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Special Issue

On June 11, 2013, the European Court of Human Rights delivered an important decision in the case *Stichting Mothers of Srebrenica and Others v. the Netherlands*.

We dedicate this special issue of our Brussels International newsletter to this judgement. Enjoy reading.



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Landmark Ruling of the European Court of Human Rights on Immunity from Jurisdiction of International Organizations and the Individual's Right of Access to Courts

Interpreting its *Waite & Kennedy* judgment of 1999 (Application No. 26083/94), in which it addressed for the first time the issue of the immunity from jurisdiction of international organizations conflicting with the individual's right of access to a court (Article 6 of the European Convention on Human Rights - ECHR), the Strasbourg Court made it clear here that even 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.

Factual Background

The *Stichting Mothers of Srebrenica* is a foundation created with a view to taking proceedings on behalf of the relatives of persons killed in Srebrenica, Bosnia and Herzegovina, in the course of the genocide perpetrated in July 1995. In 2007, this foundation, together with other individual claimants, summoned the Netherlands State (responsible for the battalion in charge of the protection of the Srebrenica "safe area" in the framework of the UN peace-keeping force) as well as the United Nations before the Dutch courts, alleging that both defendants had failed to defend the safe area and to protect civilians.

The United Nations did not appear before the Dutch courts. However, the Netherlands State invoked the UN's immunity from jurisdiction on behalf of the United Nations. The case eventually ended up before the Dutch Supreme Court, which in 2012 recognized that the UN enjoys "absolute" immunity from jurisdiction, "regardless of the seriousness of the allegations" on which the applicants base their claims.

The proceedings before the Dutch courts were then resumed

against the State only, and currently are still pending. Nevertheless, the claimants filed an application before the European Court of Human Rights, on the ground that the Netherlands State, by granting immunity to the UN, would have breached their right of access to court.

Held

The European Court reiterated its settled case-law: the individual's right of access to a court is not absolute, but may be subject to limitations; those limitations cannot restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; they furthermore must pursue a legitimate aim (which is the case of immunity from jurisdiction afforded to international organizations), and there must be a reasonable relationship of proportionality between the means employed and this aim.

The Court went on to state that measures taken by Contracting States "which reflect generally recognised rules of public international law on State immunity (*the Court would add: or the immunity of international organisations*) cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court (...). Examples are those limitations generally accepted by the community of nations as part of the doctrine of immunity from domestic jurisdiction, whether it concerns the immunity of a foreign sovereign State or that of an international organisation" (italics added).

Finally, the Court recognized that in *Waite & Kennedy*, it considered it a "material factor" – in determining whether granting an international organization immunity from jurisdiction was permissible under Article 6 ECHR – whether the applicants had available to them reasonable alternative means to protect effectively their rights under the ECHR. Yet the Court held that, "in the absence of an alternative remedy" (as in the case at hand, according to the Court), the recognition of immunity is not "ipso facto constitutive of a violation" of the right of access to a court: the Court's judgment in *Waite & Kennedy* "cannot be interpreted in such absolute terms".

The Court concluded that the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate, hence there was no breach of Article 6 ECHR.

Assessment

The Strasbourg Court was likely aware of the sensitivity of the political stakes underlying the actual court case. In this respect, the Court's decision, by refraining from challenging the UN's immunity, tends to preserve the ability of the United Nations to conduct peace-keeping operations, pursuant to its fundamental responsibility to maintain peace and security.

From a more legal standpoint, the Court's decision is interesting – and perhaps to some extent confusing – in that it refers, when presenting the principles applicable to the case at hand, to precedents dealing with the immunity from jurisdiction of international organizations but also case-law on the immunity from jurisdiction of States, and seemingly argues that the respective regimes are converging. This undoubtedly constitutes a new trend in the Court's practice, as previously the compatibility of State immunity with Article 6 ECHR was normally assessed based on the consistency of the said immunity with international law, whilst the compatibility of the immunity of international organizations with Article 6 ECHR was assessed in light of the existence of reasonable alternative remedies.

This being said, the Court still eventually verified – if only very briefly – whether the claimants had alternative means available to them (usual test for international organizations), without apparently checking whether the immunity granted by the Dutch courts was effectively “reflecting a generally recognised rule of public international law” (usual test for States).

At any rate, the ruling that the absence of alternative remedies does not entail that the immunity infringes, as such, the right of access to a court, is remarkable enough, and will likely force some domestic courts to reconsider the position

that they took in this respect (including, e.g., the Belgian Supreme Court, which in 2009 set aside the immunity from jurisdiction of an international organization based on the absence of reasonable alternative remedies and the ensuing alleged violation of Article 6 ECHR: *WEU v. Siedler*, S.04.0129.F, available at www.cass.be).

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