The *Mothers of Srebrenica* Case before the European Court of Human Rights

United Nations Immunity versus Right of Access to a Court

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Abstract

In its 11 June 2013 decision in Stichting Mothers of Srebrenica and Others v. the Netherlands, the European Court of Human Rights (ECtHR) unanimously declared the application inadmissible, ruling that the Dutch court's grant of immunity to the United Nations (UN) did not constitute a violation by The Netherlands of the applicants' right of access to a court. The author provides a critical overview of the case, situating it within the jurisprudence of the ECtHR and the International Court of Justice concerning immunities. The author concludes that the ECtHR should have applied the presumption of consistency with human rights obligations to the interpretation of the immunity rules of the UN. This could have led the Court to require the availability of alternative dispute-settlement mechanisms as a prerequisite for immunity.

1. Introduction

The decision of the European Court of Human Rights (ECtHR) in *Stichting Mothers of Srebrenica and Others v. The Netherlands*[1] addresses two very delicate questions: the compatibility of jurisdictional immunities provided for under

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1 *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Appl. No. 65542/12, ECtHR, 11 June 2013 (hereinafter '*Mothers of Srebrenica*'). On this ruling, see M.I. Papa, 'Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'Associazioni Madri di Srebrenica', 8 *Diritti umani e diritto internazionale* (2014) 27; T. Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', 10 *International Organizations Law Review* (*IOLR*) (2013) 538, at 552ff.; K. Schmalenbach, 'Preserving the

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international law with the European Convention on Human Rights (ECHR) and the relationship between the Convention and the United Nations (UN) legal order. The Strasbourg case law on both matters has recently revealed a more favourable attitude towards human rights protection.[2] The decision under review marks a significant step backwards.

It is well known that the underlying proceedings before the Dutch courts involved the sensitive issue of the UN's role in the Srebrenica genocide. More specifically, the case concerned the UN's alleged responsibility for the failure of its peacekeeping operation (the UN Protection Force, hereinafter, 'UNPROFOR') in Srebrenica to fulfil its mandate to prevent and/or stop the genocide. Unfortunately, the Dutch courts did not reach the merits of these questions; rather (albeit through partially different legal reasoning) they recognized the UN's immunity from civil jurisdiction and consequently dismissed the applications filed by the Mothers of Srebrenica Association (a Non-Governmental Organization representing victims' relatives) and some family members of the victims.[3] With all domestic legal remedies thus exhausted, the *Mothers of Srebrenica* case came before the ECtHR. There, the key question was whether the Dutch courts' granting immunity to the UN constituted a violation by The Netherlands of Article 6(1) of the ECHR, which protects the right to have any claim relating to civil rights and obligations brought before a court or tribunal.[4]

This case involved several thorny legal issues: (i) What is the nature of the jurisdictional immunities enjoyed by international organizations in general and by

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Gordian Knot: UN Legal Accountability in the Aftermath of Srebrenica', 62 *Netherlands International Law Review* (2015) 313.

2 Concerning jurisdictional immunities (in particular state immunity) see e.g. *Cudak v. Lithuania*, Appl. No. 15869/02, ECtHR [GC], 23 March 2010; *Guadagnino v. Italy and France*, Appl. No. 2555/03, ECtHR, 18 January 2011; *Sabeh El Leil v. France*, Appl. No. 34869/05, ECtHR, 29 June 2011; *Wallishauser v. Austria*, Appl. No. 156/04, ECtHR, 17 July 2012; *Oleynikov c. Russia*, Appl. No. 36703/04, ECtHR, 14 March 2013. Regarding the relationship between the ECHR and the UN Charter see *Al-Jedda v. United Kingdom*, Appl. No. 27021/08, ECtHR [GC], 7 July 2011; *Nada v. Switzerland*, Appl. No. 10593/08, ECtHR [GC], 12 September 2012. Some have pointed out that in these latter rulings the ECtHR implicitly acknowledged '*la primauté des obligations conventionnelles sur les résolutions du Conseil de sécurité*' (J. Tavernier, 'La responsabilité des Etats au regard de la Convention européenne des droits de l'homme pour la mise en oeuvre de résolutions adoptées dans le cadre du chapitre VII de la Charte des Nations Unies', 117 *Revue générale de droit international public* (2013) 101, at 111). In the ECtHR jurisprudence subsequent to the decision on the *Mothers of Srebrenica* case, a similar approach was also upheld in *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. No. 5809/08, 26 November 2013 (hereinafter '*Al-Dulimi*').

3 On the *Mothers of Srebrenica* litigation before the Dutch courts see the contribution by O. Spijkers in this issue of the *Journal*.

4 See *Golder v. The United Kingdom*, ECHR (1975) Series A, No. 18, § 36. The text of Art. 6(1) does not explicitly guarantee the right of access to a court, as it merely reads: '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' However, it is well known that over the years, the ECtHR has consistently held this right to be part of the right to a fair trial. *Ibid.*, § 40.

the UN in particular? Are they absolute or limited? And, if limited, to what extent? (ii) Do jurisdictional immunities also extend to claims for alleged violations of fundamental human rights, which are protected by *jus cogens* norms? (iii) Is the immunity conditional on the availability of an alternative remedy?

On 11 June 2013, the ECtHR unanimously declared the application inadmissible as manifestly ill-founded and therefore rejected it. This holding is based mainly on the unique nature of the dispute at hand, involving the use by the Security Council (SC) of its powers under Chapter VII of the UN Charter. However, the Court's focus on the exceptional nature of the Mothers of Srebrenica's claims against the UN did not stop it from expressing some general considerations about the law of international organizations' immunities that seem at odds with its previous jurisprudence. In addition, the impact of the judgment in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*,[5] delivered shortly before by the International Court of Justice (ICJ), was in many respects decisive.

In light of the foregoing, I will first address the sources of the jurisdictional immunity enjoyed by the UN. The relevant provisions are somewhat ambiguous, which explains why the nature and the extent of the UN's immunity are so hotly debated. Secondly, I will provide a brief overview of the previous Strasbourg case law on the subject of immunities of international organizations. Thirdly and finally, I will discuss the decision of the ECtHR on the Mothers of Srebrenica's claims, in order to ascertain whether the ECtHR could have reached a different solution.

2. Legal Basis and Scope of UN Immunity

It is generally agreed that jurisdictional immunities constitute an essential legal tool for the proper and efficient functioning of international organizations. Such organizations, as instruments of international cooperation, need immunity from the jurisdiction of national courts to be safe from detrimental interference by national authorities and to be able to fulfil their tasks. Otherwise member states, through their courts, could hinder their activities. For instance, legal processes may be used to exert political pressure to influence an organization's functioning.[6] Needless to say, immunity from national court jurisdiction does not exempt international organizations from their obligations.[7] Nor does it preclude any judicial review of their acts. In fact, several

5 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, ICJ Reports (2012) 99 (hereinafter '*Germany v. Italy*').

6 See for an overview *ex multis* K. Tesfagabir, 'The State of Functional Immunity of International Organizations and Their Officials and Why It Should Be Streamlined', 10 *Chinese Journal of International Law* (2011) 97.

7 The ICJ clearly distinguished the issue of immunity from legal process from that of compensation for any damages incurred as a result of acts performed by the UN or by its agents acting in their official capacity in its Advisory Opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (hereinafter 'Cumaraswamy').

organizations have established their own courts or internal procedures for the settlement of disputes in which they are involved.

The UN's immunity is governed by its Charter and the 1946 Convention on Privileges and Immunities of the UN (hereinafter, 'The General Convention').[8] According to Article 105(1) of the UN Charter, '[t]he Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.' This provision does not specify what privileges and immunities member states must grant the UN, but it is clearly formulated in functional terms. Hence, it does not seem to endorse an absolute immunity approach; rather, it implies that the UN's privileges and immunities are those necessary to allow it to carry out its functions efficiently and without interference from member states. Consequently, although there is no general consensus on the meaning of 'functional immunity' for international organizations,[9] it seems that an assessment of necessity is required on a case-by-case basis.

Paragraph 3 further provides that: 'the General Assembly may make recommendations with a view to determining the details of the application [of the foregoing paragraphs] or may propose conventions to the members of the United Nations for this purpose.' The General Convention has thus specified the Charter rules on UN privileges and immunities. Regarding jurisdictional immunity, Article 105(1) UN Charter must be read in conjunction with Article II, Section 2, of the General Convention (hereinafter, 'Section 2') which provides that: 'The United Nations … shall enjoy immunity from *every* form of legal process except insofar as in any particular case it has expressly waived its immunity.' (emphasis added). The General Convention thus clearly departs

According to the Court: '[t]he United Nations may be required to bear responsibility for the damage arising from such acts.' See ICJ Reports (1999) 62, at 88, § 66.

8 The Convention was opened for signature on 13 February 1946 (effective 17 September 1946), 1 UNTS 15. For a detailed analysis of the UN immunity provisions, see A.J. Miller, 'The Privileges and Immunities of the United Nations', 6 *IOLR* (2009) 7.

9 See A. Reinisch and U.A. Weber, 'In the Shadow of *Waite and Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', 1 *IOLR* (2004) 59, at 63 (pointing out that '[t]he crucial problem apparently remains to find a workable and practicable test for a functional immunity'). While some authors maintain that a strict functional necessity test would be required and that immunity would only be granted when truly necessary for the achievement of the international organization's goals (see e.g. H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff, 1994), at 39; M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virginia Journal of International Law* (*VJIL*) (1995–1996) 53, at 101ff.), others equate functional immunity with absolute immunity (e.g. E. De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations', 7 *IOLR* 2010, 79, at 87). For a different view, see also C.H. Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts', 41 *VJIL* (2000–2001) 1, at 30 (arguing that, by requiring the Secretary-General to waive unnecessary immunities, 'the General Convention preserves the conceptual framework of the functional necessity doctrine, but vests the Secretary-General with the primary authority for its application').

from Article 105(1) of the UN Charter's functional standard by shifting to absolute immunity.[10]

However, there are two important caveats mitigating absolute immunity. First, the Convention provides that the UN may waive its immunity.[11] Even more importantly, Article VIII, Section 29 (hereinafter 'Section 29'), states that: '[t]he United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'.[12] This provision's apparent goal is to avoid the denial of justice in cases involving the UN. Nevertheless, it raises two crucial questions.

First, it is not clear what constitutes a dispute of 'a private law character'. Here, it is worth noting that the UN has routinely asserted that claims relating to its political decisions fall outside the scope of Section 29.[13] The UN, however, has not provided any clear distinction between private law and public law disputes.

Even more unclear is the relationship between the UN's absolute immunity prescribed by Section 2, and the UN's obligation to provide for alternative means of settling individual third-party claims under Section 29. Can the UN claim immunity from domestic jurisdiction even when it has failed to comply with its duties under this latter provision, or should the existence of an alternative dispute settlement mechanism be considered a prerequisite for enjoying immunity?[14] In this context, it should be emphasized that while the UN has

10 The question thus arises of whether Sect. 2 of the General Convention is consistent with the UN Charter. Some have suggested that the divergence of the two immunity tests (functional under the Charter and absolute under the General Convention, respectively) would permit reliance on Art. 103 of the UN Charter to give prevalence to the standard established by the Charter (A. Orakhelashvili, 'Responsibility and Immunities. Similarities and Differences between International Organizations and States', 11 *IOLR* (2014) 114, at 152). Conversely, according to others, there is no conflict to resolve: the General Convention simply reflects the view of UN member states that the UN's jurisdictional immunity must be far-reaching, regardless of the subject matter of any suit. *Cf.* Singer, *supra* note 9, at 84.

11 On this subject, see Brower, *supra* note 9, at 27ff.; F. Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', 18 *Connecticut Journal of International Law* (2002–2003) 103.

12 It is important to note that, although the UN is not party to the General Convention, the ICJ found that the Convention gives rise to rights and obligations not only between state parties but also between each state party and the UN. See *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174, at 179. According to J.L. Kunz, 'Privileges and Immunities of International Organizations', 41 *American Journal of International Law* (*AJIL*) (1947) 828, at 848, 'the vote of approval by the General Assembly was equivalent to ratification by the UN.'

13 For instance, the UN has recently asserted that the Haiti cholera victims' claims were not receivable pursuant to Sect. 29 of the General Convention, because their consideration 'would necessarily include a review of political and policy matters' (Letter dated 5 July 2013 from Patricia O'Brien, Under Secretary-General for Legal Affairs, addressed to Brian Concannon, Institute for Justice and Democracy in Haiti). For a discussion, see R. Pavoni, 'Choleric notes on the Haiti Cholera Case', 19 *Questions of International Law* (*QIL*) (2015) 19.

14 In *Cumaraswamy*, the ICJ pointed out, by way of *obiter dictum*, that claims for compensation for any damages arising from acts performed by the United Nations or by its agents acting

established dispute-settlement mechanisms for some categories of private law-type claims,[15] no permanent settlement body has ever been set up to deal with disputes arising from peacekeeping missions. This despite the fact that the status-of-force agreements (SOFAs) between the UN and host states regularly provide for the creation of a standing claims commission to settle private law disputes involving the UN operations (over which the local tribunals have no jurisdiction because of UN immunity).[16] Moreover, to date, no such commission has ever been established, including the one intended by Article 48 of the UNPROFOR SOFA.[17]

3. ECtHR Case Law on Jurisdictional Immunity of International Organizations

The *Mother of Srebrenica* case was not the first time the ECtHR ruled on the relationship between jurisdictional immunities and the right of access to a court under Article 6(1) of the ECHR. In this area, the Court has always relied on the same three-pronged test to determine whether immunity was consistent with Article 6(1). According to the ECtHR, the right of access to a court is not absolute, but rather can be limited provided that three conditions are met: (i) the restriction does not impair the very essence of the right; (ii) the restriction serves a legitimate goal; and (iii) there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[18]

It seems that under this test, even if a restriction of the right of access to a court was proportional and for a legitimate aim, it might nevertheless violate Article 6(1), if it affected the very essence, i.e. the core, of the right. However, while the 'legitimate aim' and the 'proportionality' requirements are always

in their official capacity 'shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29' (see Advisory Opinion, *supra* note 7, at 89, § 66). This passage (also quoted in the *Mothers of Srebrenica* decision of the ECtHR, *supra* note 1, § 155) is generally understood as the ICJ's rejection of any required correlation between the right to immunity and the duty to provide for an alternative forum. See e.g. Miller, *supra* note 8, at 98. For a more clear-cut refusal of this conditionality, *cf.* also, in recent international practice, *Delama Georges et al. v. United Nations et al.*, 9 January 2015, US District Court, Southern District of New York (relating to the Haiti cholera victims' class action), available online at http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62.Opinion.and.Order.01.09.15.pdf (visited 31 December 2015).

15 On these mechanisms, see extensively B. Rashkov, 'Immunity of the United Nations: Practice and Challenges', 10 *IOLR* (2014) 332.

16 See UN Model Status of Forces Agreement, UN Doc. A/45/594, 9 October 1990, § 51.

17 Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina, 15 May 1993, 1722 UNTS 78.

18 *Ashingdane v. United Kingdom*, ECHR (1985) Series A, No. 93, § 57. The ECtHR has applied these criteria to all kinds of jurisdictional immunities (regardless of the entity who receives the immunity — foreign state, international organization, member of parliaments, civil servant, etc. — and regardless of the legal source of the immunity: international or domestic law).

examined, the 'very essence' prong is only routinely repeated in the list of conditions to be assessed, but it has never been closely scrutinized.[19]

As for the jurisdictional immunities of international organizations, all the cases on this issue, with the exception of the *Mothers of Srebrenica* case, concern disputes between international organizations and their staff. The landmark cases are *Waite and Kennedy* and its twin case *Beer and Regan* (originating from domestic litigation before German labour courts involving the European Space Agency (ESA)), which were identically decided by the ECtHR on the same date in 1999.[20] The Court accepted that international organizations' jurisdictional immunities serve a legitimate objective, because they ensure the proper functioning of the organizations 'free from unilateral interference by individual governments.'[21] Turning to proportionality, the Court, after emphasizing that the particular circumstances of each case must be considered,[22] warned that a 'material factor' was the availability of 'reasonable alternative means to protect effectively [the applicants'] rights under the Convention'.[23] Given that the ESA had established an internal appeals board, the ECtHR found the grant of immunity to be proportional and concluded that Article 6(1) had not been violated.[24] But it did not specify what features the alternative means might possess.[25] Neither did it make the immunity contingent on the existence of these means. In the Court's view, the availability of alternative means is only a material factor, thus a factor *among others* to be considered in assessing proportionality, but not dispositive.[26] As a result, the absence of such means does not *necessarily* make international organizations' immunity a disproportionate restriction on the applicants' right of access to a court.

4. The ECtHR's *Mothers of Srebrenica* Decision

The *Mothers of Srebrenica* case gave the ECtHR the opportunity to apply the *Waite and Kennedy* human rights approach to jurisdictional immunities of international organizations to the UN. However, two circumstances

19 See M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, 2010), at 17ff.

20 *Waite and Kennedy v. Germany*, Appl. No. 26083/94, ECtHR [GC], 18 February 1999 and *Beer and Regan v. Germany*, Appl. No. 28934/95, ECtHR [GC], 18 February 1999. For the sake of brevity, in the following footnotes I will refer only to the first one.

21 *Waite and Kennedy*, § 63.

22 *Ibid.*, § 64.

23 *Ibid.*, § 68.

24 *Ibid.*, § 73.

25 The Court merely referred to the existence of alternative means available to the applicants without assessing their adequacy. On this point see the critical remarks of E. Gaillard and I. Pingel-Lenuzza, 'International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass', in 51 *International and Comparative Law Quarterly* (2002) 1, at 7, 11–12 and Reinisch and Weber, *supra* note 9, at 79.

26 See e.g. N. Angelet and A. Weerts, 'Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme', 134 *Journal du droit international* (2007) 2, at 10.

distinguished the *Mothers of Srebrenica* from the ECHR's previous cases on international organizations' jurisdictional immunities: first, the underlying dispute did not concern an employment relationship between an organization and its staff, but rather the core functions of the organization involved; secondly, there was no alternative forum where the claimants could bring their case against the UN. In fact, while Article 48 of the UNPROFOR SOFA provided for the creation of a standing claims commission to deal with 'any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the courts of Bosnia and Herzegovina do not have jurisdiction',[27] this commission has never been set up.

The Court summarized the applicants' arguments as follows: (i) the functional (and consequently, in their view, limited) scope of the UN's immunity; (ii) the special nature of the claims brought before the Dutch courts, being based on the UN's involvement in genocide — an international crime forbidden by a well-established *jus cogens* norm; and (iii) the absence of any alternative means to settle the dispute.[28]

While acknowledging that there was no alternative means to effectively protect the claimants' rights — both under Netherlands domestic and UN law[29] — the ECtHR found that the Dutch courts' grant of immunity to the UN did not violate the Netherlands' obligation to ensure the applicants' rights of access to a court.[30]

The ruling is concise but also ambiguous at times, leaving many important questions unanswered.

As to the claimants' first issue, the ECtHR limited itself to noting the various interpretations of UN immunity in international practice, while refraining from adopting a firm position on the scope of such immunity or the relationship between Article 105(1) of the UN Charter and the General Convention.[31] Concerning the *jus cogens* argument and the lack of alternative means, it equated the immunity of states with that of international organizations,[32] which is

27 See *supra* note 17.

28 *Mothers of Srebrenica*, *supra* note 1, § 140.

29 *Ibid.*, § 163.

30 The ECtHR only considered the individual actions brought by relatives of the Srebrenica massacre's victims, rejecting the claim by the Stichting Mothers of Srebrenica for lack of standing. In the Court's view, the Association's 'civil rights and obligations' were not involved, as required by the ECHR under Arts 6 and 13. Consequently, the Stichting Mothers of Srebrenica were not 'victims' within the meaning of Art. 34 (*ibid.*, §§ 114–117). The Court also rejected the claim concerning the alleged violation of Art. 6 based on the Dutch Supreme Court's summary refusal to request a preliminary ruling from the European Court of Justice on the relationship between the EU principle of effective judicial protection and immunity of the UN. On this point, the Court's response was also negative and the complaint was rejected (*ibid.*, §§ 171–175). The Court also considered (under Art. 6 ECHR) and rejected as speculative the complaint relating to the alleged violation of Art. 13 ECHR (the Netherlands' alleged attempt to escape responsibility by blaming the UN for the failure to prevent the genocide; *ibid.*, §§ 166–168, 176–178). Further consideration of these points is beyond the scope of the present article, and therefore, I will not address them here.

31 *Ibid.*, §§ 141–142.

32 *Ibid.*, respectively, §§ 158, 164.

highly problematic. The Court also left unclear the issue of whether the *Waite and Kennedy* test relying on the availability of reasonable alternative means applies to the UN. However, it plainly held that the lack of an alternative remedy does not necessarily constitute a breach of Article 6.[33]

5. The ECtHR's Reference to the Judgment of the ICJ in *Germany v. Italy*

As noted, the ECtHR held that neither the seriousness of the alleged breach nor the lack of alternative means to settle the dispute were sufficient to deny immunity, citing the ICJ's judgement in *Germany v. Italy*, in which the ICJ rejected similar arguments made by Italy relating to Germany's immunity from civil jurisdiction.[34] This approach is problematic for a number of reasons and warrants examination.

The analogy between state immunity and that of international organizations — implicit in the reasoning of the ECtHR — does not withstand close scrutiny. First, immunity for states and international organizations has completely different rationales, and hence different nature and scope.[35] States' immunity rests on the principle of sovereign equality of states (*par in parem non habet iudicium*), whereas the immunity of international organizations is grounded in the need to protect their independence from undue external influences.

Secondly, the ICJ concluded that no exceptions to state immunity for *acta iure imperii* have emerged under customary international law, following close examination of relevant international practice. Hence, in extending the same findings to international organizations' immunity, the ECtHR should have first considered past practice concerning that immunity. The analogy between states' immunity and international organizations' immunity is thus questionable, especially regarding the lack of alternative means of redress. It is well known that — even if at times on different grounds — domestic courts are increasingly likely to scrutinize whether organizations provide an acceptable alternative to domestic litigation. In some cases, they have gone so far as to reject an organizations' plea for immunity based on the inexistence or insufficiency of its internal dispute-settlement procedures.[36] As a consequence of this trend, a growing number of scholars consider the existence of alternative means a *conditio sine qua non* for immunity, although there is still great uncertainty about how to assess the adequacy of such alternative means.[37] After

33 *Ibid.*, § 164.

34 *Supra* note 5. For further details and references to comments of scholars on the ICJ judgment, see Papa, *supra* note 1, at 49ff., 54ff.

35 See also Henquet, *supra* note 1, at 562.

36 For an insightful analysis, see C. Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends', 7 *IOLR* (2010) 121.

37 See Reinisch and Weber, *supra* note 9, at 72. Other scholars, while not regarding this requirement as *lege lata*, advocate *de lege ferenda* a shift to restrictive international organizations' immunity along similar lines. See e.g. Gaillard, Pingel-Lenuzza, *supra* note 25.

all, it is clear that the alternative means test is more significant in the context of an international organization's immunity than in states' immunity. In the event of claims against a foreign state, proceedings may always be commenced before the defendant state's own courts. In this situation, an alternative means always exists or at least there is a strong presumption in favour of its existence.[38] Even the ECtHR did not attach the same importance to the existence of alternative means when dealing with immunity of states, as it did in cases concerning immunity of international organizations.[39]

6. The ECtHR's Reliance on the Unique Nature of the Dispute

The Court's main rationale lies in the unique nature of the case, as it concerns the implementation of the SC's powers within the framework of Chapter VII of the UN Charter. References to the 'special nature' of the case recur throughout the decision. First, the ECtHR used this argument to avoid applying the *Waite and Kennedy* test. According to the Court '[t]he present case is different from [the others involving international organizations addressed by it in the past, because] [a]t its roots is a dispute between the applicants and the United Nations *based on the use by the Security Council of its powers under Chapter VII of the United Nations Charter*.'[40] Towards the end of the decision, the Court reiterates this[41] in support of its view that 'in the absence of an alternative remedy the recognition of immunity is [not] *ipso facto* constitutive of a violation of the right of access to a court'.[42] It also referred to the case's uniqueness to dismiss the *jus cogens* argument. For the Court, 'the matters imputed to the United Nations in the present case, however they may have to be judged, *ultimately derived from resolutions of the Security Council acting under Chapter VII of the United Nations Charter* and therefore had a basis in international law.'[43]

It therefore follows that the ECtHR gave great weight to the fact that the UN's core functions were at issue.[44] The Court relied on the unique nature of the

38 Reinisch and Weber, *supra* note 9, at 67 (referring to 'a natural alternative forum in the defendant state': at 85–86).

39 *Cf.* also Angelet, Weerts, *supra* note 26, at 10.

40 *Mothers of Srebrenica*, *supra* note 1, § 152 (emphasis added).

41 *Ibid.*, § 165.

42 *Ibid.*, § 164.

43 *Ibid.*, § 159 (emphasis added).

44 See also Papa, *supra* note 1, at 57ff.; Henquet, *supra* note 1, at 559–560; Orakhelashvili, *supra* note 10, at 166–167; Schmalenbach, *supra* note 1, at 324–325. The Court's subsequent jurisprudence supports the argument that the *Mothers of Srebrenica* reasoning does not have a general scope but rather only regards the UN's exercise of its principal function of maintaining international peace and security. In particular, in *Klausecker v. Germany* (concerning a labour dispute involving the European Patent Office (EPO)), the ECtHR returned to the *Waite and Kennedy* balancing test and relied on the existence of a dispute settlement mechanism within the organization in order to find the EPO's immunity proportionate under the circumstances. See *Klausecker v. Germany*, Appl. No. 415/07, ECtHR, 29 January 2015, § 76.

case (sometimes in conjunction with other reasons) in order to reject *all* the applicant's arguments.

The *Mothers of Srebrenica* decision was largely influenced by its precedent in the *Behrami* case, concerning alleged human rights violations by KFOR (North Atlantic Treaty Organization (NATO)-led multinational Kosovo Force) and UNMIK (UN Interim Administration Mission in Kosovo) in Kosovo. In that case, the Court considered whether it was competent to review acts adopted by states related to military operations instituted or authorized by the SC. The ECtHR refused to scrutinize these acts, given that '[t]o do so would be to interfere with the fulfilment of the UN's key mission … including … with the effective conduct of its operations'.[45] In the *Mothers of Srebrenica* case, it applied the same reasoning to the jurisdiction of domestic tribunals, using identical wording. According to the Court, to bring operations established by SC resolutions under Chapter VII of the UN Charter within the scope of domestic jurisdiction 'would be to allow individual States, through their courts, *to interfere with the fulfilment of the key mission of the United Nations … including with the effective conduct of its operation*'.[46] The similarity between the decisions in *Behrami* and *The Mothers of Srebrenica* is thus clear: to the Court, UN activities relating to maintaining peace and security deserve absolute jurisdictional protection from both national courts and the ECtHR itself. Any kind of judicial review would be tantamount to interference with the SC's responsibilities for collective security.

The ECtHR essentially *shifted* its focus from the question of the relationship between immunity and right of access to a court to that of the relationship between the ECHR and the UN acting pursuant to Chapter VII of its Charter. This shift enabled the Court to bypass the question of the interpretation of the applicable immunity provisions. While dictated by primarily political considerations — civil law suits against the UN in such politically sensitive disputes could seriously undermine its mandate to maintain international peace and security — the Court's decision not to address the scope of UN immunity as a preliminary question for proper adjudication rests on dubious legal foundations.

7. Resolving the Immunity/Right of Access Tension by Applying *Al-Jedda*'s Presumption of Consistency with Human Rights to Interpretation of the UN Immunity Rules

The *Mothers of Srebrenica* decision conflicts with the ECtHR's most recent case law on the relationship between the ECHR and the UN, in which the Court distances itself from the *Behrami* doctrine. Specifically, in the *Al-Jedda* and *Nada* decisions (and later in *Al-Dulimi*), it did not defer to the SC's Chapter VII

45 *Behrami and Behrami v. France*; *Saramati v. France, Germany and Norway*, Appl. Nos 71412/01 and 78166/01, ECtHR [GC], 2 May 2007 (hereinafter '*Behrami*'), § 149.

46 *Mothers of Srebrenica*, *supra* note 1, § 154 (emphasis added).

powers, as it had in *Behrami*, but rather applied a harmonization approach in interpreting UN obligations which *prima facie* conflict with fundamental human rights.[47]

A passage from *Al-Jedda* is particularly instructive here. In this passage (which is even quoted in the *Mothers of Srebrenica*)[48] the Court established a general presumption that the SC does not intend to derogate from fundamental human rights absent explicit language to the contrary. This means that, in the event of any ambiguity in the terms of a SC resolution, a court must choose the interpretation that is most consonant with human rights. The Court inferred this presumption from the UN Charter, specifically from Article 24(2) (requiring that '[i]n discharging … [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations') and Article 1(3) (which includes, among these purposes, the promotion and encouragement of respect for human rights and fundamental freedoms).[49]

The *Mother of Srebrenica* case offered the Court the possibility to apply the *Al-Jedda* presumption of consistency with human rights obligations to the interpretation of the UN immunity provisions.[50] As noted above, Article 105(1) of the UN Charter provides for functional immunity, but no uniform understanding of this concept can be found in either judicial decisions or scholarship.[51] By the same token, the relationship between Sections 2 and 29 of the General Convention (i.e. whether the grant of immunity is conditioned on the obligation to provide alternative means) is far from settled. Ultimately, paraphrasing the Court's language in *Al-Jedda*, one could say: 'in the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the [Charter] to intend States to take particular measures which would conflict with their obligations under international human rights law.'[52] But unfortunately the Court chose not to follow this path.

47 *Supra* note 2.

48 *Mothers of Srebrenica*, *supra* note 1, § 145.

49 *Al-Jedda*, *supra* note 2, § 102. The ECtHR confirmed these principles in *Nada* (*supra* note 2, § 172), but rebutted the presumption in light of the 'clear and explicit language, imposing an obligation to take measures capable of breaching human rights' contained in the relevant SC resolution (*ibid.*, § 166).

50 *Cf. Application by the Mothers of Srebrenica to the European Court of Human Rights against the decision of the Supreme Court of the Netherlands* (hereinafter: '*Application*'), 11 October 2012, §§ A.3.17., B.4., available online at http://www.vand iepen.com/fil eadmin/user_upload/Documenten/PDF/Screbrenica/verzoe kschrift-aan-het-ehrm-van-11-oktober-2012-in-het-engels_1_.pdf (visited 31 December 2015). See also Papa, *supra* note 1, at 57ff. and Orakhelashvili, *supra* note 10, at 168. A similar approach to UN immunity had already been suggested in general terms by J.J. Paust, 'The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity', in 51 *Harvard International Law Journal Online* (2010) 1, at 9.

51 *Supra* note 9.

52 *Al-Jedda*, *supra* note 2, § 102.

Nonetheless, it is clear that international human rights law provides right of access to a court. Moreover, in my opinion, the importance of this right for the UN is evidenced by the fact that the right to a fair trial — which includes the right to institute proceedings in civil matters[53] — was first articulated by the UN itself in Article 10 of the Universal Declaration of Human Rights (UDHR)[54] and later recognized in Article 14(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR).[55] Furthermore, the right of access to a court lies behind the 1949 creation of the UN Administrative Tribunal. The ICJ, in its advisory opinion on *Effect of Awards*, observed that the establishment of an administrative tribunal by the General Assembly was grounded in 'the expressed aim of the Charter to promote … justice for individuals'.[56]

Next, the wording of some provisions of the General Convention seem grounded in the right of access to a court, such as Article V, Sections 20 and 21, and Article VI, Section 23, concerning the immunity of UN officials and experts. Section 21 requires the UN to cooperate with the member states' authorities 'to facilitate *the proper administration of justice* … and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities' granted to officials; while Sections 20 and 23 provide that 'the Secretary-General shall have the right and the *duty* to waive the immunity' of officials and experts 'in any case where, in his opinion, the immunity *would impede the course of justice* and can be waived without prejudice to the interests of the United Nations.'[57] With regard to the latter statement, it is disputed whether such an obligation may also be applied to UN immunity, given that the waiver in this case — even if explicitly provided for in Section 2 — is not governed by the Convention.[58] Some believe that the officials and experts immunity waiver rules may be applied to the UN because the immunities of officials and experts (being limited to *official* acts) should be considered a facet of the UN's own immunity.[59] Alternatively, the UN obligation to waive its immunity has also been linked to its duty to act in good faith towards its members.[60]

Finally, as I have already indicated, Section 29 requires the UN to provide appropriate methods of dispute settlement. These mechanisms could have been

53 *Supra* note 4. See Reinisch and Weber, *supra* note 9, at 65–66.

54 UN Doc. A/810, 10 December 1948.

55 999 UNTS 171.

56 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954) 47, at 57.

57 Emphasis added.

58 See Miller, *supra* note 8, at 88ff. However, the ECtHR refused to consider 'whether the Secretary-General of the United Nations was under any moral or legal obligation to waive the United Nations' immunity' (*Mothers of Srebrenica*, *supra* note 1, § 137).

59 Brower, *supra* note 9, at 31–32.

60 *Ibid.*, at 33. In any event, these views do not find support in international practice: waiver of immunity by the UN is an exceptional event. Moreover, the Secretary-General seldom provides a justification when it refuses to waive UN immunity, confirming the absolutely discretionary character of its exercise of the waiver. On the practice on immunity waivers, see Miller, *supra* note 8, at 88ff.

intended to compensate for the General Convention drafters' decision to cast UN immunity in absolute terms (and consequently to jeopardize the functional standard contained in Article 105(1) of the UN Charter).[61]

8. Concluding Remarks

The foregoing analysis argues that the *Al-Jedda* presumption should also apply to the interpretation of UN immunity rules. Following this interpretation, the ECtHR would not have found any conflict between immunity and the right of access to a court. In other words, the Court could have interpreted the UN's immunity (Article 105(1), UN Charter and the relevant rules of the General Convention) consistently with the right of access to a court, i.e. by considering the availability of other means of redress (as established under Section 29) as preconditions to immunity.

As a result, there would not have been any normative conflict to resolve. This approach to the relationship between immunity and right of access to a court is thus completely different from the one articulated in *Waite and Kennedy*. The test in that case is premised on a normative conflict between, on the one hand, the UN's immunity and access to a court, on the other. Instead, the proposed approach shifts the emphasis to the interpretation of the UN's system of privileges and immunities to determine whether UN immunity can be harmonized with the human rights guaranteed by the ECHR.[62]

I also disagree with reliance on Article 103 of the UN Charter (providing that the member states' obligations under the Charter prevail over any other treaty obligation) — as some authors have suggested[63] — to resolve the issue of the relationship between UN jurisdictional immunities and the right of access to a court.[64] First, Article 103 relates to the obligations under the Charter, and it is doubtful whether a grant of immunity *which completely impairs the right of access to a court* could be deemed consistent with the UN's aim to promote

61 See L. Condorelli, 'Le Conseil de Sécurité, les sanctions ciblées et le respect des droits de l'homme', in L. Boisson de Chazournes and, M. Kohen (eds), *International Law and the Quest for its Implementation:* Liber Amicorum *Vera Gowlland-Debbas* (Brill, 2010) 73, at 82.

62 From a more general perspective, M. Di Filippo advocates reliance on proper interpretation of immunity treaty rules to resolve the tension between international organizations' immunity and individuals' right of access to a court (*Immunità dalla giurisdizione versus diritto di accesso alla giustizia: il caso delle organizzazioni internazioni* (Giappichelli, 2012), at 157ff.).

63 Henquet, *supra* note 1, at 552.

64 The Court's decision not to rely on Art. 103 is in line with its previous jurisprudence, in which it was silent on the issue of whether Art. 103 may supersede the obligations established by the ECHR. More specifically, the Court has cited Art. 103 (for instance, in *Behrami* and in *Al-Jedda*), but has never applied it (see on this point M.I. Papa, 'Le autorizzazioni del Consiglio di sicurezza davanti alla Corte europea dei diritti umani: dalla decisione sui casi *Behrami* e *Saramati* alla sentenza *Al-Jedda*', 6 *Diritti umani e diritto internazionale* (2012) 229, at 256ff.). However, it is clear that, had the Court intended to apply Art. 103 in the *Mothers of Srebrenica* case, it would have first interpreted the UN immunity rules. As I have pointed out, this is precisely what the Court refrained from doing.

human rights. More importantly, the General Convention, and not the UN Charter, grants the UN absolute immunity. Of course, one could assume that because the General Convention was adopted by the General Assembly according to Article 105(3) of the UN Charter, the obligations it establishes enjoy the same priority that Article 103 accords to those flowing directly from the Charter. But then the same reasoning would be equally applicable to those international human rights instruments, which the UN has adopted pursuant to Article 1(3) of the UN Charter, such as the UDHR and the ICCPR, which, as observed earlier, protect, among other things, the right of access to a court.

At any rate, the issue of the consequences of the lack of alternative dispute-settlement mechanisms remained substantially unaddressed by the ECtHR. In practice, this has led to a troubling asymmetry between the states' obligation to immunize the UN from legal process and that imposed on the UN by Section 29 of the General Convention to guarantee appropriate procedures for settlement of private law disputes involving the UN. This asymmetry is even more disturbing in the *Mothers of Srebrenica* case, given that immunity, in such an exceptional case, is not merely the denial of a procedural right (access to a court) but has the deleterious effect of perpetuating the consequences of the serious breaches of the Srebrenica victims' substantive rights.

It is undeniable that the right of access to a court (which has consistently been held by the ECtHR as an essential requirement of the rule of law[65]) has been sacrificed to the greater interests of the UN. But as a result, the Court failed in its cardinal mission as guardian of fundamental human rights in Europe in the face of the Srebrenica genocide — a tragedy it has itself defined as 'an atrocity *unique* in the history of Europe since the end of the Second World War'.[66]

65 *Golder*, *supra* note 4, § 34: 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'

66 *Mothers of Srebrenica*, *supra* note 1, § 20 (emphasis added).