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***Western European Union v Siedler:***  
**Immunity of International Organizations**  
**v**  
**the Right of Access to Justice**

Seminar Paper

Martin Riedl, BA

01306031

a01306031@unet.univie.ac.at

A 101 Diploma Study of Law

Univ-Prof. Mag. Mag. Dr. August Reinisch, LL.M.  
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# 1. Introduction

When the Belgian Court of Cassation handed down its judgment in the *Western European Union v Siedler* case in late 2009, it caused quite the uproar among scholars of public international law and persons affiliated with international organizations (IOs). In a somewhat unexpected turn of events, the supreme court of this rather small European country assessed the quality of the Western European Union's (WEU's) internal dispute settlement procedure and found the independence requirement of the IO's Appeals Commission dissatisfactory.<sup>1</sup> Consequently, the immunity of the IO was lifted, which is a striking outcome considering that until the European Court of Human Rights' (ECtHR) landmark *Waite and Kennedy* case only ten years earlier, it still appeared to be the law of the land that IOs enjoyed absolute immunity.<sup>2</sup> *Siedler* is thus a very relevant and disputed case and certainly worthy of closer inspection. For one, national supreme court cases addressing the dilemma between a state's obligation of granting immunity to an IO and at the same time securing the right of access to justice to individuals are very rare.<sup>3</sup> But even from this handful of cases, *Siedler* stands out due to the "far-reaching" decision of the judges to place so much emphasis on the right of access to a court to even set aside the immunity of the IO.<sup>4</sup>

In order to provide a full picture of the issue at stake in *Siedler*, there will first be a discussion of the two main principles which the judges were tasked to balance, namely the immunity of international organizations and the right of access to justice. Due to the space constraints of this seminar paper, the treatment of these two topics can only be a very short and broad overview focused on Europe. More attention will be given, however, to *Siedler's* most important precedent – the famous *Waite and Kennedy* judgment of the ECtHR – which for the first time addressed the clash between IO immunity and Article 6 of the European Convention on Human Rights (ECHR). The merits, shortcomings and different interpretations of this decision will be highlighted as

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<sup>1</sup> P. Schmitt, 'Western European Union v Siedler, Belgian Court of Cassation, 21 December 2009' in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 424

<sup>2</sup> T. Neumann and A. Peters in 'Beer and Regan v Germany, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999' in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016), p. 392

<sup>3</sup> P. Schmitt, 'Western European Union v Siedler, Belgian Court of Cassation, 21 December 2009' in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 424

<sup>4</sup> C. Ryngaert 'The Immunity of International Organizations Before Domestic Courts: Recent Trends' *International Organizations Law Review* 7 (2010) p. 136

they are crucial to a proper understanding of *Siedler*, which draws heavily on the ideas laid out by the Strasbourg Court. Now that ten years have passed since *Siedler*, it will be interesting to investigate whether this decision has set a trend in jurisprudence or if it has thus far been a one-time exception. While it would certainly be worthwhile to also shed light on other relevant post-*Waite and Kennedy* national case law that predates *Siedler*, the spatial limitations of this paper only allow a look forward from *Siedler*, not back. Lastly, the findings of this paper will be rounded off and concluded.

## **2. The Two Clashing Principles: A very Short Overview**

When national courts are called upon to adjudicate cases where an IO is a party and claims its immunity, the judges almost inadvertently face a legal Catch-22 situation. While IOs are not usually parties to human rights treaties like the ECHR, national courts are generally bound by fundamental rights regimes. Most human rights catalogues contained in international treaties or in national constitutional law include some form of the right of access to justice or to a court (e.g. Art 6(1) ECHR, Art 14(1) ICCPR, Art 47 CFREU), which provides the only way for individuals to obtain judicial protection in the rule of law system.

While respect for human rights is fundamental, there is also considerable merit to the long-standing practice of granting immunity to IOs. Without it, IOs would be constantly involved in a plethora of lawsuits brought against them in the many countries in which they typically operate. Some of these court proceedings might be willful and intended to harm the work of the IO when it is undesirable to political and economic leaders. This might range from outright obstruction to an attempt to force the decisions of an IO's officers in a certain direction. Therefore, according to the 'functional necessity' theory, it is vital for the efficient work of and public trust in IOs that their independence is safeguarded by a far-reaching immunity from legal process (*infra*).

### **2.1 Immunity of International Organizations**

Immunity is seen as “[o]ne of the classic branches of international law”.<sup>5</sup> When talking about ‘immunity’, we must first define how this term is to be understood. In the context of public international law, what is usually meant is ‘immunity from [domestic] legal process’, which bars “national authorities, especially national courts” from “assessing the existing legal situation”, and “includes not only immunity from jurisdiction, but also all other forms of process before national authorities”, such as the execution of judicial decisions. We can thus speak of ‘domestic immunity’, as this obligation to refrain from legal assessment only binds national authorities.<sup>6</sup> As far as the definition of the term ‘international organization’ is concerned, the one used by the UN International Law Commission in the Draft Articles on the Responsibility of International Organizations appears satisfactory. They define an IO as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”<sup>7</sup>

Due to their similar effects, the issue of domestic immunity can be easily confused with ‘non-justiciability’, which is quite a different topic that this paper can only touch upon. Essentially, domestic immunity arises when the national authorities would be competent in a particular case were it not for an immunity provision. When the settlement of a dispute requires the solution of international law problems, on the other hand, national authorities generally simply lack justiciability. The big difference between the two is that domestic non-justiciability of international law disputes as a principle applies irrespective of whether it is expressly provided for, whereas domestic immunity of international organizations generally requires a corresponding clause in a treaty or other legal basis (*infra*).<sup>8</sup>

This is because there is “no universal convention which could be applied to all organizations uniformly”, even though one was worked on by the International Law Commission as a follow-up to the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* of 1975.

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<sup>5</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 130

<sup>6</sup> M. Möldner ‘International Organizations or Institutions, Privileges and Immunities’ in *Max Planck Encyclopedias of International Law* (OUP 2011) para 1

<sup>7</sup> United Nations International Law Commission ‘Draft articles on the responsibility of international organizations’ (UNILC 2011) Article 2(a)

<sup>8</sup> C. Wickremasinghe ‘International Organizations or Institutions, Immunities before National Courts’ in *Max Planck Encyclopedias of International Law* (OUP 2009) para 4

Due to the rather limited success of this treaty, the second part of the project, which was planned to deal with “Status, privileges and immunities of international organizations, their officials, experts, etc.”, was abandoned in 1992.<sup>9</sup> Some scholars and courts have found that IO immunity is a principle of customary international law, but these views are not generally accepted. Therefore, one needs to primarily look at the range of legal documents relevant to the IO at hand to see if and to what extent it has been granted immunity. Such provisions can typically be found in the IOs “constituent treaties, in general multilateral privileges and immunities treaties, or in bilateral headquarters or host agreements” and also in “national legislation”.<sup>10</sup>

Before we go into detail about the immunities of international organizations, there must be a brief discussion of a preceding and conceptually linked kind of immunity, namely that of states. The theory of IO immunity draws many of its ideas from state immunity, and in practice, IO affiliates typically enjoy many of the same privileges as state diplomats. Also, the common rationale behind state immunity, namely that “states require a space for the conduct of unencumbered politics without fear of legal ramifications” can be seen as more or less the equivalent to the doctrine of the ‘functional necessity’ of IO immunities (*infra*).<sup>11</sup>

This is where the similarities between state and IO immunity end, as there are considerable differences between the two. For one, it has been generally accepted for some time that, contrary to the “classic doctrine of immunity”, states only enjoy limited immunity, a “movement” which can be traced back to the Austrian Supreme Court’s landmark case *Dralle v Republic of Czechoslovakia* from 1950.<sup>12</sup> This principle of ‘restricted state immunity’ differentiates between acts that are “governmental (*acta jure imperii*)” in nature, for which immunity applies, as opposed to “commercial (*acta jure gestionis*)”, for which it does not.<sup>13</sup> This paradigm shift in immunity law can mainly be attributed to a large-scale “expansion in state commercial activity” in the 20<sup>th</sup> century.

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<sup>9</sup> M. Möldner ‘International Organizations or Institutions, Privileges and Immunities’ in *Max Planck Encyclopedias of International Law* (OUP 2011), para 2

<sup>10</sup> A. Reinisch and G. Novak ‘International Organizations’ In Nollkaemper et al. (eds) *International Law in Domestic Courts: A Casebook* (OPIL 2018) p. 171

<sup>11</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 130

<sup>12</sup> M. Singer ‘Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns’ *Virginia Journal of International Law* Vol. 36 (1995) p. 53

<sup>13</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 130

At a certain point, it no longer seemed prudent to grant states the privilege of immunity in areas that fall outside the classic state functions.<sup>14</sup>

## 2.2 Rationale behind IO Immunity

In a similar manner as to states, the activities of international organizations (including commercial ones) have grown almost exponentially over the past decades. Yet scholars and courts seem more reluctant to set aside IO immunity due to another difference to state immunity. Between sovereign nations, immunity is typically based on the principle of reciprocity. It can be conceived as a give and take situation since “[e]ach state takes both the role of grantor of jurisdictional immunity and the role of recipient of jurisdictional immunity”. Consequently, a nation cannot expect to “receive more immunity than it grants” and vice versa. In a way, the shift from absolute state immunity can be compared to a domino effect. As soon as some states restrict the immunity of other states, more will follow suit. IO immunity, however, does not possess the “symmetry” of reciprocity. Typically, international organizations only receive immunity from states but have no immunity to give in return as they lack “compulsory jurisdiction over entities outside the organization”.<sup>15</sup>

Also, even if somewhat similar, the rationale behind IO immunity can be distinguished from that of state immunity. This is due to the fact that IOs are fundamentally different from states in nature as the former neither possess “territory of their own”, nor are they “properly to be considered sovereigns either”. This is why scholars make use of the ‘theory of functionalism’ to justify IO immunity. According to the principle of ‘functional immunity’, IOs enjoy certain immunities as these are deemed a *conditio sine qua non* “for their effective functioning”.<sup>16</sup> This view is supported by the wording of many immunity clauses, most notably that of the United Nations Charter, which states in Article 105(1) that the UN is afforded “such privileges and immunities as are necessary for the fulfilment of its purposes [my emphasis]”.<sup>17</sup> Klabbbers calls the

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<sup>14</sup> M. Singer 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' *Virginia Journal of International Law* Vol. 36 (1995) p. 53

<sup>15</sup> M. Singer 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' *Virginia Journal of International Law* Vol. 36 (1995), pp. 53-55

<sup>16</sup> J. Klabbbers *An Introduction to International Organizations Law* (CUP 2015) p. 131

<sup>17</sup> United Nations 'Charter of the United Nations' (UN 1945) Article 105(1)

functional necessity approach “intuitive” and “self-evident” as it appears only reasonable that IOs need to be “protected against outside interference”, a danger which is particularly likely to come from a host state.<sup>18</sup>

While the idea that IOs need at least some degree of immunity to properly function is largely uncontested, there is some criticism of functional necessity. For one, “it is almost by definition biased in favor of” IOs as it values their interest in non-interference higher than that of individuals who have been wronged by them in some way. A truly compelling reason for this, as *Klabbers* puts it, “has so far been forthcoming”.<sup>19</sup> Moreover, functional necessity sometimes seems to be more of a *post factum* justification for IO immunity rather than a guiding principle. With headquarters agreements in particular, a wide range of immunities can also be viewed as the result of an IO making good use of its negotiating powers. After all, hosting a renowned IO typically brings great prestige with it so that there might be several contestant states competing to be chosen. Also, the fact that another state has granted certain immunities will usually make it difficult for prospective host states of other headquarters or offices of the same IO to refuse granting the same immunities.<sup>20</sup>

Another issue with the concept of functional necessity is that what is vital to the good functioning of an IO is open to interpretation and the source of much discussion among scholars. One commonly held view even sees ‘functional immunity’ (in the sense of the scope of immunity from legal process as defined by the scope of functional necessity) as “merely synonymous with absolute immunity”, while others insist on the restriction to areas that are truly necessary for the functioning of an IO.<sup>21</sup> In the past, “courts have usually interpreted even functional immunity as barring legal process in all cases”, but in recent years “some domestic courts have become increasingly willing to balance jurisdictional immunity with the right to access to justice”.<sup>22</sup>

Even though absolute immunity is a rather simplistic concept, there is some appeal to it as its scope is rather clear-cut and thus provides a great deal of legal certainty. By contrast, it is difficult to agree upon the threshold of what is necessary for

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<sup>18</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 132

<sup>19</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 135

<sup>20</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 132

<sup>21</sup> A. Reinisch *International Organizations Before National Courts* (CUP 2000), p. 205

<sup>22</sup> A. Reinisch and G. Novak ‘International Organizations’ In Nollkaemper et al. (eds) *International Law in Domestic Courts: A Casebook* (OPIL 2018) p. 171



the functioning of an IO and what is not, as this will vary depending on the functions of the specific IO on a case by case basis. It is also worth pointing out that, while it is difficult enough to ascertain functional necessity at one point in time, the issue can get even more complex when the functions of an IO change over the years and decades, which makes the scope of immunity even more unpredictable.<sup>23</sup>

### 2.3 The Right of Access to Justice and the Accountability Gap in IOs

The fundamental right with which IO immunity most directly clashes is that to access to justice. In simplified terms, ‘access to justice’ can be regarded as “a synonym of judicial protection” and is found in many human rights treaties and fundamental rights bills of Western-style national constitutions.<sup>24</sup> Content-wise, the FRA (Fundamental Rights Agency of the EU) and the CoE (Council of Europe) define the “core elements” of the right of access to justice as “effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice”<sup>25</sup>. In the context of the *Siedler* case, the European Convention on Human Rights (ECHR) is the most significant legal basis for the right of access to justice, which is enshrined in Art 6(1) as part of the “Right to a fair trial”. The first sentence of this provision guarantees that “[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*” [my emphasis].<sup>26</sup> Another Convention right that is closely connected to Article 6(1) and also affected by IO immunity is the right to an effective remedy enshrined in Article 13 ECHR.<sup>27</sup>

In the modern-day human rights regime, access to justice plays a key role as “it is an essential component of the system of protection and enforcement of [the other]

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<sup>23</sup> J. Klabbers *An Introduction to International Organizations Law* (CUP 2015) p. 135

<sup>24</sup> F. Francioni *Access to Justice as a Human Right* (OUP 2007) p. 3

<sup>25</sup> European Union Agency for Fundamental Rights and Council of Europe *Handbook on European law relating to access to justice* (FRA and CoE 2016), p. 17

<sup>26</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (CoE 1950, as amended) Art 6(1)

<sup>27</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (CoE 1950, as amended) Art 13

human rights”, which includes such fundamental guarantees as the right to life. Fundamental rights protections are rather toothless if an aggrieved individual is barred from a proper trial as without a court’s competence to hear and decide on a case, individuals may essentially be stripped of their other fundamental rights.<sup>28</sup> The importance of court access can probably not be stressed enough, as litigation is practically the only effective way to obtain a remedy for legal wrongs in the rule of law system, which forbids vigilante ‘justice’. This is perhaps best illustrated in the *Mothers of Srebrenica* cases, where the female relatives of those men and boys who were slaughtered in the 1995 genocide carried out by the Serbian army during the Balkan wars.<sup>29</sup> This illustrates how interconnected the different pieces of the human rights regime are and that when one of them is impaired, the others may be too.

In recent years, there has been increasing criticism of an ‘accountability deficit’ in IOs.<sup>30</sup> It appears like a paradox that IOs, many of which have been established to foster international peace, security and cooperation as well as the advancement of human rights protection, can be and sometimes are violators of these exact rights. But in particular with UN peacekeeping operations, there is always a risk of at least unintentional human rights violations by either organs of the UN or its member states. These are claimed to have manifested in the *Srebrenica* case mentioned above as well as in the more recent *Haiti Cholera* case, which each have led to a loss of large number of human lives. Also, in both cases IO immunity presents itself as a seemingly insurmountable barrier for the relatives of the dead seeking redress.<sup>31</sup> One very direct statement concerning this accountability deficit comes from “Thomas Hammerberg, a former Council of Europe (CoE) Commissioner for Human Rights” who claims that “an international accountability deficit is no good for anyone, least of all the local population. No-one, especially an international organization, is above the law.”<sup>32</sup>

By contrast to cases concerning thousands of deaths like *Srebrenica* and *Haiti Cholera*, disputes between IOs and their (former) employees like *Siedler* are less grave

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<sup>28</sup> F. Francioni *Access to Justice as a Human Right* (OUP 2007) p. 1

<sup>29</sup> ECtHR, *Stichting Mothers of Srebrenica and Others against the Netherlands*, App No 65542/12 (11 June 2013)

<sup>30</sup> A. Reinisch ‘To What Extent Can and Should National Courts ‘Fill the Accountability Gap’?’ *International Organizations Law Review* 10 (2013) p. 573

<sup>31</sup> UN News *Haiti cholera outbreak ‘stopped in its tracks’* available on <https://news.un.org/en/story/2020/01/1056021> (retrieved 16 June 2020)

<sup>32</sup> P. Schmitt *Access to Justice and International Organizations – The Case of Individual Victims of Human Rights Violations* (Edward Elgar 2017) p. 1

but nevertheless problematic since IOs provide work to a great many personnel. Also, due to the immunities typically awarded to IOs, such employment disputes may be based on deeply unequal preconditions and may lead to a deficit in the judicial protection of IO workers. At the turn of the last millennium, the ECtHR has addressed this issue in the very famous *Waite and Kennedy* decision (*infra*).

### **3. Strasbourg paves the way: *Waite and Kennedy v Germany***

With regard to the clash of IO immunity and the right to access to a court, the ECtHR's *Waite and Kennedy v Germany*<sup>33</sup> case is perhaps the most significant European landmark case in recent decades (together with the simultaneously decided *Beer and Regan v Germany*<sup>34</sup>). "The two decisions were the first in which an international human rights court commented on the conflict between" IO domestic immunity and the right of access to justice. By doing so, the Strasbourg Court "departed from the traditional paradigm of international organizations' absolute immunity [...] under all possible circumstances from domestic judicial proceedings and enforcement".<sup>35</sup>

#### **3.1 The Facts of the Case and its Decision**

Waite, Kennedy, and Regan, who were all UK citizens, and the German Beer, were placed at the disposal of the ESA by their employers to work at the Agency's European Space Operations Centre in Darmstadt, Germany. As their limited term contracts were not renewed, they argued before the local labor court that under German law, they had already acquired the status of ESA employees due to the length of time that they had been placed at the Agency's disposal. ESA claimed its immunity from German jurisdiction, to which the labor court conceded. When Waite and Kennedy appealed, this view was shared by the second as well as by the third instance, but the Federal

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<sup>33</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999)

<sup>34</sup> ECtHR, *Beer and Regan v Germany*, App No 28934/95, (18 February 1999)

<sup>35</sup> T. Neumann and A. Peters in '*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999' in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016), p. 392

Constitutional Court denied adjudication. Consequently, the two made applications with the European Commission of Human Rights, which found in its reports that there was no violation of Article 6(1), albeit by a narrow margin (seventeen to fifteen votes). The case was then referred to the Grand Chamber of the ECtHR.<sup>36</sup>

While the Strasbourg Court recognized the competence of a state to limit court access to a certain degree but not so much “that the very essence of the right is impaired”.<sup>37</sup> In order to decide whether a limitation of access to justice is permissible, the ECtHR applied its typical three-step fundamental rights test. This in itself was already remarkable as the application of this test indicates the rejection of the absolute immunity doctrine as it would not be reasonable to conduct this test if there were no chance of it finding a violation. Instead, the judges held that the IO immunity must be scrutinized in basically the same manner as other human rights infringements, thus leading to a relative immunity.<sup>38</sup>

First, the Court asked if there was a legal basis for the interference with the right of access to justice by the German courts. It was found in Section 20(2) of the German Courts Act (*Gerichtsverfassungsgesetz*), which “provides that *other persons* [than members of diplomatic and consular missions as well as their representatives of States staying in Germany upon the invitation of the German government] shall have *immunity* from jurisdiction according to the rules of general international law, or pursuant to *international agreements* or other legal rules [my emphasis]”.<sup>39</sup> The relevant international agreement was the ESA Convention of 1980, which states in its Article XV “that the *Agency*, its staff members and experts, and the representatives of its member States, shall enjoy the legal capacity, privileges and *immunities* provided for in Annex I [my emphasis]”.<sup>40</sup> “Pursuant to Article IV § 1 (a) of Annex I, the Agency shall have *immunity* from jurisdiction and execution, *except* to the extent that it shall, by decision of the Council, have *expressly waived* such immunity in a particular case [my emphasis]”.<sup>41</sup>

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<sup>36</sup> Human Rights Case Digest *Waite and Kennedy v Germany; Beer and Regan v Germany* HRCD 10 (1999)

<sup>37</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 59

<sup>38</sup> Human Rights Case Digest *Waite and Kennedy v Germany; Beer and Regan v Germany* HRCD 10 (1999)

<sup>39</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 30

<sup>40</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 33

<sup>41</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 38

Secondly, the judges looked for a legitimate aim behind such a restriction and found IO immunity to be one. In their reasoning, the judges followed the above-mentioned ‘functional necessity’ doctrine when acknowledging that:

“the attribution of privileges and immunities to international organisations is an *essential means of ensuring the proper functioning* of such organisations *free from unilateral interference* by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations’ constituent instruments or supplementary agreements is a long-standing practice established *in the interest of the good working* of these organisations [my emphasis]”.<sup>42</sup>

Thirdly and most importantly, the judges looked at the relation between this legitimate aim and the measures taken to achieve it.<sup>43</sup> To this specific question of proportionality, the ECtHR applied what has come to be known as the ‘*Waite and Kennedy* test’ or ‘reasonable alternative means test’ as it held that:

“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. [my emphasis]”.<sup>44</sup>

In a diplomatic move somewhat similar to the later *Bosphorus* decision<sup>45</sup>, the Strasbourg Court struck a balance between the interests of the IO without rendering the rights enshrined in the ECHR meaningless even in a single case. The alternative means test “provides an escape to the structural dilemma” of balancing IO immunity with the right of access to justice.<sup>46</sup> It also follows the “*quid pro quo*-rationale” of accepting “immunity in exchange for an alternative means of dispute settlement” and introduces “a justificatory scheme for ‘balancing away’ [...] the non-availability or the

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<sup>42</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 63

<sup>43</sup> A. Reinisch and 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’ *International Organizations Law Review* 1: 59–110 (2004) pp. 78-79

<sup>44</sup> ECtHR, *Waite and Kennedy v Germany*, Application No. 26083/94 (18 February 1999) para 68

<sup>45</sup> ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, App No 45036/98 (30 June 2005)

<sup>46</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016), p. 395

qualitative flaws of an alternative means of redress”.<sup>47</sup> By now, the “alternative means-test has become a key concept in the law of organizational immunities in Europe” and has “considerably influenced domestic case-law in this area”.<sup>48</sup>

### 3.2 Reception of and Problems with *Waite and Kennedy*

*Reinisch* and *Weber*, however, criticize that the judges in *Waite and Kennedy* did not apply the test that they had just developed “in a stringent manner”. The Strasbourg Court appeared to be essentially satisfied with the existence of an internal appeals board within ESA, while overlooking the issue of the actual availability of access to it.<sup>49</sup> The approach of the judges has also been called “too perfunctory” considering the importance of the right of access to justice in the framework of fundamental rights protection. The reluctance of the Court to elaborate on its alternative means test and to apply it more convincingly “appears to echo, in some respects the German Federal Employment Court’s limited scrutiny of the alternative means” in the same case. This, however, goes against the notion that the Strasbourg Court should “interpret the Convention autonomously”.<sup>50</sup>

Also, the generally “rather vague” wording of the decision without sufficient clarification what is to be understood by it left much room for scholarly debate.<sup>51</sup> *Neumann* and *Peters*, for example, read *Waite and Kennedy* in a way that prescribes “a presumption of a disproportionate restriction of the applicant’s right to a remedy where an alternative means does not exist, is not available, or lacks core quality

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<sup>47</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016), p. 397

<sup>48</sup> *Ibid.* p. 392

<sup>49</sup> A. Reinisch and 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’ *International Organizations Law Review* 1: 59–110 (2004) p. 79

<sup>50</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016) p. 398

<sup>51</sup> P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016) p. 427

standards” which “would not be limited to an allocation of the burden of proof”, but “also substantively guide the judicial margin of appreciation”.<sup>52</sup>

Furthermore, the ECtHR describes the outcome of the *Waite and Kennedy* Test as ‘a material factor’ (*supra*) in the assessment of the proportionality criterion, which indicates that a lack of reasonable alternative means could be counterbalanced by other factors. These might be, for example (according to the commenting scholars and not the Court), “particularly important tasks of the public interest” carried out by the IO at hand. The logical consequence, however, is the following somewhat paradoxical conclusion: “[T]he more important an [IO], the less independent its administrative tribunal may be”. This would generally “send the wrong message” and give major IOs like the UN with a very large number of employees an unfair advantage over smaller, e.g. regional and/or more specialized IOs. In any event, as the judges of the ECtHR did not provide examples of factors that could counterbalance a lack of reasonable alternative means, such thoughts are mostly speculative.<sup>53</sup> In its *Mothers of Srebrenica* decision, the Strasbourg Court has provided at least some degree of clarification by stating that “it did not follow that” – even if alternative reasonable means are unavailable – “the recognition of immunity in itself constituted a violation of the right of access to a court”.<sup>54</sup>

What makes the interpretation of *Waite and Kennedy* even more challenging is the fact that “the ECtHR has so far never found a domestic act awarding immunity to an [IO] to actually violate the Convention”. It was thus never in a position where the judges had to “explain and construe any possible overriding effect of state obligations flowing from art. 6(1) ECHR over those emanating from the law of immunities”. Therefore, the Strasbourg Court left several questions that pose themselves if immunity should be discarded unanswered. Among these are issues concerning “the type of remedies to be granted by the state for a violation of art. 6 ECHR”, i.e. whether “restitution in the form of granting access to a court” is due and/or “[m]onetary

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<sup>52</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 396

<sup>53</sup> *Ibid.* p. 398

<sup>54</sup> ECtHR, *Stichting Mothers of Srebrenica and Others against the Netherlands*, App No 65542/12 (11 June 2013) para 164

compensation”.<sup>55</sup> *Neumann* and *Peters* also point to the “relative openness and ambiguity [...] as to some core aspects of the alternative means test” that “have prevented the development of a homogeneous domestic case-law in this field”.<sup>56</sup> The same scholars claim that “the open-endedness of the ECtHR’s proportionality approach makes it vulnerable to misuse by domestic courts”, as “the vaguer the general standards for an alternative means [are], the greater is the danger that the courts use the test to unduly justify immunities”. They warn of a “bias [...] in favor of immunity” on the side of domestic courts due to the “concomitant desire to provide a smooth working environment for an [IO]” and a “deference to their government’s conduct of foreign affairs”. Thus *Waite and Kennedy* might be used “as a vehicle for masking up political considerations” with “the lacquer of purportedly neutral proportionality rhetoric”, which may lead to “a novel (and more subtle) variant of ‘absolute immunity’”.<sup>57</sup> The *Siedler* case, however, is an example of the contrary, as the Belgian Court of Cassation used the precedent of *Waite and Kennedy* not to uphold the immunity of an IO, but to strike it down (*infra*).

#### 4. The *Siedler* Case

On 21 December 2009, the Belgian Court of Cassation in Brussels, i.e. the country’s supreme court in civil and penal cases, handed down a judgment that caught the attention of public international law scholars and leaders of IOs alike. That day, the Court decided three parallel cases concerning the clash between IO immunity and the right of access to a court, and applied the *Waite and Kennedy* test to each. Those legal disputes were *General Secretariat of the ACP Group v Lutchmaya*<sup>58</sup>, *General*

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<sup>55</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 396

<sup>56</sup> *Ibid.* p. 392

<sup>57</sup> *Ibid.* pp. 398-399

<sup>58</sup> Belgian Court of Cassation *General Secretariat of the ACP Group v Lutchmaya* (21 December 2009) Cass No C.03.0328.F.



*Secretariat of the ACP Group v B.D.*<sup>59</sup> and *WEU v Siedler*<sup>60</sup>, the latter of which is by far the most interesting. This is mainly because here, “the Court examined the *quality* of the dispute-settlement mechanism within the WEU, and proved willing to reject the immunity of the organization when such a quality was insufficient [original emphasis]”. It has thus been said that *Siedler* “provides a fine example of a court engaging in far-reaching, substantive review on the basis of Article 6 ECHR”.<sup>61</sup> The main reason why this decision came somewhat unexpected to the IO community is that for “decades, national courts [had] refrained from setting aside immunities of [IOs], fearing that doing so could open the door to divided decisions among the courts of different member states, lead to uncertainty and tensions between international actors, and jeopardize the independence of the organizations concerned.”<sup>62</sup> In a perhaps equally remarkable turn of events, the judges decided that even after they had lifted the WEU’s immunity, the IO’s rules prevail over the relevant national law.<sup>63</sup>

#### 4.1 The Facts and Lower Instance Decisions

Ms Siedler had been employed by the Western European Union since 1991 when she was dismissed in June 2000.<sup>64</sup> The WEU was primarily a defensive military alliance which was established in 1948 with the Treaty of Brussels, which predates the North Atlantic Treaty by approximately a year. Then known as the Brussels Treaty Organization (BTO – fittingly headquartered in Brussels), it was largely a response to the perceived threat of the increasingly Soviet-controlled Eastern European countries. In a sense, the WEU can be seen as essentially the European bloc within the NATO system, but it also focused on economic and cultural integration. The WEU (BTO) was

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<sup>59</sup> Belgian Court of Cassation *General Secretariat of the ACP Group v B.D.* (21 December 2009) Cass No C.07.0407.F.

<sup>60</sup> Belgian Court of Cassation, *Western European Union v Siedler*, Appeal Judgment Cass No S 04 0129 F (21 December 2009), ILDC 1625 (BE 2009)

<sup>61</sup> C. Ryngaert ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’ *International Organizations Law Review* 7 (2010) p. 136

<sup>62</sup> J. Wouters, C. Ryngaert, P. Schmitt ‘Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.’ *The American Journal of International Law*, Vol. 105, No. 3 (July 2011) p. 562

<sup>63</sup> P. Schmitt, ‘Western European Union v Siedler, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 424

<sup>64</sup> P. Schmitt, ‘Western European Union v Siedler, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial. Decisions on the Law of International. Organizations* (OUP 2016) p. 424

originally comprised of the UK, France, the Netherlands, Belgium, and Luxembourg, and a significant number of other European countries joined over the decades. After the failed attempt to establish the European Defence Community, the Brussels treaty was revised in 1954, at which occasion West Germany and Italy joined the alliance. Despite several fruitful contributions to European integration and defense from the initial post-war period until well into the 1990s, its role was over time diminished by other European regional organizations, i.e. CoE, the OEEC, the OSCE and in particular the EU with its growing Common Security and Defence Policy.<sup>65</sup> In 2009, the entry into force of the EU's Treaty of Lisbon sounded the WEU's death knells as the Treaty's mutual defense clause made the WEU obsolete in the eyes of its member states.<sup>66</sup> They thus agreed on the dissolution of the WEU in 2010, which was concluded when it ceased its operations the following year.<sup>67</sup> This means that by the time of the *Siedler v WEU* judgment, the imminent end of the WEU was already on the horizon, which some have argued might have been an unofficial contributing factor in the court's decision.

When Siedler lost her post with the WEU in 2000, however, the continuing existence of the organization was not yet threatened. The core issue of her later court proceedings was that while she did receive severance pay from the WEU (after petitioning the organization's competent Appeals Commission), this amount was far below what Belgian labor law would have provided for. Consequently, Siedler brought a lawsuit against her former employer before the Brussels Labor Tribunal, which granted her "supplementary compensation" in 2002. Both the claimant and the defendant filed appeals against this. The former petitioned for higher severance pay, and the latter claimed its immunity from Belgian jurisdiction.<sup>68</sup>

In its 2003 decision *Siedler v WEU*, which already drew much scholarly attention at the time, the Brussels Labor Appeals Court discarded the WEU's jurisdictional

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<sup>65</sup> WEU Website (<http://www.weu.int/>), accessed 18 May 2020

<sup>66</sup> University of Luxembourg online research infrastructure, "Western European Union: Origin and Development" <https://www.cvce.eu/en/recherche/unit-content/-/unit/72d9869d-ff72-493e-a0e3-bedb3e671faa/578edfb4-179a-486e-a75a-a1347ee1167c>, accessed 18 May 2020

<sup>67</sup> The Editors of Encyclopaedia Britannica, Encyclopaedia Britannica, "Western European Union", <https://www.britannica.com/topic/Western-European-Union>, accessed 18 May 2020

<sup>68</sup> J. Wouters, C. Ryngaert, P. Schmitt 'Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.' *The American Journal of International Law*, Vol. 105, No. 3 (July 2011) p. 560

immunity as incompatible with the fundamental right of access to a court guaranteed by Articles 6(1) ECHR and 14(1) of the International Covenant on Civil and Political Rights (ICCPR). In the Court's view, the procedural guarantees of the WEU's internal dispute resolution mechanism did not satisfy the qualitative standards set by *Waite and Kennedy*, in particular where the independence of the dispute settlement body was concerned.<sup>69</sup>

#### 4.2 The Court of Cassation's Decision and its Reception

The WEU appealed again and brought *WEU v Siedler* before the Belgian Court of cassation, which serves as the country's Court of last resort in civil and criminal matters. Based on the *Waite and Kennedy* precedent, the appellant argued that it had been granted immunity from Belgian jurisdiction and that there was a legitimate aim behind this, i.e. the independence of the organization. As regards the proportionality test, the WEU claimed that *Waite and Kennedy* only demands "the *existence* of a reasonably available means – that is characterized by its constituent instrument as independent – to protect one's rights without assessing its *quality* [my emphasis]". The WEU also maintained that, in any event, its Staff Rules were "supranational and directly applicable" and thus formed a part of the Belgian national law, meaning that even if immunity were not to apply, the Belgian Act on Labor Contracts awarding higher severance pay would not apply to *Siedler*.<sup>70</sup>

What distinguishes this case from many others is that in *WEU v Siedler*, the existence and availability of an internal dispute resolution mechanism was undisputed by both parties. After all, Ms Siedler had petitioned the WEU's Appeals Commission after her dismissal and obtained compensation by doing so. The three main legal questions were thus (a) whether the quality of this internal procedure was to be considered at all in the *Waite and Kennedy* test, or whether the mere existence of such a mechanism sufficed, as argued by the appellant. If the judges were to decide that the quality of the procedure needed to be part of the equation, they (b) needed to test

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<sup>69</sup> J. Wouters, C. Ryngaert, P. Schmitt 'Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.' *The American Journal of International Law*, Vol. 105, No. 3 (July 2011) pp. 560-561

<sup>70</sup> P. Schmitt, 'Western European Union v Siedler, Belgian Court of Cassation, 21 December 2009' in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 425

this quality and measure it the light of Art 6(1) ECHR. And lastly, in (c) the Court needed to decide on the applicable law of the case, i.e. the WEU's staff rules or the relevant Belgian labor legislation.<sup>71</sup>

In its *WEU v Siedler* decision, the Belgian Court of Cassation first rather unsurprisingly confirmed that the right of access to a court could be restricted to a certain degree if there was a strong enough interest in favor of the IO. Its immunity was found to be such a legitimate aim as it was “necessary to permit the good functioning” of the WEU “without any unilateral interference by a national government”, which echoes the functional immunity doctrine in almost the same way as *Waite and Kennedy* (*supra*). Also relying on the *Waite and Kennedy* precedent for the proportionality test, the Court concluded for question (a) that it “was not to limit itself to merely taking note of the characterization of an internal appeals commission as independent by the instrument which established that commission”. Thus the Court rejected the appellant’s argument and stressed that it had indeed the competence to perform a qualitative assessment of the procedural rules of the Appeals Commission. In this assessment, the judges found that the guarantees for the independence of the commission members was insufficient:

“The mode of designation – by an *intergovernmental* committee – and the *short term* of the mandate – two years – of the members of the commission were to be taken into account as well. These features of the internal appeals commission involved the risk that the members would be *closely tied to the organization*, thereby *lacking independence* [my emphasis].”<sup>72</sup>

Interestingly, however, the Court of Cassation did not specifically quote certain considerations of the Appeals Court judgment of 2003, which had additionally criticized that the procedure before the WEU’s Appeals Commission did not guarantee “the public character of the debates”.<sup>73</sup>

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<sup>71</sup> P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 425

<sup>72</sup> Belgian Court of Cassation, *Western European Union v Siedler*, Appeal Judgment Cass No S 04 0129 F (21 December 2009) para 53, translated by and in P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International. Organizations* (OUP 2016), p. 426

<sup>73</sup> A. Reinisch and G. Novak ‘International Organizations’ In Nollkaemper et al. (eds) *International Law in Domestic Courts: A Casebook* (OPIL 2018) pp. 190-191

This decision was met with much surprise by legal scholars, and garnered praise as well as criticism. *Wouters, Ryngaert and Schmitt* view it in a positive light when they find that “the Court of Cassation struck the right balance between the autonomy of the organization and the individual’s right to access to a court. The decision is to be commended and possibly followed in other jurisdictions”<sup>74</sup>. *Neumann and Peters* (as already mentioned *supra*) also read *Waite and Kennedy* in a way that allows national courts to set aside IO immunity if the alternative means of dispute resolution provided by the organization is unreasonable, i.e. when it “lacks core quality standards”.<sup>75</sup>

By far not all scholars who spoke out on the case, however, were swayed by the judges’ reasoning and primarily criticized that the *Siedler* case constitutes “jurisdictional overreaching”<sup>76</sup>. *Vidal*, for one (referring to the second instance decision, which was largely confirmed by the Court of Cassation), points out that the judges appear “to have been overzealous in transposing the qualitative criteria of art. 6(1) of the ECHR to the level of international administrative tribunals”<sup>77</sup> and that the procedural guarantees of the WEU’s internal appeals commission was “not substantially inferior to the general practice in the international organizations”. Consequently, not all that many IO dispute resolution mechanisms would live up to a strict scrutiny as in *Siedler* and many of them were now at a risk of national courts setting aside their immunity.<sup>78</sup>

### 4.3 Context and Effects of *Siedler*

Prominent examples that would most likely fail the *Siedler* test was the UN Administrative Tribunal, which has been replaced by a new two instance structure in mid-2009. The panel of the ‘old’ UNAT was “appointed to renewable three-year

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<sup>74</sup> J. Wouters, C. Ryngaert, P. Schmitt ‘Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.’ *The American Journal of International Law*, Vol. 105, No. 3 (July 2011) p. 566

<sup>75</sup> T. Neumann and A. Peters in ‘*Beer and Regan v Germany*, App. No. 28934/95 and *Waite and Kennedy v Germany*, App. No. 26083/94, European Court of Human Rights, 18 February 1999’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 396

<sup>76</sup> C. Ryngaert ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’ *International Organizations Law Review* 7 (2010) p. 136

<sup>77</sup> M. Vidal ILDC 53 (BE 2003), para. A5, cited in P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016), pp. 427-428

<sup>78</sup> M. Vidal ILDC 53 (BE 2003) para A4, cited in P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 428

terms”.<sup>79</sup> In an effort to “ensure independence of the judiciary” the UN now grants non-renewable seven-year terms to the judges of the UNDT (UN Dispute Tribunal) and the ‘new’ UNAT (UN Appeals Tribunal) pursuant to Articles 4(4) UNDT Statute and 3(4) UNAT Statute.<sup>80</sup> Also, the judges’ mode of designation was decidedly reformed. Under the “old regime, the General Assembly appointed the judges of UNAT following nominations made by States Parties”, which means that “the formal independence of the judges was *prima facie* compromised [original italics]”.<sup>81</sup> Now, in accordance with Articles 4(2) UNDT Statute<sup>82</sup> and 3(2) UNAT Statute<sup>83</sup>, the panel members are “appointed by the General Assembly on the recommendation of the Internal Justice Council”.

Considering that the *Siedler* decision was handed down only months after this UN internal dispute resolution reform had taken effect, it might very well be that the Belgian Court of Cassation saw these enhanced independence guarantees as the new standard by which to measure IOs in general. Even though the facts relevant to *Siedler* took place in 2000, it can be argued that finding the independence requirement of the WEU’s Appeals Commission satisfactory would have been a wrong signal to other IOs that were more reluctant to instigate sweeping changes to their internal dispute settlement regimes. With the Belgian Court of Cassation breaking the ice of IO immunity, there certainly was and is an increased risk of other national supreme courts and possibly one day the ECtHR following the reasoning of *Siedler*.

When looking at the practice of IOs and the decisions of other supreme courts in similar cases, however, it becomes clear that aside from garnering much attention

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<sup>79</sup> P. Schmitt, ‘*Western European Union v Siedler*, Belgian Court of Cassation, 21 December 2009’ in C. Ryngaert et al. (eds.) *Judicial Decisions on the Law of International Organizations* (OUP 2016), p. 428

<sup>80</sup> R. Gulati ‘The Internal Dispute Resolution Regime of the United Nations: Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the United Nations Administrative Tribunal?’ in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Volume 15 (Brill 2011) p. 521

<sup>81</sup> R. Gulati ‘The Internal Dispute Resolution Regime of the United Nations: Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the United Nations Administrative Tribunal?’ in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Volume 15 (Brill 2011) p. 520

<sup>82</sup> United Nations General Assembly ‘Statute of the United Nations Dispute Tribunal’ adopted in resolution 63/253 on 24 December 2008, as amended (last amended by resolution 73/276 on 22 December 2018).

<sup>83</sup> United Nations General Assembly ‘Statute of the United Nations Appeals Tribunal’ adopted in resolution 63/253 on 24 December 2008, as amended (last amended by resolution 71/266 adopted on 23 December 2016)

for its uniqueness, the *Siedler* decision has had rather limited effect in the ten years since the day it has been handed down. For one, the ILOAT (ILO Administrative Tribunal), which is another very prominent dispute resolution body used not only by the ILO (International Labor Organization) itself, but also many other IOs, would to this day most likely not pass the *Siedler* test. Pursuant to Article III(2) of the ILOAT Statute, the “judges shall be appointed for a period of three years by the International Labour Conference”.<sup>84</sup> These terms of office are renewable without “any limitation”.<sup>85</sup> Pursuant to Article 3(1) ILO Constitution, this Conference consists of “representatives of each of the Members”, which are the ILO member states according to Article 1(2).<sup>86</sup> The only significant difference to the WEU’s Appeals Commission as regards appointment procedure and terms of office (i.e. the points of specific criticism in the *Siedler* decision) is that the judges of the ILOAT serve slightly longer terms of three years as compared to the two years granted by the WEU.

There is one notable IO immunity case which was decided after *Siedler* and where immunity was denied, namely *OSS Nokalva v ESA* by the US Court of Appeals for the Third Circuit in 2010. Given that it was a decision by an court in the US, the legal basis and considerations are very different from that of *Siedler*, which draws on the human rights approach of the ECtHR in *Waite and Kennedy*. Also, *Nokalva* was not so much about the clash between IO immunity and the right of access to justice, which only actually arises when it has been established that immunity has been granted to the IO. The legal question was mainly whether the scope of immunity granted by the International Organizations Immunities Act of 1945, which uses state immunity as a reference point for IO immunity, was susceptible to change (i.e. narrowing) with state immunity or whether it should remain static (for the restriction of state immunity as a general trend since the mid-20<sup>th</sup> century, see *supra*. In US Law, restricted state immunity was enshrined in the Foreign State Immunities Act of 1976). In other words, the issue at hand was not the effect of a grant of immunity but whether there actually was a legal basis for IO immunity in this case. Another question was

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<sup>84</sup> International Labor Conference ‘Statute of the Administrative Tribunal of the International Labour Organization’ adopted on 9 October 1946, as amended (last amended on 17 June 2019)

<sup>85</sup> D. Petrović (ed) *90 years of contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law* (ILO 2017) p. 21

<sup>86</sup> International Labor Organization ‘Constitution of the International Labor Organization’ adopted in 1919, as amended (last amended in 1972)

whether ESA had validly waived its immunity. While *Nokalva* is almost too far removed from *Siedler* for a true comparison, it is noteworthy that in the US (in much the same way as in Europe before *Waite and Kennedy*) absolute immunity of IOs had been largely the consensus among the courts. *Nokalva* marks the first major departure from absolute immunity in the US.<sup>87</sup> According to *Boon*, this can be seen as a manifestation of a changing attitude towards IOs: “they are no longer fledgling enterprises in need of protection but powerful international actors in their own right”. And with power, so the saying goes, comes responsibility. Still, until now “the *Nokalva* case has not driven a significant shift in the law: in US jurisprudence, the Third Circuit remains an outlier”.<sup>88</sup>

The same is true of *Siedler* in a European context. The IO immunity case which has received the most attention in the Council of Europe member states in the past ten years is certainly the one of the *Mothers of Srebrenica*, who have petitioned several courts to no avail. The Dutch Supreme Court upheld the UN’s absolute immunity by relying on the ICJ’s *Jurisdictional Immunities of the State*, which rejects the ‘reasonable alternative means test’ developed by the ECtHR.<sup>89 90</sup> This Dutch judgment was later confirmed by the ECtHR in a decision that to some degree relativizes its own *Waite and Kennedy* precedent. Even though it was undisputed that reasonable alternative means of redress were not available to the claimants, the ECtHR dismissed the petition. Interestingly, “the nature of the underlying proceedings was also dismissed as a factor [...] on whether or not to grant immunity.” This case has thus cemented the UN’s position as a “*sui generis*” IO and “put a hold on” an “equal protection-line of argumentation and the *Waite and Kennedy* criteria” in cases concerning the actions covered by Chapter VII of the UNC.<sup>91</sup>

Even though the *Mothers of Srebrenica* case appears to be a significant step back from *Siedler*, the two cases can hardly be compared as their facts differ immensely. First it needs to be considered that, by the time of the final *Siedler* judgment

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<sup>87</sup> K. Boon ‘OSS *Nokalva, Inc. v European Space Agency*, United States Third Circuit decision, 617 F.3d 756 (3d Cir. 2010)’ in C. Ryngaert et al. (eds) *Judicial Decisions on the Law of International Organizations* (OUP 2016) pp. 432-438

<sup>88</sup> *Ibid.* p. 438

<sup>89</sup> Netherlands Supreme Court, *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, Final appeal judgment, LJN: BW1999, ILDC 1760 (NL 2012) 13th April 2012

<sup>90</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) [2012] ICJ Rep 99.

<sup>91</sup> A. Momirov, ‘*Mothers of Srebrenica v The Netherlands and the UN*, LJN: BW1999, Dutch Supreme Court, 13 April 2012 and *Stichting Mothers of Srebrenica and Others against The Netherlands*, App. No. 65542/12, European Court of Human Rights, 11 June 2013’ in C. Ryngaert et al. (eds) *Judicial Decisions on the Law of International Organizations* (OUP 2016) p. 449



in late 2009, the WEU was already a 'lame duck' in the sense that there was an ongoing discussion about whether it was still useful to its member states (*supra*). It was to be expected, as it would later prove to be the case, that the WEU would be dissolved soon. There was certainly not much damage to be done by lifting the immunity of an IO that would most likely not exist for much longer. The UN, by contrast, is the single most important, powerful and universal IO in the world and plays a vital role in the global world order and in the maintenance of global peace and security since its establishment in the wake of World War II. Lifting the immunity of the UN would have had disproportionately more far-reaching implications.

Secondly, the nature of the disputes is vastly different as *Siedler* concerned employment and the *Mothers of Srebrenica* stemmed from genocide. It can be argued that the immense gravity of the latter case gives even more weight to the claimants' right of access to justice. While this reasoning seems intuitive, one should not forget that since the UN does not have any military of its own, the success of its peacekeeping operations depends on the willingness of its member states to provide forces. If peacekeeping operations involved significant financial liability additionally to the already highly risky nature of combat missions and the difficulty of national politicians to justify these to their voters, fewer and fewer states would be willing to place their forces at the UN's disposal. Thus, the collective security system of the UN would be in danger. On the other hand, it appears unsatisfactory to leave the relatives of those murdered in a genocide without any compensation for the alleged wrongdoing of the UN and The Netherlands. In any event, the potential scope of financial liability in *Siedler* certainly was almost negligible compared to the *Mothers of Srebrenica*. It should also not be forgotten that Ms Siedler did not receive any additional compensation as the Belgian Court of Cassation ruled that the WEU's staff rules were applicable to her case.

## 5. Conclusion

Even if the *Siedler* decision has not set a trend among other national supreme courts or the ECtHR thus far this does not mean that courts will not make use of this precedent in the future – in particular given that IO immunity cases are very rare. Now that the immunity of an IO has been set aside once by applying the *Waite and Kennedy* test,

another court following suit would be less of a novelty than when the Belgian Court of Cassation did so in 2009. At least until the ECtHR clarifies *Waite and Kennedy* more than it did in the original judgment and in *Mothers of Srebrenica*, a more uniform line of national jurisprudence cannot be expected and *Siedler* will be within the spectrum of decisions to reasonably build upon. Also, the fact that the ECtHR was reluctant to apply the *Waite and Kennedy* to the UN, which is a very exceptional IO, does not mean that other IOs are safe from its precedent and the different national decisions based on it.

It is impossible to predict which way the judiciaries of the world will be swayed in the future. Due to the scarcity of IO immunity decisions, any new trend can take a long time to emerge and might spread at different paces in the various nations and regions of the globe. What is certain, however, is that with *Waite and Kennedy* as well as *Siedler* in the Council of Europe area and *Nokalva* in the US, the principle of absolute immunity is not as absolute as it once was. The judges in *Siedler* in particular have set a precedent that even if the legal basis and the legitimate aim of IO immunity are undisputed, it may still be set aside if basic fair trial guarantees are not met. As *Boon* points out, it might very well be that IOs are “following the in states’ footsteps”. In the early 19<sup>th</sup> century, “it was deemed ‘incompatible with [the] dignity’ of a state to subject it to a domestic legal process”.<sup>92</sup> Absolute immunity of states has now long been discarded, and that of IOs might over time suffer the same fate. Even if the natures of states and IOs are fundamentally different, courts might be increasingly willing to lift IOs’ immunities and decide cases against them on the merits. The likelihood of such a trend is certainly higher if IOs do not provide effective and reasonable alternative means of redress that also guarantee a fair procedure. IOs are thus well-advised to at least prepare for such a possibility.

(word count: 60,370 – including footnotes, excluding references)

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<sup>92</sup>K. Boon ‘OSS Nokalva, Inc. v European Space Agency, United States Third Circuit decision, 617 F.3d 756 (3d Cir. 2010)’ in C. Ryngaert et al. (eds) *Judicial Decisions on the Law of International Organizations* (OUP 2016) citing *The Schooner Exchange v McFaddon*, 7 Cranch 116 (1812)

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