



# The Immunity of the United Nations before the Dutch courts Revisited

*Court of Appeal The Hague, Judgment of 30 March 2010 (Mothers of Srebrenica et al. v. State of the Netherlands and United Nations)*<sup>1</sup>

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## 1. Introduction

The final word has not been spoken about the role of the UN peacekeeping force Dutchbat in the *safe area* Srebrenica where genocide was committed in 1995. The Court of Appeal of The Hague on 30 March 2010 delivered its judgment in the appeal of the case brought by the Association *Mothers of Srebrenica* and ten individual plaintiffs (the Plaintiffs) against the State of the Netherlands (the State) and the United Nations (UN). It concerned the preliminary matter whether the Dutch courts have jurisdiction to hear the case against the UN. In first instance, the District Court of The Hague decided the UN enjoys absolute immunity and it ruled that neither the fundamental international prohibitions of genocide and torture nor the right of access to a court of law for the victims could provide an exception to UN immunity under international law.<sup>2</sup> The Court of Appeal in its judgment has upheld the outcome of the judgment of the District Court. The reasoning of the Court in appeal however is noteworthy and on important points different from the reasoning of the Court of first instance.

This contribution will touch on three aspects of the judgment in appeal. First, the involvement of the State, second, the scope of immunity of the UN and, third, the question whether

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<sup>1</sup> Case no. 200.022.151/01 published on [www.rechtspraak.nl](http://www.rechtspraak.nl) under LJN number: BL8979 [hereinafter: Judgment in appeal]. An English translation of the judgment can be found at [www.haguejusticeportal.net/eCache/DEF/7/766.html](http://www.haguejusticeportal.net/eCache/DEF/7/766.html).

<sup>2</sup> Case no. 295247, Judgment of 10 July 2008, published on [www.rechtspraak.nl](http://www.rechtspraak.nl) under LJN number: BD6795 and LJN: BD 6796 (English translation). See G. den Dekker, 'Immunity of the United Nations before the Dutch courts', in: *Hague Justice Journal* 3, nr. 2, 28 July 2008 ([www.haguejusticeportal.net/eCache/DEF/9/569.html](http://www.haguejusticeportal.net/eCache/DEF/9/569.html)). See also O. Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court', *Journal of International Peacekeeping* 13 (2009), 197-219.

immunity of the UN can be restricted based on its potential incompatibility with the right of access to a court of law. It is followed by a brief outlook to conclude.

## 2. The involvement of the State in the proceedings

Like in first instance, the first issue the Court of Appeal had to decide was whether the State had an interest of its own to appear before the Court to defend the immunity of the UN. The State petitioned to join in the appeal proceedings, which was allowed by the Court of Appeal.<sup>3</sup> Like the District Court, the Court of Appeal ruled that the State has an interest of its own in appearing and defending the immunity of the UN before the national courts. After all, the State would be responsible for violations of international law if national courts would deny immunity contrary to the UN Charter, Article 105, and the Convention on the Privileges and Immunities of the United Nations, Article II(2), (the Convention) to both of which the Netherlands is a party. This finding of legitimate involvement of the State in the proceedings is in line with an opinion of the International Court of Justice (ICJ) stating that every Member State has an obligation pursuant to Article 105 of the UN Charter to see to it that its national courts deal with the question of UN immunity as a preliminary matter.<sup>4</sup>

The underlying issue here is that the UN has decided not to appear before the Dutch courts, limiting its reaction to explicitly invoking immunity in a single letter to the Permanent Representative of the Netherlands to the UN. As the judgment in first instance was rendered in default of appearance of the UN, Plaintiffs argued in appeal that the Dutch courts must have jurisdiction since in their opinion a default judgment can only be given after the court *ex officio* has assessed as a preliminary matter its international competence to hear the case against the UN. The Court of Appeal has rejected this argument, because establishing international jurisdiction is not part of the formalities which must be fulfilled before a Court can grant leave to proceed against a defendant who is in default of appearing.<sup>5</sup> A recent Dutch Supreme Court judgment indicates that the courts in the Netherlands are competent to assess *ex officio* the validity of the defense of immunity of a foreign State which has failed to appear.<sup>6</sup> Whether this applies as a rule to international organizations as well is not certain. In any case, it would seem that the court has to be familiar with the practice of the international organization concerned in order to determine whether certain acts fall within its official functions. The involvement of the State, defending immunity, is not without significance in that context.

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<sup>3</sup> See Judgment in appeal, par. 2.1-2.5. The alternative ground invoked by the State, viz. intervention in the proceedings, was dismissed, because the State did not indicate that it wanted to institute proceedings against any of the litigating parties.

<sup>4</sup> ICJ *Difference relating to Immunity from legal process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Rep. 1999, 62, par. 62-63.

<sup>5</sup> See Judgment in appeal, par. 3.4.

<sup>6</sup> See *Azeta B.V. v. Republic of Chile*, Netherlands Supreme Court Judgment of 26 March 2010, Case 08/03023, LJN: BK 9154, par. 3.5.3.

### **3. The scope of immunity of the UN**

The first fundamental question before the Court in appeal concerned the scope of immunity of the UN. Like the District Court, the Court of Appeal first pointed out that the UN enjoys immunity from ‘every form’ of legal process (aside from express waiver). The immunity provided by Article II(2) Convention is ‘clear’ and ‘indisputably defined as broadly as possible’ according to the Court, and has to be read in conjunction with Article 105 UN Charter, leading to the conclusion that there can be no doubt 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 the States parties to the Convention.<sup>7</sup> As will be elaborated below, the Court’s opinion is not only based on this textual analysis but also on the context (and object and purpose) of these provisions in that immunity is closely connected to the proper fulfillment of the official functions of the UN. This is in line with the main rules of treaty interpretation (Article 31 Vienna Convention on the Law of Treaties) and it also corresponds to the views expressed in doctrine that international organizations are entitled to functional immunity, meaning the immunity that an international organization needs in order to be able to function properly in fulfilling its tasks and achieving its objectives.<sup>8</sup> It has been suggested that immunities of international organizations might be restricted by domestic courts on the basis that immunity shall only extend to the organization insofar as necessary for its functioning.<sup>9</sup> However if a national court could decide whether immunity was ‘necessary’ for the functioning of the international organization in a given case, the essence of functional immunity would be lost for all practical purposes.

The Court can therefore be followed in its opinion that ‘the question that has to be looked at is not whether the invocation of immunity in the particular case 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 jurisdiction in general’. That question is answered affirmatively by the Court without hesitation. This is motivated by reference to the special position of the UN in the international legal system given the far-reaching enforcement powers of the Security Council pursuant to Article 42 UN Charter.<sup>10</sup> The Court thereupon arrives at the conclusion that the UN is entitled to immunity in this case.

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<sup>7</sup> See Judgment in appeal, par. 4.2. The Court furthermore found it obvious that the Convention implements Article 105(3) of the UN Charter, meaning the provisions of Article II(2) elaborate the necessary immunities in achieving the objectives of the UN and cannot be seen as ‘going beyond the scope’ of Article 105, see Judgment in appeal, par. 4.4.

<sup>8</sup> See, e.g., M.N. Shaw, *International Law*, 6<sup>th</sup> ed., 2009, p. 1320-1321 and 1326-1327; C. Sato, *Immunität Internationaler Organisationen*, Schriften zum internationalen und öffentlichem Recht, 2004, p. 121, 123.

<sup>9</sup> See e.g. the overview by K. Wellens, ‘Fragmentation of International law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap’, 25 *Mich.J.Int’l L.* (2003-2004), 1159, at 1176-1177.

<sup>10</sup> See Judgment in appeal, par. 4.5, referring ahead to par. 5.7 of the Judgment.

Leaving aside that the UN presence in Srebrenica was not based on Article 42 of the Charter<sup>11</sup> the most remarkable aspect here is that the Court of Appeal did not use the term ‘absolute’ immunity like the District Court did in first instance.<sup>12</sup> At first sight it would seem that the Court of Appeal adopted a more flexible view of immunity of the UN in this case, but later on in the judgment the Court further emphasizes that the UN enjoys immunity to the fullest extent possible. As we will see, the Court eventually points out that the UN must have ‘the broadest immunity possible allowing for as little discussion as possible’. Therefore in substance there seems to be not too much difference between the views expressed by the Court in first instance and those of the Court in appeal as regards the scope of the (functional) immunity of the UN.

#### 4. Immunity and the right of access to a court of law

The next fundamental question before the Court was whether the immunity of the UN should nevertheless give way to the right of access to a court of law, as claimed by the Plaintiffs. Interestingly, the Court of Appeal has assessed this question on the basis of the *presumed* application of Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), since it is not totally clear that the events in Srebrenica come under Netherlands jurisdiction within the meaning of either of these treaties. However in addition, the Court has indicated that the right to a fair trial, and the right of access to a court of law as part of it, is a rule of customary international law which can be invoked regardless of (the applicability of) relevant provisions of the ECHR and ICCPR.<sup>13</sup> We can agree with this analysis but it raises questions as to its practical effects. The customary law nature of the parallel right may be relevant in overcoming the defense of Article 103 UN Charter and in establishing legal obligations on the part of the UN, but otherwise the restrictions on the right to a fair trial as recognized in the conventions would also apply to the customary right.

The lengthy discussion in the judgment indicates that the question of lawful restrictions of the right of access to a court of law goes at the very heart of the case. The Court of Appeal refers to case law (*Beer and Regan v. Germany* and *Waite and Kennedy v. Germany*) of the European Court of Human Rights (ECtHR) and recalls that said Court has held that the right of access can trump immunity from jurisdiction. The right of access on the other hand is itself not an absolute right and can be restricted (by immunity) if the restriction serves a legitimate aim, is proportionate and does not inhibit the ‘essence’ of the right. The availability of reasonable alternative means of (internal) dispute settlement is an important indication in this

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<sup>11</sup> Although UN Peacekeeping is based (somewhere) in Chapter VII UN Charter (some say Chapter ‘six-and-a-half’), the basic principle of consent of the host State (at least in the case of UNPROFOR) would exclude Article 42 UN Charter as its proper basis.

<sup>12</sup> See further Den Dekker, op.cit. note 2, p. 4.

<sup>13</sup> See Judgment in appeal, par. 5.1.

respect.<sup>14</sup> The Court of Appeal then points out that it deviates from the reasoning followed by the District Court in first instance in that the foregoing has remained the proper test and that the ECtHR *Behrami* and *Saramati* cases have not changed any of that, even though the ‘special position of the UN within the international community’ that was recalled in the latter cases is also relevant for the case at hand.<sup>15</sup> By taking this approach, the Court of Appeal has in our view rightfully separated the preliminary question of UN immunity from the substantive question of responsibility of the UN and its Member States for wrongful conduct of a UN peacekeeping force.

Considering the foregoing it is not surprising that the Court of Appeal indicates that it can assess whether limiting the right of access of Article 6 ECHR through the recognition of UN immunity complies with the requirements properly identified in the case law of the ECtHR. Neither the fact that the UN was already in existence before the ECHR entered into force, nor the contents of Article 103 UN Charter can prevent that.<sup>16</sup> In fact, the Court of Appeal is of the opinion that Article 103 was not meant to set aside without question fundamental human rights which are recognized both in customary law and in conventions. An ‘increased attention for and recognition of fundamental rights’ can be detected in the development of international law and the UN Charter itself promotes respect for fundamental human rights. This makes it implausible that Article 103 was meant to impair the enforcement of such fundamental rights.<sup>17</sup> This finding of the Court precludes the balancing, later in the judgment, of the general interests of, on the one hand, offering a remedy to the victims through a court of law and, on the other hand, upholding UN immunity before domestic courts.<sup>18</sup>

The Court then proceeds with its assessment whether immunity of the UN is in this case compatible with Article 6 ECHR. The Court observes, in general terms, that immunity from jurisdiction serves a legitimate aim that helps international organizations to work effectively.<sup>19</sup> In regard of the proportionality test, the Court emphasizes the ‘special position’ of the UN and its ‘far-reaching powers’. The UN might face a ‘real risk’ if it would not be able to enjoy immunity (or only partial immunity) from jurisdiction: the UN, working around the world in conflict areas under difficult circumstances, could be brought before domestic courts in a state where it is operating while the conflict is going on, and such legal action might be taken with the sole objective of impeding or preventing action by the Security

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<sup>14</sup> See Judgment in appeal, par. 5.2. One of the very few examples where the available alternative means were examined and not considered to be adequate is in the case (concerning an employment dispute) of *Siedler v Western European Union*, Brussels Court of Appeal, Judgment of 17 September 2003, *Journal des Tribunaux* 2004, 617; see for a critical appraisal of this judgment, J. Wouters & P. Schmitt, ‘Challenging Acts of Other United Nations Organs, Subsidiary Organs and Officials’, Leuven Centre for Global Governance Studies, working paper 49, April 2010, pp. 26-27, 38 ([http://www.ggs.kuleuven.be/nieuw/pages/publications/working\\_papersS.html](http://www.ggs.kuleuven.be/nieuw/pages/publications/working_papersS.html)).

<sup>15</sup> See Judgment in appeal, par. 5.3.

<sup>16</sup> See Judgment in appeal, par. 5.4-5.5. See for a discussion of these issues in first instance, Den Dekker, *op. cit.* note 2, p. 7-8.

<sup>17</sup> See Judgment in appeal, par. 5.5.

<sup>18</sup> Compare Judgment in appeal, par. 5.9.

<sup>19</sup> See Judgment in appeal, par. 5.6.

Council in conflict areas.<sup>20</sup> The Court is therefore of the opinion that UN immunity from jurisdiction is closely connected to the public interest pertaining to the maintenance of peace and security in the world and considers it ‘very important that the UN has the broadest immunity possible allowing for as little discussion as possible’. In light of the foregoing the Court finds that only ‘compelling reasons’ can lead to the conclusion that UN immunity ‘is not proportionate to the objective it aims for’.<sup>21</sup>

This somewhat abstract reasoning crystallizes as the Court interprets the main arguments of Plaintiffs such that Plaintiffs have really meant to invoke such ‘compelling reasons’ when arguing, first, that the UN has not done enough to prevent the genocide in Srebrenica in violation of Article 1 of the Genocide Convention, and second, that the UN contrary to Article VIII(29) Convention has not established any reasonable alternative means of dispute settlement which Plaintiffs could use, leaving them with no other option than to start proceedings before the Dutch courts.<sup>22</sup> The Court then notes that Plaintiffs do not blame the UN for having committed the genocide in Srebrenica or for knowingly assisting in it. The UN is ‘only’ blamed for failure to prevent the genocide. The Court deems this accusation serious but not sufficiently serious so as to set aside the immunity of the UN or to render its invocation unacceptable. The Court reiterates that if this were otherwise, the risk of abuse of domestic court proceedings would be real since in a conflict situation it would be an easy way out to accuse the UN peacekeeping forces of having failed to adequately prevent crimes against humanity.<sup>23</sup>

In our view this reasoning is remarkable, for it would seem that the Court implicitly leaves open the possibility of an exception to immunity if the UN would commit or be complicit in the commission of genocide (as a ‘sufficiently serious’ accusation). It is however not clear to us how it would have made a difference if Plaintiffs had made this accusation in the present case. For, it would seem that the general interest connected with UN immunity as identified by the Court and the risk of abuse of domestic court proceedings would not change under those circumstances, making it unlikely that the test of proportionality would result in a different outcome. Maybe the Court has had in mind the – remote – possibility that the UN

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<sup>20</sup> The Court notes in addition that the UN could be sued in states where the judiciary does not work properly in accordance with the standards set out in the ECHR.

<sup>21</sup> See Judgment in appeal, par. 5.7. The Court was probably inspired by ICJ *Difference relating to Immunity from legal process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Rep. 1999, 62, par. 61, in which it was stated that only ‘the most compelling reasons’ can set aside the presumption of immunity of a UN agent before national courts (based on an express finding concerning that immunity from the UN Secretary-General).

<sup>22</sup> See Judgment in appeal, par. 5.8.

<sup>23</sup> See Judgment in appeal, par. 5.10. For completeness’ sake, the Court indicates that it is not required that such abuse must be proven before immunity can be invoked by the UN. It is noticeable that the Court refers only to crimes against humanity and not also to the crime of genocide, which would seem to underline the exceptional circumstances of this case. (the fact that genocide was committed in Srebrenica according to the Court is a ‘fact of general knowledge’, meaning it does not require proof in a Dutch court, see Judgment in appeal, par. 5.9).

would abuse its right to invoke immunity,<sup>24</sup> but even then the question remains how a domestic court can rule on possible abuse of law (which would require at least a *prima facie* assessment as to the responsibility of the UN for serious human rights violations) without first answering the preliminary question of immunity.<sup>25</sup> Even if a duty to waive immunity for such serious violations had existed in international law it would not solve the issue, for it remains unclear how a domestic court could decide whether or not this ‘duty’ was disregarded by the UN in a given case.<sup>26</sup>

In all, although there is growing support for the view that the UN as a subject of international law must observe human rights law in its operations, the Court’s reasoning would seem to fit in better with Plaintiffs’ other argument which is directly related to Article 6 ECHR, namely that there are no alternative procedures available to them which can sufficiently safeguard access to a court of law in connection with the events in Srebrenica. That argument touches on the broader debate as to whether access to a court of law may be seen as a fundamental human right which must also be respected by the UN, and if so, whether the consequences of disrespecting that right could entail that immunity should be denied and domestic courts should adjudicate the matter in the absence of a remedy provided by the international organization. Whereas the District Court in first instance refrained from examining whether an alternative remedy was available (at the UN), the Court of Appeal seems to have interpreted the obligations stemming from the ECHR case law differently, since it has looked closely at alternative remedies.

The Court of Appeal starts by observing that within the UN, there indeed is no procedure available: appropriate modes for settlement of disputes as described in Article VIII(29) of the Convention have not been created by the UN, and the Agreement on the Status of UNPROFOR – the UN mission in Bosnia-Herzegovina of which the battalion in Srebrenica formed part – does not offer a realistic opportunity to bring a claim against the UN, either.<sup>27</sup> However, according to the Court this does not establish as a fact that Plaintiffs have no access to a court of law. The Court first of all indicates that Plaintiffs have not made sufficiently clear why they have no opportunity to bring the perpetrators of the genocide, and possibly those who can be held responsible for the perpetrators, before a court of law.<sup>28</sup> This argument

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<sup>24</sup> Dutch (procedural) law recognizes the possibility that invoking lack of jurisdiction of the Dutch courts constitutes an abuse of law, see e.g. Supreme Court *X v. Y*, Judgment of 7 May 2010, 09/01115 (<http://www.jwb.nl/doc/2010-198.doc>).

<sup>25</sup> With respect to foreign States before national courts, the idea that the need for fundamental human rights protection as such can trump State immunity is not without precedent at the domestic level. In the *Ferrini* case (*Ferrini v Germany*, judgment of 11 March 2004, no. 5044) the Italian Supreme Court ruled that the right of certain Italian nationals to receive compensation for international crimes committed by Nazi Germany during WW II should prevail over German state immunity before the Italian courts. The *Ferrini* ruling however is highly controversial and a case is pending before the ICJ concerning this question (see Case concerning Jurisdictional Immunities of the State (Germany v. Italy) ([www.icj-cij.org](http://www.icj-cij.org))).

<sup>26</sup> Compare Spijkers, op.cit., note 2, p. 204-205.

<sup>27</sup> Cf. J.A. Frowein, ‘United Nations (UN)’, in: *Max Planck EPIL* (July 2009), par. 35 and 43 ([www.mpepil.com](http://www.mpepil.com)), who points out that in general no judicial remedies exist for a claim against the UN and that there is no procedure to rule on the validity of acts of the UN, which is a ‘considerable weakness of the UN system’.

<sup>28</sup> See Judgment in appeal, par. 5.11.

seems a bit far-fetched, because the obvious explanation would appear to be: since a State is responsible for the (wrongful) acts and omissions of the members of its armed forces acting on duty, including *ultra vires* acts, a civil claim against an individual soldier of the Bosnian-Serb Army<sup>29</sup> provided the identity of that soldier is known in the first place, would (in principle) be passed on to the State of Bosnia-Herzegovina. The same applies with respect to the responsible political and military leaders of the Bosnian-Serb army, which the Court of Appeal apparently has in mind, and who are already on trial before a special criminal court (Karadzic) or have been successfully hiding (Mladic). The real issue would therefore seem to be whether Plaintiffs can alternatively bring their case before a civil court in Bosnia-Herzegovina and claim damages, considering that the genocide was committed by the (Bosnian-Serb army of the) Republika Srpska against (the Bosnian Muslims of) the Federation of Bosnia-Herzegovina, i.e. the two composite entities of the State of Bosnia-Herzegovina.<sup>30</sup> The Court of Appeal observes that the right of access to a court of law does not include a guarantee that whoever wants to bring a claim will always find a (solvent) debtor. True as it is, this observation does not seem to take the foregoing issue into account.

The Court has in addition indicated that Plaintiffs have access to an independent court of law regarding their claims against the Dutch State, since the State cannot invoke immunity before its own courts. This is notwithstanding the fact that the State will likely argue that its actions in Srebrenica must be attributed (exclusively) to the UN, since that argument, according to the Court, cannot prevent that the Dutch courts must give a substantive assessment of the validity of plaintiffs' claims against the State.<sup>31</sup> This observation is factually correct, but other, related, cases before the Dutch (lower) courts so far have demonstrated the difficulty regarding attribution: 'on duty' violations of UN peacekeepers are in principle attributed exclusively to the UN and only if it can be substantiated that the State has been directly involved in the command and control of the operations during which the (alleged) violations were committed, thereby also deviating from ('cutting across or backing out of') UN operational command and control, attribution of the UN peacekeepers' conduct to the State may be possible.<sup>32</sup> The need to provide substantive evidence about the exact course of events at the level of operational command and control may present a formidable procedural hurdle for private parties, also considering that the archives and in general all documents belonging to or held by the UN are inviolable wherever located (Cf. Article II(4) Convention). Attempts

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<sup>29</sup> There can be no doubt that the Bosnian-Serb army ('VRS') has committed the genocide in Srebrenica, see ICJ *Genocide Convention Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, par. 384-415.

<sup>30</sup> Reportedly, ethnic nationalism remains the main mobilizing factor in Bosnian politics and the different segments of Bosnian society continue to see each other as an existential threat, see N. van Willigen, 'From nation-building to desecuritization in Bosnia and Herzegovina', *Security and Human Rights* 2010 no.2, pp.127-138.

<sup>31</sup> See Judgment in appeal, par. 5.12.

<sup>32</sup> See The Hague District Court *H.N. v. State of the Netherlands*, judgment of 10 September 2008 (LJN: BF0184; English translation in BF0181) and see The Hague District Court *relatives of R.M. v. State of the Netherlands*, judgment of 10 September 2008, LJN: BF 0187; English translation in LJN: BF0182). In both cases appeal is pending.

to obtain classified documents from official sources regarding the events in Srebrenica have been unsuccessful so far.<sup>33</sup>

The foregoing is not to say that we consider that the essence of the right of access to a court of law is necessarily impaired by the upholding of the immunity of the UN in this case. It does however show that it is questionable whether the alternative remedies identified by the Court are very 'real'. The Court's reasoning on this point seems to be highly theoretical and hypothetical.<sup>34</sup> This impression is in a way strengthened by a remarkable note *in obiter*: the Court 'regrets' the fact that the UN has not established alternative proceedings in conformity with its 'obligations' under Article VIII(29)(a) of the Convention but considers this not to be sufficient to set aside the immunity of the UN in this case.<sup>35</sup> The Court concludes that in this case the right of access to a court of law of Plaintiffs is not violated if effect is given to the immunity of the UN. The ruling of the District Court in first instance is upheld.

## 5. Outlook

Counsel for the Plaintiffs has announced that the case will be brought before the Supreme Court of the Netherlands. If that procedure ends with the upholding of the judgment in appeal, Plaintiffs have exhausted the local remedies and may file a complaint against the State with the ECtHR. However, that Court is bound by the limits of the ECHR, which, as already noted, can be problematic because it is not entirely certain that Plaintiffs fall under Netherlands jurisdiction within the meaning of Article 1 ECHR. Plaintiffs had also requested that the Court of Appeal ask preliminary questions to the Court of Justice of the European Union (EU), arguing that the matter at hand raises questions of fundamental human rights protection (viz. access to a court of law) within the EU, which deserve a clear fundamental answer. This request, inspired on the *Kadi* case<sup>36</sup>, was denied pointblank by the Court of

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<sup>33</sup> See Utrecht District Court *N.N. v. Minister of Defense*, judgment of 28 January 2010 (LJN: BL1931); Council of State Dpt. of Administrative Justice *Erasmus Universiteit Rotterdam (College van Bestuur) v. N.N.*, judgment of 23 September 2009 (LJN: BJ8264); Council of State Dpt. of Administrative Justice *N.N. v. Minister of Defense*, judgment of 25 March 2009 (LJN: BH7691). See also Council of State Dpt. of Administrative Justice *N.N. v. Minister of Defense*, judgment of 3 March 2010 (LJN: BL6245).

<sup>34</sup> To provide another example, the Court of Appeal (in par. 5.13) refers to ECHR *Fayed v. United Kingdom* (1990) to substantiate that rather far-reaching limitations can be compatible with the right of access to a court of law. That case however concerned a totally different matter, namely the making and publication of a report by inspectors appointed by the UK Secretary of State for Trade and Industry about the applicants' take-over of a company, through their company: the applicants complained that the report, which contained certain criticisms concerning them, determined their 'civil right to honor and reputation' and that they were denied effective access to a court in the determination of this civil right.

<sup>35</sup> See Judgment in appeal, par. 5.13. Already in the case of *Manderlier v. United Nations and Belgian State*, Brussels Court of Appeal, Judgment of 15 September 1969, 69 ILR 139, it was observed that the UN had not given effect to Article VIII(29) Convention. Still it is questionable in our view whether Article VIII(29)(a) of the Convention is meant to offer a remedy in the event of disputes such as those arising from the events in Srebrenica.

<sup>36</sup> See Court of Justice of the European Communities, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*, Judgment of 3 September 2008, 2008/C 285/03, in which the essence of the right of access to a court of law within the European Union was protected.

Appeal.<sup>37</sup> The Dutch Supreme Court, even though it is the highest national instance, arguably can do the same if the request is repeated before it. After all, it would seem that the case at hand is not directly connected to the interpretation of Union law or the validity of acts adopted by any of the EU institutions which is what preliminary rulings of the EU Court are about.<sup>38</sup>

The current case illustrates that something has to happen within the UN before any changes are likely to occur in the Member States' recognition of near-absolute UN immunity. If only for that purpose, the signaling function of the proceedings in the Netherlands is highly important.

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<sup>37</sup> See Judgment in appeal, par. 5.14.

<sup>38</sup> See Treaty on the European Union (TEU), Article 19(b) and see Treaty on the Functioning of the European Union (TFEU), Article 267. The consolidated versions of the TEU and TFEU can be found in *OJ C* 115/1, 9 May 2008.