



UN-immunity disregards fundamental human rights: A decision by the Court of Appeals at The Hague in the case of the Mothers of Srebrenica

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On 30 March 2010, the Court of Appeals in The Hague [ruled on the immunity](#) of jurisdiction of the United Nations. The background to this decision is a lawsuit brought against the Dutch State and the United Nations (UN) by the Foundation ‘Mothers of Srebrenica’, representing 6000 relatives of victims of the genocide that took place in East Bosnia in July 1995. The plaintiffs are, among others, claiming joint responsibility of the UN and the Dutch State because these parties did not prevent the genocide. The proceedings on the merits against the Dutch State are pending at the moment because of the preliminary question about the alleged immunity of jurisdiction of the United Nations.

The Court of Appeals upheld a ruling by the District Court of The Hague in 2008 that confirmed the UN’s immunity in this case but modified the arguments essentially.

Some important aspects of the Court of Appeals decision should be considered as in essence the Court of Appeals neglects the fundamental human rights of the Mothers of Srebrenica.

First of all the Court of Appeals stated that genocide took place in Srebrenica and that this is a generally known fact. This is important because lately there has been a tendency by different parties to downplay this genocide. Recently even the former Dutch general Couzy who was commander-in-chief in 1995 questioned whether a genocide in legal terms took place. This is despite the fact that the International Court of Justice (ICJ) as well as the International Criminal Tribunal for the former Yugoslavia (ICTY), after thorough argumentation on this matter, decided that the Srebrenica massacre does constitute genocide under international law.

Secondly the Court of Appeals dismissed the argument of the District Court that the UN enjoys an absolute immunity. The Court of Appeals recognized in principle the argument of the Mothers of Srebrenica that there has to be a balancing of interests between the immunity of jurisdiction of the UN on the one hand and the protection of the fundamental rights of the plaintiffs to have access to an effective judicial review on the other.

Unfortunately, the Court of Appeals decided that - even in this exceptional case - the immunity of jurisdiction of the United Nations prevails.

The Court of Appeals surprisingly questioned the applicability of Article 6 ECHR in light of Article 1 ECHR¹ in principal, but nonetheless used the framework of the Waite and Kennedy decision of the European Court on Human Rights (no. 26083/94) in the end. This judgment involved two employees of the European Space Agency (ESA) who were dismissed and brought a labour law dispute before the German court, which held that it did not have jurisdiction due to the immunity of ESA. The employees appealed against that judgment to the European Court of Human Rights, with reference to Article 6 of the ECHR. Article 6 ECHR secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access to court (that is, the right to institute proceedings before courts in civil matters), constitutes only one aspect of the right to a fair trial and access to court.

Correctly, the Court of Appeals discussed the implications of the Waite and Kennedy decision that immunity has to serve, and be proportional to, a legitimate objective, as stated in this decision (par. 59). Furthermore “(The Court)... must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case.” (par. 64)

The final conclusion of the Court of Appeals is that UN immunity prevails, because the court is of the opinion that the plaintiffs have alternative means to bring their claims to justice and therefore upholding the UN’s immunity would be proportionate. Because the perpetrators as well as the Dutch State can be sued, the general interest of the UN not to be forced to appear in national courts would prevail. This is astonishing as the responsibility of the UN and the Dutch State in this case cannot be separated and this reasoning unlawfully restricts the right of access to court.

This reasoning does not take into account that the ECHR in Waite and Kennedy is protecting the right of access to a court of law and thoroughly discussed that there were alternative effective legal remedies within the European Space Agency (ESA). The ESA had an independent arbitration court where the employees could submit their complaints. The UN does not grant any legal remedies to the Mothers of Srebrenica despite the fact that Article 29 of the Convention on the Privileges and Immunities of the UN of 1946 (“the Convention”) obliges the UN to create “appropriate modes of settlements”. The Court of Appeals confirmed that the UN failed to do so has been admitted by the parties. (legal ground 5.11) And, what seems to have been forgotten is that when immunity was granted to the UN in 1946 it was foreseen with Article 29 of the Convention that there shall be cases that legal remedies are necessary. Therefore it is clearly against this objective to argue that the UN should be protected against appearing before national courts. It is its own negligence that leads to these proceedings in the Netherlands. It is up to the UN, only, to fulfil its own obligations in terms of human rights and in confirmation of the Convention by creating alternative effective legal remedies.

Another legal point of attention which has been put forward by the Mothers of Srebrenica is that in the analytical framework of the Waite and Kennedy decision the proportionality concerns the relationship between immunity of jurisdiction vis-à-vis Article 6 ECHR. The exception mentioned by the ICJ is of a different order. In the Advisory Opinion of the ICJ of 29 April 1999, it is clearly stated that immunity of the UN-rapporteur can be set aside for “most compelling reasons” (legal ground no. 61). The Court of Appeals did not discuss this issue at all even though the plaintiffs argued that the international obligation to prevent genocide is a “most compelling reason” to set aside the immunity of jurisdiction of the UN. The applicants argued that this obligation has a jus cogens character and is therefore of a higher order than the immunity of jurisdiction of the United Nations, which is an international right that does not have such a compelling nature.

A last aspect of interest in this limited comment is the plaintiffs’ request for a preliminary ruling of the European Court of Justice (ECJ) on the basis of Article 267 of the Treaty on the Functioning of the European Union.

The Court of Appeal saw no necessity to refer this case to the ECJ without further reasoning. The question remains why the court neglected to argue on this point although these preliminary rulings are meant to ensure the effective and uniform application of Community legislation and prevent diverging interpretations by national courts. The ECJ insisted that access to effective legal remedies is to be considered an autonomous fundamental right within the European Union in the case of Kadi and Al Barakaat of 3 September 2008 (C-402/05 and C-415/05). For the Mothers of Srebrenica it is up to the ECJ to decide if it is acceptable within the European Union that the UN is the only organization in the world that enjoys de facto absolute immunity, even though the UN did not fulfil its international obligations to create effective legal remedies in accordance with Article 29 Convention, Article 6 ECHR and the fundamental European rights and is in the case at hand alleged of not preventing genocide.

And as the Court of Appeals stated correctly, the UN is the international organization with the most far-reaching powers. This is exactly the reason why human rights should prevail as it is the ultimate objective of human rights to provide protection against strong powers of authorities. If the UN is the only organization in the world that stands above the law, human rights lose their fundamental function. How credible is the UN as the foremost human rights organization if the organization itself severely disregards these fundamental rights?

The Mothers of Srebrenica cannot accept the decision by the Court of Appeals and shall appeal to the court of cassation in the Netherlands being the high court (*Hoge Raad*) asking again to reject UN-immunity or otherwise refer the case to the ECJ to get a fundamental decision for the European Union on this issue.

* The author is a senior partner at Van Diepen Van der Kroef Advocaten and represents the Foundation Mothers of Srebrenica.

¹ The Dutch Foundation Mothers of Srebrenica falls under Netherlands jurisdiction with regard to this lawsuit and therefore enjoys protection by the ECHR. Any other conclusion would have the consequence of second ranked civilians who could be deprived of their human rights stated in the ECHR in the Netherlands.