR, in *Chapman*, the ECtHR declined to rule that Article 6 of the ECHR had been violated on account of NATO's immunity from jurisdiction.[1221] The case arose out of another labour dispute. Mr Chapman sued NATO before a Belgian labour court, arguing that he was employed under a permanent contract and claiming the attendant benefits.[1222] The court awarded the claim.[1223] However, the Belgian authorities appealed (NATO did not appear) and the appellate court ruled that NATO did enjoy immunity from jurisdiction.[1224] Chapman then sued Belgium before the ECtHR. Like the appellate court, it found that NATO's Appeals Board would have been available to him, even as a former staff member, and that he had failed to make use thereof.[1225] Mr Chapman contended that the Appeals Board hearings were not fair, including because 'meetings held in private, no mandatory representation, appointment of members by governmental representatives, etc.'[1226] However, the ECtHR found that, as he had not seized the Appeals Board, he had failed to substantiate that contention.[1227]

Returning briefly to the Netherlands, the salient issues in the judgments in the two aforementioned cases against the IUSCT adjudicated by the Hague Court of Appeal in 2012 (*IUSCT abolition*) and 2013 (*IUSCT non-extension*) concerned the issue of the claimants' recourse to an alternative remedy. The Court of Appeal upheld the immunity of the IUSCT in both cases, affirming the first instance judgment in *IUSCT abolition*, but setting aside the first instance judgment of the District Court The Hague in *IUSCT non-extension* in which the lower court had dismissed the immunity defence for lack of

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[1218] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*), para. 3.5.
[1219] Ibid.
[1220] Ibid. As seen above (under the heading 'functional immunity'), in a subsequent case against the EPO, *Restaurant de la tour*, the Court of Appeal of The Hague ruled that the limitation of the right of access to court was disproportionate in relation to the aim served by the immunity. That conclusion was based on the Court's finding that the applicable functional immunity test was not met.
[1221] *Chapman v. Belgium*, Decision of 5 March 2013, ECHR (App. No. 39619/06) (*Chapman*). See generally De Brabandere (2015), at 232-233.
[1222] *Chapman v. Belgium*, Decision of 5 March 2013, ECHR (App. No. 39619/06) (*Chapman*), para. 4.
[1223] Ibid., para. 6.
[1224] Ibid., paras. 9-11.
[1225] Ibid., para. 54.
[1226] Ibid., para. 41.
[1227] Ibid., para. 55.

alternative recourse.[1228] Combined, both judgments provide the following insights into The Hague Court of Appeal's approach to the matter at the time.

According to the Court of Appeal, under *Waite and Kennedy*, upholding an international organisation's immunity from jurisdiction does not violate Article 6 of the ECHR, provided certain conditions are met, including the availability to the claimant of an alternative remedy for the settlement of private law disputes.[1229]

As to the reasonable alternative mean available to the claimants, as seen in connection with *Spaans v. IUSCT*, under the IUSCT's Staff Rules, the IUSCT's nine arbitrators are competent to hear employment disputes.[1230] The claimants in neither case had availed themselves of this internal remedy.[1231] In *IUSCT abolition*, the claimant did not as such contest the availability of the internal remedy.[1232] Conversely, the claimant in *IUSCT non-extension* argued that the internal remedy was limited to disputes concerning disciplinary matters or concerning the interpretation of the Staff Rules, and that the dispute in point was of a different nature.[1233] The Court of Appeal rejected this argument, holding that the internal remedy would have been available in the case in point.[1234]

According to the Court of Appeal in *IUSCT abolition*, the availability of the internal remedy underscores that the IUSCT's immunity from jurisdiction extends to the dispute,[1235] considering that the Supreme Court in *Spaans v. IUSCT* stated:

[1228] District Court The Hague 13 February 2012 (*IUSCT non-extension*), as paraphrased in Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (*IUSCT non-extension*), para. 1.4 ('In verband met zijn bevoegdheid overweegt de kantonrechter dat het Tribunaal als internationale organisatie functionele immuniteit geniet en dat, nu [eiseres] in haar functie van secretaresse bijdroeg aan de vervulling van de taken van het Tribunaal en de door haar aan het Tribunaal verweten gedragingen met de vervulling van die taken onmiddellijk verband houden, de Nederlandse rechter geen rechtsmacht toekomt, tenzij [eiseres] daardoor de toegang tot een onafhankelijke en onpartijdige rechterlijke instantie wordt onthouden. Omdat van de zijde van het Tribunaal verzuimd is [eiseres] te wijzen op de mogelijkheid van een interne rechtsgang of de zaak door te verwijzen naar de Tribunal Judges, is naar het oordeel van de kantonrechter voor [eiseres] niet een procedure mogelijk gemaakt, die gelijkwaardig is aan artikel 6 EVRM, en acht de kantonrechter zich bevoegd van het geschil tussen [eiseres] en het Tribunaal kennis te nemen.' Underlining added).
[1229] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (IUSCT non-extension), para. 3.4.
[1230] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 2(vi).
[1231] Ibid; Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.6.
[1232] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 12.
[1233] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.7.
[1234] Ibid.
[1235] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 12.

> 'Generally, the rules (such as Staff Regulations) governing relations between an international organization and such employees, whether contractual or otherwise, will provide for a special procedure (either inside or outside the organization) for the resolution of disputes of this kind relating to employment relations which have been removed from the jurisdiction of the host State'.[1236]

In terms of the adequacy of the alternative means, the claimant in *IUSCT abolition* contended that the internal remedy did not provide sufficient protection of her rights under Article 6 of the ECHR because the IUSCT is not an independent adjudicator of employment disputes with its own employees.[1237] However, according to the Court of Appeal, *Waite and Kennedy* requires there to be an alternative remedy and an internal remedy may qualify as such. The claimant referred to the critical note by De Waart regarding *Spaans v. IUSCT*—who had questioned the IUSCT's independence in deciding disputes with its own employees. However, according to the Court of Appeal, she did not present facts, circumstances, grounds or objections that warrant scrutiny of the internal remedy, considering also that the remedy involves all nine arbitrators of the IUSCT.[1238] Similarly, in *IUSCT non-extension* the Court of Appeal held that the claimant had not convincingly contested the adequacy of the internal remedy.[1239]

The Court of Appeal Judgment in *IUSCT non-extension* was appealed to the Supreme Court (it appears that the judgment in *IUSCT abolition* was not). The Supreme Court dismissed the appeal without giving reasons since, according to the Court, the grounds of appeal did not require that questions of law be answered in the interest of legal unity or the development of law.[1240] It appears from the opinion of the Advocate-General that the grounds of appeal regarding the adequacy of the internal remedy did not concern the rather fundamental issues central to Professor De Waart's note on *Spaans v. IUSCT*. Rather, the relevant ground of appeal turned on the issue of procedural access to, and practical implementation of, the internal remedy.[1241]

Returning to the ECtHR, in 2015 the court rendered its oft-cited judgment in *Klausecker*.[1242] The court found that the applicant had failed to make use of available alternative remedies, dismissing his challenge to the fairness of those remedies. The case arose out of the EPO's refusal to recruit Mr Klausecker due to his disability. He lodged a complaint against the EPO before the ILOAT, which the tribunal dismissed for lack of jurisdiction: the case was irreceivable as the complainant was not an

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[1236] Ibid., para. 11, referring to Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.1, sub 6.
[1237] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 14.
[1238] Ibid., para. 15.
[1239] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.7.
[1240] Supreme Court 20 March 2015, ECLI:NL:HR:2015:687 (*IUSCT non-extension*).
[1241] Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (*IUSCT non-extension*), para. 2.7-2.8.
[1242] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*).

official of the defendant organisation.[1243] However, recognising that its judgment left a 'legal vacuum', the ILOAT urged the EPO either to waive its immunity from jurisdiction, or offer arbitration proceedings.[1244] The EPO opted for the latter, proposing to Mr Klausecker arbitration proceedings, whereby each party would appoint one arbitrator, and both arbitrators would appoint a third arbitrator; the arbitrator's fees and expenses would be borne by the EPO; the applicable law would be the law ILOAT would have applied if it had had jurisdiction;[1245] and there would be a non-public hearing.[1246]

Mr Klausecker refused the offer of arbitration, arguing that the proposed proceedings did not conform to the requirements of Article 6 of the ECHR, notably the right to a public hearing within a reasonable time.[1247] Importantly, and as discussed below, there was debate before the ECtHR as to whether Article 6 of the ECHR applied. The Court left this unresolved and proceeded on the basis that it did.[1248] The Court then recalled its key considerations in *Waite and Kennedy*, holding that the limitation of Article 6 in this case served a legitimate aim, namely, to guarantee the proper functioning of the EPO.[1249] As to the proportionality of the limitation of the applicant's rights of access to court under Article 6 of the ECHR, the Court considered it 'decisive whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention'.[1250] The Court concluded: 'This offer of arbitration made to the applicant had awarded to the applicant a reasonable opportunity to have his complaint about the [EPO]'s decision examined on the merits.'[1251]

As to the applicant's challenge to the fairness of the proposed arbitration proceedings, the Court considered

> 'that the fact alone that the oral hearing before the arbitral tribunal, in which the parties could be represented by counsel, was not to be public did not make the arbitration procedure offered an unreasonable alternative to domestic court proceedings either. It refers in this respect, mutatis mutandis, to its findings in the case of Gasparini (cited above), in which it had considered that the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention.'[1252]

This reference in *Klausecker* to *Gasparini* in the context of the jurisdictional immunity of international organisations is noteworthy.[1253] To begin with, *Gasparini*—which did not concern the issue of

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[1243] Ibid., para. 19.
[1244] Ibid., para. 20.
[1245] Ibid., para. 27.
[1246] Ibid., paras. 25-27.
[1247] Ibid., para. 26.
[1248] Ibid., para. 52.
[1249] Ibid., para. 67.
[1250] Ibid., para. 69.
[1251] Ibid., para. 71.
[1252] Ibid., para. 74 (emphasis added).
[1253] *Gasparini v. Italy and Belgium*, Decision of 12 May 2009, ECHR (App. no. 10750/03) (*Gasparini*).

immunity— is significant as it extended the application of a strand of ECtHR case law concerning state responsibility in the context of international organisations.[1254] *Klausecker* then further extended that application by referring to *Gasparini* specifically in the context of the jurisdictional immunity of international organisations.

The case arose out of a dispute between NATO and Gasparini, a NATO staff member, concerning an increase in NATO's pension levy. The NATO Appeals Board had dismissed the claim that the increase was unlawful. Gasparini subsequently sued Italy, his state of nationality, and Belgium, NATO's host state, before the ECtHR. Gasparini contended that these states had failed to ensure that NATO's internal dispute resolution mechanisms complied with the requirements of the ECHR. In the court's own summary,

> 'the applicant had expressly alleged that NATO's internal dispute resolution mechanism did not protect fundamental rights in a manner which was equivalent to that of protection under the Convention. The applicant had challenged certain intrinsic features of the system and the Court therefore had to ascertain whether the impugned dispute resolution mechanism, namely proceedings before the NATO Appeals Board, was "manifestly deficient", such as to rebut the presumption of compliance by the respondent States with their Convention obligations. However, the scrutiny exercised by the Court in order to determine whether the proceedings before the NATO Appeals Board, an organ of an international organisation having its own legal personality and not being a party to the Convention, were "manifestly deficient", would necessarily be less extensive than its scrutiny under Article 6 in respect of domestic proceedings in States that were parties to the Convention and thus bound by its provisions. The Court, in reality, had to ascertain whether the respondent States, at the time they joined NATO and transferred to it some of their sovereign powers, had been in a position, in good faith, to determine that NATO's internal dispute resolution mechanism did not flagrantly breach the provisions of the Convention.'[1255]

The Court in *Gasparini* declared the application inadmissible, considering that, as it would subsequently paraphrase in *Klausecker*, 'the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention'.[1256] This reference to 'manifest deficiency' is central to the reasoning in *Gasparini*, which is itself the culmination of several decisions by the ECtHR on the responsibility under the ECHR of states as member states of international organisations.[1257]

[1254] For a critical assessment of *Gasparini* from the perspective of NATO, see Olson (2015).
[1255] Information Note on the Court's case-law No. 119, May 2009, *Gasparini v. Italy and Belgium* – 10750/03, Decision 12.5.2009 [Section II] (emphasis added).
[1256] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 74 (underlining added).
[1257] See generally T. Lock, 'Beyond "Bosphorus": The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', (2010) 10 *Human Rights Law Review* 529; C. Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations', (2011) 60 *International and Comparative Law Quarterly* 997.

This line of cases begins with *Bosphorus*[1258] which arose out of the impounding of an aircraft by Ireland on Irish territory in furtherance of a European Communities regulation, which was in turn based on a UNSC resolution. In the case against Ireland before the ECtHR, the Court held that as the aircraft was detained by Ireland on Irish territory, the applicant company fell under Irish jurisdiction in the sense of Article 1 of the ECHR. Whilst ECHR states parties are not prohibited from transferring sovereign power to international organisations, according to the ECtHR:

> 'State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . . By "equivalent" the Court means "comparable". . .
> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.'[1259]

In a parallel series of cases—*Behrami and Saramati*,[1260] *Boivin*[1261] and *Conolly*[1262]—the ECtHR declared the applications irreceivable for lack of involvement by the respondent states in the impugned act or omission by the relevant international organisation. However, in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij*,[1263] concerning an alleged violation of Article 6 of the ECHR by the European Community and the Netherlands, the ECtHR's reasoning rather converged towards its approach in *Bosphorus*. The involvement ('nexus') of the state (the Netherlands) in that case was tenuous. In *Gasparini*, the nexus between, on the one hand, Belgium and Italy, and, on the other, NATO's decision to increase the pension levy was altogether absent.

Returning to *Klausecker*, the ECtHR interlinked the 'reasonable alternative means' tests under *Waite and Kennedy* and the 'manifest deficiency' test under *Bosphorus*. *Klausecker* concerned not only the complaint that Germany had violated Article 6 of the ECHR due to its courts having upheld EPO's

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[1258] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment of 30 June 2005, [2005] ECHR (VI) (*Bosphorus*).
[1259] Ibid., paras. 155-156 (emphasis added). As to the 'interest of international cooperation', the Court recognised the "growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations". Ibid., para. 150.
[1260] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01) (*Behrami and Saramati*).
[1261] *Boivin v. 34 member States of the Council of Europe*, Decision of 9 September 2008, [2008] ECHR (IV) (*Boivin*).
[1262] *Connolly v. 15 Member States of the European Union*, Decision of 9 December 2008 (App. no. 73274/01) (*Connolly*).
[1263] *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*, Decision of 20 January 2009, [2009] ECHR (I) (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij*).

immunity from jurisdiction;[1264] it also concerned the complaint that EPO's internal appeal process and the process before the ILOAT were in breach of Article 6 of the ECHR.[1265]

On the first complaint, the Court considered whether the arbitration proceedings offered by the EPO qualified as 'reasonable alternative means' under the *Waite and Kennedy* test.[1266] The applicant argued that the arbitration proceedings did not include a public hearing. However, the Court concluded that the reasonable alternative means test was met. In this respect, the Court referred to *Gasparini,* in which

> 'it had considered that the lack of publicity of a hearing before an internal body of an international organisation in labour disputes did not render the proceedings before that body manifestly deficient for the purposes of the Convention.'[1267]

Regarding the second complaint, the Court also recalled, amongst others, *Gasparini*. It concluded that the EPO offered 'equivalent protection'.[1268] The Court then went on to state that it is

> 'therefore called upon to examine whether the fact that a candidate for a job is denied access to the procedures for review of the decision of the European Patent Office not to recruit him before the European Patent Office itself and before the Administrative Tribunal of the ILO, which is at issue in the present case, disclosed a manifest deficiency in the protection of human rights within the EPO.'[1269]

In conducting this examination, the Court referred to the *Waite and Kennedy* test with respect to immunity from jurisdiction. It then stated, with reference to its findings regarding the first complaint,

> 'that the limitations placed on the applicant's access to the German domestic courts had been proportionate to the legitimate aims pursued by the grant of immunity from jurisdiction to the EPO and the very essence of the applicant's right of access to court under Article 6 § 1 was not impaired. This finding was based, in particular, on the fact that the offer of arbitration made by the EPO to the applicant had made available to him a reasonable alternative means to have his complaint about the European Patent Office's decision examined on the merits (see paragraphs 68-74 above).
> . . . The Court considers that therefore, the fact that the applicant was denied access to the review procedures set up by the EPO, an international organisation with legal personality which is not a party to the Convention, in relation to the decision of the President of the European Patent Office not to recruit him, but was offered by the EPO an arbitration procedure to have the impugned act of the Office examined, a fortiori does not disclose a manifestly deficient protection of fundamental rights within the EPO.'[1270]

[1264] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), paras. 44-77.
[1265] Ibid., paras. 78-107.
[1266] The issue was whether the applicant invoked a 'civil right' under Art. 6(1) of the ECHR as regards his recruitment to the civil service. The Court proceeded on the basis that Art. 6(1) of the ECHR applied. Ibid., para. 52.
[1267] Ibid., para. 74.
[1268] Ibid., para. 101.
[1269] Ibid., para. 101 (emphasis added).
[1270] Ibid., paras. 105-106. Arguably, the Court in *Klausecker* interlinked the tests under *Waite and Kennedy* and *Bosphorus* in a somewhat circular fashion. This is because, in applying the *Waite and Kennedy* test, the Court held that the arbitration proceedings offered qualified as 'reasonable alternative means', considering that the lack of publicity of the hearing did not render the proceedings 'manifestly deficient' in terms of *Bosphorus*. In turn, in applying the *Bosphorus* test, the Court held that the protection of fundamental rights was not manifestly deficient,

It may be concluded that alternative means qualify as 'reasonable' in terms of *Waite and Kennedy*, insofar as they are not 'manifestly deficient' in terms of *Bosphorus*.[1271]

Next, in *Kokashvili* the ECtHR once more found that the proportionality test was met as internal remedies had been available to the applicant of which she had failed to avail herself.[1272] This case arose out of Ms Kokashvili's termination of appointment with the OSCE. She challenged the termination before a Georgian court.[1273] The court awarded the claim, ordering, amongst others, her reinstatement.[1274] However, upon the intervention of the Georgian executive authorities, the enforcement of the judgment (which was not appealed) was discontinued. Before the ECtHR, the applicant complained about the executive authorities' failure to enforce the judgment. At the outset, the Court held that a complaint about such failure 'represents an aspect of the inability to exercise fully the right to a court, within the meaning of Article 6 § 1 of the Convention'.[1275]

Having referred to, amongst others, *Waite and Kennedy* and *Klausecker*, the ECtHR then concluded that 'the applicant could have filed her complaint about the forthcoming termination of her employment contract first with the OSCE's Internal Review Board and then, if need be, with that organisation's quasi-judicial body, the Panel of Adjudicators'.[1276] Thus, as 'the applicant had a reasonable alternative opportunity of having her dispute adjudicated internally within the OSCE's organisational setting . . . the very essence of the applicant's right of access to court under Article 6 § 1 of Convention was not impaired'.[1277] On that basis, the ECtHR rejected the application as manifestly ill-founded.[1278]

It is noted that appendix 8 to the OSCE's staff regulations, then in force,[1279] sets forth, in significant detail, the terms of reference of the panel of adjudicators. Amongst other things, it provides that a panel of adjudicators consists of three members (Article 1); members are appointed upon their nomination by participating OSCE states (Article 3); adjudicators must have competence and experience (Article 3) and be independent in their decision-making (Article 12). Significantly, the 'adjudication decisions . . .

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considering the offer of arbitration, which it had already concluded satisfied the reasonable alternative means test under *Waite and Kennedy*.

[1271] The ECtHR did not state that to be reasonable, alternative means must necessarily not be manifestly deficient. However, that seems to be implied, considering that the *Waite and Kennedy* test aims to ensure that the 'very essence' of the applicant's right of access to court under Art. 6 § 1 is not impaired. In other words, it would be difficult to conceive that alternative means could qualify as 'reasonable', thereby protecting the very essence of the right of access to court, if they were manifestly deficient for the protection of human rights.

[1272] *Kokashvili v. Georgia*, Decision of 1 December 2015, ECHR (App. no. 21110/03) (*Kokashvili*).

[1273] Ibid., para. 8.

[1274] Ibid., para. 11.

[1275] Ibid., para. 31.

[1276] Ibid., para. 37.

[1277] Ibid., para. 38.

[1278] Ibid., para. 39.

[1279] Ibid., para. 24: Decision No. 366, Amendment of the OSCE Staff Regulations, 20 July 2000.

shall be final, and binding within the OSCE. Each decision shall state the reasons on which it is based' (Article 20).[1280]

The *Waite and Kennedy-Bosphorus* test was more prominently at issue in proceedings against ESA, which led to a Dutch Supreme Court judgment in 2015, upholding ESA's jurisdictional immunity.[1281] The case arose out of the claim that ESA had denied the claimants an expatriation allowance on discriminatory grounds.[1282] The claimants—of which there were 103 in the Dutch court proceedings—were denied that allowance because they had been locally recruited. The claimants contended that this was discriminatory since they experienced the same personal and financial disadvantages as non-locally recruited staff, who did receive the expatriation allowance.[1283]

ESA's Appeals Board rejected the claim. The subsequent litigation before the Dutch courts, in three instances, was limited to the incidental proceedings concerning ESA's claim for immunity from jurisdiction. This turned largely on the adequacy of the Appeals Board and the proceedings before it, as 'reasonable alternative means' in the sense of *Waite and Kennedy*. The claimants argued that the reasonable alternative means test was not met in light of Article 6 of the ECHR.

In testing adequacy, the district court applied the test in *A.L.,* distinguishing four prongs: (1) whether the members of the Appeals Board are imminent persons with sufficient legal training and knowledge; (2) whether the board's members are independent in the discharge of their functions, and impartial; (3) whether the proceedings before the board are adversarial, and the parties are being heard and treaty equally; and (4) whether the board's decision is reasoned.[1284] The district court concluded that each of the prongs of the test was met and, therefore, that upholding the immunity did not contravene Article 6 of the ECHR.

On appeal, the Court of Appeal of The Hague affirmed the district court judgment, upholding ESA's immunity. As to the applicable legal test, the Court of Appeal held that the issue is not whether the alternative recourse provides the same level of protection, but whether that protection is 'comparable'. The key question, according to the court, was whether the essence of the 'right to a court' is impaired and whether the protection of the rights under the ECHR is 'manifestly deficient'. The court referred to *Waite and Kennedy* and other ECtHR case law, including *Bosphorus*. Of note, the Court of Appeal's

[1280] Decision No. 366, Amendment of the OSCE Staff Regulations, appendix 8.
[1281] Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609 (*ESA expatriation allowance*).
[1282] Ibid., para. 3.1.
[1283] Ibid., para. 3.1. sub (vi).
[1284] As recalled in Court of Appeal The Hague 6 May 2014, ECLI:NL:GHDHA:2014:1762 (*ESA expatriation allowance*), para. 1.9.

judgment was rendered in May 2014 and thus predated *Klausecker*, in which the ECtHR had inter-linked *Bosphorus* and *Waite and Kennedy*.

The Court of Appeal did not address ESA's question as to whether under *Mothers of Srebrenica* it must decline to check the adequacy of the alternative means and uphold the immunity of ESA in any event.[1285] This is because the Court concluded that in fact reasonable alternative means were available.[1286] In this respect, upon a rather detailed and lengthy analysis, the Court of Appeal ruled that the appeals board and the proceedings before it did not impair the essence of the right of access to the courts, including when considering the various complaints regarding these proceedings in conjunction with one another and in light of the totality of the litigation.[1287] The appellants had submitted six grounds of appeal, contesting various aspects of the adequacy of the Appeals Board and the proceedings before it. The Court of Appeal dismissed each of these.[1288]

In its December 2015 judgment, the Supreme Court affirmed the Court of Appeal's judgment. As to the test regarding reasonable alternative means, with reference to *Waite and Kennedy* and *Klausecker*, the Supreme Court held that the Court of Appeal had not erred in law. It added that this conclusion is no different because the Court of Appeal had relied on the *Bosphorus* test ('comparable'), even though that case did not concern immunity from jurisdiction.[1289] According to the Supreme Court:

> 'the [Court of Appeal] apparently equated the criterion developed in [Bosphorus] with the criterion of impairing the essence of the right of access to a court, and subsequently evaluated the assertions of the claimants exclusively on the basis of the latter criterion'[1290]

In applying the reasonable alternative means test, the Supreme Court specifically examined the Court of Appeal's judgments regarding the Appeals Board's competence and its application of EU law. On the former issue, the Supreme Court held that the Court of Appeal's judgment was not tainted by a mistake of law or insufficient reasoning, as it appeared that the Court had examined the Appeal's Board's competence and considered it to be satisfactory.[1291] The Appeals Board decision confirms that the board dismissed the claims following a substantive assessment of the claimants' arguments to which end the Appeals Board manifestly found itself competent.[1292]

On the latter issue, the Supreme Court recalled that the Court of Appeal had ruled that even if the Appeals Board had wrongly applied EU law, this would not have impaired the essence of the rights

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[1285] Ibid., para. 2.2.
[1286] Ibid.
[1287] Ibid., para. 8.1.
[1288] Ibid., paras. 3.2-3.4, 4.2, 4.7, 5.3-5.8, 6.5, 7.2.
[1289] Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609 (*ESA expatriation allowance*), para. 3.3.3.
[1290] Ibid., para. 3.3.3 (present author's translation).
[1291] Ibid., para. 3.4.3.
[1292] Ibid., para. 3.4.3.

under Article 6 of the ECHR. The Supreme Court concurred with the Court of Appeal that even if the Appeals Board erred in applying EU law, ESA's immunity from jurisdiction applies.[1293]

On 20 January 2017, the Supreme Court rendered two judgments in cases against the EPO, each in favour of the organisation. The first case is not dissimilar to the case that led to the Supreme Court's aforementioned 2009 judgment,[1294] insofar as both arose out of a dispute concerning disability and both turned on the adequacy of ILOAT proceedings. The present case specifically concerned the length of ILOAT proceedings. Like the District Court, the Court of Appeal denied itself jurisdiction.[1295] In so doing, in terms of the adequacy of ILOAT proceedings, the Court of Appeal focussed on whether the essence of the right of access to court was impaired, respectively, whether the protection afforded to the complainant was manifestly deficient.[1296] The Court dismissed the challenge to the EPO's jurisdictional immunity considering the purported length of proceedings, taking into consideration the complexity of the matters at issue; the possibility of a 'fast-track procedure'; and the possibility, in certain cases, of provisional measures.[1297] In its 20 January 2017 judgment, the Supreme Court affirmed the Court of Appeal's judgment.[1298]

The litigation leading to the Supreme Court's second judgment on that date arose from an employment-related dispute with the EPO.[1299] In upholding the immunity of the international organisation, the Supreme Court overruled the Court of Appeal, which, like the interim relief judge in first instance, had rejected the EPO's claim to immunity from jurisdiction. The availability of alternative remedies in the context of immunity was once more key to the litigation.

The case arose out of a conflict between the EPO and two staff unions, who argued that the EPO's rules concerning the right to strike were unlawfully restrictive. The unions initiated summary proceedings against the EPO. In its February 2015 judgment, dismissing EPO's appeal in the incidental proceedings, The Hague Court of Appeal rejected the immunity. It proceeded to award the claims, including by ordering the EPO to revoke regulatory limitations on the right to strike.[1300] But for the Supreme Court

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[1293] Ibid., para. 3.5.3.
[1294] Supreme Court 23 October 2009, ECLI:NL:HR:2009:BI9632 (*EPO disability*).
[1295] Supreme Court 20 January 2017, ECLI:NL:HR:2017:56 (*EPO disability II*), para. 3.2.2 and para. 3.2.3, respectively.
[1296] Court of Appeal The Hague 2 June 2015, ECLI:NL:GHDHA:2015:1245 (*EPO disability II*), para. 2.10.
[1297] Ibid., paras. 2.13-2.14.
[1298] Supreme Court 20 January 2017, ECLI:NL:HR:2017:56 (*EPO disability II*), para. 3.4.2.
[1299] Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*).
[1300] In the summary of the Supreme Court: 'Het hof heeft (i) EOO geboden om VEOB c.s. onbelemmerde toegang tot het e-mailsysteem van EOO te geven, (ii) EOO verboden om toepassing te geven aan art. 30a leden 2 en 10 van het Dienstreglement, en (iii) EOO geboden om VEOB c.s. toe te laten tot collectieve onderhandelingen.' Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*), para. 3.2.3. The Minister of Security and Justice precluded enforcement of the Court of Appeal's judgment by issuing a notification under Art. 3(a) of the Bailiff's Act, according to which enforcement would be in violation of the obligations of the

overruling the decision on immunity, the Court of Appeal's judgment would have had far-reaching consequences for EPO's independence.

The Court of Appeal's judgment warrants closer examination. Having considered *Waite and Kennedy* and *Klausecker*, the Court concluded—contrary to its previous judgments in *IUSCT abolition, IUSCT non-extension, EPO Restaurant de la Tour* and *EPO disability*—[1301] that the mere unavailability of alternative recourse does not mean that a violation of Article 6 of the ECHR must be assumed and that the immunity from jurisdiction must be set aside.[1302] Furthermore, in considering the issue of reasonable alternative means,[1303] the Court considered that the question is not whether the alternative means offer the same protection as Article 6 of the ECHR, but whether this protection is comparable. The Court found it to be decisive whether the limitation of access to the domestic court impairs the essence of the

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Kingdom of the Netherlands under international law. See generally C. Ryngaert and F. Pennings, 'Fundamentele Arbeidsrechten en Immuniteit', NJB 2015/859; Blokker (2015, 'Korte Reactie'); C. Ryngaert and F. Pennings, 'Korte Respons Op de Reactie van Niels Blokker', NJB 2015/1327.

[1301] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.5 ('Het hof is daarom van oordeel dat het door het Tribunaal gedane beroep op zijn immuniteit van jurisdictie slechts gehonoreerd kan worden als voor [geïntimeerde] voorzien was in een alternatieve rechtsgang voor de beslechting van het door haar opgeworpen geschil waarvan zij gebruik kon maken.'); Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 15 ('Uit de eerdergenoemde beslissing van het EHRM in de zaak Waite en Kennedy/Duitsland blijkt dat een alternatieve rechtsgang beschikbaar moet zijn'. Underlining added); Court of Appeal (summary proceedings) The Hague 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour*), para. 12 ('Anders dan EPO heeft betoogd kan deze immuniteit echter niet zonder meer met zich brengen dat Restour daarmee iedere toegang tot de rechter moet worden ontzegd. Weliswaar is het in artikel 6 EVRM gewaarborgde recht op toegang tot een onafhankelijk en onpartijdig gerecht niet absoluut en kan dit recht aan beperkingen worden onderworpen, maar die beperkingen dienen proportioneel te zijn ten opzichte van het nagestreefde doel en zij mogen niet zover gaan dat daardoor het wezen van het recht op rechterlijke toegang wordt aangetast, bijvoorbeeld indien de belanghebbende geen redelijk alternatief voor het effectief inroepen van zijn rechten onder het EVRM ter beschikking staat.' [emphasis added]); Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO Disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.' [emphasis added]).

[1302] Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), para. 3.4 ('Dit betekent dat, zoals EOO terecht betoogt, het enkele feit dat een alternatieve rechtsgang ontbreekt, niet betekent dat een schending van art. 6 EVRM moet worden aangenomen en dat de immuniteit van jurisdictie moet worden doorbroken. Dit laatste heeft de voorzieningenrechter echter ook niet aangenomen.'). Contrary to the Court of Appeal's interpretation of the District Court's judgment in first instance, however, it is submitted that the latter judgment does in fact suggest that the immunity was rejected for lack of reasonable alternative means. See District Court The Hague (summary proceedings) 14 January 2014, ECLI:NL:RBDHA:2014:420 *(EPO unions)*, para. 3.6 ('In het kader van de beoordeling van de proportionaliteit is voorts van belang of aan de VEOB en SUEPO alternatieve rechtsmiddelen ter beschikking staan die hun recht op toegang tot de rechter effectief beschermen. Naar het oordeel van de voorzieningenrechter is dat niet het geval. Hoewel tegen beslissingen van (organen van) de Octrooiorganisatie de rechtsgang bij ILOAT bestaat, staat die rechtsgang enkel open voor individuele (ex)werknemers van de Octrooiorganisatie (zie artikel 13 EOV en de geschillenregeling in het Dienstreglement). Dat de VEOB en SUEPO de belangen van die individuele werknemers vertegenwoordigen en dat de toetsing van algemeen beleid mogelijk is via een individueel geval, laat onverlet dat voor de VEOB en SUEPO zelf geen directe toegang tot de rechter bestaat . . . Een en ander leidt ertoe dat het beroep van de Octrooiorganisatie op immuniteit van jurisdictie wordt verworpen.' [emphasis added]).

[1303] The Court of Appeals referred to the ECtHR's ruling *Bosphorus*, but it did not refer to the ECtHR's decision in *Klausecker*, rendered the previous month.

right to a court, or whether the protection of the rights under the ECHR is manifestly deficient.[1304] In so doing, the Court appears to have equated the test regarding 'essence of the right' with that regarding 'manifest deficiency', that is, where there is a manifest deficiency in the protection of a human right, the essence of that right is impaired.

The Court of Appeal then turned to apply the law to the facts before it. It held that, whilst the immunity must not necessarily be set aside in the absence of alternative remedies, this was nonetheless warranted. This is because of 'additional circumstances': at issue were the right of labour unions to collectively hold actions and conduct negotiations. The unions lacked standing before the ILOAT and could not avail of any alternative recourse provided by EPO. The ability for individual employees to complain internally within EPO and, subsequently, to the ILOAT of a violation of their right to strike did not amount to an effective remedy given the collective nature of that right. According to the Court of Appeal, the protection of the rights under the ECHR was therefore manifestly deficient.[1305] In essence, therefore, using the *Waite and Kennedy* proportionality test, the Court of Appeal balanced the right to immunity against the right of access to court, prioritising the latter.

The Supreme Court reversed the Court of Appeal's judgment. It considered the key issue to be whether—in terms of proportionality—there were reasonable alternatives to protect the rights of the unions under Article 11(1) of the ECHR,[1306] insofar as there were alternative means for the unions' *members* to vindicate the rights protected under that provision.[1307] The Supreme Court concluded that it

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[1304] Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), para. 3.6 ('Doorslaggevend is of de beperking in de toegang tot de nationale rechter "the essence of their "right to a court" ("la substance même du droit") aantast, of dat de bescherming van de door het EVRM gewaarborgde rechten "manifestly deficient" is.').

[1305] Ibid., para. 3.7 ('Anders dan EOO betoogt oordeelt het hof dat in dit geval de bescherming van de door het EVRM gewaarborgde rechten manifestly deficient is. Niet in geschil is immers dat VEOB c.s. voor hun onderhavige vorderingen geen rechtsingang hebben bij ILOAT noch in enige andere door EOO opengestelde rechtsgang.); para. 3.10 ('Zoals hiervoor is aangestipt, betekent het enkele feit dat een alternatieve rechtsgang ontbreekt niet dat een schending van art. 6 EVRM moet worden aangenomen en dat de immuniteit van jurisdictie moet worden doorbroken. Het hof is echter van oordeel dat er bijkomende omstandigheden zijn waardoor daar in het onderhavige geval wel aanleiding voor is. Het gaat in deze zaak immers om de rechten van vakbonden op het voeren van collectieve actie en collectieve onderhandelingen, dat wil zeggen om rechten die behoren tot de fundamentele beginselen van een open en democratische rechtsstaat en die erkenning hebben gevonden in meerdere (hiervoor genoemde) verdragen. De stellingen van VEOB c.s. houden bovendien in dat deze rechten door EOO stelselmatig en op vergaande wijze worden geschonden, doordat het recht op staking op ontoelaatbare wijze wordt ingeperkt en VEOB c.s. het recht om deel te nemen aan collectieve onderhandelingen geheel wordt ontzegd, hoewel zij voldoende representatief zijn. Van deze stellingen kan in ieder geval niet gezegd worden dat zij *prima facie* ongegrond zijn. Dit betekent dat het beroep van EOO op de haar verleende immuniteit van jurisdictie disproportioneel is. De Nederlandse rechter is dan ook in dit geval bevoegd van de vorderingen van VEOB c.s. kennis te nemen, hetgeen ook kan betekenen dat die rechter beslissingen neemt die gevolgen hebben voor de organisatie van EOO.' [emphasis added]).

[1306] 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'

[1307] Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*), para. 5.4.

does not necessarily result from the right to form and join trade unions that such unions are themselves entitled to access to court.[1308]

As discussed below, this illustrates the important point that for there to be a violation of Article 6 of the ECHR, there must first be a right of access to court (involving the determination of 'civil rights'). Having recalled, in particular, ECHR case law on Article 11 of the ECHR and the ECtHR's rulings in *Waite and Kennedy*, *Mothers of Srebrenica* and *Klausecker*, the Supreme Court found that the individual recourse available to union members—namely, internal recourse within EPO and access to ILOAT—presented a sufficiently reasonable alternative.[1309]

Lastly, the issue of reasonable alternative means is central to the litigation between Supreme (which is the joint indication of three foreign companies), and JFCB and SHAPE (which are NATO-entities). To recall, the District Court of Limburg had rejected the respondents' immunity, but its judgment was set aside by the Court of Appeal of 's-Hertogenbosch.

On the basis of the first instance and appeal judgments, the background to the dispute may briefly be described as follows. JFCB, on behalf of SHAPE and for the benefit of ISAF troop-contributing states, entered into two so-called basic fuel ordering agreements with Supreme ('BOAs') in 2006 and 2007.[1310] According to the BOAs, amongst others: invoices were to be settled retroactively by the relevant states; JFCB was to seek resolution in case of any unpaid invoices within a thirty-day time-period; and under at least one of the BOAs,[1311] JFCB was to assume liability for unpaid invoices.[1312] Furthermore, JFCB itself also procured fuel from Supreme, for which it paid from a communal NATO budget.[1313] The BOAs were governed by Dutch law and they did not include a dispute settlement clause.[1314]

[1308] Ibid., para. 5.6.
[1309] Ibid., para. 5.8. The Supreme Court explicitly added that this is the case even though the available protection falls short of the standard under domestic law. Furthermore, insofar as the union's claims were based on the right of 'collective negotiation', the Supreme Court rejected these along similar lines. Ibid., para. 5.9. In parallel to this case, following Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), the controversy between EPO and the unions led to further litigation. This arose out of various investigations into alleged misconduct by board members of the unions, which the EPO started following the Court of Appeal's judgment. The unions sued the EPO once more in summary proceedings before the District Court of The Hague, seeking various orders with respect to the investigations, including to appoint an external and independent expert to scrutinise the investigations, and to suspend the investigations meanwhile. The District Court denied itself jurisdiction considering, amongst others, that individual staff members had recourse to the ILOAT. See District Court The Hague (summary proceedings) 5 August 2016, ECLI:NL:RBDHA:2016:9444 (*EPO unions II*), para. 4.5. The ruling was affirmed in Court of Appeal The Hague (summary proceedings) 7 March 2017, ECLI:NL:GHDHA:2017:445 (*EPO unions II*), noting Supreme Court (summary proceedings) 20 January 2017, ECLI:NL:HR:2017:57 (*EPO unions*).
[1310] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 2.8.
[1311] Ibid., para. 2.9, see Art. 17.5 of the Herat BOA.
[1312] Ibid., para. 2.9.
[1313] Ibid., para. 2.10.
[1314] Ibid.

In addition to the BOAs, JFCB and Supreme entered into an escrow agreement in 2013. On the basis of this agreement, any residual claims on the basis of the BOAs could be submitted to a Release of Funds Working Group ('RFWG'), composed of representatives of JFCB and SHAPE. Any claims verified by the RFWG were to be paid from the escrow account.[1315] Moreover, in connection with alleged fraud on the part of the group of companies of which Supreme forms part,[1316] in 2015, Supreme and JFCB conducted discussions about claims by Supreme. These discussions, which did not yield results, were led by an agency of the US Ministry of Defence.[1317]

In the incidental proceedings in which the respondents claimed immunity from jurisdiction, the availability of alternative means was at issue. The District Court, upon concluding that NATO's functional immunity was engaged, went on to consider whether such means were available to the claimants under the *Waite and Kennedy* test.[1318] The defendants had argued that the escrow agreement and the RFWG established thereunder, as well as the US-led discussions qualified as such means.[1319] However, according to the District Court:

> 'Reasonable alternative means need not necessarily amount to independent judicial recourse. What matters is the following: 1) its members are eminent persons with sufficient legal training and/or knowledge, 2) they are independent and impartial in the performance of their tasks, 3) the proceedings are adversarial, the principle 'audi alteram partem' applies and, procedurally, the parties are treated equally, 4) the decision is reasoned.'[1320]

Resembling the analysis by the ECtHR in *A.L.*, this test appears to correspond to an assessment as to whether the first step under the *Waite and Kennedy-Bosphorus* test is met. That is, the Court was arguably exploring whether an 'equivalent', or 'comparable', protection of ECHR rights was available to the complainants.

The District Court concluded that there were no such reasonable alternative means, there being no contractually agreed dispute settlement clause in connection with the supply of goods and services in point (contrary to another such agreement entered into by the respondents).[1321] More specifically, as to the escrow account and the RFWG, the defendants had not contended that the court's aforementioned first criteria (imminence/expertise) and fourth criteria (reasoned decision) were met. As to the second criterion (independence and impartiality), importantly, the Court found that it had not been met as all members of the working group were linked to the respondents. The Court deemed that the third criterion

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[1315] Ibid., para. 2.11.
[1316] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.1.11.
[1317] Ibid; District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 2.12.
[1318] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.33.
[1319] Ibid., para. 4.35.
[1320] Ibid., para. 4.34 (present author's translation).
[1321] Ibid., para. 4.33.

(adversarial nature of the proceedings and procedural equality) was equally not met as the RFWG did not comply with the requirements of a reasonable alternative procedure.[1322]

As to the settlement discussions, the District Court found that as they were internal to the US ministry of defence (more precisely, they were led by an agency of the US defence ministry[1323]), they lacked objective legal safeguards. The respondents having failed to substantiate their position in this respect, according to the court, these discussions could not qualify as reasonable alternative means.[1324] Lastly, the respondents contended that the claimants had failed to seek recourse from the NATO member states. Be that as it may, according to the District Court, this did not preclude the claimants from seeking payment from the respondents.[1325]

For these reasons, the District Court found that the respondents' jurisdictional immunity would contravene the claimants' right to a fair trial under Article 6 of the ECHR.[1326] The Court therefore upheld its own jurisdiction to decide the dispute, though it suspended consideration of the merits and allowed for interlocutory appeal in view of the principled matters at issue.[1327] In essence, therefore, the absence of reasonable alternative means led the District Court to set aside the immunity, there being an unacceptable breach of the right to a 'fair trial'.[1328]

The Court of Appeal of 's-Hertogenbosch reversed the District Court's judgment in the incidental proceedings.[1329] It found that there is no balancing of interests (that is, jurisdictional immunity v. access to court).[1330] This notwithstanding, the Court continued to address the issue of reasonable alternative means. To begin with, the Court considered that Supreme had insufficiently contested that it could hold the individual states in ISAF liable, notwithstanding that this would possibly involve a broad range of

[1322] Ibid., para. 4.36.
[1323] Ibid., para. 2.12.
[1324] Ibid., para. 4.3.7.
[1325] Ibid., paras. 4.39-4.40.
[1326] Ibid., para. 4.41.
[1327] Ibid., para. 4.42.
[1328] Ibid., para. 4.33 ('Het ontbreken van een geschilbeslechtingsmechanisme in de BOA's Herat en Kandahar, terwijl in een vergelijkbare BOA die met andere leverancier is afgesloten een beroep op de International Chamber of Commerce is overeengekomen, maakt de claim van een ontoelaatbare schending van het recht op een fair trial dan ook gerechtvaardigd, tenzij moet worden geoordeeld dat de alternatieven die Supreme ter beschikking staan, voldoen aan de standaard in het Waite en Kennedy-arrest: er moet sprake zijn van "reasonable means to protect effectively the rights".').
[1329] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*).
[1330] Ibid., para. 6.7.10. The Supreme Court reversed the Court of Appeal's judgment on this point. Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (*Supreme*), para. 3.2.4.

legal proceedings.[1331] In this respect, it is recalled that according to the BOAs, invoices were to be settled retroactively by the relevant states.[1332]

Furthermore, the Court of Appeal held that the agreed RFWG process does represent 'reasonable alternative means'.[1333] In its judgment of 24 December 2021, upholding the respondents' jurisdictional immunity, the Supreme Court affirmed the Court of Appeal's judgment on this point.[1334] However, that is problematic insofar as the RFWG process arguably does not conform to the 'essence' of the rights under Article 6 of the ECHR as per the *Waite and Kennedy-Bosphorus* test. As seen, the District Court applied a four-pronged test inspired by ECtHR case law. One of the concerns identified by the District Court, and arguably the main one, is that all RFWG members are linked to the respondents—that is difficult to reconcile with the core requirements of independence and impartiality under Article 6 of the ECHR.

The requirements of independence and impartiality may be said to be institutional in nature.[1335] The requirements of fairness, publicity and timeliness under Article 6 of the ECHR may be said to be procedural in nature.[1336] Under ECtHR case law, 'independence' and 'impartiality' are closely linked concepts, which in the circumstances may require joint examination.[1337]

As to the concept of independence, the ECtHR's Guide on Article 6 of the ECHR states the following:

[1331] Ibid., para. 6.8.1. As to direct claims against JFCB and Shape, the Court of Appeal considered that these entities may qualify as agents of the underlying states, and that it is the states who remain ultimately liable for any debt towards Supreme. Ibid., para. 6.8.2. See also subsection 4.3.3.
[1332] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002, para. 2.9.
[1333] Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.3. ('Het hof vermag niet in te zien waarom een dergelijke vrijwillig aangegane nadere afspraak, gezien de ter zake in het Nederlands recht getroffen wettelijke regelingen, geen "redelijk alternatief" zou vormen.').
[1334] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1956 (Supreme), para. 3.3.2 ('Naar het oordeel van het hof is met dit afwikkelingsmechanisme in beginsel al sprake van een redelijk alternatief, en voert het te ver om thans reeds de vraag te beantwoorden of na het doorlopen van het redelijk alternatief in alle gevallen – dus onafhankelijk van de uiteindelijke uitkomst daarvan en van de wijze waarop de RFWG zich heeft laten informeren en debat heeft toegestaan – een beroep op immuniteit van jurisdictie kan worden gedaan. Die vraag zal naar het oordeel van het hof eerst kunnen worden beoordeeld na het doorlopen van de alternatieve "procedure" met inachtneming van de alsdan beschikbare informatie over de gevolgde procedure en over de door de RFWG genomen beslissingen. Dit oordeel moet aldus worden begrepen dat (i) het tussen Supreme, SHAPE en JFCB overeengekomen en in de escrow-overeenkomst neergelegde financiële afwikkelingsmechanisme – in het licht van de ten tijde van de uitspraak van het hof beschikbare informatie – als een redelijk alternatief middel ter bescherming van de door het EVRM toegekende rechten kan worden aangemerkt, en (ii) als op een later moment de procedure bij de RFWG is doorlopen – en daardoor meer informatie beschikbaar is over de wijze waarop de RFWG zich heeft laten informeren en debat heeft toegestaan – de vraag of sprake is van een redelijk alternatief middel wederom aan de rechter kan worden voorgelegd. Dit oordeel getuigt niet van een onjuiste rechtsopvatting en is niet onvoldoende gemotiveerd gelet op hetgeen partijen in de processtukken hebben aangevoerd over de werkwijze van de RFWG.').
[1335] Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), Chapter III.
[1336] Ibid., Chapter IV.
[1337] Ibid., para. 208.

> 'The term "independent" refers to independence vis-à-vis the other powers (the executive and the Parliament) (Beaumartin v. France, § 38) and also vis-à-vis the parties (Sramek v. Austria, § 42). Compliance with this requirement is assessed, in particular, on the basis of statutory criteria, such as the manner of appointment of the members of the tribunal and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures (see, for example, Ramos Nunes de Carvalho e Sá v. Portugal [GC], §§ 153-156). The question whether the body presents an appearance of independence is also of relevance (*ibid*., § 144; Oleksandr Volkov v. Ukraine, § 103).'[1338]

As to the concept of impartiality, under ECtHR case law it is normally understood to denote the absence of prejudice or bias. According to the ECtHR's Guide on Article 6:

> 'The existence of impartiality must be determined on the basis of the following (Micallef v. Malta [GC], § 93; Nicholas v. Cyprus, § 49):
> i. a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also
> ii. an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.'[1339]

Returning to *Supreme*, as all RFWG participants were internal to JFCB and SHAPE, it is difficult to see how the working group would satisfy these institutional requirements under Article 6 of the ECHR. In the result, it is doubtful that the immunity of SHAPE and AJF could be reconciled with *Supreme*'s rights under Article 6 of the ECHR on account of the availability of alternative recourse. (But, as discussed below, there may be grounds that nonetheless warrant the immunity prevailing over the rights under Article 6 of the ECHR.)

4.3.2.1 Interim conclusions

Whilst the lower courts have on occasion rejected the immunity, the Supreme Court has upheld the immunity of international organisations in all nine cases before it (as identified in this study), starting with *Spaans v. IUSCT* in 1985. The Supreme Court so decided on the basis that reasonable alternative means were available to the claimants (except in *Mothers of Srebrenica*, which is discussed below).[1340] Likewise, the jurisdictional immunity of international organisations has without exception prevailed in all nine cases before the ECtHR (as identified in this study), starting with its landmark judgment in *Waite and Kennedy* in 1999. In each of these cases (again, bar *Mothers of Srebrenica*), the ECtHR concluded that reasonable alternative means were available.

The test for determining whether alternative means qualify as 'reasonable' has crystalised in ECtHR case law, starting with *Bosphorus* and culminating in *Gasparini*. The question is whether the

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[1338] Ibid., para. 213.
[1339] Ibid., para. 234.
[1340] As well as Supreme Court 13 November 2007, ECLI:NL:HR:2007:BA9173, English translation on file with the present author (*Euratom*), where the issue did no arise as it concerned a criminal case.

international organisation protects fundamental rights in a manner that is at least 'equivalent' or 'comparable' to that provided under Article 6 of the ECHR. If so, it will be presumed that there is no violation of the ECHR, but that presumption can be rebutted if the claimant establishes that the protection of Convention rights is 'manifestly deficient'.

In *Klausecker*, the ECtHR interlinked the *Bosphorus* test with the *Waite and Kennedy* test concerning the immunity from jurisdiction of international organisations. As a result, insofar as 'alternative means' meet the *Waite and Kennedy-Bosphorus* test, they qualify as 'reasonable'. Such means allow to 'effectively protect' the rights under Article 6(1) of the ECHR,[1341] that is, the limitation on access to court is not disproportionate and the essence of the rights thereunder is not impaired.

In none of the cases before them did the ECtHR and Supreme Court accept challenges to the adequacy, or 'reasonableness', of alternative means. The alternative means that have withstood judicial scrutiny include proceedings before the following bodies: the ESA Appeals Board; the NATO Appeals Board; the ILOAT; an *ad hoc* arbitration tribunal; and the OSCE panel of adjudicators.[1342]

Of note, the decisions by the ECtHR and the Supreme Court discussed in this subsection all concern employment-related disputes. Such disputes can be distinguished from two other types of cases between third non-state parties and international organisations: contractual disputes; and disputes concerning the acts and omissions of international organisations (i.e., non-contractual, or tortious, liability).[1343] There is no legal reason, however, why the *Waite and Kennedy-Bosphorus* test would not guide the assessment of the availability of reasonable alternative means in those other types of cases. Indeed, the reasoning of the Court of Appeal in *Supreme*, which in essence concerns a commercial contractual dispute, illustrates that the application of the test is not as such problematic.[1344]

The cases discussed in this subsection all turned on the availability of 'reasonable alternative means'. Without such means, how could the 'very essence' of the rights under Article 6(1) of the ECHR be

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[1341] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 68.

[1342] But see *Perez v. Germany*, Decision of 6 January 2015, ECHR (App. no. 15521/08). In deciding that the application was inadmissible for failure to exhaust local remedies, the Court was critical of the adequacy of the UN's staff dispute machinery prior to the 2007 overhaul. Ibid., para. 66.

[1343] Cf. Advisory Committee on Issues of Public International Law, 'Advisory Report on Responsibility of International Organisations' (No. 27, 2015), para 2.3. The Committee noted that 'cases concerning the working conditions of the staff of an international organisation are different from cases involving, say, claims by surviving dependants for reparation for the consequences of acts or omissions of an organisation in an armed conflict.' Ibid., at 8.

[1344] As will be seen next, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), notwithstanding ambiguities in the Court's reasoning, further illustrates the application of the balancing test under *Waite and Kennedy* to a non-employment dispute.

protected, such that they are 'practical and effective'?[1345] That question was brought to the fore in *Mothers of Srebrenica*, which is the only case before the ECtHR concerning the jurisdictional immunity of international organisations were there where no such means.

4.3.3 Absence of reasonable alternative means: *Mothers of Srebrenica*

The Srebrenica genocide is central to several international and domestic cases before courts in The Hague.[1346] In one such case, as seen, the Stichting Mothers of Srebrenica Association and ten relatives of genocide victims sued the UN and the state of the Netherlands before the Dutch courts in connection with Dutchbat's failure to prevent the fall of the 'safe area' of Srebrenica.[1347]

The case on the merits was stayed pending incidental proceedings concerning the UN's immunity from jurisdiction. The courts never ruled on the merits of the case against the UN because, in April 2012, the Supreme Court upheld the judgment of The Hague Court of Appeal according to which the United Nations enjoyed immunity from jurisdiction.[1348] According to the Supreme Court: 'That immunity is absolute'.[1349]

The Stichting Mothers of Srebrenica and the other claimants then lodged a complaint against the Netherlands to the ECtHR, claiming that the state—due to its courts having denied themselves jurisdiction in the case against the UN—had contravened Article 6 of the ECHR. In a decision dated 11 June 2013, the ECtHR declared the application inadmissible, without having heard the parties.[1350]

[1345] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67 (emphasis added).

[1346] See also, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43; *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, ICTY.

[1347] In the summary of the ECtHR: 'The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (onrechtmatige daad) against them by sending insufficiently-armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.' *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 55.

[1348] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*); Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*).

[1349] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.6.

[1350] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*). The claimants also contended that the Netherlands had violated Art. 13 of the ECHR, essentially 'seeking to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the United Nations, which, given that the United Nations had been granted absolute immunity, amounted to an attempt by the

According to the ECtHR in *Mothers of Srebrenica*:

> 'The General Assembly of the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution A/RES/60/147, 16 December 2005) reiterate a "right to a remedy for victims of violations of international human rights law" found in a variety of international instruments. In so doing they refer to, among other things, Article 13 of the Convention (cited in the preamble). They are addressed to States, which are enjoined to take appropriate action and create the necessary procedures. In so doing, however, they state a right of access to justice as provided for under existing international law (see, in particular, paragraphs VIII, "Access to justice", and XII, "Non-derogation").
> . . The only international instrument on which individuals could base a right to a remedy against the United Nations in relation to the acts and omissions of UNPROFOR is the Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina of 15 May 1993, 1722 United Nations Treaty Series (UNTS) 77, which in its Article 48 requires that a claims commission be set up for that purpose. However, it would appear that this has not been done.
> . . . As the applicants rightly point out, in Waite and Kennedy (cited above, § 68) – as in Beer and Regan (cited above, § 58) – the Court considered it a "material factor" in determining whether granting an international organisation immunity from domestic jurisdiction was permissible under the Convention whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. In the present case there is no doubt that such an alternative means existed neither under Netherlands domestic law nor under the law of the United Nations.'[1351]

The Supreme Court had held:

> 'Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.'[1352]

As to the Court of Appeal, it noted that 'it has been admitted between the parties' that the UN failed to implement Section 29(a) of the General Convention.[1353] This notwithstanding, according to the Court of Appeal,

> 'it has not been established for a fact that the Association et al. have no access whatsoever to a court of law with regard to what happened in Srebrenica. In the first place it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR. If the Association et al. have omitted this

State to evade its accountability towards the applicants altogether.' Ibid., para. 166. However, according to the Court this would have required it to prejudge the outcome of the case on the merits against the Netherlands before the Dutch courts. Ibid, paras. 166–168 and 176–178. Separately, the ECtHR rejected the claim by the first claimant, Stichting Mothers of Srebrenica, for lack of standing *ratione personae*. Ibid., para. 117.

[1351] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 161-163 (emphasis added). The Supreme Court's Procurator General concluded that the UNPROFOR Sofa provides for an alternative dispute settlement mechanism, involving the setting up of a claims commission. Supreme Court Procurator General 27 January 2012, ECLI:NL:PHR:2012:BW1999 (*Mothers of Srebrenica*), para. 2.25. The Procurator General appears to have deemed this to satisfy the reasonable alternative means test under *Waite and Kennedy*, though he left aside whether the victims of the fall of Srebrenica had had sufficient opportunity to avail themselves of this mechanism.

[1352] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3.

[1353] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.11.

> because the persons liable cannot be found or have insufficient assets for compensation, the Court of Appeal observes that article 6 ECHR does not guarantee that whoever wants to bring an action will always find a (solvent) debtor.
> . . . Secondly, to the Association et al. the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open. This course has indeed been taken by the Association et al The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway. This will be no different if in that case, as the Association et al. say they expect . . . the State argues that its actions in Srebrenica must strictly be imputed to the UN. Even if this defence is put forward . . . a court of law will fully deal with the claim of the Association et al. anyway, so that the Association et al. do have access to an independent court of law.
> . . . The above implies that it cannot be said in this case that the right of access to a court of law of the Association et al. is violated if the UN's invocation of immunity from prosecution is allowed.'[1354]

As to the perpetrators of the genocide, several have been found guilty.[1355] Criminal liability may expose the perpetrators to civil liability. As to the State of the Netherlands, the claimants in *Mothers of Srebrenica* did in fact sue it as a co-respondent alongside the UN. In 2019, the Supreme Court, in final instance, found the State to be liable.[1356] Therefore, it is true, as the Court of Appeal in the immunity proceedings put it, that the claimants had access 'to a court of law with regard to what happened in Srebrenica.' But that does not correspond to the test under *Waite and Kennedy*. That test is rather 'whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.'[1357]

Suing the perpetrators of the Srebrenica genocide arguably does not meet that test. It is recalled that in *Osman*, the ECtHR opined that suing the victim's killer, or the psychiatrist who had assessed the killer, did not qualify as adequate alternatives to suing the police in negligence. That negligence is different from the alleged actions or omissions of the killer and the psychiatrist, respectively. By the same token, in *Mothers of Srebrenica*, suing the perpetrators of the genocide arguably would not qualify as reasonable alternative means to protect effectively their rights under Article 6(1) with respect to actions and omissions imputed to the UN. This is because those actions and omissions are different: whereas the perpetrators *committed* genocide, the UN allegedly *failed to prevent* genocide.

That failure was also imputed to the State of the Netherlands. Yet, suing the State arguably neither meets the *Waite and Kennedy* test of 'reasonable alternative means'. This is because, as the Supreme Court held in the case on the merits against the State, the actions and inactions of Dutchbat are attributable to the UN and the State, respectively, during *different time periods*. The State of the Netherlands came to exercise effective control over Dutchbat on 11 July 1995 at 23:00 hours—after the fall of Srebrenica—

[1354] Ibid., paras. 5.11-5.13 (emphasis added).
[1355] See, e.g., *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, ICTY.
[1356] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*).
[1357] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 68.

such that Dutchbat's actions and inactions from then on only are attributable to the State. Previously during the events at Srebrenica, the UN exercised command and control over Dutchbat, without the State exercising effective control.[1358] As a consequence, according to the Supreme Court, the State cannot be held liable for the fact that Dutchbat was unable to prevent the conquest of Srebrenica by the Bosnian Serbs.[1359] By the same token, the implication is that the UN could not be held liable for actions and inactions on the part of Dutchbat from the moment the State exercised effective control over Dutchbat.

In other words, according to the Supreme Court, the liability of the State and the UN did not coincide.[1360] As a result, litigation against the former cannot qualify as reasonable alternative means to protect effectively the claimants' right under Article 6(1) of the ECHR with respect to the actions and inactions of the latter.[1361] Indeed, as seen, the ECtHR in *Mothers of Srebrenica* stated unambiguously: 'In the present case there is no doubt that [reasonable alternative means to protect effectively their rights under the Convention] existed neither under Netherlands domestic law nor under the law of the United Nations.'[1362]

This notwithstanding, the ECtHR and the Supreme Court, like the Supreme Court's Advocate General and the lower Dutch courts, all concluded that the UN´s immunity prevailed over the claimants' right of

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[1358] For a critical appraisal, see T. Dannenbaum, 'A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands' (*EJIL: Talk!*, 2019) <ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/> accessed 21 December 2021('The power-to-prevent standard . . . recognizes the levers of control retained by the state in peacekeeping operations (troop selection and promotion, training, disciplinary authority, and criminal jurisdiction) as necessarily relevant to the attribution of wrongful conduct by its troops. It attributes wrongs to the actor(s) holding the levers of control relevant to preventing those wrongs.').

[1359] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*), para. 5.1 ('De Staat kan niet aansprakelijk worden gehouden voor het feit dat Dutchbat de verovering van Srebrenica door de Bosnische Serven niet heeft kunnen voorkomen.'). During the time-period when Dutchbat's actions and inactions were attributable to the State, the Supreme Court found it liable in connection with one specific event: the evacuation of about 350 Bosnian Muslim men from the Dutchbat compound in the afternoon of 13 July 1995. More specifically, it found that the failure to offer these men the option to stay at the compound was unlawful. The Supreme Court estimated that the men would have had a 10% chance of staying out of the hands of the Bosnian Serbs. Accordingly, the Court limited the State's liability to 10% of the damage suffered by the survivors.

[1360] An alternative approach would be to consider the matter from the perspective of 'shared responsibility'. See generally A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in *The Practice of Shared Responsibility in International Law* (2017), at 3 ('we use the concept of shared responsibility to refer to situations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.'), and at 8 ('In the context of the genocide in Srebrenica, there is merit in seeing the responsibility of Serbia, the United Nations, the Netherlands and possibly other states, General Mladić, and other individual perpetrators in their mutual relationship – and each actor in that relationship can be appraised in legal terms').

[1361] It is here that the case may differ from that of *Supreme*. Whilst JFCB and SHAPE enjoy jurisdictional immunity, the states participating in ISAF were ultimately liable towards Supreme, such that litigation against those states could conceivably qualify as reasonable alternative means to protect effectively Supreme's right under Art. 6(1) of the ECHR. Cf. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.1.

[1362] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 163.

access to court. However, the Dutch opinions were starkly divided as to the legal grounds on which the UN's immunity prevailed. On the one hand, the Court of Appeal (like the Advocate General of the Supreme Court) applied the balancing test under the ECtHR's *Waite and Kennedy* judgment, holding that reasonable alternative means were available. On the other, the Supreme Court held that *Waite and Kennedy* did not apply. Instead, the Supreme Court seems to have upheld the UN's immunity on the basis of the priority rule under Article 103 of the UN Charter. As for the ECtHR, its judgment in *Mothers of Srebrenica* is ambiguous regarding the application of *Waite and Kennedy* and Article 103 of the UN Charter.

The purpose of the following is to highlight those aspects of the *Mothers of Srebrenica* case that are relevant in the broader context of this study.[1363]

4.3.3.1 Immunity from jurisdiction, access to court and reasonable alternative means

Following its conclusion that there were no reasonable alternative means, the ECtHR in *Mothers of Srebrenica* held:

> 'It does not follow, however, 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. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), § 101). As regards international organisations, this Court's judgments in Waite and Kennedy and Beer and Regan cannot be interpreted in such absolute terms either.'[1364]

The issue considered here by the ECtHR, therefore, was whether jurisdictional immunity without an alternative remedy inevitably results in a violation of Article 6(1) of the ECHR. The Court concluded that that is not the case. In reaching that conclusion, the Court relied on the ICJ´s judgment in

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[1363] See the aforementioned publications by the present author for a more detailed discussion of the cases before the Dutch courts and the ECtHR. Following the *Mothers of Srebrenica* litigation, the UN's immunity was at issue in another case before the District Court of The Hague. See District Court The Hague 5 November 2014, ECLI:NL:RBDHA:2014:14620 (*ICTR compensation*). The case arose out of the acquittal of a person by the ICTR who had spent many years in its custody. Together with several family members, he sought compensation from the UN for unlawful detention. The District Court denied itself jurisdiction on the basis, amongst others, of the UN's immunity from jurisdiction. In this respect, building on the reasoning by the Supreme Court and the ECtHR in *Mothers of Srebrenica*, the District Court held that whilst the investigation and prosecution of international crimes by the ICTR is undeniably another activity than peacekeeping, both are conducted on the basis of chapter VII of the UN Charter and they are, therefore, activities in the context of the performance of the UN's core activities, that is the maintenance of peace and security. Furthermore, according to the District Court, the absence of alternative remedies—including under Section 29 of the General Convention, see ibid., para. 7.3—does not lead to a violation of a fundamental right of acquitted persons. Ibid., para. 7.19 (on the interpretation of 'civil right' under Art. 6 of the ECHR, see subsubsection 4.3.3.2 of this study).

[1364] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 164 (emphasis added).

Jurisdictional Immunities of the State,[1365] as well as *Waite and Kennedy*. However, it is submitted that these opinions do not in fact support that conclusion.

As to the former judgment, it is not on point.[1366] The case arose out of the Italian courts accepting jurisdiction over claims brought against Germany in connection with crimes committed during the Second World War. Before the ICJ, Germany argued that it was entitled to state immunity. Italy contested that immunity on the basis, amongst others, that the claimants lacked alternative remedies. The ICJ ruled in favour of Germany. In paragraph 101 (to which the ECtHR referred in the above-quoted passage in *Mothers of Srebrenica*), the ICJ held (emphasis added)

> 'that it could find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.'

The issue before the ICJ, therefore, was whether Germany's *entitlement* to state immunity was conditional on the existence of alternative means. The ICJ rejected such conditionality, that is, the right of a state to jurisdictional immunity does not depend on the availability of alternative recourse.[1367] Contrary to what the ECtHR stated in *Mothers of Srebrenica*, the ICJ did *not* consider a rule to the effect that jurisdictional immunity absent an alternative remedy is *ipso facto* constitutive of a violation of the right of access to court. Much less has the ICJ 'explicitly denied the existence of such a rule'. Therefore, the ICJ's judgment in *Jurisdictional Immunities of the State* does not support the ECtHR's conclusion in *Mothers of Srebrenica* on this point.

[1365] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99 (*Jurisdictional Immunities of the State*).

[1366] The ECtHR's reliance on *Jurisdictional Immunities of the State* seems to be warranted in another respect. This concerns the ECtHR's rejection of the claimants' argument that 'since their claim is based on an act of genocide for which they hold the United Nations (and the Netherlands) accountable, and since the prohibition of genocide is a rule of ius cogens, the cloak of immunity protecting the United Nations should be removed'. *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 156. The ECtHR considered that the current position regarding state immunity under customary international law was stated in *Jurisdictional Immunities of the State*. That is, as paraphrased by the ECtHR: 'International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of ius cogens.' *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 158. The ECtHR concluded that 'this also holds true as regards the immunity enjoyed by the United Nations.' Ibid. Similarly, Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.10 ff. There seem to be good arguments for that conclusion. To consider that jurisdictional immunity depends on the nature of the claim would be to ignore the essence of the immunity as a procedural bar to the exercise of jurisdiction. It is a preliminary matter, distinct from the merits of a claim.

[1367] Similarly, as concluded in subsection 3.2.2, there are good arguments that the right to jurisdictional immunity under Section 2 of the General Convention is not conditional on the implementation of Section 29 thereof.

As to the ECtHR's reliance on *Waite and Kennedy*, it is true that the proportionality test in that judgment is not cast in absolute terms—the availability of reasonable alternative means rather is a 'material factor' in determining proportionality. That wording suggests that the limitation of the rights under Article 6 can be proportionate *without* reasonable alternative means. However, the ECtHR in *Waite and Kennedy* found that alternative means were in fact available such that the Court was not called to make a principled ruling on this point. This notwithstanding, the ECtHR did state in *Waite and Kennedy,*[1368] as it recalled in *Mothers of Srebrenica*:[1369] 'It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.'[1370]

In reality, it is difficult, indeed impossible, to conceive that the 'very essence' could be preserved without alternative means. That is, upholding jurisdictional immunity absent such means necessarily violates Article 6 of the ECHR (assuming that provision applies in the first place, which is discussed below). As Reinisch paraphrased *Waite and Kennedy*: 'In the Court's view, the proportionality of the grant of immunity depended upon the availability of 'reasonable alternative means' to protect their rights'.[1371] Where such means are not available, the grant of immunity is not proportionate and Article 6 of the ECHR is breached. In other words, contrary to the ECtHR in *Srebrenica*: in the absence of an alternative remedy, the recognition of immunity *ipso facto* is constitutive of a violation of the right of access to a court.

In *Mothers of Srebrenica*, in resolving the conflict between the right of access to court and the right to immunity from jurisdiction, in the absence of reasonable alternative means, the Dutch courts and the ECtHR concluded that the immunity prevailed. The question arises as to the legal basis for that conclusion. Whilst the opinions are ambiguous, the priority rule under Article 103 of the UN Charter plays a key role, as will be briefly considered below.

[1368] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59.
[1369] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 139(b).
[1370] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59 (emphasis added). The Court continued to state, in the context of proportionality: 'It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'. Ibid., para. 67 (emphasis added).
[1371] Reinisch (2016, 'Immunity'), para. 33 (emphasis added). Cf. Irmscher (2014), at 473 ('The European Court of Human Rights has recognized that immunities may constitute a proportionate limitation of the right of access to court, provided there exists an alternative remedy for the claimant.' [emphasis added]).

A preliminary question that arises is whether there is a conflict to begin with, that is, whether Article 6 of the ECHR applies – where it does not, there is no conflict with the obligation to confer jurisdictional immunity to resolve.

4.3.3.2 'Civil right' under Article 6(1) of the ECHR in light of Section 29 of the General Convention

With reference to its constant case law, in *Mothers of Srebrenica* the ECtHR set out the following test regarding the application of Article 6 of the ECHR:

> 'Article 6 § 1 applies to disputes (contestations) concerning civil "rights" which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not they are also protected by the Convention . . . The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the right in question (see, among many other authorities, . . . Markovic and Others v. Italy [GC], no. 1398/03, § 93, ECHR 2006-XIV'.[1372]

The Court then went on to apply that test to *Mothers of Srebrenica*:

> 'The Court accepts that the right asserted by the applicants, being based on the domestic law of contract and tort (paragraph 55 above), was a civil one. There is no doubt that a dispute existed; that it was sufficiently serious; and that the outcome of the proceedings here in issue was directly decisive for the right in question. In the light of the treatment afforded the applicants' claims by the domestic courts, and of the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the Mustafić and Nuhanović cases (see paragraph 110 above), the Court is moreover prepared to assume that the applicants' claim was "arguable" in terms of Netherlands domestic law . . . In short, Article 6 is applicable.'[1373]

The concept of 'civil rights and obligations' under ECtHR case law is complex and evolving. It has two aspects: 'arguable right' at the domestic level; and 'civil' right.[1374] The following is limited to the former aspect, as it allows to demonstrate the relevance of the internal law of the international organisation.[1375]

[1372] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 119 (emphasis added).
[1373] Ibid., para. 120 (emphasis added).
[1374] The matter of the application of Art. 6 of the ECHR to staff disputes with international organisations remains to be explored. As seen, in *A.L.* v. *Italy*, Decision of 11 May 2000, ECHR (App. 41387/98) and *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), the ECtHR referred to its case law on civil service disputes (which notably includes *Vilho Eskelinen and Others v. Finland* [GC], Judgment of 19 April 2007, [2007] ECHR (II)). It then proceeded on the basis that Art. 6 applied as reasonable alternative means—that is, the NATO Appeals Board and *ad hoc* arbitration, respectively—were available. As submitted in paragraph 3.4.2.2.1., staff disputes may not qualify as disputes of a 'private law character' under Section 29 of the General Convention. However, that is unlikely to be determinative of whether such rights qualify as 'civil' in terms of Art. 6 of the ECHR. In this respect, the ECtHR held in *König*: 'Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned'. *König v. Germany*, Judgment of 28 June 1978, ECHR (Ser. A no. 27) (*König*), para. 89.
[1375] Notwithstanding the autonomous character of Art. 6 of the ECHR. According to the Guide on Article 6 of the European Convention on Human Rights, the concept 'cannot be interpreted solely by reference to the respondent

Whether there is an arguable right must be determined with reference to domestic law. As the ECtHR recalled in *Mothers of Srebrenica*: 'the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned.[1376] This means that, as one ECtHR observer put it, 'where there is no actionable claim in domestic law, because of substantive national law, individuals cannot claim that Article 6 should apply.'[1377]

In *Mothers of Srebrenica*, the ECtHR assumed that the 'claim is arguable in terms of Netherlands domestic law*'* (emphasis added) on two grounds: the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the *Mustafić* and *Nuhanović* cases. And, the 'treatment afforded the applicants' claims by the domestic courts'. However, neither ground seems to support that assumption.

As to the ECtHR's reference to the *Mustafić* and *Nuhanović* cases, it suggests that these cases were decided under Dutch law. They were not. The background to the cases may be gleaned from the Court of Appeal's judgments:

> 'Mustafic was working as an electrician for Dutchbat . . . After the fall of Srebrenica, Mustafic had sought refuge in the compound . . . Mustafic expressed his intention that he wanted to stay at the compound together with his family. Aide-de-camp Oosterveen reacted to this by saying that that was not possible because everybody had to leave, with the exception of UN personnel. At the end of the afternoon on 13 July 1995, after the remaining refugees had left the compound, Mustafic also left with his family. Outside the gate of the compound Mustafic was separated from his family by the Bosnian Serbs, he was deported and killed by the Bosnian Serb Army or related paramilitary groups; his family survived.'[1378]

As for Mr Nuhanović, he was a United Nations employee who worked as an interpreter with Dutchbat. As Bosnian Serb forces overran Srebrenica, Nuhanović together with his parents and minor brother Muhamed sought refuge at a compound outside the city where Dutchbat units were quartered. Nuhanović was entitled to be evacuated as a United Nations employee but, insofar as relevant for present purposes, Muhamed was left behind and was killed.[1379]

Nuhanović and Mustafić sued the Netherlands before the Dutch courts, holding it liable in tort (and breach of contract), in sum, for failing to offer protection against the Bosnian Serb forces. The District

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State's domestic law; it is an "autonomous" concept deriving from the Convention. Article 6 § 1 applies irrespective of the parties' status, the nature of the legislation governing the "dispute" (civil, commercial, administrative law etc.), and the nature of the authority with jurisdiction in the matter (ordinary court, administrative authority etc.)'. Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), para. 1 (emphasis added).

[1376] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 168.

[1377] Interights, 'Manual for Lawyers – Right to A Fair Trial under the ECHR (Article 6)' (2009), at 5.

[1378] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 2.29.

[1379] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR0133 (*Nuhanović*), paras. 2.28-2.29.

Court of The Hague dismissed the claims on the basis that the alleged conduct was attributable to the UN, and not to the Netherlands.[1380]

The District Court judgment was overturned on appeal. The Court of Appeal found—in essentially identical interim judgments—[1381] that the conduct of Dutchbat could in fact be attributed to the State of the Netherlands.[1382] It then went on to opine:[1383]

> 'Apart from the State's opinion - which has been considered to be incorrect in the above - that the Court should judge Dutchbat's conduct strictly in accordance with international law, it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina. Additionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound. The Court assumes that, by advancing the argument in its defense that these conventions are not applicable, the State did not mean to assert that it does not need to comply with the standards that are laid down in art. 2 and 3 ECHR and art. 6 and 7 ICCPR in peacekeeping missions like the present one.
> 6.4 In addition, as pleaded by Mustafic et al. and not challenged by the State, pursuant to art. 3 of the Constitution of Bosnia and Herzegovina, provisions from treaties to which the Republic of Bosnia and Herzegovina is a party have direct effect and constitute a part of the law of Bosnia and Herzegovina. Because the ICCPR was in force in any case in 1995, the articles 6 and 7 ICCPR constitute a part of Bosnian law that the Court must apply in accordance with international private law and consequently these provisions have priority over the law of Bosnia and Herzegovina, in so far as this law were to deviate from the provisions of this treaty.'[1384]

The Court of Appeal held that

> 'Dutchbat, according to the standards of the law of Bosnia and Herzegovina and under the legal principles (with binding effect on the State) that are laid down in art. 6 and 7 ICCPR, did not have the right to send Mustafic away from the compound. According to those standards it is not allowed to surrender civilians to the armed forces if there is a real and predictable risk that the latter will kill or submit these civilians to inhuman treatment.'[1385]

And so:

> 'The Court concludes that the State acted wrongfully towards Mustafic by ensuring that he left the compound against his will. The Court also believes that Mustafic would still be alive (except for special circumstances that are not under discussion) if the State had not acted wrongfully towards him.'[1386]

[1380] Ibid., para. 3.8; Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 3.9.
[1381] The interim judgments were rendered in 2011. The subject matter of the remaining litigation is not relevant for present purposes.
[1382] Court of Appeal The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR5386, English translation provided by Court (*Mustafić*), para. 5.20.
[1383] The following references are to the Court of Appeal's judgment in *Mustafić*.
[1384] Ibid., paras. 6.3–6.4 (emphasis added).
[1385] Ibid., para. 6.8.
[1386] Ibid., para. 6.14.

More specifically,

> 'The Court concludes that the State, by ensuring that Mustafic left the compound and by not taking him along to a safe area, which resulted in the death of Mustafic, acted wrongfully towards Mustafic et al., under the provisions of art. 154 Act on Obligations of Bosnia and Herzegovina as well as based on a violation of the right to life and the prohibition on inhuman treatment. Pursuant to art. 171 paragraph 1 Act on Obligations of Bosnia and Herzegovina, the State is liable for the conduct of the Dutchbat members, who were employed by the State and who caused the damage "in the course of their work or in connection with work"'.[1387]

On 6 September 2013, the Supreme Court dismissed the appeal by the State of the Netherlands in both cases.[1388] The law governing the disputes—that is, the law of Bosnia and Herzegovina, supplemented by customary international law—was not contested before it.[1389]

The point here is that the *Mustafić* and *Nuhanović* cases would have warranted closer examination before being cited as evidence that the claims in *Mothers of Srebrenica* were arguable under Dutch law. Contrary to what the ECtHR suggests, those cases were *not* decided under Dutch law. The Dutch courts only applied *Dutch private international law*, which is procedural in nature and, as far as domestic law is concerned, pointed to the substantive law of Bosnia and Herzegovina.

The other ground on the basis of which the ECtHR assumed that the *Mothers of Srebrenica* 'claim is arguable in terms of Netherlands domestic law' concerns 'the treatment afforded the applicants' claims by the domestic courts'. But, what 'treatment' was the Court referring to? By the time the ECtHR rendered its *Mothers of Srebrenica* decision regarding the immunity of the UN, on 11 June 2013, the Dutch courts had dealt exclusively with the incidental proceedings with respect to the UN's immunity from jurisdiction. None of the judgments in those proceedings considered the nature of the claim in terms of Article 6 of the ECHR. As to the case on the merits against the Netherlands (insofar as relevant by analogy for claims against the UN, discussed below), it was decided only *after* the ECtHR rendered its judgment on the UN's immunity.[1390] The District Court's judgment in first instance in the case on the merits is dated 16 July 2014. It is therefore not clear how the ECtHR's reference to 'treatment afforded the applicants' claims by the domestic courts' would support its assumption that the claim in *Mothers of Srebrenica* was arguable under Dutch law.

Notwithstanding the ECtHR's unsubstantiated assumption at the time, however, the subsequent proceedings on the merits against the State of Netherlands do support that assumption *retroactively*.

[1387] Ibid., para. 6.20.
[1388] Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Nuhanović*); Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*Mustafić*).
[1389] Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*Nuhanović*), para. 3.15.5; Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*Mustafić*), para. 3.15.5.
[1390] Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*), paras. 4.3-4.4.

That is, these proceedings suggest that the claims against the UN were in fact arguable under Dutch law. This is because the courts in those proceedings found the Netherlands liable under Dutch tort law.

In deciding to apply Dutch law, the District Court reasoned as follows, in relevant part:

> 'Just as Claimants the District Court is of the opinion that the unlawfulness according to national law of the actions of which Dutchbat is accused and that are attributable to the State must be assessed according to the law of The Netherlands. As to this it deliberates as follows.
> . . . The State correctly has not denied that unlawful actions of the State as Claimants argue consist of the exercise of public authority i.e. acta jure imperii. Till the current Section 10:159 BW came into force the international private law of The Netherlands contained no codified special rule governing the choice of law for acta jure imperii. Section 10:159 BW stipulates that acta jure imperii should be assessed according to the law of the State that exercised said authority. According to the explanation the basis of said indicative ruling is that: "the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability." (Note of amendment to the proposed law Enacting and introducing Book 10 on International private law in the Civil Code (Law to enact and introduce Book 10 of the Civil Code) (TK 2009/10, 32137, no.7).
> . . . In 1995 no legal community-wide rule governing the choice of law existed for law applicable to agreements based on unlawful acts. There did exist however the COVA judgment referred to by the State (HR November 19th 1993, NJ 1994, 622) that formulated a jurisprudential rule governing the choice of law that meant the starting point was the applicable law of the country where the unlawful act had taken place. This rule governing the choice of law was codified in 2001 in the Wet Conflictenrecht Onrechtmatige daad (hereinafter to be referred to as: WCOD) [= Unlawful Act (Conflict of Laws) Act].
> . . . In the Explanatory Memorandum to the WCOD that contains no special rule for acta jure imperii there is inter alia the following: "The legislative bill only lays down the most important rules of the international unlawful act and in so doing ties in with the COVA judgment referred to." (TK 1998/99, 26608, no. 3, p. 2.). From this explanation the District Court deduces that not all of the rules of unwritten private law in The Netherlands are codified in the WCOD and this apparently includes the now codified rule governing the choice of law that relates to the very rare situation whereby the State becomes liable for government troops outside The Netherlands.
> . . . The District Court further considers that the acta jure imperii has for decades had a special place in the international private law of The Netherlands when answering the question whether a state enjoys immunity from jurisdiction. In that connection the thought in the explanation to 10:159 BW lies equally at the basis of the starting point namely that in cases of acta jurii imperii it may only be summoned to appear before a court of law on its own territory and beyond that enjoys immunity from jurisdiction.
> . . . The foregoing leads the District Court to the opinion that the law of The Netherlands applies to Claimants' valid claim concerning the unlawful act. That we are dealing here with actions in the context of a UN mission does not lead to any other opinion given the fact that as earlier deliberated upon it may be attributed to the State. Nor does the fact that Bosnian law was applied to the Nuhanović and Mustafić cases where likewise there was a valid claim based on an unlawful act having taken place lead to any other opinion. In those cases the applicable law was not in dispute and for that reason did not have to be officially determined.'[1391]

[1391] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), paras. 4.166-4.171 (emphasis added). The reference to TK 2009/10, 32137, no. 7 is to: 'Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek) nr. 7, Nota van Wijziging, Ontvangen 17 maart 2010 ("Aan dit voorstel ligt ten grondslag dat de uitoefening van overheidsgezag bij uitstek een terrein is dat is overgelaten aan de soevereiniteit van de staat om wiens overheidsgezag het gaat. Daarbij past niet dat vreemd recht zou moeten worden toegepast op de vraag of bij de uitoefening van dat gezag sprake is van onrechtmatig handelen en, zo ja, in hoeverre dit tot aansprakelijkheid leidt. Overigens zou in de

The grounds of appeal did not challenge the District Court's conclusion as to the applicability of Dutch law.[1392] The Court of Appeal, noting that the applicable law was not in dispute, decided to apply Dutch law,[1393] as did the Supreme Court in final instance.[1394]

To be clear, there were significant differences between the judgments of the courts regarding the extent of the liability of the Netherlands.[1395] This notwithstanding, the courts all adjudicated the dispute under Dutch law and in doing so found the Netherlands liable in tort. This is relevant for the case against the UN since according to the ECtHR, the claims against the Netherlands and the UN were near identical, that is:

> 'The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (onrechtmatige daad) against them by sending insufficiently-armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.'[1396]

Against this backdrop—the Netherlands having been found liable under Dutch tort law, and the claims against the Netherlands and the UN being near identical—there is support for the proposition that the claims against the UN were equally arguable under Dutch law.

However, the fundamental question arises whether it is appropriate to assess the lawfulness of the UN's actions and inactions pursuant to Dutch law or, for that matter, *any* domestic law. It is submitted that, rather than domestic law, it is Section 29 of the General Convention that is best suited for that purpose. Its application to the UN and its operations across the world reflects the Organisation's universal character and ensures that its liability is determined uniformly and consistently. That is a distinct advantage over the application of domestic laws, which differ widely in substance and are at risk of

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meeste gevallen ook op grond van artikel 3 van de Wet conflictenrecht onrechtmatige daad Nederlands recht toepasselijk zijn op de aansprakelijkheid voor schade als gevolg van de uitoefening van Nederlands openbaar gezag.")'.

[1392] Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*), para. 33.

[1393] Ibid., para. 33.

[1394] Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*), para. 4.1. For examples of the Supreme Court applying Dutch law (more specifically Art. 6:162 DCC, the key provision on tort), see, e.g., ibid., paras. 4.2.2 and 4.2.5.

[1395] Indeed, Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*) quashed District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*) and Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (*Mothers of Srebrenica, merits*) quashed Court of Appeal The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (*Mothers of Srebrenica, merits*).

[1396] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 55 (emphasis added).

manipulation. The approach of determining the application of Article 6 of the ECHR on the basis of Section 29 of the General Convention corresponds to Jenks' anticipation that the 'proper law of international organisations' would in future 'not be limited to a choice between different systems of municipal law but may provide for the application of rules of an international character, including the domestic law of an international organisation.'[1397] According to Jenks, more specifically, 'an increasing number and proportion of legal transactions will be removed from the domain of conflict to that of common international rules.'[1398]

The ECtHR laid the groundwork for that approach, having stated the following in *Mothers of Srebrenica*, in line with its constant case law:

> 'The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, among other authorities and mutatis mutandis, Loizidou v. Turkey (merits), judgment of 18 December 1996, § 43, Reports 1996-VI; Al-Adsani, cited above, § 55; and Nada v. Switzerland [GC], no. 10593/08, § 169, ECHR 2012). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of immunity to a State (the Court would add: or to an international organisation) (see Loizidou, cited above, § 43; Fogarty, cited above, § 35; Cudak, cited above, § 56; and Sabeh el Leil, cited above, § 48).'[1399]

Section 29 of the General Convention being a treaty provision, it is submitted that it ought to be taken into account as 'rules of international law'.[1400] As a result, the test under Article 6(1) of the ECHR would be whether there is an arguable right under *Section 29 of the General Convention*.

Somewhat paradoxically, additional support for this approach may be found in the reasons underlying the District Court's decision in *Mothers of Srebrenica, merits* to apply Dutch law in the case against the State of the Netherlands. As seen, the court held the following, in relevant part:

> 'The State correctly has not denied that unlawful actions of the State as Claimants argue consist of the exercise of public authority i.e. acta jure imperii. Till the current Section 10:159 BW came into force the international private law of The Netherlands contained no codified special rule governing the choice of law for acta jure imperii. Section 10:159 BW stipulates that acta jure imperii should be assessed according to the law of the State that exercised said authority. According to the explanation the basis of said indicative ruling is that: "*the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability*.'[1401]

[1397] Jenks (1962), at xxxi (emphasis added).
[1398] Ibid., 263.
[1399] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 139I (emphasis added).
[1400] See also UN Doc. A/CN.4/L.682 (2006), para. 35 ff, discussed below.
[1401] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), para. 4.167 (underlining added).

This reasoning is geared towards states insofar as it draws on the core features of the state: the exercise of public, or government, authority; and sovereignty. Nonetheless, international organisations may be said to have corresponding features. As to the exercise by states of public, or government, authority, this arguably corresponds to the exercise by international organisations of the powers bestowed on them to perform the functions for which they were established. As to sovereignty, though an exclusive quality of states,[1402] its underlying value—independence—applies equally to international organisations.

As the District Court recalled in *Mothers of Srebrenica, merits*, in amending Dutch private international law, the Dutch legislature explained that the lawfulness of core state action is most aptly assessed under the State's own law. This is because 'the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned.'[1403] By the same token, the lawfulness of an international organisation's exercise of its powers arguably warrants being assessed under its own internal rules. Indeed, the more the core functionality of an international organisation is at issue, the stronger the argument for assessing its liability pursuant to its own rules.

Applying the foregoing to the case in point, the question is whether the claims in *Mothers of Srebrenica* would be arguable under the Section 29(a) of the General Convention. Under that provision, the UN's liability is limited to disputes of a 'private law character'. As submitted in chapter 3, there are good arguments to conclude that the *Mothers of Srebrenica* dispute is not of a private law character.[1404] The implication would be that there is no right of action in this case against the UN. Hence, Article 6 of the ECHR, duly taking into account the UN liability regime, would not apply.

That conclusion would not be entirely foreign to the ECtHR. Amongst the cases in which the Court concluded that there was no arguable right under domestic law, the circumstances in *Markovic* are not altogether different from those in *Mothers of Srebrenica*.[1405] *Markovic* arose from a lawsuit which victims of the NATO bombing of Belgrade brought against Italy before the Italian courts. They alleged that Italy's support for the military action was illegal. The case turned on the application of Italian tort

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[1402] However, states may be said to confer sovereign powers on international organisations. See Sarooshi (2005), at 1.
[1403] District Court The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562, English translation in ECLI:NL:RBDHA:2014:8748 *(Mothers of Srebrenica, merits*), para. 4.167.
[1404] Contrary to Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3, the ECtHR left open the question whether Section 29 of the General Convention was at play. *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 . . . can be construed so as to require a dispute settlement body to be set up in the present case.').
[1405] *Markovic and Others v. Italy* [GC], Judgment of 14 December 2006, [2006] ECHR (XIV).

law. The proceedings before the Italian courts ended with the Italian Court of Cassation ruling that, as the ECtHR summarized,

> 'the impugned act was an act of war; since such acts were a manifestation of political decisions, no court possessed the power to review the manner in which that political function was carried out; further, the legislation that gave effect to the instruments of international law on which the applicants relied did not expressly afford injured parties a right to claim reparation from the State for damage sustained as a result of a violation of the rules of international law.'[1406]

The Italian Court of Cassation's judgment was highly relevant for the ECtHR's determination as to the existence of an arguable right under Italian law. In this respect, the ECtHR considered the following:

> 'In assessing therefore whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see Masson and Van Zon v. the Netherlands, 28 September 1995, § 49, Series A no. 327-A). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see Z and Others v. the United Kingdom, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.'[1407]

In a similar vein, the ECtHR held that

> 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.
> . . . Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.'[1408]

Against this backdrop, the Court of Cassation's judgment having been central to the ECtHR's analysis, the latter's conclusion in *Markovic* was that

> 'it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a 'right' to reparation under the law of tort existed in such circumstances.'[1409]

Furthermore, the Court

> 'considers that the Court of Cassation's ruling in the present case does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in

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[1406] Ibid., para. 106. Along similar lines, the UK Government, as an intervening party, contended in the *Markovic* proceedings before the ECtHR that 'the rule of national law that the State was not liable to compensate individuals for losses which they had suffered on account of the State's decisions in the conduct of foreign relations limited the scope of the general rules of liability in their application to the State for reasons of public policy'. *Markovic*, para. 88.
[1407] Ibid., para. 95 (emphasis added).
[1408] Ibid., paras. 107-108.
[1409] Ibid., para. 111.

> domestic law. At the relevant time, the position under the domestic case-law was such as to exclude in this type of case any possibility of the State being held liable. There was, therefore, no limitation on access to a court of the kind in issue in *Ashingdane*'.[1410]

The claim underlying *Markovic* was against Italy, it was brought before the Italian courts and decided under Italian law. Notwithstanding these differences with the *Mothers of Srebrenica* case, the claims underlying *Mothers of Srebrenica* are arguably no less political than Italy's support for the NATO bombing as the *Mothers of Srebrenica* claims relate to the exercise of Chapter VII powers under the UN Charter. In these circumstances, having concluded in *Markovic* that there was no arguable right under Italian law, the ECtHR in *Mothers of Srebrenica* could conceivably have reached the same conclusion, applying the UN's own liability law based on Section 29 of the General Convention.

However, of note, in *Markovic* the ECtHR ruled that, while there was no arguable right under domestic law, Article 6(1) of the ECHR *did* apply. In essence, this is because in the proceedings before the Italian courts, the right had been arguable until the Court of Cassation settled the matter in final instance. The ECtHR considered that

> 'there was from the start of the proceedings a genuine and serious dispute over the existence of the right to which the applicants claimed to be entitled under the civil law. The respondent Government's argument that there was no arguable (civil) right for the purposes of Article 6 because of the Court of Cassation's decision that, as an act of war, the impugned act was not amenable to judicial review, can be of relevance only to future allegations by other complainants. The Court of Cassation's judgment did not make the applicants' complaints retrospectively unarguable (see Z and Others v. the United Kingdom, cited above, § 89). In these circumstances, the Court finds that the applicants had, on at least arguable grounds, a claim under domestic law.
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> . . . Accordingly, Article 6 is applicable to the applicants' action against the State. The Court therefore dismisses the respondent Government's preliminary objection on this point. It must therefore examine whether the requirements of that provision were complied with in the relevant proceedings.'[1411]

This means that during the proceedings leading up to the Court of Cassation's judgment, the claimants were entitled to the protection under Article 6 of the ECHR, involving the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' In this respect, the ECtHR in *Markovic* considered, amongst others, that

> 'the applicants cannot argue that they were deprived of any right to a determination of the merits of their claims. Their claims were fairly examined in the light of the domestic legal principles applicable to the law of tort. Once the Court of Cassation had considered the relevant legal arguments that brought the applicability of Article 6 § 1 of the Convention into play, the applicants could no longer claim any entitlement under that provision to a hearing of the facts.'[1412]

[1410] Ibid., para. 114.
[1411] Ibid., paras. 101-102.
[1412] Ibid., para. 115.

The ECtHR in *Markovic* concluded that in the relevant proceedings Article 6 of the ECHR had not been violated. Conversely, a challenge may arise when it comes to the UN, because of the *process* to determine whether such a right exists under the UN Liability Rules. As discussed elsewhere in this study, that process does not conform to the requirements of Article 6(1) of the ECHR, or Article 14(1) of the ICCPR, particularly as it is the UN itself that determines the character of a dispute.

Finally, even if it is determined that there is an 'arguable right', it remains to be determined whether that right qualifies as 'civil' in the sense of Article 6 of the ECHR. The ECtHR's ruling in *Klausecker* illustrates that this determination may not be straightforward, notably as regards civil service disputes.[1413] The ECtHR left unresolved in that case whether Article 6 of the ECHR applied and proceeded on the basis that it did.[1414] It dismissed the application on the basis that reasonable alternative means were available.[1415]

Notwithstanding the foregoing, as seen, the ECtHR in *Mothers of Srebrenica* concluded that Article 6 of the ECHR did apply.[1416] In the absence of alternative remedies, the question arises of how the Court resolved the conflict between access to court and jurisdictional immunity.

4.3.3.3 Resolving the conflict between jurisdictional immunity and access to court absent reasonable alternative means

The issue is how to determine which obligation takes priority: the obligation to grant jurisdictional immunity to the defendant international organisations, or the obligation to accord access to court to the claimant. In the case of the UN, Article 103 of the UN Charter is at play as a potential basis to prioritise the former. However, as will be briefly seen, the *Mothers of Srebrenica* opinions are ambiguous on this point. Aside from Article 103 of the UN Charter—and of relevance to international organisations other

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[1413] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 48 ff. Cf. Lawson (1999), at 456 ('Naar mijn mening is artikel 6 bij de huidige stand van het recht niet van toepassing op arbeidsgeschillen tussen de internationale organisatie en haar werknemers voorzover deze essentiële taken verrichten, en *behoort* artikel 6 ook niet van toepassing te zijn.' [emphasis in original]). As with the question whether an 'arguable right' can be said to exist under Art. 6 of the ECHR, the internal law of the international organisation may be taken into account here, as the 'proper law' of the international organisation (see Jenks (1962), at xxxi). As seen in paragraph 3.4.2.2.1 of this study, staff disputes arguably do not qualify as disputes of a 'private law character' under Section 29 of the General Convention. However, under ECtHR case law, it is the 'substantive content and effects of the right – and not its legal classification' that is relevant. See Council of Europe/European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)' (2019), para. 28 ('Whether or not a right is to be regarded as civil in the light of the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take into account the Convention's object and purpose and the national legal systems of the other Contracting States'. [emphasis added]).

[1414] *Klausecker v. Germany*, Decision of 6 January 2015, ECHR (App. no. 415/07) (*Klausecker*), para. 52.

[1415] Ibid., paras. 76-77.

[1416] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 120.

than the UN, which do not benefit from a provision like Article 103 of the UN Charter— there are good arguments that militate in favour of prioritising the immunity from jurisdiction over the right of access to court. However, the case law of the lower Dutch courts not infrequently points in the opposite direction.

4.3.3.3.1 Prioritising jurisdictional immunity over access to court under Article 103 of the UN Charter

The various opinions in *Mothers of Srebrenica* referenced the priority rule under Article 103 of the UN Charter. That provision reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

The obligation to accord the UN jurisdictional immunity arises under Section 2 of the General Convention, which in turn is based on Article 105 of the UN Charter. In light of the UN Charter basis of that obligation, the question arises as to whether, under Article 103 of the UN Charter, it takes priority over the obligation to access to court under Article 6(1) of the ECHR.

The application of Article 103 of the UN Charter was a source of disagreement and confusion in the various opinions in *Mothers of Srebrenica*.[1417] Whilst the Court of Appeal concluded that Article 103 of the UN Charter applied in principle, it held that this provision 'was not intended to allow the Charter to just set aside like that fundamental rights recognized by international (customary) law or in international conventions'.[1418] Conversely, the Supreme Court seems to have prioritised the UN's jurisdictional immunity on the basis of Article 103 of the UN Charter, though its reasoning in this respect is limited.[1419] Important questions remain unresolved. Notably, Article 103 of the UN Charter is limited to competing obligations under 'any other international agreement'. However, the Supreme Court stated explicitly that the Netherlands no longer contested that the right of access to court is part of customary international law.[1420] Did the Supreme Court imply that the priority rule in Article 103 of the UN Charter applies to competing obligations under general international law as well?[1421]

[1417] See generally G.R. Den Dekker, 'Absolute Validity, Absolute Immunity: Is There Something Wrong with Article 103 of the UN Charter?', in C. Ryngaert and others (eds.), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (2015), 247.
[1418] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.5.
[1419] In finding that the UN's immunity is absolute, the Supreme Court stated: 'respecting it is among the obligations on UN member states which, as the ECtHR took into consideration in *Behrami and Saramati*, under Art. 103 of the UN Charter, prevail over conflicting obligations from another international treaty.' Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.6.
[1420] Ibid., para. 4.3.1.
[1421] According to the ILC Study Group on 'fragmentation of international law: difficulties arising from the

As for the ECtHR in *Mothers of Srebrenica*, its reasoning regarding Article 103 of the UN Charter is particularly ambiguous. The Court referred to this provision in the context of Article 31(3)(c) of the VCLT, which provides that 'there shall be taken into account, together with the context: . . . (c) Any relevant rules of international law applicable in the relations between the parties'.[1422] In this context, all the Court stated regarding Article 103 of the UN Charter is that it

> 'has had occasion to state its position as regards the effect of that provision, and of obligations flowing from the Security Council's use of its powers under the United Nations Charter, on its interpretation of the Convention (see Al-Jedda v. the United Kingdom [GC], no. 27021/08, § 102, ECHR 2011)'.[1423]

However, *Al-Jedda* is of limited relevance, because it did not, as such, concern 'the effect' of Article 103 of the UN Charter. The issue in *Al-Jedda* was whether the claimant's internment in a facility run by British forces in Iraq conformed to Article 5 of the ECHR.[1424] The UK argued that

> 'Article 5 of the Convention was displaced by the legal regime established by United Nations Security Council Resolution 1546 by reason of the operation of Articles 25 and 103 of the United Nations Charter, to the extent that Article 5 was not compatible with that legal regime.'[1425]

However, the ECtHR found that

> 'neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.'[1426]

As a result, in the absence of a normative conflict in *Al-Jedda*, Article 103 of the UN Charter did not apply in that case. Conversely, such a conflict does arise in the present case, that is, between the obligations to accord jurisdictional immunity and grant access to court. The operation of Article 103 of

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diversification and expansion of international law', 'it seems sound to join the prevailing opinion that Article 103 should be read extensively - so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations.' UN Doc. A/CN.4/L.682 (2006), para. 345 (emphasis added). See, likewise, Higgins *et al* (2017), para. 12.31 ('There is emerging consensus that the priority that Article 103 gives to the UN Charter over "international agreements" is also applicable to rules of customary international law.').

[1422] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 144.

[1423] Ibid., para. 145 (emphasis added).

[1424] *Al-Jedda v. the United Kingdom* [GC], Judgment of 7 July 2011, [2011] ECHR (IV) (*Al-Jedda*), para. 59.

[1425] Ibid., para. 91. Similarly, ibid., para. 100 ('they argue that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. They contend that, as a result of the operation of Article 103 of the United Nations Charter . . . the obligations under the Security Council Resolution prevailed over those under the Convention.').

[1426] Ibid., para. 109.

the UN Charter remains to be explored further in resolving that conflict.[1427] That, however, would fall outside the scope of the present study.

4.3.3.3.2 The choice between jurisdictional immunity and access to court

Al-Jedda illustrates the statement made by Koskenniemi, in his capacity as chairman of the ILC Study Group on 'fragmentation of international law: difficulties arising from the diversification and expansion of international law': 'In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well.'[1428]

In a similar vein, as the ECtHR has repeatedly stated,

> 'the Convention forms part of international law. It must consequently determine State responsibility in conformity and harmony with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty.'[1429]

As explained by Koskenniemi:

> 'Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators. This results precisely from the "clustered" nature in which legal rules and principles appear. But it may also be rationalized in terms of a *political* obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.'[1430]

[1427] In resolving the conflict, there are no further priority rules at play. In particular, neither obligation has the status of *jus cogens*. Cf. Irmscher, at 471 ('while it is generally recognized that certain human rights guarantees have attained the status of jus cogens norms in view of their recognition as such, this is not the case with the right of access to court'). Furthermore, considered from the perspective of the Netherlands as forum state, the competing treaty obligations at issue are at the same level in the hierarchy of norms. Each applies by virtue of Art. 93 of the Constitution, which provides: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' Of note, Art. 17 (*jus de non evocando*) of the Dutch Constitution provides: 'No one can be prevented against his will from being heard by the courts to which he is entitled to apply under the law.' <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021. This right may be taken to correspond to Art. 6 of the ECHR. However, while it is amongst the fundamental rights listed in the Constitution, this right does not operate so as to outrank the UN's right to immunity from jurisdiction. In this respect, according to Art. 120 of the Constitution, 'the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.' (emphasis added.)

[1428] A/CN.4/L.682, 13 April 2006, para. 37 (emphasis added).

[1429] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 144 (emphasis added). See also A/CN.4/L.682, 13 April 2006, para 164 ('the European Convention on Human Rights is not, and has not been conceived as a self-contained regime in the sense that recourse to general law would have been prevented. On the contrary, the Court makes constant use of general international law with the presumption that the Convention rights should be read in harmony with that general law and without an *a priori* assumption that Convention rights would be overriding.')

[1430] UN Doc. A/CN.4/L.682 (2006), para. 35 (italics in original, underlining added).

The proportionality test under *Waite and Kennedy* reflects the foregoing insofar as it reconciles the right of access to court with the jurisdictional immunity of the international organisation through 'reasonable alternative means'. In aiming to harmonise conflicting obligations, the test is reflective of the broader international legal framework and it is solution-oriented. Furthermore, the harmonious and systemic approach in international law also militates in favour of interpreting Article 6 of the ECHR in conformity with Section 29 of the General Convention, discussed above.

That being so, according to Koskenniemi, 'although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: "it may resolve apparent conflicts; it cannot resolve genuine conflicts".' [1431]

Similarly, as concluded by Pauwelyn,

> 'the interplay of norms in international law is no longer of academic interest only. In today's interdependent world, where states must co-operate in pursuit of common objectives and do so under the auspices of an ever increasing number of distinct international organisations, the potential for conflicts between norms is very real indeed. In the absence of a centralised international law-maker, the multitude of law-makers and other actors, be they domestic or international, at work on the international scene fuel the risk of conflict of norms arising.'[1432]

In the case in point, absent reasonable alternative means, there is genuine conflict between the obligation to confer jurisdictional immunity and the obligation to grant access to court. The issue is how to resolve that conflict (leaving aside Article 103 of the UN Charter). The ECtHR as a specialised human rights court has limited leeway—as seen, absent alternative remedies, it can only conclude that the forum state breached Article 6 of the ECHR. Conversely, domestic courts are faced with a choice as to which obligation to prioritise.

Importantly, *Waite and Kennedy* does *not* dictate that in the absence of reasonable alternative means, the right of access to court necessarily prevails. All the case stands for is that the forum state incurs liability under the ECHR where its courts uphold the immunity from jurisdiction of an international organisation in the absence of such means. It does not resolve the normative conflict as such.

In the words of the ILC Study Group, the relationship between immunity and access to court qualifies as one

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[1431] Ibid., para. 42.
[1432] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 487.

> 'of conflict. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the [VCLT].'[1433]

It is those 'basic rules' that guide the discussion that follows. Even if these rules may not lead to an unequivocal legal outcome,[1434] they provide arguments to prioritise the jurisdictional immunity of international organisations. However, as will be seen, the lower Dutch courts not infrequently hold the opposite.

Legal and policy considerations in favour of immunity from jurisdiction

- Lex posterior: arbitrary results

Article 30 of the VCLT concerns the application of successive treaties relating to the same subject matter and reflects the principle *lex posterior derogat legi priori* ('when two rules apply to the same matter, the later in time prevails'[1435]). The *lex posterior* principle may be said to apply insofar as the ECHR (in light of Article 6) and the General Convention (in light of Section 2) relate to the 'same subject matter' in terms of Article 30(1) of the VCLT:[1436] access (or not) to court.

More specifically, the current situation would be governed by Article 30(4) of the VCLT:

> 'When the parties to the later treaty do not include all the parties to the earlier one:
> (*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

[1433] UN Doc. A/CN.4/L.702 (2006), para. 14(2) (emphasis added). As Irmscher put it: 'There is either access to court or immunity, *tertium non datur'.* Irmscher (2014), at 464. More specifically, according to Irmscher: 'it is the forum State that is bound by the two conflicting rules of international law. There is a clear conflict between the duty to respect the immunity of the international organization and the duty to provide access to court when it comes to the determination of civil rights, as compliance with one would necessarily mean non-compliance with the other. The first obligation is owed towards the other Member States of the international organization and/or to the organization. The second obligation, in turn, is owed primarily to the other contracting parties of the human rights treaty, but likewise to the actual beneficiaries of the human rights guarantees, i.e. the natural and legal persons falling under the scope of application of the respective treaty.' Ibid., at 474 (fns. omitted). Cf. Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), paras. 3.4 and 3.10, according to which the mere fact that alternative recourse was absent did not mean that the immunity from jurisdiction must be set aside. Rather, a choice must be made between the obligation to grant access to court and uphold the immunity from jurisdiction (in the case in point, according to the Court of Appeal, the former outbalanced the latter).

[1434] Cf. Irmscher (2014), at 474-475 ('The application of the normal conflict rules does not yield any reliable results in the present case that would generally be applicable . . . the *lex specialis* rule does not provide any meaningful results. Nor can the principle of *lex posterior derogat legi priori* provide a solution'. [fn. omitted]).

[1435] A. Aust, *Modern Treaty Law and Practice* (2013), at 221.

[1436] According to Art. 30(1) of the VCLT: 'Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.'.

> (*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.'[1437]

The General Convention was adopted on 13 February 1946. Having been adopted on 4 November 1950, the ECHR qualifies as the 'later treaty'.[1438]

The ECHR has 47 states parties,[1439] 46 of which (Andorra being the exception)[1440] are also amongst the 162 states parties to the General Convention (i.e., 116 states parties to the General Convention are not states parties to the ECHR). From the perspective of the Netherlands (as the forum state, being a state party to both treaties), the application of Article 30(4) of the VCLT would have the following results:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 45 states that are parties to both treaties, the obligations under the ECHR (as the 'later treaty') would prevail;[1441]
- Under Article 30(4)(b) of the VCLT, as between the Netherlands and Andorra, being a state party to the ECHR but not the General Convention, the ECHR would apply. Conversely, under the same provision, as between the Netherlands and the 116 states parties to the General Convention that are not states parties to the ECHR, the General Convention would apply.

As a result, the Netherlands would be bound by the ECHR (access to court) towards 46 states and by the General Convention (immunity) towards 116 states.

The problem Irmscher identified with respect to the application of the *lex posterior* principle is that it would

> 'lead to completely arbitrary results, when applied by the courts of a single State. With respect to an organization which that State has joined before entering into human rights obligations, human rights would prevail, whereas with regard to all organizations which that State joined later, immunity would be ruling.'[1442]

[1437] According to Art. 30(3) of the VCLT: 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'.

[1438] The date of adoption of the treaty is the relevant date for purposes of Art. 30 of the VCLT. See Aust (2013), at 204. But see E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions', (1988) 59 *British Yearbook of International Law* 75, at 110 ('It appears that Article 30 is based on suppositions that are too simple as regards the time factor in multilateral treaty-making processes.').

[1439] <coe.int/en/web/portal/47-members-states> accessed 21 December 2021.

[1440] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed on 21 December 2021.

[1441] That is, under Art. 30(4)(a) in conjunction with Art. 30(3) of the VCLT, 'the earlier treaty', being the General Convention, 'applies only to the extent that its provisions are compatible with those of the later treaty', being the ECHR. The immunity under Section 2 of the General Convention is not compatible with the right of access to court under Art. 6(1) of the ECHR.

[1442] Irmscher (2014), at 466.

The application of the *lex posterior* rule may lead to arbitrary results insofar as the timing of the adoption of the General Convention and the ECHR may to an extent be a coincidence. If the General Convention had been the 'later treaty', the result would have been rather different. That is:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 45 states that are parties to both the ECHR and the General Convention (as the 'later treaty'), the obligations under the General Convention would prevail;
- Under Article 30(4)(b) of the VCLT, the Netherlands' competing obligations would remain unchanged. That is, as between it and those 116 states parties to the General Convention that are not states parties to the ECHR, the General Convention would apply. Conversely, under the same provision, as between the Netherlands and Andorra, being a state party to the ECHR but not the General Convention, the ECHR would apply.

As a result, the Netherlands would be bound by the ECHR (access to court) towards only one state (Andorra) and by the General Convention (immunity) towards 161 states.

The 'arbitrariness' in connection with timing may be further illustrated by the case of NATO. By way of background, as explained by Olson:

> 'The legal structure of NATO's immunities is quite complex. NATO's founding document, the 1949 North Atlantic Treaty, is a rather trim political agreement establishing a military alliance. The North Atlantic Treaty is decidedly not, however, a constituent instrument . . .
> With respect specifically to NATO immunities, their essential elements are found in the 1951 Ottawa Agreement, for the civilian side, and for the military headquarters in the 1952 Paris Protocol to the NATO Status of Forces Agreement.'[1443]

Whilst the North Atlantic Treaty does not contain a provision on the privileges and immunities of NATO akin to Article 105 of the UN Charter, Article V of the Ottawa Agreement does contain a provision similar to Section 2 of the General Convention.[1444] The Ottawa Agreement was adopted on 20 September 1951, such that in terms of Article 30(4) of the VCLT it is the 'later treaty' compared to the ECHR (adopted on 4 November 1950). On the understanding that all 30 NATO member states are states parties

[1443] Olson (2015), at 163 (fns. omitted). The reference is to the Ottawa Agreement and the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, 200 UNTS 340 ('Paris Protocol'). In *Supreme*, the Court of Appeal held that neither the Ottawa Agreement nor the Paris Protocol confer jurisdictional immunity on the defendants. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), paras. 6.6.3 and 6.6.6.

[1444] Art. V of the Ottawa Agreement provides: 'The Organisation, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organisation, may expressly authorise the waiver of this immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or detention of property.'.

to the Ottawa Agreement, 28 of these (including the Netherlands) are also states parties to the ECHR (which has 47 states parties in total), the other two states being the United States and Canada.

The application of the *lex posterior* test under Article 30(4) of the VCLT would lead to the following results:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 27 states that are parties to both the ECHR and the Ottawa Agreement, the Ottawa Agreement (being the 'later treaty') would apply;
- Under Article 30(4)(b) of the VCLT, as between the Netherlands, and the USA and Canada, being states parties to the Ottawa Agreement but not the ECHR, the Ottawa Agreement would apply. Conversely, under the same provision, as between the Netherlands and those 19 states parties to the ECHR that are not states parties to the Ottawa Agreement, the ECHR would apply.

In sum, the Netherlands would be bound by the ECHR (access to court) towards 19 states and by the Ottawa Agreement (immunity) towards 29 states.

However, here as well the timing of the adoption of the Ottawa Agreement and the ECHR may to an extent have been a coincidence. The North Atlantic Treaty and the Ottawa Agreement are closely related in that they together form NATO's basic legal framework (together with the Paris Protocol to the NATO Status of Forces Agreement). The North Atlantic Treaty was adopted just before the adoption of the ECHR, while the Ottawa agreement was adopted shortly thereafter. The Ottawa Agreement might just as well have been adopted before the ECHR, with rather different results. That is:

- Under Article 30(4)(a) of the VCLT, as between the Netherlands and the remaining 27 states that are parties to both the ECHR and the Ottawa agreement, the ECHR (being the 'later treaty') would apply;
- Under Article 30(4)(b) of the VCLT, as between the Netherlands and those 19 states parties to the ECHR that are not states parties to the Ottawa Agreement, the ECHR would apply. Conversely, under the same provision, as between the Netherlands and the USA and Canada, being states parties to the Ottawa Agreement but not the ECHR, the Ottawa Agreement would apply.

In sum, the Netherlands would be bound by the ECHR (access to court) towards 46 states and by the Ottawa Agreement (immunity) towards only 2 states.

In conclusion, the *lex posterior* test under Article 30(4) of the VCLT arguably is of little assistance in the present case to resolve the normative conflict between the obligations to, on the one hand, accord jurisdictional immunity and, on the other, grant access to court. Under that test, the dates of adoption of

the relevant treaties would determine the resolution of that conflict. However, those dates are particularly close to one another and the sequence of the adoption of the treaties in point may be rather a coincidence. What instead seems to be significant in terms of the interrelationship between these treaties is that their adoption formed part of a process of intense international law making following the Second World War. This calls for an enquiry into the intention of the states, the significance of which is underscored by the ILC study group: 'The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose.'[1445]

- The intention of the states parties

Like the UN Charter, the ECHR was adopted in the aftermath of the Second World War.[1446] The former embodied the international community's policy objective to buttress international cooperation through the UN. The latter embodied the policy objective to protect human rights at the regional level as part of a global process in furtherance of the UN Charter and the Universal Declaration of Human Rights. These policy objectives and, in consequence, these treaties are complementary.

More specifically, the UN Charter, as seen,[1447] can be viewed as the UN's constitution. Its preamble recalls the determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'.[1448] The promotion of respect for human rights and fundamental freedoms is one of the purposes of the United Nations.[1449] A significant milestone in this respect is the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948.[1450] That instrument is the linking pin with the ECHR, as the latter's preamble reflects:

> 'Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;
> Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared'.[1451]

The adoption of the ECHR, and subsequently the ICCPR, followed the UNGA's adoption of the General Convention in furtherance of Article 105 of the UN Charter. There is no evidence to suggest that in guaranteeing the right of access to court under Article 6(1) of the ECHR, and subsequently Article 14(1)

[1445] UN Doc. A/CN.4/L.702 (2006), para. 14(27) (emphasis added).
[1446] P. van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2006), at 3.
[1447] See subsubsection 2.3.2.1 of this study.
[1448] UN Charter, preamble, para. 2.
[1449] Art. 1(3) of the UN Charter ('To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. [emphasis added]).
[1450] UN Doc. A/RES/217A(III) (1948).
[1451] Preamble to ECHR, paras. 2-3.

of the ICCPR, states intended to undercut the UN by reneging on their commitment under the General Convention to protect its independence through jurisdictional immunity. It seems in fact unlikely that states had such an intention.[1452]

Similar reasoning applies in the case of NATO. Its member states are unlikely to have intended that the general right of access to court under Article 6 of the ECHR would take priority over the immunity which they specifically and contemporaneously bestowed on NATO under Article V of the Ottawa Agreement,[1453] building on the North Atlantic Treaty.[1454]

The General Convention and the Ottawa Agreement, irrespective of their precise dates of adoption in relation to the ECHR, appear to express the intention of the states to shield the UN and NATO, respectively, from the jurisdiction of national courts.

- Lex specialis

The aforementioned intention of states may be given appropriate expression through the *lex specialis derogat legi generali* principle.[1455] Though the principle, which is not codified in the VCLT, is not free from controversy,[1456] according to the aforementioned ILC study group, it

> 'is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.'[1457]

In terms of the principle's rationale, the ILC working group explained:

> 'That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be

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[1452] In this connection, the preamble to the UN Charter expressed the determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. UN Charter, Preamble, para. 3 (emphasis added).
[1453] The operation of the *lex posterior* principle, as seen, in fact supports this proposition.
[1454] Olson argued along similar lines: 'The North Atlantic Treaty, European Convention on Human Rights and Ottawa Agreement were developed essentially simultaneously, and by a largely identical group of states. The North Atlantic Treaty entered into force in 1949, fourteen months before signature of the ECHR. The Convention and Ottawa Agreement were signed within less than a year of each other, and entered into force less than nine months apart. Nine of the Convention's original twelve signatories were also original signatories of Ottawa. Eight of the ten original European allies ratified Ottawa before they ratified the Convention. It was in this context that each ally undertook a binding and unconditional commitment to every other ally—including the non-European ones—that its courts would not interfere with the workings of the Alliance. In the context of an organization whose very purpose is to affirm and maintain political solidarity, such an undertaking cannot easily be disregarded.' Olson (2015), at 170-171.
[1455] Cf. Irmscher (2014), at 466 ('The concept of, and rules implementing, immunities may constitute lex specialis with respect to the forum State's obligation concerning access to court.').
[1456] Ibid. ('The principle of *lex specialis* is, however, heavily disputed in public international law'). Pauwelyn argued that the *lex specialis* principle gives way to that of *lex posterior*. Pauwelyn (2003), at 409.
[1457] UN Doc. A/CN.4/L.702 (2006), para. 14(5).

> applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.'[1458]

However, Irmscher questions the relevance of the *lex specialis* principle in the case in point, stating that

> 'it is not a straightforward exercise to identify the more special provision of two different sets of rules pertaining to completely different legal areas and with opposing legal consequences. Identifying the *lex specialis* will bound to be a value judgment rather than a compelling legal reasoning.'[1459]

To the contrary, it is submitted that there are in fact good arguments that Section 2 of the General Convention is *lex specialis* in relation to Article 6 of the ECHR, in the sense that the former operates as a 'modification, overruling or a setting aside'[1460] in relation to the latter. Whereas Article 6 of the ECHR creates a general entitlement of access to the courts, Section 2 of the General Convention provides a specific exception exclusively with respect to the UN. Indeed, as Irmscher himself stated:

> 'What can be said . . . is that, when looking at the substance of the obligations, while the right of access to court is one that principally obliges the State for the benefit of an unlimited number of potential claimants, immunities are expressly granted in individual cases for the benefit of individual international organizations, where this has been expressly agreed upon by the (forum) State.'[1461]

Complications arise in applying the *lex specialis* principle where the states parties to the competing treaties are not identical. In this respect, the ILC Study Group stated the following:

> 'The hard case is the one where a State (A) has undertaken conflicting obligations in regard to two (or more) different States (B and C) and the question arises which of the obligations shall prevail. Here the *lex specialis* appears largely irrelevant. Each bilateral (treaty) relationship is governed by *pacta sunt servanda* with effect towards third parties excluded. Such conflict remains unregulated by article 30 of the VCLT. The State that is party to the conflicting instruments is in practice called upon to choose which treaty it will perform and which it will breach, with the consequence of State responsibility for the latter.'[1462]

However, in the case in point, 46 out of 47 ECHR states parties are also parties to the General Convention. Andorra is the only state that is a party to the former treaty but not to the latter one, though it is bound to respect the UN's immunity under Article 105 of the UN Charter. There seem to be good arguments that the obligation under Section 2 of the General Convention prevails amongst the ECHR states parties—as between those states and the other states parties to the General Convention—on the basis that that obligation is *lex specialis* in relation to Article 6(1) of the ECHR. This arguably

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[1458] Ibid., para. 14(7) (emphasis added). The operation of the *lex specialis* principle is precluded where one of the obligations has *jus cogens* status. Ibid., para. 14(10). However, that is not the case here. See Irmscher (2014), at 475.
[1459] Irmscher (2014), at 466-467.
[1460] UN Doc. A/CN.4/L.682 (2006), para. 88.
[1461] Irmscher (2014), at 467 (emphasis added).
[1462] UN Doc. A/CN.4/L.682 (2006), para. 115 (fn. omitted, emphasis added).

corresponds to the intention of the ECHR states parties, that is, to create a general right of access to court, except in the case of the UN.

- Article 31(3)(c) of the VCLT and the different legal natures of the competing norms

The general rule of interpretation contained in Article 31(3)(c) of the Vienna Convention points in the same direction.[1463] It provides that 'there shall be taken into account . . . any relevant rules of international law applicable in the relations between the parties'. As the ILC Study Group explained:

> 'Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty'.[1464]

Applied to the current case, according to Irmscher:

> 'the underlying principle of this rule may be said to be that general rules of a multilateral character may have to be taken into account when interpreting a certain provision. Thus, when interpreting and applying the right of access to court, regard must be had to other obligations of the forum State as a matter of treaty law, including immunities granted in accordance with public international law. The Human Rights Committee, in its General Comment no. 32, has expressly recognized that "exceptions from jurisdiction deriving from international law such, for example, as immunities" can constitute a legitimate limitation of the right of access to a court under Article 14, CCPR — a clear indication that immunities under international law constitute the context for the interpretation of the right of access to court.'[1465]

Indeed, in terms of the legal nature of the rights at issue, whereas the right to immunity is absolute, the right of access to justice is not. As Irmscher put it:

> 'Whereas the right of access to court is by no means absolute and would depend on the details, limitations and conditions of the domestic legal order, immunity has been regulated in an unqualified automatic manner. It is essentially self-executing and applies automatically, it is not a mere consideration by virtue of which a court would be given the discretion to refuse the adjudication of a certain dispute.'[1466]

Therefore, the interpretation of the right of access to court in light of the jurisdictional immunity of international organisations militates in favour of the latter taking priority over the former.

[1463] According to the ILC Study Group: 'When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31-33 having to do with the interpretation of treaties.' UN Doc. A/CN.4/L.702 (2006), para. 14(3) (emphasis added). Art. 31(3)(c) is also cited by the ECtHR in interpreting the ECHR, taking 'into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty'. See, e.g., *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01), para. 122.

[1464] UN Doc. A/CN.4/L.702 (2006), para. 14(21).

[1465] Irmscher (2014), at 468 (fn. omitted, emphasis added).

[1466] Ibid., (emphasis added).

- Consequences of prioritising one right over the other

As to the consequences of the courts of a state party to the General Convention denying the immunity of the UN, under the ASR—specifically, Articles 1, 2, 4[1467] and 12—the forum state would incur international responsibility for the internationally wrongful act of breaching the obligation under Section 2 of the General Convention.[1468] At the very least,[1469] it would incur that responsibility towards the 116 states parties to the General Convention that are not parties to the ECHR. Similarly, in the case of NATO, by denying its jurisdictional immunity, the forum state would commit an internationally wrongful act, at least towards the USA and Canada, for breaching the obligation under Article V of the Ottawa Agreement.

As a result, amongst others, under Article 30 of the ASR, the forum state would be under an obligation to cease doing so, that is, to ensure respect for the jurisdictional immunity of the international organisation. Insofar as domestic courts are independent, the executive branch may be limited to making representations in favour of the immunity. And, it arguably would be required to preclude the execution of judgments rendered in contravention of the immunity.[1470]

The forum state would moreover be under an obligation to make full 'reparation' under Article 31 of the ASR. The damage resulting from a denial of immunity is the impairment of the independence of the international organisation. As seen in subsection 4.2.1, such impairment may take various forms. It is difficult to conceive how such damage could be repaired. That is why it is important to respect the jurisdictional immunity of international organisations in the first place. According to Irmscher,

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[1467] Art. 4 of the ASR provides: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' (emphasis added).

[1468] As submitted in subsubsection 3.2.2.2, there is insufficient support for the argument that the forum state is entitled to suspend the UN's jurisdictional immunity under the General Convention on the basis that the UN's failure to implement its obligation under Section 29 of the treaty amounts to a 'material breach' thereof. Similarly unconvincing, it is submitted, is the argument that the forum state could deny the UN's immunity as a countermeasure against the UN for the latter's failure to implement Section 29 of the General Convention. But see Irmscher (2014), at 476-478.

[1469] The state might incur such responsibility also towards the states that are parties to both the ECHR and the General Convention, on the view that the latter prevails as per the reasoning above.

[1470] As seen, under Art. 3(a) of the Bailiff's act, the Minister of Justice may instruct a bailiff to not serve a judgment on an international organisation, where doing so would be in violation of the state's obligations under international law obligations. Such an instruction was given, for example, following Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*). See also Court of Appeal The Hague (summary proceedings) 15 March 2007, ECLI:NL:GHSGR:2007:BA2778 (*OPCW*), upholding the instruction issued by the Minister of Justice under Art. 3(a) of the Bailiff's act. This followed District Court The Hague (summary proceedings) 7 November 2005, cause list no. 530605/05-21363 (on file with the present author) (*Resodikromo* v. *OPCW*), dismissing the OPCW's immunity from jurisdiction and awarding the claim on the merits.

> 'if the right of access to court would prevail, the concept of immunities would be completely disregarded and thus become obsolete, since the purpose of immunity from jurisdiction is exactly to exclude any substantive examination of the case by the court.'[1471]

Indeed, in practice international organisations jealously guard their immunity from jurisdiction. Where an international organisation is sued before a domestic court, it will typically engage with the forum state, through its foreign ministry, to insist on the immunity being respected.[1472] In addition, legal proceedings between the international organisation and the forum state cannot be excluded; a dispute settlement clause may well be in place.[1473]

Yet, Irmscher suggests that the consequences of denying the immunity are less weighty than the consequences of denying access to court.[1474] According to Irmscher:

> 'Accepting the obligation to respect an organization's immunities would mean non-observance of the human rights obligation of the forum State. Depending on the available mechanisms, a State could face proceedings before the competent treaty body which could independently confirm a violation of the treaty, and potentially order the State party to pay compensation and/or to remedy the situation, at least with respect to the future. Thus, there is potential for a judgment or a comparable legal pronouncement, possibly with high publicity. Furthermore, the State may be obliged to remedy the situation or to pay compensation.'[1475]

However, in none of the nine cases identified in this study did the ECtHR rule against the forum state, although this was because reasonable alternative means were deemed to be available, whereas Article 103 of the UN Charter was at issue in *Mothers of Srebrenica*. If it came to an award against the forum state for upholding the jurisdictional immunity of an international organisation, this might be the cost of protecting the independence of the organisation.[1476] Any reputational damage could be offset by the state demonstrating its commitment to the right of access to court,[1477] or seeking to ensure the accountability of the international organisation, in other ways. For example, as a member state of the international organisation, the state could argue for the improved implementation of Section 29 of the General Convention (or equivalent provision). Alternatively, it could pursue an advisory opinion from the ICJ

[1471] Irmscher (2014), at 469.
[1472] But see Irmscher (2014), at 475-476 ('political irritations will normally be limited, if they will surface at all.')
[1473] For example, headquarters agreements concluded with the Netherlands typically provide for arbitration where a dispute cannot be settled amicably. See, e.g., Art. 44 of the IRMCT Headquarters Agreement. But see Irmscher (2014), at 475-476 ('the unlikelihood of an international organization to start legal proceedings against one of its Member States').
[1474] Irmscher (2014), at 476 ('even though the two obligations of the forum State are of equal value, the consequences of not respecting them would be essentially different. Arguably, and based on factual considerations only, the consequences of disrespecting immunities would weigh much less from the perspective of the forum State, given the character and possible vulnerability of the international organization.').
[1475] Irmscher (2014), at 475.
[1476] Financial awards ordered by the ECtHR are generally not such as to be prohibitive for states. See, e.g., the award for compensation and expenses in *Osman v. the United Kingdom* [GC], Judgment of 28 October 1998, [1998] ECHR (VIII) (*Osman*).
[1477] Cf. ibid., at 469 ('even if immunities are respected by the court, the right of access to court would still have a broad scope of application.').

under Section 30 of the General Convention for breach of Section 29 (or equivalent provisions), or exercise diplomatic protection for claimants that are its nationals. An alternative approach to avoid exposure through an adverse judgment would be for the forum state to concede responsibility towards the claimant and offer compensation.

- Context

In balancing the obligation to accord immunity against the obligation to grant access to court, context is relevant. To begin with, one cannot lose sight of the wide divergence amongst international organisations, the sources of their immunity and the different types of third-party claims against them. Thus, for example, the UN's absolute immunity under the General Convention was at issue in *Mothers of Srebrenica*, which concerned the UN's alleged failure of the UN in the face of genocide in connection with a Chapter VII operation. NATO's SHAPE and JFCB are invoking functional immunity under customary international law in the *Supreme* case, concerning a contractual dispute. The IUSCT, seated in the Netherlands, has relied on its functional immunity under its headquarters agreement in various employment disputes (*Spaans v. IUSCT* having been previously decided under general international law). And, the EPO, partly seated in the Netherlands, has relied on its functional immunity under multilateral agreements in a variety of disputes. All these cases essentially raise the same conflict between immunity and access to court, but the different circumstances of each warrants careful consideration in addressing that conflict.

The membership of an international organisation forms a contextual element of particular significance. This is illustrated by the case of NATO. As seen, the adequacy of its alternative remedies in staff cases has come before the ECtHR in *Gasparini* and, concerning NATO's jurisdictional immunity, in *Chapman*. The issue in both cases was whether under the *Waite and Kennedy-Bosphorus* test, NATO's Appeals Board and its procedures conformed to the essence of Article 6 of the ECHR. Whilst the ECtHR found in *Gasparini* that the test was met, it dismissed the applicant's challenge in *Chapman* as the applicant had not availed himself of the Appeals Board. This notwithstanding, the point is that the Court scrutinised the adequacy of NATO's alternative remedies. In this respect, Olson, a former NATO legal adviser, stated that 'NATO has some very real concerns relating to the jurisprudence of the European Court of Human Rights, and struggles to make sense of it.'[1478] He continued to comment:

> 'NATO is *not* a "European" body, despite the fact that 26 of its 28 member states are European. Rather, in its very conception—its own constitution, one might say—it is a trans-Atlantic body in which the North American element is as fundamental as the European. It cannot be doubted that the North American allies would immediately reject the proposition that NATO is part of the European public order in the sense that 'European constitutional instruments' could directly dictate or constrain its internal workings. And insofar as the implication is that rulings of the Court might, by purporting

[1478] Olson (2015), at 169.

> to apply ECHR standards directly to the Organization's internal regulations or enforcement mechanisms, effectively impose Convention norms on NATO bodies outside Europe . . . —that, too, would raise serious questions . . . The degree of state action required seems to have shrunk dramatically, however, to the point that, in its 2009 ruling in *Gasparini* the Court apparently abandoned even the pretence of requiring some state action as a precondition to holding an ECHR party accountable for actions of NATO. Rather, in that case it took it on itself to judge the quality of NATO's internal appeals tribunal on the basis that allegations of its insufficiency raised the possibility of a "structural lacuna" in the Organization, for which it considered ECHR Parties still directly accountable almost a half-century after the original transfer of sovereign powers to NATO.'[1479]

Did the ECtHR, as Olson put it, 'effectively impose Convention norms on NATO bodies' or, as he suggested in a footnote with reference to ICJ case law, infringe the 'basic principle that a court may not exercise jurisdiction over a state without that state's consent'?[1480] Arguably, the Court did not do so. As Olson himself recognised, it is 'ECHR Parties' who are being held to account in light of their obligations under the ECHR in connection with international organisations. The ECtHR may have no choice but to rule that a state party breaches Article 6 of the ECHR where its courts uphold immunity whilst alternative remedies do not meet the *Waite and Kennedy-Bosphorus* test. That is a consequence of those states being parties to the ECHR, whilst simultaneously being NATO member states. However, the ECtHR's ruling does not, as such, interfere with NATO and, contrary to Olson's concern, ECHR norms are not being imposed on it.

Nonetheless, there could be indirect such interference if a NATO member state would set aside NATO's jurisdictional immunity in anticipation of an ECtHR ruling. To prioritise the obligation to grant access to court over the obligation to accord immunity would be questionable in view of NATO's membership and purpose. Two of the Ottawa Agreement's states parties—the United States and Canada—are not parties to the ECHR. Having been founded, at least in part, to respond to the threat posed by the Soviet Union,[1481] NATO 'is a trans-Atlantic body in which the North American element is as fundamental as the European.'[1482] That 'North American element', made up of the USA and Canada, is not subject to the ECHR. At the same time, the ECHR's 47 states parties do include the Russian Federation and other former Soviet states. To ignore NATO's jurisdictional immunity on account of the ECHR is fundamentally problematic: it would expose NATO to interference in the name of ECHR states parties, including those that, at least in part, gave cause for NATO's establishment.

[1479] Ibid., at 170 (fn. omitted; italics in original, underlining added).
[1480] Ibid., at 170, fn. 22. Along similar lines, see Lock (2010), at 540 ('The USA and Canada are not bound by the Convention, but the alleged procedural deficit in the staff rules of NATO would be attributable to them also. If the Court had found a violation of the Convention, it would thus have held these countries indirectly responsible for the violation of a human rights treaty to which they are not parties.').
[1481] <nato.int/cps/us/natohq/declassified_139339.htm> accessed 21 December 2021.
[1482] Olson (2015), at 170.

This context is relevant to resolve the conflict between jurisdictional immunity and access to court in the pending case of *Supreme*. Even if in that case alternative remedies are deemed to be absent, and notwithstanding that the respondents' immunity arises under general international law (as opposed to a treaty), the foregoing may provide good arguments for the immunity to prevail.[1483]

Similar reflections arise with respect to the IUSCT, though a very different type of international organisation compared to NATO. Seated in the Netherlands, its only member states are the USA and Iran. Under Article 3 of the IUSCT's headquarters agreement with the Netherlands, concluded in 1990, the IUSCT enjoys functional immunity. As seen, a real question arises as to whether the IUSCT's alternative recourse in staff cases (that is, the tribunal's own arbitrators) meets the requirement of independence under Article 6 of the ECHR. If that requirement is not met, and where the immunity of the IUSCT is upheld, the ECtHR would find the Netherlands in breach of Article 6 of the ECHR.

However, that does not mean that the Dutch courts must prioritise the obligation to grant the claimants access to court over the obligation to accord the IUSCT immunity from jurisdiction. To the contrary, as in the case of NATO, the circumstances of the IUSCT may provide good arguments for prioritising its immunity. To begin with, its sole states parties are the USA and Iran, on which the ECHR has no bearing. Established in 1981, the Tribunal was part of a negotiated solution for a highly volatile situation, the Iran hostage crisis. The Netherlands was prepared to host the tribunal, perhaps in light of its constitutional commitment to 'promote the development of the international legal order.'[1484] Whilst that commitment equally includes promoting and encouraging respect for human rights (which includes the right of access to court), it may be that in the circumstances, the Netherlands' intention was first and foremost to offer protection to the IUSCT to enable it to carry out its sensitive mandate in full independence. Having to that end agreed to confer immunity from jurisdiction on the IUSCT,[1485] the Netherlands may have to accept the consequences of being simultaneously bound by the ECHR. That is, the potential for an adverse ruling of the ECtHR does not justify breaching the obligation under the headquarters agreement to accord jurisdictional immunity to the IUSCT.

[1483] The District Court stated that it would balance the conflicting rights to, on the one hand, access to court and, on the other, functional immunity. District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (*Supreme*), para. 4.25 ('De rechtbank zal daarom onderzoeken of de functionele immuniteit dient te wijken voor artikel 6 EVRM. Hierbij moet worden beoordeeld of het belang van het respecteren van de functionele immuniteit van AJFCH en SHAPE zwaarder weegt dan het belang van Supreme bij "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".'). However, in reality the Court applied the proportionality test under *Wait and Kennedy* and, having concluded that there were no reasonable alternative means, it prioritised the rights under Art. 6 of the ECHR. Ibid., paras. 4.36-4.41.

[1484] Art. 90 of the Constitution of the Netherlands, <government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> accessed 21 December 2021.

[1485] Of note, the IUSCT Headquarters Agreement does not include a provision akin to Section 29 of the General Convention, requiring the IUSCT to make 'provision for the settlement of disputes of a private law character'.

The ECtHR has shown that it is itself not oblivious to the realities surrounding the simultaneous application of different treaties. For example, in *Behrami and Saramati,* it held:

> 'The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.
> . . . The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN.'[1486]

This passage was the lead-in to a reference to Article 103 of the UN Charter. Though it does not contain a legal argument, the quoted passage took into account an important reality to back up the ECtHR's deference to the UN Charter in declaring the applications in *Behrami and Saramati* inadmissible. For national courts, which as courts of general jurisdiction enjoy broader discretion in making policy choices than the ECtHR, the 'reality check' in *Behrami and Saramati* is instructive in addressing the conflict between immunity and right of access to court.

- Interim conclusions

Waite and Kennedy does *not* dictate to domestic courts that the obligation to grant access to court must prevail. The implication of this precedent is merely that where the courts of a forum state uphold the immunity from jurisdiction of an international organisation, in the absence of reasonable alternative means, the forum state will in most cases (*Mothers of Srebrenica* being the exception) breach Article 6 of the ECHR. The ECtHR, as a specialised human rights court, may have no choice but to make a finding to that effect. Conversely, domestic courts, as courts of general jurisdiction, will have to balance the forum state's obligation to grant access to court against its obligation to respect the international organisation's immunity from jurisdiction.

In conducting this balancing exercise, there are good arguments that militate in favour of prioritising the immunity. Notably, whilst the *lex posterior* principle arguably leads to 'arbitrary results', the *lex specialis* principle may reflect the intention of states to create a general entitlement of access to the court, except as agreed otherwise with respect to international organisations. Furthermore, the right of access to court is not absolute, which in light of Article 31(3)(c) of the VCLT militates in favour of prioritising the obligations to accord immunity. Moreover, while the consequences of denying the immunity arguably outweigh those of denying access to court, contextual considerations, notably the

[1486] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], Decision of 2 May 2007, ECHR (App. no. 71412/01; 78166/01), paras. 146-147.

member states of the international organisation, may point in the same direction. The examples concerning NATO and the IUSCT illustrate the realities at play.

By seeking to vindicate the right of access to court in alternative ways, the forum state may provide comfort to its courts in upholding the jurisdictional immunity of international organisations. Ultimately, it is for international organisations and their member states to provide access to justice through alternative remedies. This would reconcile the conflicting international obligations concerning jurisdictional immunity and access to justice, in furtherance of the systemic approach referred to by Koskenniemi. And, it would ensure compliance by international organisations with their international law obligations to provide for alternative remedies.

The 'Waite and Kennedy approach' in domestic case law

Notwithstanding the arguments developed in the foregoing, in choosing between the conflicting obligations to accord immunity from jurisdiction and grant access to court, the lower Dutch courts not infrequently prioritise the latter over the former. The approach followed is essentially along the lines of *Waite and Kennedy*:[1487] the jurisdictional immunity is to give way where Article 6 of the ECHR would be breached in the absence of alternative remedies. It has not come to immunity being denied by the Dutch courts in final instance. This is because alternative remedies were each time deemed to be available (*Mothers of Srebrenica* being the exception). Indeed, litigation concerning the jurisdictional immunity of international organisations largely concerns the question of whether adequate alternative remedies are available. The lower Dutch courts are less inclined to conclude that they are.

Thus, for example, the District Court of Limburg in its 2017 judgment in *Supreme* set aside the immunity of the respondents on the basis that the available remedies were below par.[1488] On similar grounds, the District Court The Hague has on several occasions denied the jurisdictional immunity of international

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[1487] Cf. Reinisch (2016, 'Immunity'), para. 33 ('In the Court's view, the proportionality of the grant of immunity depended upon the availability of 'reasonable alternative means' to protect their rights'. [emphasis added]). Cf. Irmscher, at 473 ('The European Court of Human Rights has recognized that immunities may constitute a proportionate limitation of the right of access to court, provided there exists an alternative remedy for the claimant.' [emphasis added]).

[1488] District Court Limburg 8 February 2017, ECLI:NL:RBLIM:2017:1002 (Supreme) ('4.33 . . . Het ontbreken van een geschilbeslechtingsmechanisme in de BOA's Herat en Kandahar . . . maakt de claim van een ontoelaatbare schending van het recht op een fair trial dan ook gerechtvaardigd, tenzij moet worden geoordeeld dat de alternatieven die Supreme ter beschikking staan, voldoen aan de standaard in het Waite en Kennedy-arrest: er moet sprake zijn van "reasonable means to protect effectively the rights" . . . 4.41. Gelet op het voorgaande komt de rechtbank tot het oordeel dat het beroep op de functionele immuniteit van AJFCH en SHAPE in dit geval afstuit op het in artikel 6 van het EVRM gewaarborgde recht op een fair trial. De rechtbank acht zich daarom bevoegd kennis te nemen van de vorderingen.' [emphasis added]). On appeal, the immunity was upheld on the basis, amongst others, that alternative remedies were deemed to be available. Court of Appeal 's-Hertogenbosch 10 December 2019, ECLI:NL:GHSHE:2019:4464 (*Supreme*), para. 6.8.3. ('Het hof vermag niet in te zien waarom een dergelijke vrijwillig aangegane nadere afspraak, gezien de ter zake in het Nederlands recht getroffen wettelijke regelingen, geen 'redelijk alternatief' zou vormen.').

organisations. Thus, in its 2014 judgment in *EPO unions,* the Court rejected the EPO´s immunity from jurisdiction on the basis that the claimants could not avail themselves of alternative remedies.[1489] In 2012, in *IUSCT non-extension*, the Court denied the IUSCT's immunity from jurisdiction as the claimant had not been informed of alternative remedies.[1490] And, in 2002, the Court denied the PCA immunity from jurisdiction in *Pichon v. PCA* on the basis that the PCA had not implemented the obligation under Article 16 of the PCA Headquarters Agreement to 'make provisions for appropriate methods of settlement of: (a) disputes arising out of contracts and disputes of a private law character to which the PCA is party'.[1491]

[1489] District Court The Hague (summary proceedings) 14 January 2014, ECLI:NL:RBDHA:2014:420 *(EPO unions)*, para. 3.6 ('In het kader van de beoordeling van de proportionaliteit is voorts van belang of aan de VEOB en SUEPO alternatieve rechtsmiddelen ter beschikking staan die hun recht op toegang tot de rechter effectief beschermen. Naar het oordeel van de voorzieningenrechter is dat niet het geval . . . Een en ander leidt ertoe dat het beroep van de Octrooiorganisatie op immuniteit van jurisdictie wordt verworpen.' [emphasis added]). Conversely, whilst the Court of Appeal rejected the immunity, it stated that this was *not* because of the mere absence of alternative recourse. See Court of Appeal The Hague (summary proceedings) 17 February 2015, ECLI:NL:GHDHA:2015:255 (*EPO unions*), paras. 3.4, 3.10.

[1490] District Court The Hague 13 February 2012 (IUSCT non-extension), as paraphrased in Supreme Court Procurator General 23 January 2015, ECLI:NL:PHR:2015:26 (IUSCT non-extension), para. 1.4 ('In verband met zijn bevoegdheid overweegt de kantonrechter dat het Tribunaal als internationale organisatie functionele immuniteit geniet en dat, nu [eiseres] in haar functie van secretaresse bijdroeg aan de vervulling van de taken van het Tribunaal en de door haar aan het Tribunaal verweten gedragingen met de vervulling van die taken onmiddellijk verband houden, de Nederlandse rechter geen rechtsmacht toekomt, tenzij [eiseres] daardoor de toegang tot een onafhankelijke en onpartijdige rechterlijke instantie wordt onthouden. Omdat van de zijde van het Tribunaal verzuimd is [eiseres] te wijzen op de mogelijkheid van een interne rechtsgang of de zaak door te verwijzen naar de Tribunal Judges, is naar het oordeel van de kantonrechter voor [eiseres] niet een procedure mogelijk gemaakt, die gelijkwaardig is aan artikel 6 EVRM, en acht de kantonrechter zich bevoegd van het geschil tussen [eiseres] en het Tribunaal kennis te nemen.' [emphasis added]). See also Court of Appeal The Hague (summary proceedings) 21 June 2011, ECLI:NL:GHSGR:2011:BR0188 (*EPO v. Restaurant de la Tour),* para. 12 ('Weliswaar is het in artikel 6 EVRM gewaarborgde recht op toegang tot een onafhankelijk en onpartijdig gerecht niet absoluut en kan dit recht aan beperkingen worden onderworpen, maar die beperkingen dienen proportioneel te zijn ten opzichte van het nagestreefde doel en zij mogen niet zover gaan dat daardoor het wezen van het recht op rechterlijke toegang wordt aangetast, bijvoorbeeld indien de belanghebbende geen redelijk alternatief voor het effectief inroepen van zijn rechten onder het EVRM ter beschikking staat.' [emphasis added]).

[1491] District Court The Hague 27 June 2002, cause list no. 262987/02-3417 (on file with the present author) (*Pichon v. PCA*), at 2 ('Blijkens artikel 16 lid 1 sub a van de zetelovereenkomst dient de PCA regels op te stellen voor de wijze van beslechting van geschillen die kunnen ontstaan op grond van contracten en conflicten van civielrechtelijke aard waarbij de PCA partij is. Niet is gebleken dat aan deze bepaling uitvoering is gegeven. Dit betekent dat Pichon geen enkele rechtsgang heeft. Dat is niet de bedoeling geweest van de contracterende partijen bij de zetelovereenkomst.'). While the Court referred to Art. 6 of the ECHR, it primarily relied on the purported intention of the parties to the PCA Headquarters Agreement, suggesting a linkage between the entitlement to jurisdictional immunity and the availability of alternative recourse.

Furthermore, several judgments suggest that the jurisdictional immunity would have been dismissed but for the availability of alternative remedies. These include the Hague Court of Appeal judgments in *IUSCT non-extension*,[1492] *IUSCT abolition,*[1493] and *EPO disability*.[1494]

As to the Dutch Supreme Court, as seen, in *Mothers of Srebrenica* it did not consider the absence of reasonable alternative means to be of consequence for the UN's immunity. However, the case is atypical, notably as Article 103 of the UN Charter was at play. In *Spaans v. IUSCT*, back in 1985, the Supreme Court held that it could 'disregard' the question of whether 'exceptions may be made' to the jurisdictional immunity of the IUSCT.[1495] This was because, in that case, the Supreme Court deemed that alternative remedies were available. However, as lower courts continue to fuel the notion that immunity depends on adequate alternative remedies, the Supreme Court may have to confront that question.

The approach in the said case law of the lower Dutch courts is also seen abroad. As explained by Blokker and Schrijver, with reference to several European jurisdictions,

> 'national courts have often accepted immunity claims by international organizations, sometimes criticizing the absence of any remedies or referring to the availability of alternative remedies. But occasionally, national courts have rejected such claims, in the absence of alternative remedies.'[1496]

[1492] Court of Appeal The Hague 17 September 2013, ECLI:NL:GHDHA:2013:3938 (*IUSCT non-extension*), para. 3.5 ('Het hof is daarom van oordeel dat het door het Tribunaal gedane beroep op zijn immuniteit van jurisdictie slechts gehonoreerd kan worden als voor [geïntimeerde] voorzien was in een alternatieve rechtsgang voor de beslechting van het door haar opgeworpen geschil waarvan zij gebruik kon maken'. [underlining added]).

[1493] Court of Appeal The Hague 25 September 2012, ECLI:NL:GHSGR:2012:BX8215 (*IUSCT abolition*), para. 15 ('Uit de eerdergenoemde beslissing van het EHRM in de zaak Waite en Kennedy/Duitsland blijkt dat een alternatieve rechtsgang beschikbaar moet zijn' [underlining added].).

[1494] Court of Appeal The Hague 28 September 2007, ECLI:NL:GHSGR:2007:BB5865 (*EPO disability*), para. 3.5 ('Dit betekent dat aan de Nederlandse rechter in de onderhavige zaak in beginsel geen rechtsmacht toekomt. Op dit beginsel dient een uitzondering te worden gemaakt indien [werknemer] door de eerbiediging van de hier aan de orde zijnde immuniteit de toegang tot een procedure die een aan artikel 6 EVRM gelijkwaardige bescherming biedt, wordt onthouden.' [emphasis added). See also District Court The Hague 28 November 2001 (*ISNAR*), para. 5.10, cited in District Court The Hague 13 February 2002, NIPR 2004, no. 268, English translation in (2004) 35 NYIL 453 (*ISNAR*) ('every person is entitled, under international law too, to an effective legal process in cases such as the present one. If it should therefore transpire that the legal process in accordance with the Staff Regulations is not effective in this specific case, the Dutch courts would have a function after all.' [emphasis added]).

[1495] Supreme Court 20 December 1985, ECLI:NL:HR:1985:AC9158, NJ 1986/438, m.nt. P.J.I.M. de Waart, English translation in (1987) 18 NYIL 357 (*Spaans v. IUSCT*), para. 3.3.4. In upholding the IUSCT's immunity, the District Court The Hague in the same matter held that the absence of legal recourse for IUSCT staff members would *not* have rendered the Dutch courts competent. See Sub-District Court The Hague 9 July 1984, *NJ* 1986/438, para. 8.

[1496] Blokker and Schrijver (2015), at 353 (fns. omitted, emphasis added). See also, ibid., at 345, arguing that the answer to criticism over the absence of recourse is 'to reduce as much as possible any 'accountability gaps': for example, by waiving the immunity whenever necessary and possible or by providing for alternative remedies for private law disputes. If international organizations do not take this requirement seriously, courts may increasingly reject immunity claims by international organizations and, more generally, international organizations may lose support in public opinion.'). Likewise, Schrijver (2015), at 331, arguing 'an uncomfortable and unsatisfactory situation has evolved as a consequence of the lack of adequate procedures for instituting legal proceedings against the United Nations. This is being expressed by increasing dissatisfaction and also in several court rulings at

According to Reinisch, 'The *Waite and Kennedy* test linking immunity to the availability of "reasonable alternative means" of redress has been also espoused by a number of national courts'.[1497] It may be that '[i]n spite of this growing acceptance of the *Waite and Kennedy* approach, it is too early to say whether national courts will generally follow it'.[1498] One thing seems clear, however: without adequate alternative remedies, jurisdictional immunity is not to be taken for granted.

4.4 Reducing 'accountability gaps': a role for national courts?

In following the *Waite and Kennedy* approach—that is, in the absence of alternative remedies, access to court takes priority over jurisdictional immunity—domestic courts seek to avoid gaps in the accountability of international organisations.[1499] From this perspective,[1500] Reinisch has proposed a role for national courts. Whether disputes can be adjudicated by domestic courts would be determined on the basis of a balancing exercise involving the following considerations:

> '(a) whether [national courts] are suited to perform this task; and (b) whether such exercise of jurisdiction will disproportionally hinder the independent functioning of international organizations. Clearly, both aspects will always require nuanced answers; they will come as matters of degree and not as black-and-white, yes-or-no responses. Thus, each element in itself, and subsequently both elements combined, will require a balancing exercise.'[1501]

As to the potential for interference in the functioning of the international organisation, Reinisch proposed the identification of 'criteria to assess different degrees of political interference'.[1502] In this

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national level and at European level, which are weakening respect for the immunity of the United Nations.' See likewise Daugirdas and Schuricht (2021), at 55-56 ('as international organizations' lawyers have themselves recognized, international organizations immunity is vulnerable when injured individuals lack access to alternative dispute settlement mechanisms.').

[1497] Reinisch (2016, 'Immunity'), para. 35.

[1498] Ibid., para. 41. Reinisch concludes: 'Art. II Section 2 has become one of the central provisions of the General Convention. Immunity from legal process has always been considered a crucial tool to guarantee the independent functioning of international organizations. While an outright exemption from the jurisdiction of national courts has become problematic, in particular, in situations where no alternative dispute settlement mechanisms have been made available, judicial practice tends to recognize the UN's 'immunity from every form of legal process' as enshrined in Art. II Section 2 General Convention.' Reinisch (2016, 'Immunity'), para. 108.

[1499] Blokker and Schrijver (2015), at 345.

[1500] Reinisch (2015), at 322 ('While national courts can hardly be considered to be generally unsuited to adjudicate cases involving international organizations, it may well be that they are often not in the best position to do so. Where other dispute settlement options are available to potential claimants and where these appear better suited to decide complex issues of international organizations law, domestic courts should abstain from filling any accountability gap by upholding jurisdiction. Instead, they should defer to other, probably international dispute settlement institutions.') Similarly, I. Dekker and C. Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals', in A.A.H. van Hoek and Nederlandse Vereniging voor Internationaal Recht, *Making Choices in Public and Private International Immunity Law* (2011), 83 at 108 ('Domestic courts should only grant international organisations immunity if the latter offer reasonably available alternative dispute-settlement mechanisms (cf., the caselaw of the European Court of Human rights)'.

[1501] Reinisch (2015), at 319.

[1502] Ibid., at 322.

respect, one

> 'element to be taken into account is the actual internal operation of international organizations through the exercise of jurisdiction of national courts . . . Again this will be a question of degree that will increase with the extent to which a national court will have to address issues of the internal law of an international organization.'[1503]

As to who carries out the balancing exercise, Reinisch considered this 'could be found in the form of international courts or tribunals performing the balancing exercise and deciding whether or not domestic courts should adjudicate or grant immunity.'[1504] Specifically, he envisaged a '"preliminary ruling" in which an international court or tribunal would merely decide the incidental procedural issue of whether an international organization enjoys immunity or not'.[1505] Reinisch proposed that this role be performed by the ICJ.[1506] To this end, he envisaged the making of

> 'explicit provision for the introduction of the suggested limited preliminary ruling system in the applicable immunities instruments, such as multilateral privileges and immunities treaties or headquarters agreements. This would clearly require the political will on the part of states and international organizations to do so. But given the increasing importance of immunity issues from a 'rule of law' and accountability perspective, such an enlarged role of the ICJ would appear feasible.'[1507]

It is submitted that, in reality, these proposals are likely to be challenging. For one, the legal framework governing international organisations is a patchwork of instruments. Practical challenges would arise as each such instrument would have to be renegotiated. International organisations in the Netherlands are moreover unlikely to agree to any changes to their immunity protection. This is because they currently enjoy a large measure of protection, with Dutch courts broadly interpreting the scope of jurisdictional immunity, even where the immunity is cast in functional terms. Moreover, no matter how authoritative the ICJ is, as the principal judicial organ of the UN, organisations that do not form part of the UN system may prefer to keep matters in their own hands.

Perhaps most fundamentally,[1508] it is difficult to see how the proposal would address the fundamental reason why international organisations require jurisdictional immunity, as discussed in subsection 4.2.1 of this study, that is, to avoid interference in their independent and efficient functioning. It may be

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[1503] Ibid., at 323.
[1504] Ibid., at 325. In the case of adjudication, presumably the international organization would be expected to waive its immunity. See Reinisch (2015), at 324.
[1505] Ibid., at 326.
[1506] Ibid.
[1507] Ibid., 327-328.
[1508] It is also not clear from the proposal how the intended 'preliminary ruling' would concern the relationship between the international organisation's immunity and the claimant's right of access to court. A finding by the ICJ to the effect that the international organisation is entitled to immunity would in any event not preclude a claimant from suing the host state before the ECtHR for breach of Art. 6 of the ECHR.

possible to avert certain risks through preliminary rulings.[1509] But to safeguard properly against domestic interference would require closer oversight over the domestic proceedings. The ICJ would have to familiarise itself with the dispute and effectively police the proceedings. That is an unlikely role for the Court.

It is submitted that efforts to improve the accountability of international organisations would be more usefully directed to developing alternative remedies proper.[1510] As explained by Blokker and Schrijver, the answer to criticism that individuals who suffer from the activities of international organizations cannot bring claims

> 'is not to question the existing regime of immunity rules of international organizations. . . . [T]he regime of immunities rules is and continues to be a key part of the law of international organizations, essential for their independent functioning, generally accepted and respected in practice. Instead, the answer is to fully implement this regime and to reduce as much as possible any 'accountability gaps': for example, by waiving the immunity whenever necessary and possible or by providing for alternative remedies for private law disputes. If international organizations do not take this requirement seriously, courts may increasingly reject immunity claims by international organizations and, more generally, international organizations may lose support in public opinion.'[1511]

Alternative remedies, thus, serve to protect the independence and effectiveness of international organisations by preserving their jurisdictional immunities, and protecting their legitimacy.[1512]

Leaving aside the impact on international organisations if national courts were to adjudicate third-party disputes, such adjudication would unlikely serve the interests of third-parties. This is because international organisations will resist complying with domestic judgments, ultimately by relying on their immunity from *execution*. The result, therefore, would be no different than if the domestic court had

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[1509] For example, the ICJ could conceivably designate a national court that is best placed to adjudicate a case to avoid the risk of diverging national court rulings, which is one of the problems identified by McKinnon Wood. See Schermers and Blokker (2018), para. 1611.

[1510] Cf. Reinisch (2015), at 328 ('A more pragmatic short-term response for international organizations trying to avoid situations in which national courts may be tempted to "close the accountability gap" by denying immunity to international organizations would be increasing efforts to eliminate "accountability gaps" in the first place. This could be achieved by international organizations developing functioning alternative means of redress that make the balancing exercise described above superfluous.'); Johansen (2020), at 300 ('The main advantages of pursuing reform at the international level are clear: International organisation retain their independence, while the accountability toward individual victims is ensured – provided that sufficient accountability mechanisms are established.').

[1511] Cf. Blokker and Schrijver (2015), at 345. See also Johansen (2020), at 298 ('I stand with those opposing radical changes to the current regime international organisation IO immunities'; De Brabandere (2010), at 119 ('The answer to the question of how to improve the rights of individuals who cannot bring a claim against an international organization needs . . . to be found, not in an inconsistent exception to international organization immunity, but rather in the creation of effective alternative dispute settlement mechanisms.').

[1512] Cf. Blokker and Schrijver (2015), at 343 ('It is considered to be less acceptable today if individuals suffer from the activities of international organizations and do not have adequate remedies or cannot bring claims against these organizations with some chance of success. Parallel to this, the role played by international organizations has become much more prominent than in previous decades. Their number and activities have multiplied, and as a result it is less exceptional that 'things may go wrong' and that individuals consequently suffer from their operations.').

upheld the international organisation's immunity from jurisdiction—the claimant would be left empty-handed.

In sum, national courts are not well placed to adjudicate third-party disputes against international organisations. The rationale for the jurisdictional immunity of these organisations continues to apply; however, to bolster the immunity (and the legitimacy of international organisations), alternative remedies are indispensable. It is through such remedies that 'accountability gaps' are to be reduced.[1513] National courts incentivise the development of such remedies through the *Waite and Kennedy* approach.[1514]

4.5 Conclusions

As seen in chapter 3 of this study, Section 29 of the General Convention was conceived as the counterpart to the UN's jurisdictional immunity. The premise underlying that idea remains valid insofar as, due to their ever-increasing responsibilities, international organisations more than ever need protection against domestic interference through jurisdictional immunity.

It is not to be taken for granted, however, that jurisdictional immunity effectively shields international organisations from third-party claims before domestic courts. The problem does *not* lie with the legal regime governing the immunity as such. In the Netherlands, the domestic jurisdiction central to this chapter, the immunity of international organisations is firmly rooted in the legal order. There is a broad variety of sources providing for such immunity, including, according to the Dutch Supreme Court in *Spaans v. IUSCT*, general international law. And, the jurisdictional immunity is recognised in the case law of the Dutch courts, as well as the ECtHR.

Rather, the key challenge to the effectiveness of immunity from jurisdiction arises out of the conflict between the obligation to respect the immunity and the obligation to grant access to court under Article 6(1) of the ECHR. To be sure, that conflict is not insurmountable. To begin with, it needs to be considered closely whether the obligation to grant access to justice under Article 6 of the ECHR applies. If it does not, then there is no conflict to resolve. The question as to the application of Article 6 of the ECHR turns on whether the dispute concerns the 'determination of . . . civil rights'. In the case of the UN, that arguably is to be determined in accordance with Section 29 of the General Convention, the core provision governing the organisation's third-party liability. As discussed in chapter 3 of this study, there are good arguments that the *Mothers of Srebrenica* dispute is outside the scope of that provision

[1513] Cf. Irmscher (2014), at 487 ('Alternative legal remedies are meant to fill this perceived accountability gap').
[1514] Cf. Reinisch (2015), at 319 ('The exercise of jurisdiction by national courts should not be an end in itself, but rather the means to achieve an end: that is, the development of adequate alternative dispute settlement mechanisms within international organizations in order to ensure their accountability.').

for lack of a 'private law character'. The implication would be that, contrary to the ECtHR's conclusion in *Mothers of Srebrenica*, Article 6 of the ECHR would not apply.

And even where Article 6 of the ECHR *does* apply, the obligation to grant access to court can be reconciled with the obligation to accord jurisdictional immunity through 'reasonable alternative means'. The Dutch Supreme Court recognised this early on in its judgment in *Spaans v. IUSCT* and it is central to the ECtHR's decision in *Waite and Kennedy*. According to subsequent ECtHR case law – developed on the basis of another line of cases in the context of international organisations – alternative means qualify as 'reasonable' if they conform to the essence of the rights under Article 6(1) of the ECHR.

In the contemporary era of jurisprudence, the Supreme Court and the ECtHR ruled in favour of the jurisdictional immunity of international organisations in each of the nine respective cases before them, as identified in this study. Alternative remedies were available in each of these cases, except one: *Mothers of Srebrenica*. Whilst the various courts in that case nonetheless concluded in favour of the UN's immunity, their reasoning is widely divergent. The ECtHR's decision is particularly ambiguous. It seems to confound the question of whether the entitlement to jurisdictional immunity is conditional on the availability of alternative recourse (which it arguably is not) with the question of whether jurisdictional immunity leads to a violation of the right of access to court. Absent reasonable alternative means, the answer to the latter question, in principle, is yes. The question then arises as to which obligation to prioritise: to uphold jurisdictional immunity or grant access to justice?

In the case of the UN, whilst not clearly articulated in the various *Mothers of Srebrenica* opinions, Article 103 of the UN Charter may operate so as to prioritise the obligation to uphold immunity from jurisdiction over the obligation to grant access to justice. But, even absent Article 103 of the UN Charter, there are good arguments for domestic courts to prioritise the obligation to uphold immunity from jurisdiction over the obligation to grant access to court.

Notwithstanding the foregoing, it is not to be taken for granted that the lower Dutch courts will uphold the jurisdictional immunity of international organisations. The relevant case law, like that in other jurisdictions, follows the ECtHR's approach in *Waite and Kennedy*. That is, in the absence of alternative remedies, access to court takes priority over jurisdictional immunity.

But domestic courts are not well placed to fill 'accountability gaps' concerning international organisations. A lose-lose situation arises: domestic adjudication impairs the independent functioning of international organisations. And, as international organisations decline to comply with domestic judgments and enjoy immunity from *execution*, third-party claimants are denied justice after all.

To ensure that international organisations are protected through jurisdictional immunity and that third-party claimants receive justice, the solution is to reconcile the conflicting obligations concerning immunity and access to court. Consonant with *Waite and Kennedy*, this involves the development of alternative remedies.

According to Jenks, writing in 1961:

> 'International immunities are apt to be regarded either as one of the housekeeping problem [sic] of international organisations or as an insidious encroachment on the rule of law, the liberty of the subject, and the equality of man. They are neither.'[1515]

In view of the complexities discussed in this chapter, the jurisdictional immunity of international organisations is anything but a 'housekeeping problem'. The immunity is as fundamental as ever to protect the independence of international organisations. But, immunity requires counterbalancing by alternative remedies to avoid 'accountability gaps'. Without such remedies, immunity *does* encroach on the rule of law, thereby undermining the legitimacy of international organisations. And, importantly, courts may attempt to close accountability gaps by rejecting immunity. This underscores the significance of the proper implementation of Section 29 of the General Convention.

[1515] C. Wilfred Jenks, International Immunities (1961), at xiii, continuing: 'In the present stage of development of world organisation they are an essential device for the purpose of bridling unilateral and sometimes irresponsible control by particular governments of the activities of international organisations. These organisations have been created by agreement amongst governments to discharge important and in some cases vital responsibilities on behalf of the world community as a whole with freedom, with independence, and with impartiality.'.