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The Right to a Fair Trial v Immunity: Examining Recent Case Law Concerning International Organisations

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Abstract

The immunity of international organisations and the human right to a fair trial are two concepts of international law which are inherently conflicting. Through analysis of recent case law originating from the European Court of Human Rights, the United Nations Human Rights Committee and the Austrian Constitutional Court, this thesis evaluates how national and international judiciaries navigate the resulting difficulties. The doctrine established in the *Waite and Kennedy* case, which requires "reasonable alternative means" of dispute resolution where immunity constitutes a procedural barrier to the courts, is used to tackle the issue. Although the formula is applied throughout the analysed cases, the judiciaries still fall short of credibly protecting the fundamental right to a fair trial. Furthermore, an evaluation of case law concerning peacekeeping operations reveals a concerning pattern. When tort claims are involved, courts abandon their established reasoning and uphold the immunity of international organisations at the expense of accountability and justice.

Die Immunität internationaler Organisationen und das Menschenrecht auf ein gerechtes Verfahren sind zwei völkerrechtliche Konzepte, die in einem widersprüchlichen Verhältnis zueinanderstehen. Anhand der Analyse jüngster Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, des Menschenrechtsausschusses der Vereinten Nationen und des österreichischen Verfassungsgerichtshofs untersucht diese Arbeit, wie nationale und internationale Gerichte mit den daraus resultierenden Schwierigkeiten umgehen. Die Doktrin, die im *Waite and Kennedy* Fall etabliert wurde und welche alternative Streitbeilegungsverfahren fordert, sobald Immunität ein formelles Hindernis zum Zugang zu Gerichten darstellt, wird als Lösung herangezogen. Obwohl diese Formel in allen analysierten Fällen zur Anwendung kommt, gelingt es den Gerichten dennoch nicht, das Grundrecht auf ein gerechtes Verfahren glaubhaft zu schützen. Darüber hinaus zeigt eine Auswertung der Rechtsprechung zu friedenserhaltenden Operationen ein besorgniserregendes Muster auf. Bei deliktischen Ansprüchen geben die Gerichte ihre etablierte Argumentationslinie auf und bestätigen die Immunität internationaler Organisationen auf Kosten von Zurechenbarkeit und Gerechtigkeit.

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List of Abbreviations

ACC	Austrian Constitutional Court
ADB	Asian Development Bank
ADBAT	Asian Development Bank Administrative Tribunal
CPISA	Convention on the Privileges and Immunities of the Specialised Agencies
CPIUN	Convention on the Privileges and Immunities of the United Nations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESA	European Space Agency
HCR	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
MINUSTAH	United Nations Stabilisation Mission in Haiti
OPEC	Organisation of the Petroleum Exporting Countries
OSCE	Organisation for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights

1. Introduction

International organisations are integral actors in global politics. From global trade to regional security, from public health to economic integration, international organisations permeate large parts of life in a globalised world. Human rights, too, are a cornerstone of the modern world, even though their violation remains a persistent and troubling reality. International organisations and human rights are indispensable components of the post-1945 international system. This makes it all the more disturbing when they clash. When international organisations commit human rights violations, it strikes at the very foundation of the liberal world order.

Two specific concepts of international law that play an essential role in this context are the immunity of international organisations on the one hand and the fundamental right to a fair trial on the other. Their respective claims and seemingly mutually exclusive nature inevitably give rise to conflict. When the immunity of an international organisation constitutes a procedural barrier for the individual attempting to access a court, calls that this amounts to a violation of their rights are quick to follow suit.

This conflict has been particularly evident in the context of peacekeeping operations. The inability of the United Nations peacekeepers to prevent the 1995 Srebrenica massacre is perhaps one of the most prominent examples. Employment disputes involving international organisations tend to receive less attention from the global public. While such cases may be less interesting politically, this particular type of dispute has been the backdrop for some of the most pioneering jurisprudence and most pertinent scholarly debate concerning the immunity of international organisations. One key concept that emerged in the *Waite and Kennedy* case before the European Court of Human Rights (ECtHR) and which aims to reconcile the immunity of international organisations with the individual's right to a fair trial is the notion of "reasonable alternative means" for the effective protection of these rights.

As its title suggests, this thesis analyses a selection of recently concluded case law which at their core features this fundamental conflict between the immunity of international organisations and the right to a fair trial. In doing so, it seeks to provide answers to the following two research questions: How do international and national judiciaries reconcile the right to a fair trial under international human rights with the immunity of international organisations? What standards must internal justice mechanisms meet to qualify as "reasonable alternative means” of dispute resolution?

Methodically, this thesis will analyse three cases adjudicated before three different judiciaries: the European Court of Human Rights (ECtHR), the Human Rights Committee as the judicial treaty body to the International Covenant on Civil and Political Rights (ICCPR) and the Austrian Constitutional Court.

At the outset, it will be necessary to lay the foundation for any further analysis and discussion by presenting two introductory chapters: one on the nature of international organisations' immunity, and another on the two relevant human rights regimes, the United Nations' ICCPR and the Council of Europe with its European Convention on Human Rights. The latter chapter will place particular emphasis on the right to a fair trial. Subsequently, this thesis will proceed to analyse the three cases, considering the circumstances and claims of each case before examining the judgment of the respective judiciary. Given that all three cases involve the formula established in the *Waite and Kennedy* case, the next chapter will zoom in on the concept of “reasonable alternative means”, assessing it in detail and providing a substantiated critique. The final chapter will depart from the focus on employment disputes to examine two of the more widely known cases involving the conflict between the immunity of international organisations and the right to a fair trial, namely *Stichting Mothers of Srebrenica* and the *Haiti Cholera* case. The aim here is to explore the notably different approach taken by the courts in tort cases.

2. The Immunity of International Organisations

2.1. Origins

Since the emergence of international organisations on the stage of global politics, they have shaped and transformed the field. While prior to the 19th century, only sovereign states were active participants in the international sphere, international organisations surfaced with a new *raison d'être*. Instead of pursuing individual and often conflicting national foreign policy goals, they were created to achieve common objectives such as "world peace […] trade, disarmament, human rights, the environment, the Antarctic, commodities, maritime affairs and regional development".[1]

Sands and Klein specify three minimum requirements necessary to distinguish international organisations from other entities that are active on a global level. International organisations must be established by sovereign states (or other international organisations) by way of a constituent treaty, have "an autonomous will distinct from that of its members and be vested with legal personality [and] must be capable of adopting norms addressed to its members".[2]

Like states, international organisations also enjoy certain privileges and immunities. While often used imprecisely due to their blurred contours, Schermers and Blokker provide a useful distinction between these two concepts. While "the word 'privilege' [is used] for all cases in which local legislation is not, or is differently applicable [for international organisations], the word 'immunity' [is more narrowly used] for immunity from jurisdiction".[3] The relationship of international organisations *vis-à-vis* municipal law will be expanded on later.

Going back to the 1920s, the League of Nations, created in the aftermath of World War I as the first universal organisation, and its officials enjoyed jurisdictional immunity in Switzerland, the host state of the League's headquarters. Although it sparked considerable controversy at the time, the immunity of international organisations was upheld in early case law. In *International Institute of Agriculture v. Profili* (1931), the Italian Court of

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[1] E. C. Schlemmer, "International Organisations, the Rule of Law and Immunity," *Journal of South African Law* 126, no. 1 (2013): 24.
[2] Philippe Sands, Pierre Klein, and D. W. Bowett, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), 16.
[3] Henry G. Schermers and Niels Blokker, *International Institutional Law*, 5th rev. ed. (Boston: Martinus Nijhoff Publishers, 2011), 258.

Cassation ruled that "there is nothing which authorises the intervention of an external jurisdiction".[4]

Nevertheless, many of today's controversial issues surrounding the immunity of international organisations were already discussed at this early stage. This included pertinent debates about justice and accountability, which will be dealt with in more detail later in this thesis. During the 1924 session of the *Institute de Droit International* held in Vienna, Article 4 of the adopted resolution provided that "immunity should be waived when it does not serve the interest of protecting the organisation".[5]

The League of Nations not only failed in achieving its original goals of international peace and security laid out in the Covenant, but much of the legal thought surrounding the immunity of international organisations also did not make it through to the other side of World War II. Although Blokker grants that the new set of immunity rules "were firmly based on the relevant law, practice and thinking of the 1920s and 1930s", they can be considered "new rules indeed".[6]

The new model of international organisation of the 1940s (primarily the United Nations) contained in their legal instruments several key characteristics that continue to shape international law to this day. Immunity was to be based on the concept of functional necessity (see below) and to be interpreted in an "absolute and unconditional"[7] manner. Only the highest-level officials were to enjoy diplomatic immunity, similar to state diplomats. Lower-level officials were only granted immunity for acts performed in their official capacity.[8] This provision applied to all officials, regardless of their nationality. This meant that even nationals of the host state employed by international organisations were granted immunity from their own national jurisdiction. For the most part, this set of rules is largely followed to this day.

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[4] Niels Blokker, "Jurisdictional Immunities of International Organisations - Origins, Fundamentals and Challenges," in *The Cambridge Handbook of Immunities and International Law*, ed. Tom Ruys, Nicolas Angelet, and Luca Ferro (Cambridge: Cambridge University Press, 2019), 188, https://doi.org/10.1017/9781108283632.
[5] Ibid., 190.
[6] Ibid., 191.
[7] Ibid.
[8] Unlike actual diplomats whose private acts are also covered by diplomatic immunity.

2.2. Immunity of International Organisations Compared to State Immunity

The earlier comparison between the immunities granted to state diplomats and those afforded to senior officials of international organisations prompts the question of how state immunity more broadly compares to the immunity enjoyed by such organisations.

Indeed, the immunity of states is substantially different to that of international organisations. It is based on the fundamental notion that sovereign states are equal and thus may not exercise jurisdiction over one another. This is expressed in the principle of *par in parem non habet imperium* (equals have no sovereignty over each other) which essentially provides that a state cannot be brought before another state's courts and adjudicated according to that state's laws. Early legal doctrine envisaged state immunity in absolute terms. The state and its representatives (before that, the respective monarch) were considered completely immune from all suits irrespective of the nature of the action in question (official or private).

However, states increasingly engaged in activities typical of private businesses, such as investing, trading, leasing property, and acquiring funds. Despite this commercial behaviour, their sovereign status and the principle of sovereign equality prevent the courts of one country from ruling on the actions of another sovereign state. In response to this development, many countries adjusted by drawing a distinction between a state's commercial actions and its sovereign actions.[9] Thus, "since the end of the nineteenth century, they [states] had all adopted a restrictive doctrine, recognising absolute immunity only relating to acts committed in the exercise of sovereign authority (*acta jure imperii*) and not for trading activities or acts that a private person could perform (*acta jure gestionis*)".[10]

The distinction between these two qualitatively different forms of state actions has raised questions about whether such a separation would also work for international organisations. Academics have long debated the issue and produced opposing points of view. As Sato writes that "the vast majority of scholarly legal opinions conclude that international organisations must also enjoy immunity for their *acta jure gestionis*".[11]

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[9] Sam Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (The Hague: Kluwer Law International, 1995), 152.

[10] Gleider Hernández, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2022), 240.

[11] Chie Satō, *Immunität internationaler Organisationen* (Frankfurt am Main: Lang, 2004), 61. English translation is my own. „Auf jeden Fall tendiert die überwiegende Mehrheit der Lehrmeinung dahin, dass die Internationalen Organisationen auch für ihre *acta jure gestionis* Immunität genießen müssten".

Schlemmer, on the other hand, takes quite a different route to this rather absolute angle to argue vehemently against such an understanding of the immunity of international organisations. His critique, which will be featured below in greater detail, argues for increased accountability and a restrictive interpretation.[12]

Others, like Schermers and Blokker, argue that thinking about the immunity of international organisations in these categories is altogether inappropriate. According to them,

> "[…] the application of the distinction between *acta iure gestionis* and *acta iure imperii* to acts of international organisations has been explicitly rejected by courts of other countries, and is also generally rejected in doctrine. According to Higgins, '[t]o suggest that this distinction has any relevance to organisations is to assimilate them to states, which is not correct. Their basis of immunity is different. The relevant test under general international law is whether an immunity from jurisdiction to prescribe is necessary for the fulfilment of the organisation's purposes. That question cannot be answered by reference to whether it was, in respect to the matter under litigation, acting *in sovereign authority* or *as a private person*'".[13]

2.3. Functional Immunity

The phrase "necessary for the fulfilment of the organisation's purpose" serves as the central criterion underpinning the scope and justification of the immunity granted to international organisations. Clearly, international organisations do not possess the same level of sovereign power as states. As Muller writes, international organisations are "created *by* states *for* a purpose. They are granted special status, only to the extent required for the achievement of that purpose".[14] The resulting kind of immunity, particular to international organisations, is called "functional immunity".

To arrive at the understanding that an international organisation, in a particular litigation, enjoys immunity from jurisdiction, one must inquire about the nature of the activity in question and whether it serves to advance the purposes for which the organisation was

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[12] Schlemmer, "International Organisations, the Rule of Law and Immunity," 21-38.
[13] Schermers and Blokker, *International Institutional Law*, 1033. Also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995), 93. Quoted in Schermerns and Blokker, *International Institutional Law*, 1033.
[14] Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 152-153.

created. Simply put, the relevant question is, "Was the activity necessary for the effective functioning of the organisation"?[15]

In the same way that the legal personality, which essentially is the very departure point for the debate about immunity, can be found in the provisions of any international organisation's constituent treaty, so can its purpose.[16] "If the acts can thus be defined as necessary for the public purpose of the organisation, it must *prima facie* be assumed that the international organisation is immune, whether or not the act would have constituted an act *gestionis* or *imperii* had it been performed by a state".[17] Ultimately, functional immunity stipulates that acts carried out in furtherance of an international organisation's objectives are granted immunity from jurisdiction.

Because this definition deviates substantially from the reasoning behind state immunity, it is worth briefly exploring the logic behind it. As discussed earlier, many of the legal roots of international organisations go back to the 1940s. The creation of the United Nations after World War II did not just occur against the backdrop of the failure of its predecessor, the League of Nations, but also from a recognised need to shield the new organisation through legal safeguards to ensure its resilience and longevity.

McKinnon Wood identified three reasons why international organisations required protection. National courts may, because they operate within the borders of their national legal order, have different legal assessments of a matter than judges of other states and legal systems. This would prejudice the affairs of the organisation. While this could happen without bad intentions, there are – secondly – also "people who may believe either that they have a duty to compel the organisation to adopt a particular course of action, or that they have suffered a wrong at its hand". Therefore, international organisations need protection from such "cranks, fanatics or cantankerous people." Thirdly, to achieve greater legal uniformity "the legal effects of acts performed by international organisations should not be determined, quite possibly in divergent ways, by national courts".[18]

Irrespective of the organisation's immunity it is important to note that the municipal law of the state in which a given international organisation is operating remains in place.

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[15] Ibid., 153.
[16] The classic example would be *Charter of the United Nations* (signed San Francisco, 26 June 1945, effective 24 October 1945), Article 1.
[17] Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 153.
[18] Schermers and Blokker, *International Institutional Law*, 1034.

This is especially relevant to the relationship between an international organisation and its host state. Immunity, put simply, just means that municipal law is not enforceable in case the international organisation is a party in a lawsuit. As Klabbers points out, "the very concept of immunity would seem to imply that there is something to be immune from, and that something can hardly be anything other than the local legal system".[19]

Given that immunity is a right awarded to international organisations, this begs the question of how it is codified. The first step is to study the constituent treaty of the individual organisation as it is "the main source of law as regards to [its]immunity from legal process".[20] These provisions tend to be more general, as the prime example, Article 105 of the Charter of the United Nations, illustrates.

> "The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".[21]

Seeing as this needed some more clarification, the United Nations developed its immunity in more detail in the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN). One year later, in a similar fashion, the Convention on the Privileges and Immunities of the Specialised Agencies (CPISA) laid down the characteristics of the Specialised Agencies' immunity. Thirdly, come the bilateral host state agreements that codify the particularities and reflect the individual relationship between a given international organisation and its host state.[22]

The question of immunity for international organisations raises important issues concerning third states – those which are neither member states nor host states of the organisation. This is particularly relevant in private law disputes, as discussed below. If the immunity of international organisations is primarily grounded in contractual agreements between parties, what does this mean for states not party to those agreements? Under the principle *pacta tertiis nec nocent nec prosunt* (agreements do not bind or benefit third parties), this challenges the idea that such immunity stems from customary international law. Although some older academic writings have supported the existence of immunity as a customary international law, both the International Law Commission (ILC) and much of the scholarly

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[19] Jan Klabbers, *An Introduction to International Organizations Law*, 3rd ed. (Cambridge: Cambridge University Press, 2015), 136, https://doi.org/10.1017/CBO9781316106853.
[20] Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 155.
[21] *Charter of the United Nations* (signed San Francisco, 26 June 1945, effective 24 October 1945), Article 105.
[22] Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 155-162.

community have concluded that no such rule exists. The main reason is the significant variation in immunity regimes among different organisations. Although some aspects point to the idea that "it seems too categorical to conclude that international organisations never enjoy immunity under customary international law"[23], the full debate lies beyond the scope of this work.

2.4. Critique

While the primary preoccupation of the "founding fathers" of the post-war international organisations was protecting them from encroaching national judiciaries and safeguarding this comparatively weak new type of actor in global governance, the world of international law has changed drastically since then. The concept of functional immunity, intended as the solution for the need for immunity in the absence of sovereign statehood, has since come under critique.

The primary controversy concerns the scope of functional immunity. Schermers and Blokker argue that functional immunity, by definition, delimits its own scope. Only what is needed for the organisation's effective functioning can be covered by its immunity.[24] According to Klabbers, the obvious "drawback of the functional necessity thesis (but probably also the main source of its attraction) is precisely its open texture. […] The determination of the functional needs of an organisation is essentially in the eye of the beholder. [I]t is almost by definition biased in favour of international organisations".[25] This has practical consequences. As Reinisch points out, "[t]he fundamental problem is clearly that functional immunity means different, and indeed contradictory things to different people or rather different judges and states".[26]

In practice, this means that different narratives about immunity and interpretations of functional needs compete with each other or as Muller puts it,

> "[t]here is an inherent conflict between the functions of international organisations – which require a maximum of independence within the host state legal order – and

[23] Niels Blokker, "Jurisdictional Immunities of International Organisations - Origins, Fundamentals and Challenges," 194-197.
[24] Schermers and Blokker, *International Institutional Law*, 1034.
[25] Klabbers, *An Introduction to International Organizations Law*, 133-135.
[26] August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000), 206.

the ever widening scope of their activities – which demand some form of supervision and means of redress for third parties dealing with the organisation".[27]

With the gradual rise in importance of international organisations globally over the course of the previous decades, accountability has become a major issue. Blokker argues that with an increased role in the international arena, international organisations "[…] have become concrete and relevant public authorities that are part of global governance. As with any public authority, things may go wrong. […] As for any public authority, international organisations must be accountable".[28]

To a certain extent, we have encountered this problem before. Just as with the gradual and integrative development of states, so too have international organisations ventured into everyday activities that do not come to mind immediately.

> "In order for them to function properly, these organisations must employ people, lease buildings, apply for loans, buy property, deal in commodities, purchase computer equipment, contract people to develop software for them, and much more. In participating in these marketplace activities, the counter-parties with whom the international organisation engages must be able to rely on the normal principles of *pacta sunt servanda*. All players in this game are entitled to assume that everyone will abide by the same rules of the game […]".[29]

Regardless of the fact that an overly broad interpretation of functional necessity of an international organisation may ultimately lead to the problematic question of whether the organisation concerned is still acting within its legal boundaries set out in its constituent treaty or whether it has already exceeded them and is therefore acting *ultra vires*, an overly generous interpretation consequently gives rise to the following conflict, fleshed out more clearly by Reinisch and Weber:

> "In the quest for an appropriate immunity standard for international organisations, the paramount underlying rationale of functional immunity, the protection of the independent functioning of the organisation, should be kept in mind. It has been

[27] Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 151.
[28] Niels Blokker, "Jurisdictional Immunities of International Organisations - Origins, Fundamentals and Challenges," 186-187.
[29] Note, however, that Schlemmer is not revering back to state centred understanding of immunities and calling for the distinction of international organisations actions in *acta jure imperii* and *gestionis* as this would constitute a mistake of category. The call for increased accountability in private activity is well-founded, nevertheless. E. C. Schlemmer, "International Organisations, the Rule of Law and Immunity," 24.

> observed that this purpose should be balanced against the equally cogent demand of protecting the interest of potential litigants in having a possibility to pursue their claims against an international organisation before an independent judicial or quasi-judicial body".[30]

In addition to the problems raised by Schlemmer, Reinisch and Weber, which fundamentally concern matters of private law and contractual liabilities, Klabbers draws attention to an additional point. The immunity of international organisations based on functional necessity can lead – and indeed has led – to "violations of public order or human rights".[31] One of the most prominent examples includes "the case against the UN before Dutch courts in which it was claimed that the UN should have done more to prevent the genocide in Srebrenica".[32] Certain aspects of this case will be revisited at a later point.

In conclusion, functional immunity is a compelling framework that has been used successfully to counter some of the theoretical issues surrounding the immunity of international organisations. Nevertheless, this approach "does not always provide a solution for the conflict between the organisation's need for independence and the host state's need for adequate means of redress for its inhabitants".[33]

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30 August Reinisch and Ulf Andreas Weber, "In the Shadow of *Waite and Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement," *International Organizations Law Review* 1, no. 1 (2004): 64-65, https://doi.org/10.1163/1572374043242330.
31 Klabbers, *An Introduction to International Organizations Law*, 134.
32 Blokker, "Jurisdictional Immunities of International Organisations - Origins, Fundamentals and Challenges," 187.
33 Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship*, 154.

3. International Human Rights and the Right to a Fair Trial

3.1. The United Nations and the International Covenant on Civil and Political Rights

3.1.1. Context and Development

The previous chapter referred to the League of Nations as the first universal international organisation, which ultimately failed to guarantee international peace and security. Regarding human rights, it is not at all inappropriate to describe the period following the Second World War as a *caesura* with great implications for both international law and global governance. From the ashes of wartime atrocities emerged the foundations of our modern human rights regimes, which are nowadays often taken for granted.

The first milestone was the Universal Declaration of Human Rights (UDHR), which was adopted on 10 December 1948 by the General Assembly of the newly created United Nations in Paris. The 30 Articles of the UDHR had to remain relatively light in terms of substantive obligations, given the tense mood of the early East-West conflict. While the Declaration had spelt out what rights were deemed important by the international community, it "was a political instrument [and] the second step consisted of producing a binding legal instrument, an international treaty".[34]

A taxonomy created much later in the late 1970s by Czech jurist Karel Vasak, who distinguished between so-called first- and second-generation human rights, helps to sketch out the subsequent developments of human rights.[35] The UDHR essentially encompasses said categories of human rights: first-generation rights, which include civil and political rights, and second-generation rights, which cover economic, social, and cultural rights. Although initially intended to be part of one large instrument, the General Assembly, upon recommendation from the Economic and Social Council (ECOSOC), decided to move ahead in crafting separate treaties for the two sets of rights.[36] These considerations ultimately led to the adoption of two key international covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both signed on 16 December 1966.

[34] Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (Oxford; New York: Oxford University Press, 2008), 32.
[35] Exploring the political aspects of the negotiation and conclusion of these human rights instruments exceeds the scope of this work. It suffices to say that the tensions of the early Cold War are inextricably linked to and reflected in the progressive development of human rights.
[36] Tomuschat, *Human Rights: Between Idealism and Realism*, 32-33.

Together with the Universal Declaration, they make up the International Bill of Human Rights. Tomuschat argues that

> "[t]aken together, the rights enunciated in the different international instruments seek to protect individuals from fear – through the establishment of rights as the counterpart of negative duties of public authorities – and from want – though rights which impose on states the burden to provide individuals with goods and services which they need for a life in dignity. Additionally, they aim to provide protection against discrimination. […] Such resolute action against discrimination corresponds fully to the inherent logic of the human rights idea pursuant to which every human being must be treated on a footing of parity with his/her fellow citizen."[37]

What sets the two Covenants apart is the degree to which they are binding upon States Parties. Even though the provisions of the ICCPR contain limitation clauses "which permit reduction in their scope depending on existing social needs", they are backed up by a sound compliance system and by the view of the Human Rights Committee (see below) that "any legitimate restriction must be in accordance with the requirements warranted in a democratic society"[38]. The rights under the ICSECR have, in contrast, a rather promotional character out of which no enforceable rights arise for the individual. Compared to these rights, the provisions of the ICCPR leave considerably less room for interpretation.

The substantive provisions of the ICCPR are a clear reflection of the UNHR. From the right to life (Article 6), the prohibition of torture (Article 7) and slavery (Article 8) to the Freedom of thought, conscience, religion and belief (Article 18) or the freedom of opinion and expression (Article 19) – just to name a few – the Covenant contains provisions to counter government interference and provides civil and political liberties.

3.1.2. Implementation

The ICCPR essentially took the civil and political rights outlined in Articles 1 to 21 of the UDHR and gave them greater legal weight. With a linguistic quality missing in the UDHR, the ICCPR lays out in Article 2(1) that States Parties

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[37] Ibid., 40.
[38] Ibid., 41.

> "undertake to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[39]

and agree to take the necessary legal measures to advance this commitment (Article 2(2)).

These commitments are backed up by the necessary institutional setup to ensure compliance. In Article 28, the ICCPR establishes the Human Rights Committee, which serves as a quasi-judicial treaty body overseeing the implementation of the ICCPR. Made up of 18 independent and impartial human rights experts, it convenes in sessions in Geneva three times per year.

On top of its judicial activities, the Human Rights Committee is also charged with "[studying] the reports submitted by the State Parties to the present Covenant".[40] Under Article 40(1), "[s]tate parties submit reports to the Committee on the measures they have adopted which give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights within their jurisdiction."[41] Furthermore, it can issue comments or make recommendations on any issue within the scope of the Covenant and report alleged violations to the General Assembly. "Consequently, [the reports] have strong moral force and, to date, with a few notable exceptions, States have acted in accordance with the reasoned opinion of the Committee".[42]

Article 41 ICCPR sets up a regime of inter-state complaints that allows states to bring alleged human rights violations before the Human Rights Committee. A requirement, however, is the prior formal declaration of a State Party to the Covenant to recognise the Committee's competence to receive and consider complaints by another state. Thus, "this system of inter-state complaints operates on the basis of reciprocity".[43]

The last, and perhaps most contentious, competence of the Human Rights Committee concerns rulings over individual complaints. Under Article 1 of the First Optional Protocol

[39] *International Covenant on Civil and Political Rights* (signed New York, 16 December 1966, effective 23 March 1976), Article 2(1).
[40] *International Covenant on Civil and Political Rights* (signed New York, 16 December 1966, effective 23 March 1976), Article 40(4).
[41] Rhona K. M. Smith, *International Human Rights Law*, 10th ed. (Oxford: Oxford University Press, 2021), 70, https://doi.org/10.1093/he/9780192845382.001.0001.
[42] Ibid., 71.
[43] Ibid., 70.

to the Covenant that was signed in 1966 and entered into force a decade later, nationals of a State Party to the Protocol may submit communications to the Human Rights Committee in respect of alleged human rights violations committed by said state. Of the 174 signatories of the ICCPR, 116 have ratified the First Optional Protocol – notable exceptions are "large developed States [like] the United Kingdom and the United States of America".[44] Individuals wishing to proceed with communications to the Committee must have exhausted local remedies and claim a violation of the provisions of the Covenant. Then "[t]he Committee examines communications in closed meetings, and all proceedings are written. It decides whether a violation has occurred and is instructed by the treaty to 'forward its views' to the State and the individual complainant".[45] While the legal character of final "views" of the Human Rights Committee is not laid out either in the Covenant or the Protocol, "the Committee has long asserted that the views are morally binding on States, and in recent years has taken the bolder position that its views are binding".[46]

3.2. The Council of Europe and the European Convention on Human Rights

3.2.1. Context and Development

The earlier examination of the International Covenant on Civil and Political Rights highlighted the historical foundations of today's international human rights instruments, which are fundamentally informed by the tragedies of the Second World War. Equally, on the European continent, the codification of human rights after 1945 resulted in the establishment of a unique and extraordinarily effective regime that in many ways continues to be a model for similar frameworks globally.

In Europe, as the site of the most unspeakable crimes of the Holocaust, "it was felt particularly necessary to reaffirm the worth and dignity of the human person".[47] Consequently, the need grew for institutional mechanisms to secure such ambitions. The solution was to be found in the newly created Council of Europe, which "was seen as one of the devices which would in the future prevent the recurrence of similar tragedies."[48]

[44] Ibid., 71.
[45] Henry J. Steiner, "International Protection of Human Rights," in *International Law*, 2nd ed., ed. Malcolm D. Evans (Oxford: Oxford University Press, 2006), 764.
[46] Ibid.
[47] Tomuschat, *Human Rights: Between Idealism and Realism*, 31.
[48] Ibid.

Established on 5 May 1949, the aim of the organisation, as laid out in Article 1 of the Statute of the Council of Europe, was

> "to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress [pursued through] the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms ".[49]

The authors of the ECHR did not just have the recent past in mind but looked ahead to counter a new fear – the threat of a communist takeover. Because of the rising tensions of the early Cold War years, speed was of the essence. This was evident in the language of the ECHR's provisions, which emphasised "broadly uncontroversial"[50] rights to facilitate widespread acceptance and adoption. "The result was the production of a convention containing civil and political rights considered essential to the provision of a bulwark against the spread of communism, and a guarantee against a repetition of the horrors of the Second World War".[51]

The preparatory work for drafting a continental human rights instrument started soon after the establishment of the Council of Europe. The signing of the ECHR on 4 November 1950, just one year after the creation of the Council, speaks both to the collaborative effort and determination driving this major legal and societal project, as well as to the apparent "red scare" and the need to move quickly.

Similar to the ICCPR, whose preparatory work had already concluded, irrespective of the fact that it would not be signed for another 16 years, the provisions of the ECHR were built on the foundations of historic legal documents like the American Declaration of Independence (1776) and the French *Déclaration des Droits de l'Homme et du Citoyen* (1789). The immediate model for the ECHR, however, was the previously mentioned Universal Declaration of Human Rights.

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[49] *Statute of the Council of Europe* (signed London, 5 May 1949, effective 11 April 1951), Article 1(a)-(b).
[50] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention on Human Rights*, 6th ed. (Oxford: Oxford University Press, 2014), 4.
[51] Ibid.

This work will not delve deeply into the substantive provisions of the ECHR – aside from the right to a fair trial, which will be examined in the following section – but will instead focus on the institutional and judicial mechanisms established to ensure compliance. Nevertheless, it is important to point out that the Convention is not just a direct copy of the UDHR. Rather, the effectiveness of the ECHR is based, among other reasons, on the specificity of limitation clauses. Although the ICCPR also contains requirements of proportionality and necessity, “the circumstances in which limitations might legitimately be imposed on [human rights under the ECHR], are often made more specific”.[52]

3.2.2. Implementation

To better understand the effectiveness of the ECHR, it will be necessary to briefly explore the institutional makeup of the Council of Europe. The main executive organ of the Council of Europe is the Committee of Ministers, which gathers the State Parties’ foreign ministers in yearly sessions at the organisation’s headquarters in Strasbourg. It receives recommendations by the 318 members of the Council’s Parliamentary Assembly, which is made up of delegates from State Parties’ national legislative bodies. Furthermore, the Council of Europe has a Secretariat that oversees the organisation’s administration and is headed by the Secretary General, who is “appointed by the Parliamentary Assembly on the recommendation of the Committee of Ministers”.[53] Last but not least, the European Court of Human Rights (ECtHR) is perhaps the most pertinent organ for the purposes of this work.

For much of the existence of the Council of Europe, the organisation had a judicial framework in which the different procedural phases of a case, mostly individual complaints under Article 34 of the Convention[54], were conducted by separate organs, namely the European Commission of Human Rights and the European Court of Human Rights. Both were so-called Convention organs which “sat on part time basis”[55] and met in yearly sessions. Protocol 11 to the Convention, which entered into force on 1 November 1998, “restructured the institutional framework of the Convention and made provisions for a

[52] Ibid., 7.
[53] *Statute of the Council of Europe* (signed London, 5 May 1949, effective 11 April 1951), Article 36(b).
[54] The very few but highly political inter-state complaints under the ECHR lie outside the scope of this thesis.
[55] Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 3rd ed. (London: Sweet & Maxwell, 2008), 7.

wholly new judicial system"[56] that replaced both organs with a new permanent Court, "which handles both the admissibility and merits phase of application."[57]

After the applications are registered at the Court's Registry, a Committee made up of three judges will consider the admissibility of the complaint according to the criteria laid out in Article 35, read in conjunction with the provisions of Article 34 of the Convention. Notably, inadmissibility requires unanimity in the Committee."[Cases considered admissible by the Committee] are put before a seven-judge Chamber of the Court [which] will consider the written arguments of the parties, investigate the material facts if these are in contention, and may hear oral arguments".[58] At this stage, the Court proposes the option of a friendly settlement. The final judgment on the merits of the case is legally binding according to Article 46 of the Convention. The Committee of Ministers to which the judgment is transmitted supervises its execution.[59]

3.3. The Right to a Fair Trial

The remainder of this chapter will focus on one specific substantive provision, the right to a fair trial, which is included in both previously discussed human rights treaties – Article 14 ICCPR and Article 6 ECHR.

The right to a fair trial is not a monolithic concept. The examination of the ICCPR and the ECHR has highlighted similarities and differences in the instruments' respective development and implementation mechanisms. These two are, however, not the only sources of international human rights. Considering the large number of other human rights treaties and the plethora of regional or thematic courts such as criminal courts, it is, as Clooney and Webb point out, "not always easy to discern [the scope and content of the right] given the multitude of international law sources that define it".[60] Given the case selection of this thesis, it is evident that the ICCPR and the ECHR are the most pertinent legal instruments. However, there is little to be gained from dogmatically comparing the right to a fair trial in both treaties. For this reason, deviating from the comparative character

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[56] Rainey, Wicks, and Ovey, *The European Convention on Human Rights*, 6th ed., 9.
[57] Ibid.
[58] Rainey, Wicks, and Ovey, *The European Convention on Human Rights*, 6th ed., 10.
[59] For a concise overview of the procedure before the European Court of Human Rights, see Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 3rd ed. (London: Sweet & Maxwell, 2008),7-24.
[60] Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law*, 1st ed. (Oxford: Oxford University Press, 2020), https://doi.org/10.1017/ajil.2022.23, 5.

of the previous section of this chapter, this section will provide a more interconnected overview of the right to a fair trial.

The right to a fair trial evolved in much the same way as the two main human rights treaties themselves. Contained first in the UDHR[61], the right was subsequently included in the ICCPR, which to this day serves as a model for similar provisions in regional instruments. The existence of many different human rights treaties, such as the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR) and the Arab Charter on Human Rights, means that there is diversity in terms of content too. Thus, "the scope and expression of the right to a fair trial varies in the regional treaties, with some component rights receiving higher protection and others receiving less protection or being omitted altogether".[62]

Article 14 ICCPR lays out the right to a fair trial, which is made up of several components, namely

- Article 14(1) – The equality of the individual "before courts and tribunals", the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law", and a public trial subject to narrowly defined exceptions.
- Article 14(2) – The presumption of innocence.
- Article 14(3) – Minimum guarantees:
    (a) Right to be informed of the charge.
    (b) Right to prepare a defence.
    (c) Prohibition of undue delay.
    (d) Right to be tried in person and to defend oneself in person or through legal assistance.
    (e) Right to examine prosecution witnesses and call defence witnesses on equal terms.

[61] Nowak argues that the right to a fair trial goes back even further and that it has its roots in the "Anglo-Saxon common law tradition of 'due process of law', which can be traced to the Magna Charta Libertatum of 1215". Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N. P. Engel, 1993), 236.
[62] Ibid., 7.

(f) Right to the free assistance of an interpreter in court.

(g) Prohibition of self-incrimination and coerced confession.

- Article 14(4) – special procedures for juvenile trials.
- Article 14(5) – right to appeal
- Article 14(6) – right to compensation for miscarriage of justice.
- Article 14(7) – protection against double jeopardy.

Nevertheless, human rights are not just what is written in treaties. Instead, they are "living rights" that have developed especially through pertinent jurisprudence. This is exemplified well in the debate about the exhaustiveness of the right to a fair trial. It has been a topic of both scholarly debate and case law whether the provisions of Article 14 ICCPR constitute an exhaustive list of rights. Certain aspects are essential for a trial to be considered fair, for example, the fairness of the prosecution and the prohibition of covert tactics or deception.[63] Especially the *Jadhav* case before the International Court of Justice (ICJ) between India and Pakistan brought that issue to the fore.

In this case, India had argued that Mr Jadhav, an Indian national, tried and sentenced to death by a military tribunal in Pakistan, had his right to a fair trial violated because he was barred from consular access and protection under the Vienna Convention on Consular Relations. Although the Court determined that it had jurisdiction only over breaches of international law under the Vienna Convention and not over alleged human rights violations, like violations of the right to a fair trial, the separate opinions of two of the judges made clear "that the rights to consular access and protection were inextricably tied to the right to a fair trial".[64] Therefore, far from containing an exhaustive list, Article 14 ICCPR spells out "minimum guarantees". As Judge Robinson of the ICJ wrote, it should be understood as a "bundle of rights" and "other rights may be added to the list".[65] Similarly, Schabas opines that "[t]he right to a fair trial is, however, broader than the sum

[63] Ibid., 8.
[64] Separate opinion of Judge Cancado Trinidade and Declaration of Judge Robinson in Clooney and Webb, *The Right to a Fair Trial*, 8-9.
[65] Ibid.

of these individual guarantees. This follows from Article 14(3), which expressly refers only to the accused's 'minimum guarantees'".[66]

As mentioned above, this thesis will not provide a side-by-side comparison between Article 14 ICCPR and Article 6 ECHR. Nevertheless, it is worth noting that although they largely cover a similar scope, there are some systematic differences between them. The most obvious, perhaps, concerns the "minimum guarantees" that "everyone charged with a criminal offence has" as per Article 6(3) ECHR. Interestingly, these guarantees are more developed in the ICCPR, which contains additional rights to those in the ECHR. "In turn, the Council of Europe incorporated most of these additional rights by means of Protocol No. 7 to the European Convention".[67]

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[66] William A. Schabas, *Nowak's CCPR Commentary: U.N. International Covenant on Civil and Political Rights*, 3rd rev. ed. (Kehl am Rhein: N. P. Engel, 2019), 371.
[67] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2017), 265.

4. Case Analysis

4.1. Background. *Waite and Kennedy*

As discussed in detail in the chapter on international organisations' immunity, the concept was originally designed to protect a relatively weak new type of actor in global politics. Its primary purpose is to ensure the independent functioning of the organisation, which, in the fulfilment of its purposes outlined in its constituent instrument, should not be prejudiced by interfering national judiciaries. In practice, however, this *functional* immunity has proven to mean *absolute* immunity in most cases. This, by default, may clash with the right to a fair trial. Reinisch and Weber point out that

> "[t]he human rights rationale of providing access to court is equally cogent in the context of the immunity of international organisations: the relevant human rights instruments clearly phrase the underlying fair trial rights as rights of individuals entitling them to have a fair third-party adjudication of their claims against anyone else, regardless of whether the opponent might be another private party, a foreign state or an international organisation".[68]

As a result, this may lead to a situation in which a state, by granting an international organisation immunity from suit – for example, in its role as a host state – commits a human rights violation because it effectively denies an individual access to a fair trial under its national jurisdiction. In Europe, where, through the Council of Europe and its European Court of Human Rights, there is quite an advanced human rights jurisprudence, this issue has indeed surfaced. In its seminal case, *Waite and Kennedy v Germany,* the ECtHR in 1999 addressed this conflict and established a formula to reconcile it. Summed up in one sentence, if there are "alternative means of legal process available to the applicants, it cannot be said that [...] the essence of their 'right to a court' [is impaired]".[69]

The two British nationals Mr Waite and Mr Kennedy, "system programmers by profession and employed by the British company SPM, were placed at the disposal of the European Space Agency [ESA] to perform services at the European Space Operations Centre in Darmstadt", Germany. In 1990, when they were notified that their cooperation would be terminated and their contracts would expire, "the applicants [...] instituted proceedings

[68] Reinisch and Weber, "In the Shadow of Waite and Kennedy," 67.
[69] European Court of Human Rights, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 73.

before the Darmstadt Labour Court (*Arbeitsgericht*) against ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) act (*Arbeitnehmerüberlassungsgesetz*), they had acquired the status of employees of ESA".[70] The court, as well as the Labour Appeals Court of Frankfurt am Main and the Federal Labour Court, to which they subsequently appealed to, "declared the applicants' action inadmissible considering that ESA had validly relied on its immunity from jurisdiction".[71] Arguing that "they had been denied access to court [under Article 6(1) ECHR] for the determination of their dispute with ESA in connection with an issue under German labour law"[72], the applicants – under the "old" system of protection – petitioned the European Commission of Human Rights. Thus, the principal issue of *Waite and Kennedy* was "whether Germany had complied with this provision when granting immunity to ESA".[73]

The ECtHR in its judgment finally found that there had been no breach of Article 6(1) ECHR. The Court, on the one hand, affirmed the importance of fundamental rights *vis-à-vis* immunity, stating 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 purposes and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention […]. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective".[74]

However, the Court emphasised that the right to a fair trial may also be subject to certain limitations. Indeed, states may limit the right of access to courts as long as "any resulting limitations [do] not impair the essence of the right. [Limitations must] pursue a legitimate

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[70] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 15.
[71] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 17.
[72] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 43.
[73] August Reinisch, "Right of Access to Courts – Labor Dispute with International Organization – Immunity from Jurisdiction of Municipal Courts – Alternative Remedies for Employees of International Organization," *The American Journal of International Law* 93, no. 4 (1999): 934, https://doi.org/10.2307/2555358.
[74] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 67.

aim [and there must be] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.[75]

In respect to the first requirement – the legitimate aim needed to limit the right to a fair trial – the Court found that the immunity of an international organisation was “an essential means of ensuring the proper functioning of such organisations free from unilateral interference”.[76] Moreover, immunity was deemed particularly important given the contemporary “trend towards extending and strengthening international cooperation in all domains of modern society”.[77]

Far more important, however, was the assessment that the limitation of the right to a fair trial was not disproportionate. “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.”[78] Indeed, it found that the ESA Appeals Board, the Agency’s administrative tribunal, “has jurisdiction ‘to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member’”[79] and therefore qualified as an alternative means to protect their rights effectively.

Although *Waite and Kennedy* is a landmark case in reconciling the right to a fair trial and the immunity of international organisations, the roots of the “alternative means” formula go back to the earliest documents of the United Nations regarding immunity.

> “The idea that immunity should be granted to international organisations only upon the condition that adequate alternative redress mechanisms are available to third parties finds a clear legal expression already in the UN General Convention which provides that ‘the United Nations shall make provisions for appropriate models of settlement […] disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’”.[80]

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[75] Reinisch, “Right of Access to Courts,” 934.
[76] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 63.
[77] Ibid.
[78] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 67.
[79] Ibid.
[80] The UN General Convention refers to the 1946 Convention on the Privileges and Immunities of the United Nations, discussed earlier in this thesis. Reinisch and Weber, “In the Shadow of Waite and Kennedy,” 69.

This notion is also backed up by case law. In *Effect of Awards Made by the UN Administrative Tribunals* the ICJ clarified that not providing the United Nations' staff with "judicial or arbitral [remedies] for the settlement of any disputes which may arise between it and them"[81] would not be in the spirit of an organisation that sets out to promote freedom and justice for individuals under the Charter.

Furthermore, Reinisch argues that the division of judicial competence, as established in the *Solange* jurisprudence of the German Constitutional Court, supports the view that arbitration before an administrative tribunal of an international organisation can be considered compatible with the right to a fair trial:

> "While *Solange* I upheld that German Constitutional Court's human rights scrutiny of acts of Community organs 'as long as' [European] Community law did not contain a comparably adequate fundamental rights protection, *Solange* II stated the proposition in reverse and concluded that the German judiciary lacked competence to review acts of Community organs 'as long as' equal human rights protection was guaranteed by the [European Court of Justice]". [82]

Thus, it can be said that the ECtHR held that, "as long as" fundamental rights are protected through alternative means such as administrative tribunals, national courts may limit their own jurisdiction by granting immunity to international organisations without violating the individual's right to a fair trial.

In conclusion, *Waite and Kennedy* marked a new approach towards the immunity of international organisations insofar as the ECtHR started "scrutinising more closely the grants of immunity from jurisdiction of national courts which deprive claimants of access to dispute settlement".[83] The next sections of this chapter will delve deeper into the concepts of alternative means, leading to a discussion not only about "the availability of such alternative means of protection but also at their adequacy from a 'fair trial'/'due process' perspective […]". [84]

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[81] Ibid., 70.
[82] Reinisch, "Right of Access to Courts," 936.
[83] Ibid., 935.
[84] August Reinisch, "The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals," *Chinese Journal of International Law* 7, no. 2 (May 14, 2008): 305, https://doi.org/10.1093/chinesejil/jmn020.

4.2. Analysis. *M.L.D. v Philippines*

The judgment of the ECtHR in *Waite and Kennedy* in many ways changed how issues surrounding international organisations' immunity had been adjudicated previously. The formula, which was established requiring "reasonable alternative means" to protect effectively individuals' right to a fair trial under the ECHR in the absence of national court proceedings, is widely considered an important step in increasing accountability of international organisations. In *M.L.D. v Philippines*, a recently concluded case before the ICCPR's Human Rights Committee, many of the issues discussed in the previous chapter resurfaced.

4.2.1. The Case

On 26 July 2018, M.L.D., an Australian national requesting anonymity in the proceedings, submitted an individual complaint to the Human Rights Committee under the provisions of the First Optional Protocol to the Convention, claiming that the Philippines, a State party to the ICCPR, had violated her rights under Article 14(1) read in conjunction with Article 2 of the Covenant.

The applicant commenced her employment with the Asian Development Bank (ADB) in 2007, assuming the role of agriculture, environment, and natural resources economist within the Bank's South-East Asia Department. In March 2015, the Bank placed her on a three-month performance improvement plan. Following nearly nine years of service, the Bank terminated her employment on 23 November 2015, citing alleged unsatisfactory performance as the basis for the dismissal. On 2 November 2016, the applicant challenged this decision before the Bank's Administrative Tribunal (ADBAT). In her appeal, she contended, *inter alia*, that the termination lacked a factual foundation, asserting that her performance had not been objectively deficient. The applicant's principal request was for the decision terminating her employment to be declared null and void.[85] The applicant, on 6 May 2017, approached the ADBAT for a second time. The tribunal dismissed her, arguing that "she had exhausted internal grievance procedures, including compulsory conciliation […] and the appeal with the Appeals Committee, which found that the Bank had duly terminated the author's employment […]".[86]

[85] Human Rights Committee, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 2.1.
[86] Ibid.

According to the applicant, ADBAT lacked the necessary attributes of competence, independence, and impartiality. She emphasised that the president of the Bank, who acted as the respondent in all Tribunal proceedings, played a central role in its functioning by holding the authority to decide on the renewal of the judges' three-year terms. In her assessment, this undermined the Tribunal's independence and did not comply with the standards of impartiality required by Article 14 of the Covenant. She further alleged that the proceedings fell short of the guarantees of a fair trial. According to the applicant, she had not been granted an oral hearing, the evidence presented had not undergone a thorough examination, and ADB's ombudsperson, whom she had approached earlier, had been prevented from testifying.[87]

In September 2017, "the author approached the Department of Foreign Affairs of the Philippines [to arrange] for her employment grievance to be re-examined by a competent, independent and impartial tribunal established by law, or alternatively [for the government] not to issue any executive certificate in favour of the purported immunities of the Asian Development Bank in order to allow for determination of the author's employment dispute with the Asian Development Bank by court in the Philippines".[88] The applicant received no response from the Philippine authorities.

Before the Human Rights Committee, the applicant claimed a violation of her right to a fair trial (Article 14(1)) and a violation of the Philippines' obligation to ensure that her rights under the Covenant are recognised (Article 2):

> "In regard to article 14(1), the author has claimed: (a) that the Asian Development Bank is obliged to provide a fair trial to the author, which it has not done; and (b) that the international responsibility of the State party is engaged and has been contravened as it has failed to take any steps to remedy the violations of the author's rights, as is required under article 2 of the Covenant."[89]

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[87] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 2.2.
[88] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 2.4.
[89] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 3.1.

4.2.2. Views of the Human Rights Committee

The first point of interest regarding the views of the Human Rights Committee concerns the admissibility of the case.

In its preceding observation on admissibility, the State party had argued that "the communication does not emanate from an individual subject to the jurisdiction of the State party [as, pursuant to the Headquarters Agreement,] staff of the Asian Development Bank enjoy immunity from legal processes […]".[90] The Philippines, relying on the functional immunity of the international organisation, had claimed that it had no jurisdiction over what they characterised as "an employment claim against the Bank, not a violation of any right enshrined in the Covenant".[91] In contrast, the applicant had argued that "the issue of jurisdiction cannot be conflated with immunity".[92] Despite the ADB's status as an international organisation, the legal order of the Philippines remained in place because the Bank's headquarters were located within its territory. The laws of the Philippines continue to apply, regardless of whether immunity is upheld in a specific case.

The Human Rights Committee, applying the *Waite and Kennedy* formula, held that the case was admissible. Even though ADB enjoyed both legal personality and jurisdictional immunity, "the host State party may still have jurisdiction under the Covenant if the international organisation does not provide a reasonable alternative means of dispute resolution".[93]

In respect to the views of the Committee regarding the merits of the case, the influence of *Waite and Kennedy* is even more evident. Copying verbatim the judgment of the ECtHR the Committee recalled that "the Covenant is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective", arguing that State parties are not absolved of their obligation to guarantee the rights under the Covenant even though they may "transfer to [international organisations] certain competencies and accord them immunities […]".[94]

In keeping with the application of the *Waite and Kennedy* formula of State parties having to ensure "reasonable alternative means" for them not to violate the right to a fair trial in

[90] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 4.2.
[91] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 4.3.
[92] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 7.2.
[93] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 8,6.
[94] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 9.6.

the presence of jurisdictional immunity, the Committee asserted "that it is incumbent on international organisations including the Asian Development Bank, to provide reasonable alternative means of dispute resolution […]".[95] However, the Human Rights Committee also found that "[w]here the internal affairs of the international organisation are concerned, […] the standard of fair trial guarantees applicable to the resolution of internal disputes might differ depending on the type of dispute."[96] Thus,

> "oral hearings and witness testimonies are not required when the dispute concerns internal matters of the international organisation, without external impact, and that the organisation has discretion as to the reasonable alternative means of dispute resolution, taking into account the principles of objectivity, necessity and impartiality, and not amounting to arbitrariness or denial of justice".[97]

Given this assessment regarding "reasonable alternative means" the Human Rights Committee came to the conclusion "that the author has not supported with evidence the claim that the Bank's remedial mechanisms acted arbitrarily or denied the author access to justice or a fair trial".[98] Thus, the Committee found that there had been no violation of Article 14(1) read in conjunction with Article 2(3) on the side of the State party, the Philippines.

4.3. Analysis. *X v OPEC*

Another labour-related dispute involving an international organisation was *X v OPEC* (Organisation of the Petroleum Exporting Countries), which was concluded before the Austrian Constitutional Court (*Verfassungsgerichtshof*) in September 2022. Austria acts as the host state for several international organisations, including most prominently the United Nations, the Organisation for Security and Co-operation in Europe (OSCE), and OPEC. The case, therefore, attracted considerable attention in Austria, not only within legal circles but also in the broader media. The outcome – the amendment of the host state agreement – serves as an appropriate case study for the research question concerning the action taken by national judiciaries in navigating the tensions between the right to a fair trial and the immunity of international organisations.

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[95] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 9.7.
[96] Ibid.
[97] Ibid.
[98] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 9.8.

4.3.1. The Case

The applicant had commenced employment as an internal auditor at OPEC in 1999 and had worked there until termination in late 2017. The applicant filed a civil lawsuit with the Labour Court of Vienna (*Arbeits- und Sozialgericht Wien*), alleging wrongful termination and seeking payment of the salary owed from the date of termination until the scheduled retirement date in 2023. The Court dismissed the applicant on the grounds of jurisdictional immunity laid out in Article 9 of the Headquarters Agreement of OPEC with its host state, Austria. The subsequent proceedings before the Austrian Constitutional Court (2020) and – for a second time – before the Viennese Labour Court (2020) were unsuccessful for reasons of immunity. The applicant appealed against the decision of the latter court and simultaneously "petitioned the [Constitutional Court] to declare certain provisions of the OPEC Headquarters Agreement to be unconstitutional, as a violation of the rights under the European Convention on Human Rights, which has the status of constitutional law in Austria".[99]

The applicant claimed

a) that the inviolability of the headquarters seat, as provided under Article 5 of the Headquarters Agreement, violated her right to a fair trial under Article 6 ECHR. It was argued that inviolability made effective service of process impossible – an action that, according to the Court's earlier case law, constitutes an exercise of sovereign authority.[100]

b) that the immunity from execution of OPEC's property would make it impossible to enforce judgments granting affirmative relief (Leistungsurteil) obtained against the organisation in court. However, according to the case law of the ECtHR, such enforcement proceedings form an integral part of the right to a fair trial. The applicant, therefore, argued that this right had been violated.[101]

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[99] Philipp Janig, "*X v. OPEC. Judgment No. SV 1/2021 (SV 1/2021-23). ECLI:AT:VFGH:2022:SV1.2021*," *American Journal of International Law* 118, no. 2 (2024): 332, https://doi.org/10.1017/ajil.2024.13.

[100] „Art. 5 Abs. 1 und 2 Amtssitzabkommen verletze den Antragsteller in den verfassungsgesetzlich gewährleisteten Rechten auf ein faires Verfahren gemäß Art. 6 Abs 1 EMRK, […] weil damit […] die – einen Hoheitsakt darstellende – wirksame Zustellung von Klagen und sonstigen Schriftstücken ordentlicher Gerichte an die OPEC ohne ihre Einwilligung und damit die wirksame Rechtsverfolgung im Anlassfall ausgeschlossen würden". Austrian Constitutional Court, *X v OPEC*, SV1/2021-23 (29 September 2021), Title III, Para 2.2.

[101] ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title III, Para 2.4.

c) that the organisation's immunity from jurisdiction under Article 9 of the Headquarters Agreement violated the right to a fair trial in a disproportionate and unconstitutional manner, given that OPEC did not provide any reasonable alternative means to effectively protect their rights.[102]

The Austrian government, in a written submission to the Court, argued that the author's application ought to be found inadmissible. Firstly, it was considered that the Constitutional Court did not have jurisdiction in the matter due to the organisation's immunity. OPEC's absolute immunity was not only based on the provisions of the Headquarters Agreement but also guaranteed under customary international law. Moreover, it claimed that the inviolability of the headquarters seat emanated from[103] its extraterritoriality found in Article 3(1) of the Agreement.

4.3.2. Ruling of the Austrian Constitutional Court

The latter argument presented by the Austrian government was rejected by the Constitutional Court, which considered the extraterritoriality of the headquarters seat to be merely declaratory with regard to the inviolability of the premises.[104] Extraterritoriality in and of itself did not preclude Austria from exercising jurisdiction".[105] The Court also found the first argument surrounding OPEC's immunity allegedly guaranteed under customary international law to be unfounded, arguing that

> "[i]t cannot be assumed that there exists a general practice accepted as law [cf. Article 38(1b) of the Statute of the International Court of Justice] which obliges Austria to accord immunity to an international organisation of which Austria is not a member even if no reasonable alternative remedy for settling employment disputes is available".[106]

Because these objections were dismissed, the Court found the case admissible.

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[102] ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title III, Para 2.3.
[103] „[…] es handle sich daher ‚um einen Ausfluss' der ‚Extraterritorialität des Amtssitzbereichs der OPEC'" ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title III, Para 4.1.
[104] ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title IV, Para 1.11.
[105] Janig, "*X v. OPEC*," 333. Referencing ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title IV, Para 1.11.
[106] Janig, "*X v. OPEC*," 333. Referencing ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title IV, Para 1.12.

Regarding the merits of the case, the Court reiterated the judgment of the ECtHR in *Waite and Kennedy*, arguing that any limitations of the right to a fair trial were contingent upon the existence of "reasonable alternative means" of effectively protecting one's rights under the ECHR. However, the Court found that "reasonable alternative means" did not have to correspond to domestic court proceedings in every respect, arguing that

> "[w]hat is required is comparable, i.e. equivalent, not identical, legal protection. Slightly lower guarantees do not constitute a violation of Article 6 [as long as] the alternative legal protection system is not manifestly inadequate."[107]

However, the Court found that this was indeed the case, given that OPEC did not provide "reasonable alternative means" of effectively protecting the rights of its employees. The only mechanism found in Article 13 of OPEC's Staff Regulations was lodging a complaint with the organisation's Secretary General. However, this "system" had several shortcomings:

> "First, the secretary general remained the sole deciding authority, as he was not obliged to refer a complaint to the Personnel Committee; second, he was also not bound by its report, as the Committee's power was limited to 'observing and reporting'; third, the secretary general was neither an 'independent' body, nor impartial in the present case, as he was responsible for the termination of the applicant's employment in the first place. Fourth, the procedure foresaw neither a right to be heard nor an obligation by the secretary general to give reasons for their decision."[108]

This manifestly deficient system was the basis for the Court's conclusion that the jurisdictional immunity granted to OPEC by Austria was unconstitutional as it violated Article 6 ECHR. Furthermore, the Court for the same reason found both the inviolability of OPEC's premises and the impermissibility of the service of legal process to violate the Austrian Constitution. Both concepts were considered essential to ensuring a fair trial under the European Convention.[109]

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[107] ACC, *X v OPEC*, SV1/2021-23 (29 September 2021), Title IV, Para 2.6. English translation is my own. „Gefordert ist ein vergleichbarer, d.h. gleichwertiger, kein identischer Rechtsschutz. Geringfügig niedrigere Garantien begründen keine Verletzung von Artikel 6 [so lange] das alternative Rechtschutzsystem [nicht] offenkundig unzulänglich ist".
[108] Janig, "*X v. OPEC*," 334.
[109] Ibid.

The Court's ruling led to the amendment of the Headquarters Agreement, which came into effect in 2024. The protocol for the amendment negotiations between the Republic of Austria and OPEC provides that the Agreement shall contain provisions on the settlement of labour disputes through an independent and impartial dispute settlement mechanism that protects the rights of the organisation's employees.[110] As noted by Janig, "given that the OPEC Staff Regulations are not publicly available, it is not possible to evaluate who may avail themselves of this new mechanism and whether it would qualify as 'reasonable alternative means' for the purposes of the *Waite and Kennedy* doctrine".[111]

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[110] Helmut Tichy, Konrad Bühler, and Pia Niederdorfer, "Recent Austrian Practice in the Field of International Law: Report for 2022," *Journal of Public Law / Zeitschrift für Öffentliches Recht* 78, no. 1 (March 1, 2023): 132-133, https://doi.org/10.33196/zoer202301011301.
[111] Ibid., 335.

5. **"Reasonable Alternative Means"**

All three cases analysed in this thesis heavily rely on the concept of "reasonable alternative means", which was first applied by the European Court of Human Rights in *Waite and Kennedy*. Often imagined as the solution to the inherent discrepancies between the functional immunity of international organisations and the right to a fair trial, the concept, nevertheless, has its difficulties, as alluded to in the preceding subchapters. This section will explore the fault lines of the *Waite and Kennedy* formula case by case and provide a critique.

It will serve to remind the reader why the close examination of "reasonable alternative means" is important. At its core, the concept is intended to protect the individual's rights laid out in international human rights treaties. It is a way for the individual to protect themselves from violations of their fundamental rights by international organisations, and indeed states that grant them immunity from jurisdiction in fulfilment of certain tasks. In a rule-of-law-based system where individuals have the right to sue the state before a competent national court, it would be entirely inconsistent with modern concepts of justice to deny that right simply because an international organisation is involved. As Gaillard and Pingel-Lenuzza point out,

> "According to the dominant theory, it is the existence of these alternative means of dispute resolution that justifies maintaining the absolute character of immunity of international organisations, for the reason that they neutralise this absolute character".[112]

5.1. ***Waite and Kennedy***

The problems surrounding the concept of "reasonable alternative means" begin as early as the *Waite and Kennedy* judgment itself. The Court definitively ruled on the nature of the right to a fair trial provided in Article 6 of the European Convention, arguing that it did not constitute an absolute right. Instead, it could, under certain circumstances, be limited. As long as it happens in pursuance of legitimate goals – like the functional integrity of an international organisation – and is considered proportionate, states may restrict an

[112] Emmanuel Gaillard and Isabelle Pingel-Lenuzza, "International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass," *International and Comparative Law Quarterly* 51, no. 1 (2002): 3, https://doi.org/10.1093/iclq/51.1.1.

individual's right of access to the courts by granting immunity. Limitations are appropriate so long as the "very essence of the right [is not] impaired".[113] Because of the sole existence of the European Space Agency Appeals Board, the applicants' rights were found not to have been violated.

What the *Waite and Kennedy* ruling is missing, however, is a detailed analysis as to how precisely ESA's Appeals Board makes up for the limitation of the applicants' rights. In its ruling, the Court argues that ESA's Staff Regulations provide that the Appeals Board is a body "'independent of the Agency', [which] has jurisdiction 'to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff members'".[114] The essence of the applicants' original claim, however, concerned precisely their status as members of the Agencies' staff, which they were trying to settle in court. Hence, it is unclear whether the Appeals Board was in fact competent to hear the applicant's complaint in the first place. The Court acknowledged that it is the Appeal Board's responsibility to "settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff member". The Court offered no further assessment of this highly unsatisfactory finding, leaving the issue unresolved.

5.2. ***M.L.D. v Philippines***

As Burchard points out, the Human Rights Committee, with the present judgement, "took an important step towards addressing rule of law and fair trial issues within international organisations and their internal justice mechanism".[115] By applying the *Waite and Kennedy* formula of "reasonable alternative means", the Committee globalised a legal concept which many academics "perceived as applicable only in the European context".[116] Although this is a very positive development, it can only be described as a start, given the outcome of the case.

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[113] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 59.
[114] ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 69.
[115] Dana Burchardt, "Human Rights Committee Globalises *Waite and Kennedy* – But Fails to Protect Judicial Independence Effectively," *EJIL:Talk! Blog of the European Journal of International Law*, October 22, 2024, https://www.ejiltalk.org/human-rights-committee-globalises-waite-and-kennedy-but-fails-to-protect-judicial-independence-effectively/.
[116] Idem.

The most significant shortcoming of the judgment concerns the substantive claims by the author, which the Committee barely addressed. In her communication, the applicant had criticised, among others, the President of the Asian Development Bank and their involvement in the Bank's Administrative Tribunal. She claimed that the individual who acts as the sole respondent in all proceedings before the Administrative Tribunal cannot be the same person who is in charge of appointing judges to the Tribunal. Particularly, the President's power to "[recommend] whether or not to renew the term of a particular Administrative Tribunal judge"[117] violates both judicial independence and impartiality of the Tribunal.

Instead of engaging with the applicant's claims, the Human Rights Committee found that "the author had access to internal review mechanisms"[118] and that fair trial "standards [...] might differ" when proceedings concerned "internal affairs of the international organisation".[119] As long as the alternative means are reasonable, meaning objective, impartial, do not limit the individual's rights unnecessarily, and do not amount to arbitrariness or denial of justice, the Committee saw no problem with lower fair trial standards in international organisations.

Twenty years after the *Waite and Kennedy* judgment, this can only be described as a missed opportunity. The ADB's Administrative Tribunal is clearly deficient in certain institutional aspects and has been described as a "poorly designed and not fully independent and impartial internal justice [mechanism]".[120] Instead of taking the claims seriously and providing substantive standards for further international human rights jurisprudence, the Human Rights Committee, by being satisfied with the nominal existence of an "alternative means", *de facto* gave the Asian Development Bank (and other international organisations) a "free pass"[121] to continue violating individuals' fundamental rights.

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[117] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 2.2.
[118] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 9.8.
[119] HRC, *M.L.D. v Philippines*, Communication number 3581/2019 (18 July 2024), Para 9.7.
[120] Burchardt, "Human Rights Committee Globalises *Waite and Kennedy*."
[121] Ibid.

5.3. *X v OPEC*

The case before the Austrian Constitutional Court also leaves a bitter taste. To the great credit of the Court, its judgment resulted in the amendment of OPEC's headquarters agreement with Austria and the revision of the internal justice mechanism of an international organisation. That in itself is a great achievement and a big step towards greater accountability of international organisations and the furtherance of fundamental rights. However, as pointed out above, the details of the new mechanism remain behind closed doors.

As the Court points out, "alternative means" of enforcing the individual's rights do not have to provide exactly the same standards of protection but equivalent ones. However, OPEC's previous system, in which complaining to the Secretary General of the organisation was the only option and the Personnel Committee only observed and submitted non-binding reports, was clearly not meeting them. It was therefore clearly necessary to take outside action to compel the organisation to reform. However, the impression is that, as long as international organisations' internal justice mechanisms are not in blatant violation of fair trial standards – as OPEC's system was found to be – they can get away with substantially lower ones.

Here again, the Court could have taken a bolder stance and created a precedent for certain tribunal practice that might have spilt over to other international organisations to the benefit of the individual's right to a fair trial.

In conclusion, the requirements for "reasonable alternative means", which continue to be undefined on a universal level, run the risk of being hollowed out by such judgements. As long as national and international courts, along with academic commentary, continue to accept that different standards may apply to international organisations, these organisations will retain their privileged status under international law.

6. Immunity in Tort Cases

So far, this thesis has examined the frictions between international organisations' immunity and the individual's right to a fair trial in relation to employment disputes involving international organisations. The case selection and the resulting focus on such disputes arose because *Waite and Kennedy*, which established the formula of "reasonable alternative means", was itself an employment dispute. Hence, it can be said that this type of lawsuit has greatly contributed to international human rights jurisprudence.

This section, however, looks not at employment disputes, which are based on contracts, but will instead analyse case law which includes tort claims. Both cases, *Stichting Mothers of Srebrenica* and *Haiti Cholera*, took place in the context of peacekeeping operations. Thus, they received not only global public attention but are also extremely relevant to the core mission of the United Nations as the modern-day universal international organisation. The courts' approach towards fundamental rights and immunity in these cases is an instructive piece of the puzzle for understanding the relationship between immunity and the right to a fair trial more fully.[122]

6.1. *Stichting Mothers of Srebrenica*

The original case had taken place in the District Court of The Hague in 2007. There, Stichting Mothers of Srebrenica, a Netherlands-based association of victims of the 1995 massacre in Srebrenica, made claims both under civil and international law against the defendants, the United Nations and the Netherlands. Dutch Soldiers under the command of the United Nations Protection Force (UNPROFOR) were accused of having "failed to act appropriately and effectively to defend the Srebrenica 'safe area' and […] to protect non-combatants".[123] One of the claims under civil law concerned a tort committed by the defendants "by sending insufficient armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support".[124]

The District Court of The Hague, the Court of Appeal of The Hague and the Supreme Court of the Netherlands, to which the applicants subsequently appealed, each found that they

[122] A thorough analysis of these cases lies far beyond the scope of this thesis. This section intends to shed light on certain aspects of the judgements to support the arguments of this thesis.

[123] European Court of Human Rights, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 54.

[124] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 55.

had no jurisdiction due to the immunity of the United Nations. The applicants then lodged an application with the ECtHR claiming that the Netherlands had violated Article 6 and Article 13 of the European Convention on Human Rights.

Regarding the applicability of Article 6, the Court found "that the right asserted by the applicants, being based on the domestic law of contract and tort, was a civil one"[125] and thus in line with the provisions of the Covenant. The Court reiterated that "[a]rticle 6 (1) applies to disputes […] concerning civil 'rights' which can be said, at least on arguable grounds, to be recognised under domestic law"[126], which it found to be the case. In considering whether the defendant had indeed violated the right to a fair trial, the Court repeated its earlier jurisprudence from *Waite and Kennedy,* asserting that Article 6 is not absolute but may be limited if the essence of the right was not impaired. Limitations must serve a legitimate aim and be proportional.[127] The Court found the granting of immunity to the United Nations adhered to both requirements and thus concluded that the Netherlands had not violated the applicants' right under Article 6 of the Convention.

The argument of the Court concerning "reasonable alternative means" of redress is especially noteworthy. It was argued that even though "in the present case it [was] beyond doubt that no such alternative means existed"[128], "[i]t 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 court". [129] The Court elaborated further on this, arguing that

> "[i]n 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

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[125] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 120.
[126] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 119.
[127] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 139. As well as ECtHR, *Waite and Kennedy v Germany*, Application number 28934/94 (18 February 1999), Para 59.
[128] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 163.
[129129] ECtHR, *Stichting Mothers of Srebrenica v Netherlands*, Application number 65542/12 (11 June 2013), Para 164.

> Court's judgments in *Waite and Kennedy* […] cannot be interpreted in such absolute terms either".[130]

Both the Court's assessment regarding "reasonable alternative means" as well as the reference to the ruling of the International Court of Justice which fundamentally deals with state immunity – based on very different legal arguments as explored in the beginning of this work – seem out of line with the previous assessment concerning immunity and the right to a fair trial.

Katz Cogan commented in this respect that

> "*Waite and Kennedy* […] had dealt with private disputes, including employment cases, not public law matters. In the present case, however, […] the acts of the international organisation that the plaintiff sought to impugn were taken pursuant to the organisation's core mission [i.e. the maintenance of international peace and security]".[131]

Immunity is particularly important in such "core" matters, as it is intended to protect the organisation from encroachment by individual states. Katz Cogan argues cogently here that the Court had judged Article 6 of the Convention in this light.

6.2. *Haiti Cholera*

In the aftermath of the Cholera epidemic in Haiti, a group of victims sued the United Nations before the United States District Court for the Southern District of New York in 2013. The applicants alleged that the defendant was responsible for the outbreak of the cholera epidemic because "the United Nations had negligently and recklessly allowed peacekeepers from Nepal carrying cholera to enter Haiti in the wake of the 2010 earthquake without reasonable health screening. The suit further alleged that the United Nations had negligently maintained inadequate sanitation facilities".[132] The epidemic that followed, according to later estimates by the United Nations itself, had resulted in 800.000 cases of

[130] Ibid. Concerning State immunity, the ICJ ruled that there is "no basis [for] immunity [to be] dependent upon the existence of effective alternative means of securing redress". International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* (3 February 2012), Para 101.
[131] Jacob Katz Cogan, "Stichting Mothers of Srebrenica v. Netherlands," *American Journal of International Law* 107, no. 4 (2013): 889, https://doi.org/10.5305/amerjintelaw.107.4.0884.
[132] "U.S. Federal Court of Appeals Upholds United Nations' Immunity in Case Related to Cholera in Haiti," *American Journal of International Law* 111, no. 1 (2017): 162, https://doi.org/10.1017/ajil.2016.10.

cholera in the country and in the death of 9.000 individuals. The applicants thus "[alleged] various tort and contract claims against the defendants, the United Nations and the United Nations Stabilisation Mission in Haiti (MINUSTAH) […]".[133]

The United Nations, before de decision of the District Court, argued that "[w]ith respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters [and are therefore] not receivable".[134] Indeed, the District Court later dismissed the applicant's petition for lack of jurisdiction as the United Nations enjoyed jurisdictional immunity under the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN).[135]

More striking than the determination of the Court that it lacked jurisdiction, however, was its assessment concerning the nature of the United Nations' immunity. The applicants, relying on Article VIII, Section 29(a) CPIUN, had argued that the immunity of the United Nations was contingent on the availability of an alternative means of dispute resolution, which the United Nations had not made available to them for adjudication of their claims. The District Court held that the applicant was not in the right and rejected the argument. The Court of Appeals for the Second Circuit, to which the applicants later appealed, upheld the ruling of the District Court. It argued that the United Nations immunity provided by Article II, Section 2 CPIUN was not conditioned by the United Nations' fulfilment of its Section 29 obligation to "make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of private law character [such as torts] to which the United Nations is a party". [136] Furthermore, the Second Circuit found that "[p]laintiffs' argument, if correct, would seem to defeat [the United Nations' immunity]".[137]

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[133] United States District Cour for the Southern District of New York, *Georges v United Nations*, Case number 1:13-cv-07146-JPO (9 January 2015), 1.
[134] Patricia O'Brien, Under-Secretary-General for Legal Affairs of the United Nations, *Letter to Brian Concannon, Attorney for the Haitian Cholera Victims*, February 21, 2013, http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf.
[135] United States Court of Appeals for the Second Circuit, *Georges v United Nation*, Case number 15-455 (18 August 2016), 2.
[136] *Convention on Privileges and Immunities of the United Nations* (signed New York, 13 February 1946, effective 17 September 1946), Article VIII, Section 29(a).
[137] "U.S. Federal Court of Appeals Upholds UN's Immunity," 166.

6.3. Conclusion

The legal reasoning of both the European Court of Human Rights and the United States Court of Appeals for the Second Circuit can only be described as incomprehensible. Both courts essentially ruled that the granting of immunity in the absence of a reasonable alternative means of redress did not violate the right to a fair trial provided for in the relevant legal instruments.

Firstly, this directly contradicts the European Court of Human Rights' earlier reasoning in *Waite and Kennedy*. This dissonance was obvious to the Court itself, which explains the argumentative recourse to *Jurisdictional Immunities*. The comparison to state immunity, however, commits a fallacy because the immunities of states and of international organisations are not based on the same legal arguments, as this thesis has explained earlier. Unfortunately, the Court provided no further reasoning for this unfortunate analogy.

Secondly, the rulings of the courts are dogmatically inconsistent. The European Convention of Human Rights provides for the right to a fair trial in all civil and criminal proceedings and the CPIUN confers upon the United Nations the obligation to "make provisions for appropriate modes of settlement of (a) [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a part".[138] Nowhere in these and other treaties, like the International Covenant on Civil and Political Rights, are there provisions that would exclude tort claims. Disputes arising in the context of peacekeeping operations are bound to contain both contractual and tort claims. It is unjustified, however, that courts would apply different standards to cases involving tort claims than to contract-based disputes like the employment disputes analysed before. While this differentiation cannot be sustained under international law, the comparatively greater political importance of peacekeeping operations compared to employment disputes may help to explain this double standard.

[138] *Convention on Privileges and Immunities of the United Nations* (signed New York, 13 February 1946, effective 17 September 1946), Article VIII, Section 29(a).

7. Conclusion

The immunity of international organisations and the globally recognised fundamental right to a fair trial are inherently conflicting. As this thesis has described, immunity was intended to protect international organisations from encroaching national governments, which, by way of their judiciaries, may seek to impose their will on them or jeopardise their work.

The doctrine of functional necessity was introduced to address the lack of a clear theoretical basis for granting jurisdictional immunity to international organisations as non-state actors. It justifies immunity only to the extent necessary for the international organisation to carry out its activities effectively. In this sense, the doctrine can also be seen as a limiting principle. However, in practice, the immunity granted to international organisations often goes far beyond what is required, largely because the scope of what is necessary to function properly is open to interpretation. The result, in most cases, is absolute immunity.

The right to a fair trial, with its accompanying minimum guarantees, plays a vital role in safeguarding individuals from arbitrary or unjust treatment. It ensures that everyone has access to an impartial and competent tribunal, along with the opportunity to present their case and defend their rights. As previously discussed, this protection is not conditional upon the identity of the actor involved. Whether the restriction comes from a state or an international organisation, the obligation to uphold the right to a fair trial remains the same. This universality underscores the fundamental nature of the right.

This thesis set out to address two specific research questions: first, how international and national judiciaries reconcile the right to a fair trial under international human rights with the immunity of international organisations; and second, what standards internal justice mechanisms must meet to qualify as "reasonable alternative means" of dispute resolution.

The *Waite and Kennedy* case, which in many ways functioned as the point of departure for this thesis, represented a new approach to the conflict between the immunity of international organisations and the individual's right to a fair trial. In its judgment, the European Court of Human Rights asserted that the granting of immunity to an international organisation was dependent on the availability of "reasonable alternative means" to effectively protect one's rights under the European Convention on Human Rights. The fact that this reasoning has since permeated into both national and other international judiciaries, such as the Austrian Constitutional Court and the ICCPR's Human Rights

Committee, answers the first research question. The disappointments come in answering the second.

As this thesis has demonstrated, the *Waite and Kennedy* formula has not proven to be a comprehensive solution to the challenges some might have hoped it would address. On the contrary, the analysis of this thesis has revealed significant weaknesses, highlighting the difficulties and inconsistencies in applying the formula in case law.

Indeed, the shortcomings of the analysed judgements paint quite a dire picture. *Waite and Kennedy* itself was an important step to reconcile theoretically immunity and the right to a fair trial. Nevertheless, the judgment of the ECtHR also contains a great disappointment. The Court failed to assess whether the ESA Appeals Board genuinely qualified as an *effective* "reasonable alternative means", given the contested status of the applicants as members of ESA's staff. This weakened the Court's argument significantly. Equally, in *M.L.D. v Philippines*, the Human Rights Committee left much to be desired. As it was satisfied with the nominal existence of an alternative dispute settlement mechanism, it ignored the claims of a dysfunctional tribunal that blatantly violates the most basic notions of judicial independence and impartiality. The Austrian Constitutional Court, on a positive note, did much to uphold the rights enshrined in the ECHR. Through its ruling and the subsequent amendment of the headquarters agreement, it created precedent for other national judiciaries to champion human rights in light of the absolute claims of immunity of international organisations. This paves the way for positive future developments concerning other headquarters agreements. However, as described above, the fact that OPEC's newly created judicial mechanism is not publicly available leaves much to be desired. Whether the new system complies with fair trial standards can ultimately not be known.

Lastly, the way in which national and international judiciaries have ruled in cases involving tort claims can only be qualified as inconsistent and unjustified. The judgments of both the ECtHR (*Stichting Mothers of Srebrenica*) and the courts in the United States (*Haiti Cholera*) ridicule the reasoning of *Waite and Kennedy*. There is no legal justification to express the need for "reasonable alternative means" in contractual employment disputes, but not in cases involving torts. The fact that the United Nations continues to enjoy immunity for its most public activities, peacekeeping operations, is proof of an unjustified double standard. It illustrates the continued accountability problem of the organisation, which justifiably erodes trust.

At a time when international organisations and the rules-based international order at large are being questioned, this is unsustainable. The credibility and thus the long-term relevance of international organisations as a force for good in the world depends on their unconditional commitment to international human rights and a fundamental reassessment of their immunity.

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On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorised assistance on it.

Juan Lucas Rumpf