Judgment

Appeal Court in The Hague

Commerce section

Case number / cause-list number: 200.022.151/01

Case number District Court: 07-2973

Judgment in the first civil law section, March 30, 2010

in the case of

1. the Association of Citizens **MOTHERS OF SREBRENICA,**
   established in Amsterdam,

2. **[Name]**,
   living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

3. **[Name]**,
   living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

4. **[Name]**,
   living in Sarajevo, Bosnia-Herzegovina,

5. **[Name]**,
   living in Sarajevo, Bosnia-Herzegovina,

6. **[Name]**,
   living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

7. **[Name]**,
   living in Sarajevo, Bosnia-Herzegovina,

8. **[Name]**,
   living in Sarajevo, Ilidža, Bosnia-Herzegovina,

9. **[Name]**,
   living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

10. **[Name]**,
    living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

11. **[Name]**,
    living in Sarajevo, Bosnia-Herzegovina,

appellants,
respondents in the incident,

hereinafter to be referred to as the Association et al. (appellants 1 through 11), [F] et al. (appellants 2 through 11) and the Association (appellant sub 1),
lawyer Mr. M.R. Gerritsen, LL.M. in Amsterdam,

versus

1. **THE STATE OF THE NETHERLANDS** (Ministry of General Affairs), established in The Hague,
respondent,
plaintiff in the incident,
hereinafter to be referred to as: the State
lawyer: Mr. G.J.H. Houtzagers, LL.M. in The Hague

2. the organisation having legal personality **THE UNITED NATIONS**,
established in New York, United States of America,
respondent,
hereinafter to be referred to as: the UN (singular)
who failed to appear.

The proceedings

By writ of 7 October 2008 the Association et al. appealed against the judgment of the District Court in The Hague of 10 July 2008 delivered to the parties in the interlocutory claims brought by the State that the court has no jurisdiction with regard to the United Nations, as well as claims petitioning for third-party intervention or the joinder of parties. By statement of appeal the Association et al. put forward 18 grounds of appeal against the contested judgment. The State contested the grounds of appeal by its statement of defence on appeal and brought an interlocutory claim petitioning to be allowed as intervening party, or alternatively, as joining party in the appeal of the Association et al. against the United Nations. The Association et al. presented a statement of defence in this incident moving for the dismissal of the interlocutory claims. On 28 January 2010 the parties gave arguments for their positions in both the matter of the court's jurisdiction and the incident on appeal; the Association et al. by its lawyer as well as by Messrs. A. Hagedorn, LL.M., J. Staab, LL.M., and S.A. van der Sluijs, LL.M., all lawyers in Amsterdam; and the State by its lawyer as well as by Mrs. K. Teuben, LL.M., lawyer in The Hague; all basing themselves on memoranda of oral pleadings submitted to the Court of Appeal. In conclusion, the parties requested judgment.

What's at issue in this case

1.1 In this case, the following is at issue. The Association et al. base their claims primarily on the fact that in the East Bosnian enclave Srebrenica in July 1995 genocide occurred, that [F] et al. and the individuals whose interests the Association represents (the natural persons hereinafter also referred to as: the mothers of Srebrenica) are surviving relatives of the men murdered by Bosnian Serbs in this incident, and that the State and the United Nations are liable toward them for the loss incurred by them, because they, contrary to promises made and to other legal obligations resting with them, failed to prevent the genocide. The Association et al. summoned the UN and the State with respect to this matter. In summary, the Association et al. primarily request to rule, (i) that the State and the UN failed to meet their obligations toward the mothers of Srebrenica, or alternatively acted wrongfully toward them, (ii) that the State and the UN must pay for the loss incurred by [F] et al., to be assessed by the Court at a later

point of time, and must pay an advance toward the compensation owing to them as well as the legal costs.

1.2 In the proceedings before the District Court the State brought an interlocutory claim moving to be allowed as an intervening or, alternatively, joined party in the action between the Association et al. and the UN. Simultaneously, the State brought an interlocutory claim moving that the court has no jurisdiction in the case against the UN with regard to the immunity from prosecution granted to the UN.

1.3 In its judgment of 10 July 2008 the District Court ruled that it has no jurisdiction to hear the claims against the UN, and that a decision in the incident concerning intervention or joinder can be omitted. Summarily, the Court based its decision on the grounds that the UN has been granted absolute immunity and no rights can be derived from any other (mandatory) standards pertaining to international law (such as the Genocide Convention or article 6 of the European Convention on Human Rights and Fundamental Freedoms) to make an exception to that immunity.

Assessment of the incident for intervention or joinder

2.1 With regard to its petition to be allowed on appeal to appear as intervening or joining party the State argued as follows. Pursuant to its obligations to the UN arising from international law laid down in article 105 of the United Nations Charter (hereafter: the Charter) and Article II, § 2 of the Convention on the Privileges and Immunities of the United Nations (regulated by Act of 24 December 1947, Bulletin of Acts and Degrees 1947, H 452, hereafter: the Convention), the State has an interest in guaranteeing the UN's immunity in this case by contesting the grounds for appeal put forward by the Association et al. and, if the Court of Appeal finds that the UN should not be granted immunity in this instance, by being able to institute a legal remedy against such judgment.

2.2 The Association et al. contested that the State has an interest in intervention or joinder. According to the Association the State is a party to the proceedings as a co-defendant already, and in that capacity can submit arguments to plead that the court has no jurisdiction to hear the claims against the UN. Other requirements laid down for intervention or joinder are not satisfied either, according to the Association et al.

2.3 The Court of Appeal considers as follows. There is question of intervention as defined in article 217 of the Netherlands Code of Civil Procedure if the third party (in this case, the State) wishes to institute proceedings against one, or both, of the litigating parties. From the interlocutory claim brought by the State and its motivation emerges that there is no question of such a claim. Essentially, the State wishes to effect that the Court of Appeal upholds the ruling of the District Court, according to which it found it has no jurisdiction to hear the claims against the UN. This means that the interlocutory claim for intervention must be dismissed.

2.4 There is question of joinder within the meaning of article 217 of the Netherlands Code of Civil Procedure if a third party (in this case, the State) joins in the proceedings to assist one of the parties in defending its claim against the other party. As the State wants, as is clear from the preceding, the claim against the UN to be dismissed on the grounds of immunity from prosecution granted to the UN, the interlocutory claim must be assessed on the basis of the requirements in place for the joining of third parties. Joinder is not ruled out on the single ground that the party whom the third party wishes to join has not appeared in the proceedings. Neither is joinder precluded by the fact that the State was summoned by the Association et al. together with the UN. The claim by the Association et al. against the State and the claim by the Association et al. against the UN are independent claims existing separately. The single fact that the

State and the UN were summoned together does not signify that the State became a party to the proceedings instigated by the Association et al. against the UN.

2.5 It is a prerequisite, but also sufficient for joinder that the State has an interest in the outcome of the proceedings because it may have consequences for the State, in law or de facto. In this case the State argues rightfully that it has a reasonable interest in a Netherlands court not delivering any judgments which conflict with the immunity granted to the UN according to Conventions to which the Netherlands is a party (as is the case with article 105 of the Charter and article II § 2 of the Convention), because in that case the State, to whom such rulings should be imputed under international law, would violate its obligations arising from those conventions. The State therefore has a reasonable interest in explaining its interest before a court of law and to defend why that court should find it has no jurisdiction. This interest is not prejudiced by the possibility that the prosecution is heard pursuant to article 44 of the Netherlands Code of Civil Procedure. There are no good reasons why the State should be able or allowed to explain its position in the matter of the UN's immunity to a court of law strictly by those means.

Assessment of the appeal in the principal case

3.1 In ground 1 the Association et al. argue that the District Court wrongly assumed that an advance to the amount of € 10,000 is claimed, whereas in fact it is a sum of € 25,000. This ground, as the State acknowledges too, was rightfully put forward. The Court of Appeal shall assume therefore that [F] et al. claim an advance of € 25,000 per person.

3.2 In ground 2 the Association et al. argue that the District Court interpreted (part of) their defence (namely, against the State's petition that the court has no jurisdiction) wrongly, that is, in too restricted a sense. The Association et al. argue that it is to be expected that the State in the principal case will argue with respect to its own liability that not the State but the UN is to be held liable for the events occurring in Srebrenica in July 1995, after first having kept the UN outside of the proceedings as a result of the interlocutory claim concerning the court's jurisdiction. Such behaviour on the State's part, combined with the fact that the surviving relatives of the genocide victims would then not have any recourse to legal redress is legally, humanly and morally unacceptable. In this case, the State presents its own enlightened self-interest as an obligation under international law. According to the Association et al. the obligation under international law was not established for the purpose of evading the State's own responsibilities.

3.3 This defence does not hold. In the first place the interlocutory claim concerning jurisdiction cannot anticipate defences that might be brought by the State in the principal case against the claims instituted against the State. Besides, it is not clear how the State would evade its liability if any if the claim against the UN would fail as a result of immunity from prosecution. As considered above, the cases against the State and the UN are separate proceedings which will each be assessed on its own merits, regardless of what is found in the other case.

3.4 With ground 3 the Association et al. appeal against the District Court's finding that the non-appearance granted against the UN does not mean that the District Court rendered a (positive) decision on its international jurisdiction. According to the Association et al. non-appearance can only be granted against an international organisation after official testing by a court of law of its international public-law jurisdiction. This defence fails. The question whether non-appearance can be granted against a defaulting defendant precedes and is independent of whether a court has no

jurisdiction because the defendant is entitled to immunity from prosecution. If a court of law establishes that the terms and formalities for granting non-appearance against the defendant have been duly observed, than it must grant leave to proceed against the defendant in default of appearance irrespective of the question of jurisdiction. In other words, international jurisdiction to hear a claim is not part of the formalities that must be satisfied for a court of law to grant leave to proceed against a defendant who is in default of appearing.

3.5 In ground 4 the Association et al. appeal against the motivation given by the District Court in 5.3. In it, the District Court considered that the fact that the Minister of Justice did not apply article 3a of the Bailiffs Act has no consequences whatsoever on the Court's jurisdiction. As this judgment of the Court is correct, the defence shall fail. In so far as the Association et al. wish to argue that the Court should have ruled that article 3a of the Bailiffs Act in this case does not constitute an interest of the State for the interlocutory claim, they do not acknowledge that the Court did not base itself upon this provision when it ruled that the State does have this interest.

3.6 With ground 5 the Association et al. contest the Court's decision that, in summary, entails that the State has an interest of its own in its argument that the Court has no jurisdiction in the Association's claim against the UN. The grounds argued by the Association et al. in connection with this the Court of Appeal has already considered (under 2.4 and 2.5) and rejected. This ground for appeal is therefore denied.

3.7 In ground 6 the Association et al. argue that although the District Court in its motivation under 5.7 considers that possibly the State's defence against the claim brought against it is out of order, the District Court does discuss (part of) that defence in its motivation under 5.9. The defence fails because the grounds adduced by the District Court under 5.7 are correct and because in 5.9 only the State's defence is represented and does not support the Court's judgment.

4.1 In grounds 7 through 18 the Association et al. with various arguments appeal against the District Court's judgment that is has no jurisdiction to hear the Association's claims against the UN. These grounds will be dealt with jointly.

4.2 Article II § 2 of the Convention lays down that the UN, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. Pursuant to article 31 of the Vienna Convention of the law of treaties (Bulletin of Treaties 1977, no. 169) a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Court of Appeal finds that in this light the immunity referred to in article II § 2 of the Convention, which is indisputably defined as broadly as possible, is clear and, considering - amongst other things – the considerations given hereinafter regarding article 105 of the Charter, does not allow any other interpretation than that the UN has been granted the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law in the countries that are a party to the Convention.

4.3 The Association et al. take the position that the question whether the UN has immunity from prosecution should not be assessed on the basis of article II, § 2 of the Convention, but on the basis of article 105 of the Charter, which provides that the UN shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. According to the Association et al. the immunity provided for under article 105 of the Charter is more restricted than that under article II, § 2 of the Convention, because on the basis of the former a court must determine in each and every case brought before it whether the immunity invoked is

necessary for the realization of the UN's objectives. The Association et al. adopt the position that article 105 of the Charter has priority over article II, § 2 of the Convention, because article 105 subsection 3 of the Charter provides that the General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of article 105 of the Charter, but that the Convention has no scope beyond the higher-classed Charter. Moreover, the latter is believed to be confirmed by article 103 of the Charter, which provides that the obligations under the Charter take precedence over the Members' obligations pursuant to other international treaties.

4.4 The Court of Appeal does not share the Association's view. In the opinion of the Court of Appeal it is evident, for it appears from the considerations preceding the provisions of the Convention, that the Convention and therefore also article II § 2 of the Convention, implement (amongst other things) article 105, subsection 3 of the Charter, in the sense that article II § 2 of the Convention further substantiates which immunities are necessary for attaining the objectives of the UN. There is no indication that article II § 2 of the Convention goes beyond the scope allowed by article 105 of the Charter in this respect.

4.5 It would be of no avail to the Association et al. anyway if the invocation of the UN's immunity was tested strictly on the basis of article 105 of the Charter, for the question that needs to be addressed is not whether the invocation of immunity in this particular case in hand is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution in general. The Court of Appeal answers the latter question without doubt affirmatively with reference to the motivation in 5.7 hereinafter.

5.1 The conclusion from the above is that the UN is entitled to immunity from prosecution. However, as the Association et al. argue, the question is whether this immunity should be surpassed in this case for the rights of the Association et al. to have access to a court of law laid down in article 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter: ECHR) as well as article 14 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR). In answering this question the Court of Appeal will base itself on the assumption that article 6 of the ECHR and article 14 of the ICCPR apply to (the claims of) the Association et al. For because the question whether the Mothers of Srebrenica fall under Netherlands jurisdiction within the meaning of article 1 ECHR, or reside within Netherlands territory or are subject to Netherlands jurisdiction within the meaning of article 2 ICCPR can not unequivocally be answered in the affirmative, the Court of Appeal finds that the right to a fair trial and the right of access to a court of law it entails is a matter of customary law, which can be invoked independently of the preceding provisions.

5.2 The European Court of Human Rights (hereinafter: the European Court) has ruled in a number of judgments delivered that the immunity from prosecution under international law must be set aside under certain circumstances for the right of access to a court of law guaranteed by article 6 ECHR. The European Court found that the right of access to a court of law is not absolute but may be subject to restrictions, provided that those restrictions are not that far-reaching that they violate the essence of the law. Moreover, according to the European Court, a restriction must meet the requirement that it serves a legitimate goal, and that it is proportionate to the goal pursued. An important aspect when establishing whether immunity from prosecution constitutes a permissible restriction is the question whether the interested party has access to reasonable alternative means to protect its rights under the ECHR

effectively. Cf: European Court 18 February 1999 in the matter of *Beer and Reagan v. Germany, no. 28934/5* and *Waite and Kennedy, no. 26083/94*.

5.3 Contrary to the District Court the Court of Appeal does not believe that the European Court departed from its ruling motivated above under 5.2 in the cases of *Behrami v. France, no. 1412/01* and *Saramati v. France, Germany and Norway, no. 78166/01*, delivered 2 May 2007. In the cases of Behrami and Saramati neither immunity from prosecution of the UN before a national court of law, nor article 6 ECHR were the issue. In those cases, the issue was whether there was a case to answer in the matter of the complaints brought before the European Court by Behrami and Saramati against a number of separate countries. The European Court in no way indicated that it reconsidered or departed from its previous judgments in the cases of *Beer and Reagan* and *Waite and Kennedy*. In the cases of *Behrami* and *Saramati* the European Court did, however, make observations on the special position of the UN within the international community, which are also pertinent to the present case. The Court of Appeal will get back to this.

5.4 Neither does the Court of Appeal hold decisive that in the cases of *Beer and Regan* and *Waite and Kennedy* an international organisation was at issue which had been founded after the ECHR came into operation. It is true that the rulings of the European Court in these cases were based, amongst other things, on the motivation that it would be incompatible with the objectives of the ECHR if co-signatories to the Convention could evade their responsibilities under the ECHR by transferring powers to an international organisation. However, the Court of Appeal believes it is implausible that this ruling implies that the single fact that an international organisation has existed longer than the ECHR is sufficient reason to believe that the co-signatories are discharged from their obligation to guarantee fundamental rights under the ECHR. Particularly in the case of (older) international organisations (like the UN) that presumably will continue to exist for a long time yet this would mean that part of the rights guaranteed by the ECHR would be barred from application almost permanently.

5.5 Finally, the Court of Appeal believes that article 103 of the Charter does not preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR. Article 103 provides that in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The Court of Appeal is of the opinion that this was not intended to allow the Charter to just set aside like that fundamental rights recognised by international (customary) law or in international conventions. The development of international law since 1945, the year the Charter was signed, has not stopped and shows an increasing attention for and recognition of fundamental rights, that cannot be ignored by the Court of Appeal. Moreover, as is clear from the preamble to the Charter and article 1 subsection 3 of the Charter, the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms. It is implausible that article 103 of the Charter intends to impair the enforcement of such fundamental rights.

5.6 The preceding means that the Court of Appeal as laid down in the criteria worded by the ECHR in the cases of *Beer and Regan* and *Waite and Kennedy* will test whether the invocation by the State of the immunity from prosecution of the UN is compatible with article 6 ECHR. First of all, the Court of Appeal is of the opinion that this immunity serves a legitimate goal. The immunity from prosecution that States usually grant to international organisations is a practice that has been in existence for a long time and aims to promote the effective operation of such international organisations.

The Court of Appeal refers to the motivations given by the ECHR in the case of *Beer and Regan* under 5.3, which also apply to the case in hand.

5.7 With regard to the question whether the immunity from prosecution of the UN is in proportion to the goal aimed for in this case the Court of Appeal postulates the following. Amongst the international organisations the UN has a special position, for under article 42 of the Charter the Security Council may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. No other international organisation has such far-reaching powers. In connection with these extensive powers, which may involve the UN and the troops made available to them in conflict situations more often than not entailing conflicting interests of several parties, there is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any action undertaken by the Security Council, or even preventing it altogether. It is not inconceivable, either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining to keeping peace and safety in the world. For this reason it is very important that the UN has the broadest immunity possible allowing for as little discussion as possible. In this light the Court of Appeal believes that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.

5.8 Essentially the Association et al. argue that such compelling reasons apply in the case in hand. First of all they argue that in this case very serious offences are involved, to wit genocide. In their opinion the United Nations has not undertaken enough to prevent the genocide in Srebrenica and therefore acted contrary to Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (Bulletin of Treaties 1960, 32, hereinafter referred to as the Genocide Convention), which, in summary, provides that genocide is a crime under international law which the Contracting Parties undertake to prevent and to punish. Secondly, the Association et al. point out that the UN, contrary to its obligations under article VIII, § 29 preamble and under (a) of the Convention has made no provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of private law character to which the UN is a party. As a result there is no other way of obtaining redress than by summoning the UN before a national, in this case Netherlands court of law; that is, so it was presented by the Association et al.

5.9 The Court of Appeal predisposes that it appreciates the terrible events the mothers of Srebrenica and their relatives fell victim to, and the suffering inflicted on them as a result. The State has not refuted that genocide took place in Srebrenica; it is a generally known fact. That the mothers of Srebrenica seek redress in a court of law for this is wholly understandable. Not all is said by this, however. As has been considered before, a substantial general interest is served if the United Nations is not forced to appear before a national court of law. In this field of tension the pros and cons must be balanced between two very important principles of law in their own right, of which in the end only one can be deciding.

5.10 In the first place the Court of Appeal concludes that the Association et al. acknowledge that it was not the UN that committed genocide (cf *inter alia* statement

of defence in the interlocutory claims of 6 February 2008, p. 29). Neither can it be inferred from the arguments put forward by the Association that the UN knowingly assisted in committing the genocide. Essentially, the Association et al. blame the UN for failing to have prevented genocide. The Court of Appeal is of the opinion that although this reproach directed at the UN is serious, it is not that pressing that immunity should be waived or that the UN's invocation of immunity is, straightaway, unacceptable. Besides, the Court of Appeal considers, as put forward before, that UN peacekeeping operations will usually occur in areas around the world where a hotspot has developed, and that a reproach that, although it did not commit crimes against humanity itself, the UN failed to act against it adequately, under the circumstances can be latched onto too easily, which could lead to misuse. The reproach that the UN failed to prevent genocide in Srebrenica and therefore was negligent is insufficient in principle to waive its immunity from prosecution. Neither is it deciding that in the present case it is not argued that there is a question of misuse in the sense referred to above. If invocation of UN immunity was only successful if misuse were proved in the case in hand, the immunity would be violated unacceptably.

5.11 The next argument put forward by the Association et al. is the absence of a procedure which sufficiently safeguards access to a court of law. It was pointed out that the UN has failed to make provisions as laid down in article VIII, § 29 in the preamble under (a) of the Convention for appropriate modes of settlement of disputes arising out of contracts or other disputes of private law character to which the UN is a party. That the UN failed to do so has been admitted between the parties. Also, the State has insufficiently refuted the Association's reasoned arguments that the 'Agreement on the status of UNPROFOR' does not offer a realistic opportunity to the Association et al. to sue the UN. The Court of Appeal believes, however, that it has not been established for a fact that the Association et al. have no access whatsoever to a court of law with regard to what happened in Srebrenica. In the first place it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR. If the Association et al. have omitted this because the persons liable cannot be found or have insufficient assets for compensation, the Court of Appeal observes that article 6 ECHR does not guarantee that whoever wants to bring an action will always find a (solvent) debtor.

5.12 Secondly, to the Association et al. the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open. This course has indeed been taken by the Association et al. The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway. This will be no different if in that case, as the Association et al. say they expect – and with some reason, cf the statement in the interim proceedings in the first instance instigated by the State under 3.4.8 – the State argues that its actions in Srebrenica must strictly be imputed to the UN. Even if this defence is put forward (which the Association et al. contest in anticipation anyway, cf the initiating writ of summons nos. 347 and ff.), a court of law will fully deal with the claim of the Association et al. anyway, so that the Association et al. do have access to an independent court of law.

5.13 The above implies that it cannot be said in this case that the right of access to a court of law of the Association et al. is violated if the UN's invocation of immunity from prosecution is allowed. The Court of Appeal refers to the decision in the case of the European Court of 21 September 1990 *Fayed v. United Kingdom, no. 17101/90*, which

shows that the European Court considers even fairly far-reaching restrictions to access to a court of law acceptable. There is no question of such far-reaching restrictions in this case, as the Association et al. can hold two categories of parties liable for the damages incurred by the mothers of Srebrenica, namely the perpetrators of the genocide and the State. Seen in this light the Court of Appeal does not hold decisive, although it regrets, the fact that the UN has not instigated an alternative course of proceedings in conformity with their obligations under article VIII § 29 in the preamble and under (a) of the Convention for claims as this in order to waive the immunity from prosecution.

5.14 The conclusion must be that there is no unacceptable violation of article 6 ECHR or article 14 ICCPR if a Netherlands court of law in this case upholds the immunity from prosecution granted to the UN. The Court of Appeal finds no reason to submit any preliminary questions to the European Court of Justice. Following the above the grounds for appeal are all denied.

6. The District Court's ruling shall be upheld. The Association et al. shall be ordered to pay the costs of the appeal and the incidental proceedings as the party against whom the matter is decided.

Ruling

The Court of Appeal:

In the incident for intervention or joinder:

- allows the State to join the United Nations as party joining in the action;
- disallows the application to be allowed to intervene;
- orders the Association et al. to pay the costs of the incident, set at nil on the State's part;

In the Appeal against the District Court's ruling of 10 July 2008:

- upholds the ruling that was appealed against;
- orders the Association et al. to pay the costs of the appeal, so far set at € 313 for expenses and € 2,682 for lawyer's fees on the State's side, and at nil on the UN's side, and determines that these amounts must be paid within fifteen days of this ruling, to be increased by the interest due as referred to in article 6:119 of the Netherlands Civil Code from the expiry of the specified term until the day on which payment is made in full;
- declares this ruling to be provisionally enforceable with regard to the order to pay the costs.

This judgment was given by Justices A. Dupain, M.A.F. Tan-de Sonnaville and S.A. Boele, and pronounced in open court on March 30, 2010 in the presence of the clerk.