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Effective Domestic Remedy

Vincent Couronne, Raphaël Maurel

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A. Introduction

1 Effective domestic remedy is any procedural rule that aims to establish the right for individuals that courts enforce provisions contained in international or supranational legislations. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly (→ *United Nations, General Assembly*) in 2005 provide that States shall make available 'adequate, effective, prompt and appropriate remedies, including reparation' (→ *Remedies*; → *Reparations*) for victims of such violations (Art 2 (c)). This obligation stems from many conventions in general international law. However, in some aspects of international law such as investment law, the obligation of effective domestic remedies is not clearly required, and is rather implied by the obligation to provide → *fair and equitable treatment* to the investor, or by the prohibition of → *denial of justice*. The need for effective remedies is probably less ambiguous in the systems of international conventions of human rights such as the → *International Covenant on Civil and Political Rights (1966)* ('ICCPR') and other conventions on human rights. For their application, Committees play a role that deserves to be scrutinized. Regional human rights organizations also protect effective domestic remedies, such as the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR'), the → *American Convention on Human Rights (1969)* ('ACHR'), and the → *African Charter on Human and Peoples' Rights (1981)* ('ACHPR'). Aside from those conventions, European Union ('EU') law provides a wide range of examples where domestic courts are required to organize effective remedies. Besides, not only does the EU have a much more comprehensive field of action than that of the three conventions, it possesses institutions which can adopt secondary legislation providing for domestic remedy procedures.

2 Effective domestic remedies are a necessary tool in order to give full effect to the legal provisions enshrined in conventions and treaties. They are also the condition for the application of the subsidiarity principle, inherent to systems relying on domestic courts for the enforcement of the conventions and treaties. This crucial role explains the phenomenon of 'proceduralization' of substantive rights.

1. Historical Background

3 The aftermath of the Second World War was the pivotal period where concerns of the effectiveness of rights enshrined in international legal instruments were addressed. The inclusion of commitments made by States Parties to defend human rights in conventions and declarations would be in vain if domestic courts are not involved in enforcing said commitments: the courts are meant to be independent, impartial, and to uphold the law as a deterrent measure against the State.

4 Article 8 → *Universal Declaration of Human Rights (1948)*, adopted by the United Nations General Assembly on 10 December 1948, expresses this concern for effectiveness. It provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law' and was inspired by the → *American Declaration of the Rights and Duties of Man (1948)* adopted in Bogotá on 2 May 1948, whose Article XVIII on domestic remedy is a copy of the much-renowned *amparo* (Burgorgue-Larsen, 2011, 677). The writ of *amparo* is a remedy, mostly implemented in Latin American countries. It enables individuals to bring the violation of fundamental rights before a constitutional or a supreme court. Later, Article 25

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(2) ACHR continued the American tradition by providing for a right to judicial protection by States' courts.

5 In Europe, Article 13 ECHR, which provides for an effective domestic remedy, was integrated into the 1950 Convention in reference to the 1948 United Nations' Declaration. The *travaux préparatoires* of the ECHR show that Article 13 aims at giving the means by which individuals can obtain relief at the national level for violations of their ECHR rights before having recourse to the → *European Court of Human Rights (ECtHR)* (*Kudła v Poland*, 2000, 152). This protection is somewhat broader as not only does it include judicial remedies, but also non-judicial bodies as Article 13 ECHR provides that the right to an effective remedy shall be granted before 'a national authority'. This term is broader than judicial. The same type of protection is also enshrined in the ACHPR of 1981. Article 7 (1) (a) provides that every individual shall have the 'right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

6 When the → *European Coal and Steel Community (ECSC)* was created in 1951, no such provision could be found in the treaty. The same can be said for the Treaty Establishing the European Economic Community ('EEC') in 1957. The lack of such a provision can be explained by the fact that 1951 saw the creation of a new form of procedure: the reference by national courts for a preliminary ruling of the Court of Justice of the European Coal and Steel Community, then of the Court of Justice of the European Communities, known since 2009 as the Court of Justice of the European Union. Indeed, such a reference put in place an institutionalized dialogue between national courts and the Court of Justice on the validity of Acts of the ECSC (Art 41 ECSC) or EEC institutions (Art 177 EEC). As such, individuals in litigation before national courts could ask these courts to request a referral for a preliminary ruling to the European Court. The Treaty Establishing the EEC expanded the proceeding, allowing requests for the interpretation of EEC law. Finally, the → *Lisbon Treaty* entered into force in 2009 and aligned with human rights instruments by obliging Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Art 19 (1) Treaty on European Union ('TEU').

2. The Expression of a Judicial Subsidiarity

7 → *Subsidiarity* is a constitutional principle of EU law, applying to the distribution of competences between the European Court of Justice ('ECJ'; → *European Union, Court of Justice and General Court*) and national courts. It is also a 'structural principle of international human rights law' (Carozza, 2003, 78).

(a) Subsidiarity in the Context of the Distribution of EU Competences

8 The subsidiarity principle as enshrined in Article 5 TEU provides that the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level. This principle regulates the exercise of competences. This subsidiarity 'is deemed judicial when judicial guarantees, hence procedural ones, are involved' (Verdussen, 2000, 261). Following this logic, effective domestic remedies are considered to enforce judicial subsidiarity (Accetto and Zleptnig, 2005, 395). Judicial subsidiarity gives domestic courts the task to make sure that EU law is correctly enforced in the national legal orders.

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(b) Subsidiarity in the Context of the Enforcement of Human Rights

9 Subsidiarity is not a phenomenon unique to EU law; it is indeed in 'the European Convention of Human Rights that the notion's full range of potential becomes apparent' (Verdussen, 2000, 261). It is widely accepted that the State acts as the principal protector of the ECHR (Xenos, 2012, 1). The ECtHR has long been very clear as to the role subsidiarity plays in its case law practices: the Court 'cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention' (*Certain Aspects of the Laws on the Use of Languages in Education in Belgium, ECHR v Belgium*, 1968, 10). However, the objective of subsidiarity is different for the ECtHR than for the ECJ. In the ECtHR's view, subsidiarity is a crucial means to reduce its workload by preventing cases being unnecessarily brought before it and dealt with instead by domestic courts, thus making the later examination by the Court easier.

10 The ECtHR strengthened subsidiarity by using 'pilot judgments' (→ *Pilot Judgment*). When a judgment which points to structural deficiencies in national law has been delivered and a large number of applications to the Court concerning the same problem are pending or likely to be lodged, 'the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system' (Council of Europe Recommendation to Member States on the improvement of domestic remedies (2004), 13).

11 The 1969 ACHR also takes into account the treatment of cases by domestic courts: Article 2 provides that 'where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State Parties undertake to adopt, in accordance with constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights of freedoms'. The consequence of this provision is that it involves domestic courts in the judicial enforcement of the Convention (*Heliodoro Portugal v Panama*, 2008, 180).

B. Effective Domestic Remedy in International Law

12 Effective domestic remedies are found in several legal systems that fall under international law. Many treaties include in their provisions the obligation to enforce adopted rules at the domestic level; some expressly provide for the existence of domestic remedies.

1. General International Law

13 Apart from the special branches of international law, many treaties provide for the existence of domestic remedies. For example, Article 11 1996 World Intellectual Property Organization Copyright Treaty ('WCT') (→ *World Intellectual Property Organization (WIPO)*) provides that 'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention'. Sometimes, effective remedies are not granted by a specific provision but are mentioned in the → *Preamble* of an agreement. This is the case of the Preamble to the 2010 Cooperation Agreement between the European Union and the United States, in which the Parties stress 'the common values governing privacy and the protection of personal data … including the importance which both Parties assign to due process and the right to seek effective remedies for improper government action'. In the field of international environmental protection (→ *Environment, International Protection*), States often have the obligation to create remedies. For example, Article 17 (3) (1) (c) Central America–

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Dominican Republic–United States Free Trade Agreement ('DR-CAFTA') provides that '[e]ach Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws'. The requirement of a remedy's effectiveness is not always mentioned; for example, Article 235 Montego Bay Convention provides: 'States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction'.

14 The existence of a customary obligation may arise to provide effective remedy in the case of a serious violation of international humanitarian law (→ *Humanitarian Law, International*). Indeed, effective remedy appears in international law as one of the means to comply with an obligation of reparation. However, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law seem, in some aspects, to consider reparation as a branch of effective remedies (see pt II (d); though the distinction is clearly made in pts VII, VIII, and IX). In 2012, the → *International Court of Justice (ICJ)* had the opportunity to discuss the obligation to provide for an effective remedy in relation to immunities (*Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, 2012). In this case, Italy noted that Germany did not offer an effective remedy to the victims of serious violations of international humanitarian law, despite its obligation of reparation. According to Italy, this omission made it impossible for Germany to invoke jurisdictional immunity before the courts of the State of the victims' nationality (para 45). The Court did not accept Italy's argument: 'The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition' (para 101). As such, in international law, even though there is an obligation of reparation, the absence of effective remedies does not constitute an exception to immunities before the national courts of another State. In the *Germany v Italy* case, the Court is in line with a well-known 'traditional, 'no conflict' approach that tends to deny the inherent friction. This approach does not see any real conflict between immunity and access to court simply because immunity is regarded as an international law requirement which deprives states of their jurisdiction over certain types of defendants' (Reinisch and Weber, 2004, 82). This solution, which is based on State's practice, has been criticized. Notably, Judge Yusuf wrote that 'the centrality to the dispute between the Parties of the link between the lack of reparations and the denial of immunity by the Italian courts in order to provide an alternative means of redress to the victims, has been substantially overlooked, if not completely sidelined, in the Judgment' (dissenting opinion of Judge Yusuf, 9). Indeed, these findings 'reflect the unsatisfactory international legal framework when it comes to ensuring individual reparations for serious violations of human rights and humanitarian law' (Zyberi, 2014, 410).

15 There is therefore no general obligation to provide effective domestic remedies to protect the rights created by the conventions or customary law. This is not the case for certain branches of international law, where this obligation is commonly present, if not systematic.

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2. International Investment Law

16 Before any recourse to arbitration, there can be an obligation to exhaust local remedies. Aside from such a situation, the obligation to provide effective domestic remedies can be found in international investment law. Unlike in human rights protection systems, the obligation to provide effective domestic remedies is not a rule in itself, but rather a consequence of the obligation to provide fair and equitable treatment to the investor (national treatment), for example by prohibiting the denial of justice. Some States, such as the Republic of Korea or Slovakia, have included in their model investment agreements a provision according to which '[t]he local remedies … shall be available for investors of the other Contracting Party on the basis of treatment no less favourable'. This customary principle (Paulsson, 2005, 1) is not disputed, even though its content varies.

17 Nevertheless, the effectiveness of the remedy may be a problematic criterion. Arbitral tribunals seem to consider that the denial of justice is limited to its procedural aspect (De Nanteuil, 2014, 324). Most of the time, arbitral tribunals consider that an unjustified or unfounded national judgment does not constitute a denial of justice, but, rather, a prohibited discrimination or violation of another right. In a human rights system, such an unjustified or unfounded national judgment would be treated under effective remedy criteria. In investment law, indeterminacy of the requirement of effective domestic remedies can be found in a recent decision of the → *International Centre for Settlement of Investment Disputes (ICSID)* (*Infinito Gold Ltd v Republic of Costa Rica,* 2017, para 243). An ICSID Tribunal determined *prima facie* its jurisdiction and logically postponed the decision on whether the violation would constitute an unlawful expropriation, a breach of the → *customary international law* minimum standard of treatment (→ *Minimum Standards*), or a denial of justice, to the merits stage. The question was not obvious, even if the question did not concern the jurisdiction. According to another Tribunal, 'such a claim "*requires a manifest and gross failure to comply with the elementary principles of justice*" that "*offend[s] a sense of judicial propriety.*" Tribunals such as *Loewen v. U.S.* and *Thunderbird v. Mexico* confirm that [the threshold required for this claim] is a very high threshold, in absolute and in relative terms' (emphasis in original) (*Ascom Group SA, Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, 2013, para 1228).

18 In the *Levy de Levi* case (*Levy de Levi v Republic of Peru*, 2014), the Tribunal seems to admit several possible situations of denial of justice, specifically the unfairness and unpredictability of the decisions issued by the courts (para 417); 'the situation in which an error or a failure of a judicial system can generate a denial of justice, because it is not capable of being rectified by existing remedies, that is, an error by a court that the judicial system does not allow a higher court to correct' (para 424). In this case, it is worth noting that the claimant based her argumentation about denial of justice on Article 5 1996 Agreement between the Republic of Peru and the Republic of France on the Reciprocal Promotion and Protection of Investments. This Article only concerns the full protection and security of investments, but the Tribunal 'fully agrees with the description made by the Claimant that the standard of full protection and security has gone from referring to mere physical security and has evolved to include, more generally, the rights of investors' (para 407).

19 To conclude, effective domestic remedies are not guaranteed as such in international investment law. The construction of the notion of denial of justice by the case law is made harder because of the absence of the rule of precedent in international arbitration. As a consequence, the denial of justice appears to be rarely recognized by the arbitral tribunals.

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3. Human Rights

20 Many human rights instruments reference effective domestic remedies, as do many instruments of → *soft law*, such as Article 8 Universal Declaration of Human Rights. The ICCPR provides that States must ‘ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’ (Article 2 (3)). When the remedies are granted, there is an additional obligation to enforce them.

21 Despite this obligation, the ICCPR does not clearly define what is meant by ‘effective remedies’. According to academics, this Article could be read as providing that ‘an aggrieved individual must at least have the opportunity to present the reasons which make him believe that the executive act complained of violates his human right. Further, there needs to be an official investigation, an identification of the persons responsible, compensation for victims and the prevention of future violations’ (Seibert-Fohr, 2002, 16–17). But this interpretation does not exhaust questions raised within the framework of human rights, which explains the controversy over the meaning of ‘effective remedies’. For example, some question ‘whether the phrase is limited to formal prosecutions or if other mechanisms of justice, such as truth commissions or non-traditional trials’ are included (Fiddler, 2015, 902). The → *Human Rights Committee* had to interpret this Article in its case law. It ruled that ‘Article 2 Covenant may be invoked by individuals only in relation to other provisions of the Covenant’ (*Picq v France*, 17 August 2009, Communication No 1632/2007, 6.4). However, when Article 2 can be invoked, the Committee's case law is particularly intrusive, to the extent that it is doubtful whether such an interpretation of effective domestic remedies could be generalized. The *Mellet v Ireland* case is a good example. In this case, the author of the communication was pregnant in Ireland, where she was informed that her foetus had Edwards’ syndrome (trisomy 18) and that it would die in utero or shortly after birth. Given that abortion was not an option by virtue of local law in such a case, the author decided to travel abroad to terminate her pregnancy. After delivering a stillborn baby, she returned to Ireland weak and still bleeding. She was unable to obtain financial assistance and received neither aftercare nor bereavement counselling. Among some violations of the ICCPR, she invoked, under Article 2, the fact that in 2013, she ‘still suffers from complicated grief and unresolved trauma and says she would have been able to accept her loss better if she had not had to endure the pain and shame of travelling abroad’ (*Mellet v Ireland*, 2016, 2.5). Indeed, the Committee considers that the obligation to provide an effective remedy requires the State ‘to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation and to make available to her any psychological treatment she needs. The State party is also under an obligation to take steps to prevent similar violations in the future. To that end, the State party should amend its law on the voluntary termination of pregnancy, including, if necessary, its Constitution, to ensure compliance with the Covenant, ensuring effective, timely, and accessible procedures for pregnancy termination in Ireland’ (para 9; see also *C v Australia*, 2017, 10).

22 Article 83 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (‘ICMW’; see → *Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)*) is identical to Article 2 ICCPR. According to Article 77 ICMW, the CMW is empowered to accept and consider individual complaints, but this process is not yet in force since it has not been accepted by a minimum of contracting States. However, the CMW publishes concluding observations on countries that are required to submit regular reports under Article 73 ICMW. Article 83 is always considered in relation with Article 7 on non-discrimination, and the CMW’s conclusions sometimes note risks of breaches of Article 83, though not with the same level of requirement as the ICCPR (for example: *Concluding observations of the CMW*, 2006, 25).

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Different ways of formulating the same notion exist, such as in the 1969 International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'; see → *Committee on the Elimination of Racial Discrimination (CERD)*), of which Article 6 provides that 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or → *satisfaction* for any damage suffered as a result of such discrimination'. The CERD ruled that, in case of alleged racial discrimination, 'the terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies' (*Dogan v Netherlands*, 1988, 9.4), but require States to 'carry out an effective investigation to determine whether or not an act of racial discrimination had taken place' (*Adan v Denmark*, 2010, 7.7). As such, 'even if article 6 might be interpreted to require the possibility of judicial review of a decision not to bring a criminal prosecution in a particular case alleging racial discrimination, the Committee refers to the State party's statement that it is open, under national law, judicially to challenge a prosecutor's decision' (*Quereshi v Denmark*, 2003, 7.5). Nevertheless, the CERD considers that Article 6 ICERD stipulates that effective satisfaction and reparation must be granted for any damage suffered as a result of discrimination; in consequence, 'the purely symbolic fine imposed by the … court does not provide effective satisfaction or reparation in accordance with that provision' (*BJ v Denmark*, 2000, 3.1).

23 Yet, other multilateral conventions do not provide for any obligation to guarantee effective domestic remedies. This is the case for the 1966 → *International Covenant on Economic, Social and Cultural Rights (1966)*, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (see → *Committee on the Elimination of Discrimination against Women (CEDAW)*) (even though Article 2 (c) provides that States shall 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (→ *United Nations Committee against Torture (CAT)*), the 1989 Convention on the Rights of the Child (→ *Committee on the Rights of the Child (CRC)*) (although it is possible to interpret Article 24 (3) as an invitation to create such remedies: 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children') or the 2006 Convention on the Rights of Persons with Disabilities (→ *Committee on the Rights of Persons with Disabilities (CRPD)*). Lack of such obligations does not mean that the Committees cannot examine an alleged violation of the obligation to provide effective remedies, especially when certain Articles can be interpreted as protecting the right to effective remedies. For example, in the case *DS v Slovakia*, the CEDAW relies on Article 2, read in conjunction with Articles 1 and 11 Convention on the Elimination of All Forms of Discrimination against Women, and notes 'that the courts' consecutive failures to effectively implement the Anti-Discrimination legislation, by reversing the burden of proof in favour of the author upon presentation of a prima facie case of discriminatory treatment by the employer and his préposé/s, constitute a violation of her right to an effective remedy and has the effect of denying her the possibility of appropriate satisfaction and reparation for damage suffered' (*DS v Slovakia*, 2016, 7.5). Thus, the CEDAW 'recommends that the State party provides the author with an effective remedy' (para 8). However, the CRC has never had to rule on a question relating to effective remedies, except as an admissibility criterion. To conclude, the guarantee of effective domestic remedies varies in international human rights law. This is due to the purpose of the Conventions; some of them do not offer remedies to individuals, but aim at ensuring that the Parties tackle impunity by establishing their jurisdiction in case of serious

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violations of rights enshrined in the Conventions. Therefore, the obligation of reparation is not systematically provided; when provided, it is linked to the effectiveness of the remedies. There is a very close link, although sometimes artificial, between effective remedies and reparation in this branch of international law.

C. Effective Domestic Remedy in Regional Conventions on Human Rights

24 Effective domestic remedies are also found in regional conventions for the protection of human rights. Unlike in the EU legal order, there is no secondary legislation imposing specific domestic remedies in such systems. Hence, human rights courts can only rely on their charter—the Convention.

1. The European Convention on Human Rights

25 Effective domestic remedies within the European Convention mechanism stem from the exhaustion of domestic remedies (→ *Local Remedies, Exhaustion of*) as required by Article 35 (1), and from the right to an effective remedy before a national authority provided by Article 13. State Parties also have to abide by the decisions of the ECtHR by executing its judgments (Art 46 ECHR). In this respect, national authorities have to offer sufficient redress to put an end to violations of the ECHR. In addition, a new procedure, inspired by the preliminary ruling procedure before the ECJ, appeared in 2018. Protocol 16 provides for the possibility for the highest courts and tribunals of a State Party to request the ECtHR to 'give advisory opinions on questions relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'. The so-called 'dialogue Protocol' was adopted in 2013 and entered into force 1^{s} August 2018 and should improve the enforcement of the Convention by domestic courts.

26 Article 13 ECHR provides that: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. In the ECtHR's view, the provision aims to encourage individuals to seek remedy for violations of the Convention before domestic courts, especially when pertaining to the Article 6 requirement of reasonable time (*Kudła v Poland*, 2000, 157). Thus, the requirement for an effective remedy before a national authority is ancillary to the protection of the Convention's provisions. The ancillary character of Article 13 means that its applicability requires both that there be a violation of rights and freedoms of the Convention and that the claim is arguable.

27 First, in order to safeguard the meaning of Article 13 ECHR, the ECtHR considers that a *violation* committed by persons acting in an official capacity has to be interpreted so that the remedy shall be accessible for anyone claiming that their rights and freedoms have been violated. As a consequence, the ECtHR does not ultimately need to find that a substantive right has been violated in order to require an effective remedy (*Lindstrand Partners Advokatbyrå v Sweden*, 2016).

28 Second, it stems from Article 13 ECHR, that an arguable claim to be a victim of a breach of the Convention rights requires that a national authority must provide the individual with a remedy that is capable of determining his claim and, if appropriate, of securing redress (*Kudła v Poland*, 2000, 157).

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29 Third, the ECHR requires the remedy to be effective, and such effectiveness is 'construed as ensuring either the prevention of the alleged violation, or the provision of adequate redress' (*Barkhuysen and van Emmerik*, 2015, 1042). Thus, any excessive formalism can hinder the effectiveness of the remedy (*GR v Netherlands*, 2012, 55); effectiveness also requires → *compensation* for the victim of an excessively long procedure, or the expedition of a decision by the courts (*Kudła v Poland*, 2012, 158 and 159); suspension of deportation proceedings of asylum seekers is also required (*Čonka v Belgium*, 2002, 79). Investigative powers are also under the scrutiny of Article 13 ECHR, which requires practical independence of the authority in charge of investigations into alleged ill-treatment or killings (*Oğur v Turkey*, 1999, 91), and a 'thorough and effective investigation' in case of killings or ill-treatment (*Askoy v Turkey*, 1996, 98).

30 In *Kudła v Poland*, the ECtHR called upon States' co-operation in order to create effective remedies which would help in reducing the number of individual petitions (*Kudła v Poland*, 2012, 148). In this case, Poland breached Article 6, para 1 ECHR in that the right to a trial within a reasonable time had not been respected. But the Court went further and also decided to give direct expression to the States' obligation to protect human rights within their own legal systems. The Court then found that Poland had breached Article 13 ECHR by not providing for the applicant a remedy in order to complain against an unreasonable length of proceedings. Some States played the game by creating such remedies (Burgorgue-Larsen, 2015, 138). In Italy, the 2001 Pinto Act created a new recourse before domestic authorities for individuals alleging a violation of reasonable time requirements. The ECtHR later considered that by not using this new procedure, an individual would not meet the non-exhaustion of domestic remedies criteria (*Brusco v Italy*, 2001)

31 As an ancillary right, a violation of Article 13 ECHR can be alleged together with a violation of substantive provisions of the Convention (Articles 2–12 and 14) as well as provisions of the Protocols (Barkhuysen and van Emmerik, 2015, 1047). As such, Article 13 is used as a means to 'proceduralize' the substantive rights of the ECHR, thus reinforced by such a process (Dubout, 2007, 398). The adjunction of procedural obligations alongside substantive ones became obvious to the ECtHR (*McCann v United Kingdom*, 1995, 161), and can be seen as the expression of the 'positive obligations' the ECtHR requires from the State in order to make the provisions of the ECHR fully effective (*Airey v Ireland*, 1979, 24).

32 In similar vein to Articles 2 or 3 ECHR, the ECtHR considers that the requirements of Article 13 are broader than the obligation of investigation (Kaya v Turkey, 1998, 107), even if the distinction between the obligations under Article 2 or 3 and Article 13 remain blurry (Barkhuysen, and van Emmerik, 2015, 1051). The right to a fair trial provided by Article 6 (1) was extended by the ECtHR to a right to access a court, thus impinging on Article 13 ECHR (*Golder v United Kingdom*, 1975, 34). The same process by which a substantive right absorbs Article 13, can be seen in relation with other provisions of the ECHR.

2. The American Convention on Human Rights

33 The ACHR also bears a body of rules according to which domestic courts must enforce rights provided by the ACHR. Article 2 provides that States Parties—thus including domestic courts—shall give effect to the rights and freedoms enshrined in the ACHR (see sec A.2(b) above).

34 However, Article 25 (1) ACHR is the core system behind the effectiveness of domestic remedies. It provides that 'everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.' Such a judicial protection is reinforced by

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Article 25 (2): ‘The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.’

35 In addition, Article 8 (1) ACHR on the right to a hearing, has been used in combination with Article 25 (1), leading to a ‘virtually complete blending’ of the two provisions, even though recent cases show a clearer line between the two provisions (Burgorgue-Larsen, 2011, 678).

36 This *amparo* procedure is different to *habeascorpus* as per Article 7 (6), as the latter is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions (*Judicial Guarantees in States of Emergency (Arts 27 (2), 25 and 8 ACHR)*, 1987, 33).

37 Article 25 helped the → *Inter-American Court of Human Rights (IACtHR)* to make this provision autonomous. Autonomy means that in order to claim for a breach of Article 25 (1), there need not be a violation of substantive rights enshrined in the ACHR. This is a major difference from Article 13 ECHR (Burgorgue-Larsen, 2011, 681): the right to an effective domestic remedy is open not only for individuals claiming for a violation of their rights provided for in the Convention, but also those recognized ‘by the constitution or laws of the state concerned’ (Art 25 (1)).

38 Under Article 25 (1) ACHR, domestic remedies shall be ‘effective’. In *Velàsquez Rodrìguez v Honduras*, the IACtHR stated that ‘a remedy must also be effective—that is, capable of producing the result for which it was designed’ (1988, at 66). In this landmark decision, the IACtHR clarifies what an ineffective remedy would be: if the remedy ‘is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied’ (1988, at 66).

39 Beyond the three requirements of Article 25 (2) ACHR in order for the remedy to be effective, the IACtHR added more criteria. First, a formal procedure enshrined in the constitution or in a statute is not enough if the remedy is virtually impossible (*Judicial Guarantees in States of Emergency (Arts 27(2), 25, and 8 ACHR)*, 1987, 24). Second, that the remedy be effective means the real possibility of filing an appeal (*Constitutional Tribunal v Perú*, 2001, 90). Third, the outcome of the remedy has to be enforced by the competent authority (*López Álvarez v Honduras*, 2006, 139).

40 Other procedural requirements can make the remedy required by the provisions of the ACHR ineffective. The Court tries to identify each of these requirements in order to report them. For instance, the remedy is not effective ‘if it presents a danger to those who invoke it; or if it is not impartially applied’ (*Velàsquez Rodrìguez v Honduras,* 1988, 66). The Court included other situations where the remedy would not meet the effectiveness criteria, for instance when there is an unjustified delay in the decision (*Judicial Guarantees in States of Emergency (Arts 27 (2), 25, and 8 ACHR)*, 1987, 24).

41 In order to assess the effectiveness of the remedy, the Court ‘must examine all the domestic judicial proceedings in order to obtain an integrated vision of these acts’ (‘*Niños de la Calle*’ *v Guatemala*, 1999, 224) In this case, the Court found deficiencies in investigations, for instance incomplete autopsies, missing fingerprints, and no investigation about the vehicle used by the abductors of the victims (para 231).

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42 Article 25 (1) ACHR also provides that domestic remedies have to be 'prompt'. It is unclear whether Article 8 (1) on the right to a fair trial within a reasonable time takes precedence over Article 25 (1) or whether the promptness requirement of the latter has autonomous effect. In some cases the Court stated that there was a violation of the promptness requirement in relation to Article 25 (1) only (eg *Apitz Barbera y otros v Venezuela*, 2008, 156). In other cases, a violation of such a requirement has been found in relation to Article 8 (1) (eg *Valle Jaramillo v Colombia*, 2008, 155).

3. The African Charter on Human and Peoples' Rights

43 The principle of subsidiarity also guides the interpretation of effective domestic remedies in the ACHPR system. Indeed, according to the → *African Commission on Human and Peoples' Rights (ACommHPR)* ('African Commission') the existence of the substantial rule that the State must create effective domestic remedies relies on the procedural rule of exhaustion of domestic remedies: 'Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists' (*Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 2001, 39). The African Commission adopts a specific interpretation of this procedural rule: 'if the right is not well provided for, there cannot be effective remedies, or any remedies at all' (*Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, para 37). When it comes to substantial obligations, the African Commission considers that the State:

> is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms (*Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, para 46).

Such an extension of a procedural rule is noteworthy because the ACHPR is perfectly silent on the substantive aspect of effective domestic remedies. Indeed, two provisions are relevant to the effective domestic remedies but do not clearly provide for it. Firstly, Article 7 provides that 'Every individual shall have the right to have his cause heard' and lists some pertinent rights (right to an appeal, right to be presumed innocent, right to defence, right to be tried within a reasonable time, and right to be tried by an impartial court), without mentioning effective remedies. Secondly, Article 26 provides that the States 'shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'.

44 The specificity of the reasoning, which establishes an obligation to guarantee effective domestic remedies based on the set of rules enshrined in the Charter, is deemed more interesting than the reasons behind the lack of legal basis, which have been commented upon in academic literature (Musila, 2006, 447). Despite such ambitious case law, the reasoning of the African Commission has come under criticism: 'The result is that the Commission's jurisprudence, to the extent that it can be discerned, is lacking in theorisation' (Musila, 2006, 459).

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45 Article 27 (1) 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights fills this void by finally creating a substantive rule, providing that: 'If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'. This Article is crystal clear and creates a basis for the obligation for effective domestic remedies, even though it is ultimately entirely up to the African Court to ask for such remedies. Indeed, effective domestic remedies are implemented only because an international decision found a violation of the ACHPR, and not because of the application of a provision of the ACHPR.

46 Therefore, the African Court does not have to deal with claims of lack of an effective remedy, but of claims based on Article 7 ACHPR concerning the violation of the right to a fair trial. For example, in the case of *Minani Evarist*, the Applicant claimed his 'fundamental right to have his cause heard by a court of law' was protected by Article 3 ACHPR providing for equality before the law. Rather than creating an autonomous obligation of effective domestic remedies, the Court instead corrected the error and assessed the allegations under Article 7 (*Evarist v United Republic of Tanzania*, 2018, 53–58).

47 To conclude, the African system of effective domestic remedies remains under construction. A future amendment of the ACHPR can be foreseen. Article 25 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is less ambiguous: 'States Parties shall undertake to: a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law'.

D. Effective Domestic Remedy in the European Union

48 European Union law bears three levels of requirements for effective remedies: in the Treaty on the Functioning of the European Union ('TFEU'), in secondary legislation, and in the Court of Justice of the European Union's case law.

1. References for a Preliminary Ruling

49 Since 1957, EU primary law contains a procedural provision that directly concerns national courts. Article 267 TFEU provides for a reference to be raised before the ECJ for its interpretation of Union law or for its appreciation of Union Law validity. The clarity of requirements laid down in the treaties and its continuation through to Article 267 TFEU as adopted in Lisbon in 2009 have enabled the ECJ to develop a detailed and constant body of case law.

50 According to Article 267 TFEU, the national judge can or sometimes must refer a question to the ECJ. Whether the judge has a choice in the matter or not depends primarily on the nature of decisions handed down by the national jurisdictions. The response depends on whether or not there is a possible remedy against a decision. Article 267 TFEU is crystal clear: 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court'. Therefore, the contrary applies to those decisions for which remedy exists—the judge is not obliged to seek a preliminary ruling.

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51 However, judges are under obligation to seek such a ruling when the validity of EU law is in question, a matter over which only the ECJ has jurisdiction (*Foto-Frost v Hauptzollamt Lübeck-Ost*, 1987, 17). With *Foto-Frost,* the Court centralizes procedural competence for its own benefit.

52 In the case of references in matters relating to the interpretation of EU law, the judge of last resort is not obligated to ask for a preliminary ruling so long as the Court of Justice has already answered questions on similar matters, 'irrespective of the nature of the proceedings which led to the decisions, even though the questions at issue are not strictly identical' (*CILFIT*, 1982, 14). In the *CILFIT* judgment, the ECJ outlined two cases in which national judges are not obligated to refer cases: when the question is not relevant, that is to say, if the answer to that question, regardless to what it may be, can in no way affect the outcome of the case (*CILFIT*, 1982, 10); or when the answer is so evident that it leaves no scope for reasonable doubt as to the manner in which the question is resolved (*CILFIT*, 1982, 16).

2. Effective Remedies Provided by the Lawmaker

53 While, prior to 2009, the Treaty on European Union made no mention of the procedural implementation of EU law by Member States, this did not stop derivative law being adopted. Despite being rather piecemeal in the first half of the European project, it now covers a range of areas and lays down uniform rules. As such, the EU harmonized large swathes of Member State procedures (Accetto and Zleptnig, 2005, 399), in areas such as public contracts, telecommunications regulation, immigration law, or competition law. In this context, remedies are any procedural rule that aims to establish the right for individuals when national authorities—mainly of a judicial nature—enforce provisions contained in EU law.

54 There are few binding legislative acts that are truly harmonizing by nature. The Directive concerning unfair business-to-consumer commercial practices in the internal market ('Directive 2005/29/EC'), for example, calls on Member States to ensure 'adequate and effective means exist to combat unfair commercial practices' (Directive 2005/29/EC, 2006, Art. 11) without laying down too many requirements. Another legislative act that is similarly minimalist and worth noting is the Directive on unfair terms in consumer contracts (Directive 93/13/EEC, 1993, Art. 7), which, a few years earlier, laid down the same obligation as in the previous case. The national judge is not specifically mentioned and yet ultimately, is the indirect addressee of such provisions.

55 A second category of legislative acts shows that the normative power can go even further and initiates a more technical harmonization of the rules of procedure. As such, the Regulation on the Statute for a European Company—with clear and simple wording—provides that Member States shall set up a judicial remedy with regard to any infringement, considering that this remedy shall have a suspensory effect on procedures specified by the Regulation (2001, Art 64). The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention'), to a lesser extent, provides that Member States 'shall provide adequate and effective remedies, including injunctive relief' and that, to this end, the general public shall have 'access to administrative and judicial review procedures' (Art 9 (5)). These two legislative acts go above and beyond those in the first category in that they specifically target the national judge and even go so far as to impose minor procedural rules in a limited procedural scope. One can also mention the Directive concerning the distance marketing of consumer financial services ('Directive 2002/65/EC'), which goes even further than the Aarhus Convention and the Regulation on the Statute for a European Company in that, in addition to the obligation of providing judicial remedy (Directive 2002/65/EC, 2002, Art. 13(2)), it provides that the national judge be able to force operators to put an end to practices that

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have been declared to be contrary to the Directive (Directive 2002/65/EC, Art 13 (3)), and it questions the notion of burden of proof (Directive 2002/65/EC, Art 15). Hence, it is via this intermediate category that we can see the will of legislators to better define trial procedure and do so by invoking EU competence in matters of procedure.

56 Lastly, the third category of legislative acts is the most binding and quite extensive. Without being so bold as to cover all such acts, we can, nevertheless look into a small selection that reflect the diversity of fields encompassed. The Regulation on European Union trade mark (Regulation (EU) 2017/1001, 2017, 1) is an example of the apparent ambition to lay down national procedural rules concerning the levy of execution, the designation of EU trade mark courts, the jurisdiction over infringement and validity, the international jurisdiction, and even the extent of the jurisdiction. Yet it goes much further insofar as it lays down rules in terms of defence as to the merits, counterclaims, provisional measures, to name but a few. The Directive relating to the application of review procedures to the award of public supply and public works contracts (Directive 89/665/EEC, 1989, 33) is just as abundant and was revised in 2007 to include even more procedural aspects (Directive 2007/66/EC, 2007, 31). The extent to which Member States transfer competence to the EU can provide insight into why the revision was made: the more a competence is exercised by the EU, the more the EU governs national procedural rules. Hence, the EU applies the subsidiarity principle according to which the action can, 'by reason of its scale or effects, be implemented more successfully by the Union' than by the Member States. It is worth noting that the domain of public procurement, while a shared competence, is covered quite extensively by EU law. However, the Regulation on insolvency proceedings ('Regulation (EU) 2015/848'), which was adopted according to the procedure for judicial cooperation in civil cases and grants the EU limited competence, provides in great detail the national procedural processes to be implemented when the case is taken before the national judge in matters of cross-border insolvency (Regulation (EU) 2015/848, 2015, 19).

57 Procedural competence of EU institutions is determined as per the rules of competence distribution between Member States and the EU. As part of its interpretive power, the ECJ has defined the limits of such procedural obligations.

3. Exercise of the Competence by the Court of Justice of the EU

58 When applying EU law, national courts have to use their own judicial procedures if the EU has not provided for harmonized procedural rules that the national courts have to apply. This situation is what the ECJ calls 'procedural autonomy of the Member States' (*i-21 Germany GmbH and Arcor AG and Co KG*, 2006, 57). In such cases, national procedures must fulfil criteria of equivalence and effectiveness, as well as the principle of effective judicial protection.

(a) The Equivalence Criterion

59 Firstly, the criterion of equivalence outlaws any discrimination of EU law made by national judicial procedure. According to both the principle and the definition used by the ECJ, which has remained unchanged since 1976, judicial procedures 'cannot be less favourable than those relating to similar actions of a domestic nature' (*Rewe-Zentralfinanz eG and Rewe-Zentral AG*, 1976, 5, and *Comet BV*, 1976, 13). In a way, it implicitly requires 'jurisdictional equality' (Cassia, 2007, 422).

60 In order to do so, it must be possible, in the case of a substantive provision of Union law, to identify a national law norm that is ultimately *similar* in nature. In the *Palmisani* case, Advocate General Cosmas concludes that particular rigorousness is required when identifying similar laws in national law. This means that 'a claim must be compared with a claim of a similar kind, a procedural rule with a procedural rule of a similar kind, and court procedure with court procedure of a similar kind. Comparison must not be made between

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disparate claims, or between rules disassociated from the corresponding procedure or which are subject to different procedures, for example administrative procedures on the one hand and judicial procedures on the other' (*Palmisani/INPS*, 1997, 27).

(b) The Effectiveness Criterion

61 Secondly, the effectiveness criterion makes room for power of interpretation by the ECJ. In interpreting the law, the Court determined that procedures that abide by the effectiveness criterion are those that do not 'render virtually impossible or excessively difficult the exercise of rights conferred by Union law' (*Donau Chemie AG*, 2013, 27). This definition for effectiveness is rather vague and the criterion is conferred a high level of malleability in terms of indirect administration of EU law. The Court of Justice makes the most of this freedom, using an extensive discretionary power (Adinolfi, 2012, 285) which is mostly determined by the intensity of the norms surrounding the case.

62 For example, effectiveness requires the national judge, when hearing a case in which there are questions around the validity of a national law in light of EU law, to call for provisional measures, in particular interim relief (*Factortame*, 1990, 21; → *Interim (Provisional) Measures of Protection*). There is the same requirement when the national judge, as part of a reference for a preliminary ruling, is faced with an act of EU secondary law of which the validity is contested in light of the Treaties (*Zuckerfabrick Suderdithmarschen*, 1991, 20).

63 Furthermore, → *res judicata* is a fundamental requirement in ensuring legal certainty and a proper conduct of procedure; it is recognized by EU Member States and the ECJ alike with both accepting it as justification (see sec D.3(d) below). Effectiveness and *res iudicata* are not mutually exclusive. Nevertheless, it is not absolute in that it infringes upon the principle of primacy when a judicial decision that violates EU law cannot be contested. The ECJ stated that the authority imbued in the notion of *res iudicata* was not absolute in three separate cases: materially, in terms of recuperating public aid that violates the internal market (*Lucchini SpA v MICA*, 2007, 63); in terms of procedure, when the authority imbued in judicial decisions leads to the ongoing violation of EU law (*Fallimento Olimpiclub*, 2009, 30); or, when the conditions set by the ECJ in the implementation of provisional measures according to EU law are not respected (*Commission v Italy (Sardinian hotels)*, 2012, 55).

64 These situations show that effectiveness requirements can be rigorous where strategic fields of EU law are at stake. The same can be said about the obligation to award reparation for violations of EU law by Member States. In the *Francovich and Bonifaci* landmark decision, the ECJ stated that: 'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible' (*Francovich and Bonifaci*, 1991, para 33). Such redress shall be granted every time the precise criteria as defined by the ECJ is fulfilled in the case before the national court.

(c) The Principle of Effective Judicial Protection

65 Thirdly, the principle of effective judicial protection has the privilege of being enshrined in primary law, which is not the case for equivalence and effectiveness criteria. 'The right of access to the courts … is ubiquitous amongst contemporary democratic societies' (Cassia, 2007, 415). As such, in 1986, the *Johnston* case opened the way for national procedure to

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be encompassed within a general principle of law (→ *General Principles of Law*)—that of the right to effective judicial protection—and no longer by the sole criterion of effectiveness.

66 The ECJ laid down a principle by which acts from Member States and Communities are to be checked for conformity with primary law, referred to as the 'basic constitutional charter' (*Parti écologiste 'LesVerts' v Parliament*, 1986, 23). Less than a month later, it went further and made it obligatory for national courts to fulfil an effective judicial remedy as a general principle of law (*Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986, 18). The 'stepping stone' (Prechal and Widdershoven, 2011, 286) that was *Van Colson*, which called that 'the sanction be such as to guarantee real and effective judicial protection' (ECJ, 1984, 23), further entrenched the principle as a general principle of community law.

67 Following 1986 and the *Johnston* case, the ECJ invoked the principle of effective judicial protection as part of a more progressive move, manifested by the obligation to grant a judicial remedy against an administrative decision where reasons are stated (*UNECTEF/Heylens*, 1987, 15), or, later on, by the obligation to extend the individual's legal interest in bringing proceedings when invoking Directive 76/207 (*Verholen*, 1991, 24), or the obligation to take interim measures in the application of EU customs law (*Siples Srl*, 2001, 17).

68 Henceforth, Article 47 → *Charter of Fundamental Rights of the European Union (2000)* guarantees citizens 'the right to an effective remedy before a tribunal', just as Article 19, para 1 TEU makes it compulsory for Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The two provisions—integrated into primary law in 2007 by way of the Treaty of Lisbon—strengthen the right of access to the courts providing a national procedural framework for the application of EU law.

(d) Justifications to Violations of the Effectiveness Criterion by a National Procedural Provision

69 The ECJ pays close attention to matters of national constitutional interest that arise in numerous cases. It therefore accepts violations of the effectiveness criterion when such violations are justified by an objective of public interest. If the judge, in examining the national procedural provision, deems that it renders virtually impossible the exercise of rights conferred to individuals by EU law, the judge can then consider objectives in the public interest that may justify the national procedure. The procedure is then considered to be compatible with EU law.

70 Objectives in the public interest include 'the rights of defence', 'the requirement of legal certainty', or 'a proper conduct of procedure' (*Peterbroeck*, 1995, 14, and *van Schijndel and van Veen*, 1995, 19). Although appearing for the first time in two decisions in a case relating to the possibility for a court to raise a plea of its own motion, the possibility to justify a violation of EU law by a domestic remedy was later extended in the following cases: to national procedures that limit the retroactive effect of legislative provisions; to the right of a person to be granted party status before the court; in 2003, to matters pertaining to type of evidence (*Steffensen*, 2003, 66); to *res iudicata*, to the right to redress (*Pontin*, 47), to proscription of unjust enrichment (*Lady and Kid A/S*, 2011, 18), to periods of prescription (*Rosado Santana*, 2011, 92), and even to the territorial jurisdiction of a tribunal to certain matters (*Agrokonsulting*, 2013, 48).

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71 The ECJ saw such justifications—in that case the protection of environment—as 'overriding considerations', which have a social function and cannot be considered on economic grounds (*Inter-Environnement Wallonie ASBL*, 2012, 58; *Association France Nature Environnement*, 2016, 34). Jurisdictional subsidiarity plays into the idea of giving greater freedom to national jurisdictions by taking into consideration national specificities and reasons in the public interest that Member States can legitimately invoke.

4. Is the Effective Domestic Remedy the Expression of a Procedural Autonomy of the Member States?

72 The ECJ sometimes mentions a notion that is widely used and accepted in doctrine; that of *procedural* autonomy *(→ National Procedural Autonomy)*. Following the ruling in *International Fruit Company*, in which the ECJ found that it was up to the Member States 'to determine which institutions within the national system shall be empowered to adopt the said measures' (ECJ, 1971, 3), Member States were inferred with *institutional* autonomy (Rideau, 1972, 884). Ultimately, Professor Robert Kovar drew the notion of procedural autonomy (Kovar, 1977, 232) from the *Fleishkontor* case, despite the fact the term does not appear in the ruling. In the wording of the ruling, this implementation takes place in principle 'with due respect for the forms and procedures of national law' (ECJ, 1970, 4). Henceforth, the notion of procedural autonomy, bound by the requirements of equivalence and effectiveness, became widespread throughout doctrine up until it was first used by the ECJ in 2006 (*i-21 Germany GmbH and Arcor AG and Co KG*, 2006, 57).

73 However, many, predominantly in the English-speaking world, spoke out against the notion of Member States being autonomous in matters of procedure, preferring *procedural competence* (van Gerven, 2000, 502; Rosas and Armati, 2012, 272; Bobek, 2012, 305), or the principle of 'primary national procedural responsibility' (Beck, 2012, 228). The conflict arose from a contradiction within procedural autonomy: the treaties do not differentiate between substantive and procedural law, and *a fortiori*, such autonomy is not justified. Although Member States are primarily responsible for determining domestic remedies for the enforcement of EU law, this competence is overridden as soon as the EU decides to enact procedural rules which shall apply uniformly in the Member States. As such, procedural rules are directly governed by the principle of distribution of competences between the EU and its Member States.

E. Conclusion

74 The guarantee for effective domestic remedies depends widely on the legal order in question. It is worth noting that general international law fails to formally provide for a right to domestic remedies, while such obligations are widely provided in regional legal orders such as human rights legal systems or in the European Union. Difficulties in establishing effective remedies in international investment law and the fact that remedies in international human rights agreements rely mostly on reparation shows that the regional level is still the most appropriate for action. However, in the case of European, American, and African conventions, a leading role is given to regional Courts; their case law is crucial in the formulation of domestic obligations, sometimes by using bold interpretations in order to fill the gaps not covered by conventions.

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