LJN: BD6796, Rechtbank 's-Gravenhage , 295247 / HA ZA 07-2973 Judgment in the incidental proceedings

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Inhoudsindicatie: Judgment in the incidental proceedings in the civil case brought by the Association 'Mothers of Srebrenica' and ten individual plaintiffs (the Association et al.) versus the State of the Netherlands and the United Nations (UN). At issue in these incidental proceedings is the question whether a Dutch court is competent to hear this civil action insofar as it pertains to the United Nations. Central to the issue of whether a Dutch court has jurisdiction in this case is the question whether this case offers grounds or reasons to make an exception to the immunity enjoyed by the UN under international law. This immunity is laid down in Article 105, subsection 1 of the UN Charter and detailed in article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations (the Convention). In deciding the matter of whether or not the UN enjoys immunity in this case the court first considers how the immunity, enshrined in article 105, subsection 1 of the UN Charter and developed in article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations is interpreted and applied to prevailing law in international practice. The court concludes that in international-law practice absolute immunity of the UN is the standard and is respected, and that the interpretation of article 105 of the UN Charter offers no basis for restriction of the immunity of the UN. Subsequently, the court considers whether the absolute immunity of the UN under international law is in conflict with other standards of international law, such as the standards of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Genocide Convention. This does not lead to an exception to this immunity. The ancillary claim brought by the State that the court is incompetent in the case of the Association et al. versus the UN should therefore be allowed. The court declares it is incompetent to hear the action instituted against the UN.

Uitspraak

Judgment

District Court in The Hague

Civil law section

Case number / cause-list number: 295247 / HA ZA 07-2973

Judgment in the incidental proceedings, July 10, 2008

in the case of

1. [A],
living in [...], Bosnia-Herzegovina,
2. [B],
living in [...], Bosnia-Herzegovina,
3. [C],
living in [...], Bosnia-Herzegovina,
4. [D],
living in [...], Bosnia-Herzegovina,
5. [E],
living in [...], Bosnia-Herzegovina,
6. [F],
living in [...], Bosnia-Herzegovina,
7. [G],
living in [...], Bosnia-Herzegovina,
8. [H],

living in [...], Bosnia-Herzegovina,
9. [I],
living in [...], Bosnia-Herzegovina,
10. [J],
living in [...], Bosnia-Herzegovina,
11. the Association of Citizens MOTHERS OF SREBRENICA,
established in Amsterdam,
plaintiffs in the principal case,
respondents in the incident to determine the procedural issue whether the court has jurisdiction and in the incident to determine whether the State is allowed to intervene as third party or, alternatively, to join the United Nations in the principal case between the Association et al. and the United Nations,
procurator litis originally Mr. E.D. Drok, LL.M., now Mr. R.G. Snouckaert van Schauburg, LL.M.,
lawyers Messrs. M.R. Gerritsen, LL.M., A. Hagedorn, LL.M., J. Staab, LL.M. and S.A. van der Sluijs, LL.M., of Amsterdam

versus

1. THE STATE OF THE NETHERLANDS (Ministry of General Affairs), established in The Hague,
respondent in the principal case,
plaintiff in the incident to determine whether the court has jurisdiction and in the incident to determine whether the State is allowed to intervene as third party or, alternatively, to join the United Nations,
procurator litis Mr. G.J.H. Houtzagers, LL.M.,
lawyers Messrs. M. Dijkstra, LL.M. (substituted in court by his colleague Mr. A. van Blankenstein, LL.M.) and Mr. G.J.H. Houtzagers, LL.M.,
2. the organization having legal personality
THE UNITED NATIONS,
established in New York, United States of America,
respondent in the principal case,
who failed to appear.

The plaintiffs in the principal case will be referred to hereinafter as the Association et al. (plural). The respondents in the principal case will be referred to hereinafter as the State respectively the UN (singular). The plaintiffs under 1 – 10 in the principal case will be referred to jointly as [A] et al.; the plaintiff under 11 in the principal case as the Association.

1. The proceedings

1.1. The course of the proceedings appears from:
- The writ of summons dated June 4, 2007;
- A letter from the State to the Court dated September 17, 2007 with attached to it a letter from the United Nations to the Permanent Representative of the Netherlands to the UN dated August 17, 2007;
- A letter from the Association et al. to the Court dated September 20, 2007;
- The official advisory opinion of the Public Prosecutions Department, delivered at the cause-list session of November 7, 2007;
- The leave to proceed in default of appearance, given November 7, 2007 against the UN who failed to appear;
- The motion by the State in interim proceedings on December 12, 2007 to (1) have the Court declare it has no jurisdiction in the actions against the UN and (2) to allow the State as intervening party, or alternatively, to allow the State to join the UN as a party in the principal proceedings;
- The statement of defence in the incidents of February 6, 2008 presented by the Association et al.;
- The memorandums of oral pleading of the parties appearing in the incidents and the verbal explanation by the Public Prosecutor in the Public Prosecutor's Office of The Hague as representative of the Public Prosecutions Department, rendered at the Court hearing of June 18, 2008.

1.2. In conclusion, judgment is given in the incidents.

2. The claim in the principal proceedings

2.1. The Association et al. move, in summary:
(1) that the Court rules that the UN and the State have failed imputably towards [A] et al. as well as the individuals whose interests are represented by the Association in the performance of their obligations, in the manner set forth in the writ;
(2) that the Court rules that the UN and the State have acted wrongfully towards [A] et al. as well as the individuals whose interests are represented by the Association, in the manner set forth in the writ;
(3) that the Court rules that the UN and the State have violated their obligations to prevent genocide as laid down in the Genocide Convention;

(4) that the Court orders the UN and the State, jointly and severally, to pay compensation for the loss suffered by [A] et al., to be assessed and settled in accordance with the law
(5) that the Court orders the UN and the State, jointly and severally, to pay an advance in the amount of € 10,000 [ten thousand Euros] each to [A] et al. on the compensation as referred to under (4);
(6) that the Court orders the UN and the State, jointly and severally, to pay the costs of these proceedings.

2.2. The Association et al. motivate this – in summary – as follows. In July 1995 the worst act of genocide in Europe since the Second World War was committed in the East Bosnian enclave of Srebrenica. The State (with the Netherlands UN battalion Dutchbat) and the UN are responsible for the fall of the enclave in which Dutchbat had its base, as well as for the consequences, namely the murder by Bosnian Serbs of 8,000 – 10,000 citizens of Bosnia-Herzegovina who had taken refuge within the enclave. The State and the UN's acts (and omissions) in the context of the implementation of various UN resolutions according to which the enclave Srebrenica was declared a "Safe area" are in violation of promises made and, even besides that, are wrongful towards Fejzi? et al. – all of whom are surviving relatives of men murdered by Bosnian Serbs – and towards the Association representing the interests of the victims' relatives.

3. The disputes in the incidents

3.1. The State moves in the incidental procedure to have the Court disqualified that the
Court declares it has no jurisdiction in so far as the claims by the Association et al. pertain to the co-defendant, the UN.

3.2. The State moves in the incident to determine whether the State is allowed to intervene
as third party or, alternatively, to join the United Nations in the principal case, that it, in so far as is required for the institution of the action referred to sub 3.1 re the Court's jurisdiction or for the putting forward of defences pertaining to this jurisdiction, is allowed as intervening party, or at least as party joining the action on the UN's side in the principal case between the Association et al. and the United Nations.

3.3. The State motivated the ancillary claims referred to in 3.1 and 3.2 – in summary – as
follows. By virtue of article 105 of the UN Charter, in conjunction with article II paragraph 2 of the Convention on the Privileges and Immunities of the United Nations, to be referred to as the Convention, the UN enjoys immunity from legal process and with regard to implementation. The Court must grant this immunity ex officio. In any case the Court should follow the point of view expressed to it by the UN Secretary-General in the matter of the UN's immunity unless if there is an urgent reason not to. Such an urgent reason can only be, and this is not the case here, that the UN expressly waived its immunity.
Under international law the State has an interest of its own in (invoking) this immunity, which is laid down in article 3a of the Bailiffs Act. The seriousness of the facts put forward by the Association et al. and of the reproaches based on them towards the UN do not justify that this immunity is passed over in silence. The International Convention on Civil and Political Rights [hereafter: ICCPR] and the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereafter: ECHR] do not provide with a statutory basis an infringement of the UN's immunity in this case.

3.4. The Association et al. contest the ancillary claims by the State. They move that the
State has no cause of action in the incidents, or at least that the action be dismissed. Their point of view can be summarized as follows.
(1) Only the UN itself can, if it appeared, invoke its immunity, if the matter arises. Since it
deliberately failed to appear, an assessment of the defence of lack of jurisdiction is out of order. The motions by the State are devious tricks, now that the State is expected to argue in the principal case that not the State but the UN is responsible for the events referred to in the principal case. Legally, humanly and morally this is unacceptable.
(2) The State has no further interest of its own in its motions, and in any case no relevant
interest, for the Public Prosecutions Department when it delivered its official advisory opinion already expressed the UN's point of view on its immunity. Apart from that, the (Minister of Justice on behalf of the) State has not made use of the possibility of giving notice under article 3a of the Bailiffs Act.
(3) For awarding the incident whether the State is allowed to intervene as third party or,
alternatively, to join the United Nations, the law, in casu article 217 of the Code of Civil Procedure, has no scope. Neither does the State have an interest of its own vis-à-vis the UN.
(4) The Court already addressed the matter of its jurisdiction by granting leave to proceed
in default of appearance against the UN, for leave to proceed in default of appearance cannot be granted if the Court has no jurisdiction. If the Court assessed officially if it has jurisdiction to hear the actions against the UN, it has done so prior to granting leave to proceed in default of appearance.
(5) The UN does not enjoy immunity in this case. This follows from, amongst other things, the articles 14 ICCPR and 6 ECHR. Essential to this is that the UN, unlike a state, cannot be brought before its own (independent) court. There is no effective alternative legal course of proceedings open to the Association et al. – as required by article 6 ECHR – in order to submit their actions to a court of law. The immunity of a state or an international

organization is subordinated to an individual's rights, at least in case of violation of peremptory provisions of international law, which was the case here. In principle, the UN enjoys functional - and therefore limited - immunity, but in this case the acts objected to do not fall within the scope of that functional immunity. In any case, there is no functional need for immunity. Functional immunity has boundaries which have been overstepped here, for in this case the issue is violation of the highest standard of international law, belonging to ius cogens or peremptory law: the prohibition on (tolerating) genocide. Such violation cannot be "necessary" - as required for immunity in article 105 sub 1 of the UN Charter - for the
realization of the UN objectives. The importance of enforcement of this standard prevails over the interest pertaining to immunity.

3.5. What the parties appearing submitted further will be addressed if necessary for a decision on the State's ancillary claims.

4. Some relevant conventional-law and other provisions

4.1. The articles 31 and 32 of the Vienna Convention on the Law of Treaties (Bulletin of Treaties 1977, no. 169), hereinafter to be referred to as the Vienna Convention on Treaties, read as follows:

"Article 31
1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

4.2. The articles 103 and 105 of the UN Charter, in so far as they are relevant here, read:
"Article 103
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 105
1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. [...]
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

4.3. Article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations, based on article 105 subsection 3 of the UN Charter [hereinafter: the Convention] (Bulletin of Treaties 1948, no. 1 224) reads:
"Article 2, paragraph 2
The United Nations [...] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. [...]"

4.4. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter: the Genocide Convention] (see Bulletin of Treaties 1960, no. 32 amended by Bulletin of Treaties 1966, no. 179)

reads as follows:
"Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

4.5. Article 6 subsection 1 of the ECHR reads, in so far as relevant here:
"In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law. [...]"

4.6. Article 13a of the General Provisions (Kingdom Legislation) Act, reads as follows:
"The jurisdiction of the Court and the enforceability of judicial decisions and of authentic deeds are restricted by exceptions recognized by international law."

4.7. Article 3a of the Bailiffs Act, in so far as relevant here, reads as follows:
"1. If a bailiff reasonably takes into account the possibility that the performance of an official act he is instructed to do is contrary to the international-law obligations of the State, he at once informs our Minister of the instructions received in the manner as provided for by the ministerial regulation.
2. Our Minister may notify a bailiff that an official act he is or will be instructed to perform, or that has already been performed by him is contrary to the international-law obligations of the State.
[...]"

5. The assessment

5.1. This judgment is strictly concerned with the Court's jurisdiction with regard to the action by the Association et al. against the UN, that is the Court's jurisdiction to hear this action and decide in the case. In compliance with the request by the parties appearing the Court will give an in this instance final decision in the present judgment.

5.2. The assertion by the Association et al. that the Court by its decision of November 7, 2007 to grant leave to proceed in default of appearance against the UN already rendered a decision about its jurisdiction in the case against the respondent is dismissed. Granting leave to proceed in default of appearance in itself just means that the Court has established that the non-appearing defendant was summoned in a legally valid manner. The question whether a non-appearing defendant is summoned in the manner prescribed by law logically precedes the assessment of the (international) jurisdiction of the Court with regard to the action against this defendant, for it is possible that the defendant wishes to submit his views on this to the Court, and then it must first be established whether he was summoned in accordance with the law if he failed to appear. A Court may render a decision about its jurisdiction at the same time as granting leave to proceed in default of appearance, but does not have to do so. In this case this was not done; on November 7, 2007 the Court just gave a decision on the leave to proceed in default of appearance as requested by the Association et al., but not on its own jurisdiction in the case against the UN. In the copy of the record of the cause-list session in question, of which the parties appearing are cognizant, no mention is made of (any assessment or any decision by the Court, ex officio or on application, concerning) the Court's jurisdiction or the UN's immunity.

5.3. Neither can any consequences regarding the jurisdiction of the Court be attached to the fact that the Minister of Justice (as an organ of State) made no use of the possibility by virtue of article 3a of the Bailiffs Act to notify the bailiff serving the writ of summons to the UN. As emerged during the June 18, 2008 hearing, the parties appearing agree that the bailiff in question failed to notify the Minister by virtue of article 3a subsection 1 of the Bailiffs Act. But even besides that, the application of article 3a of the Bailiffs Act or the omission thereof does not anticipate a Court's decision about its jurisdiction, nor negatively affects the right of the State as a party in the action to submit its view on it to the Court. This is supported by the legal history of article 3a of the Bailiffs Act (see Parliamentary documents II, 1992/93, 23 081, no. 3, p. 3-4).

5.4. The Court will now first of all decide in the matter of the incidental motion by the State that the Court has no jurisdiction with regard to the action against its co-defendant, the UN. To this end the Court will also take into consideration the advisory opinion of the Public Prosecutions Department. Considering this framework for assessment the Court may leave unanswered the question whether it has the power or is obliged, even, to assess ex officio whether the UN enjoys immunity, for in view of the discussion between the parties appearing the question of the Court's jurisdiction has been submitted to the Court in its entirety.

5.5. It should be noted that the defences put forward by the Association et al., summarized in 3.4 under (1) and (2) of this judgment, fail. The State has a judicially relevant interest of its own in its motion that the Court has no jurisdiction in the case against its co-defendant. This is without prejudice to the fact that the Public Prosecutions Department already drew the Court's attention to this matter of jurisdiction in its advisory opinion of November 7, 2007. Although the Public Prosecutions Department is an organ of State it must not be identified with the State. In the execution of its duties, the Public Prosecutions Department in this field too has a

certain degree of independence vis-à-vis the Minister of Justice, laid down in detail in the Judiciary (Organization) Act, as well as a responsibility of its own also laid down in other statutes. Apart from that the State, as a party to the proceedings, has a right of its own with further statutory powers attached to make use of procedural possibilities. The Public Prosecutions Department does not have the possibility to appeal if in a civil action it has given an advisory opinion by virtue of article 44 of the Code of Civil Procedure. In law, its opinion is just an advice of an authority that is not a party to the proceedings. To a party to the proceedings on the other hand, such as the State in this case, the remedy of appeal is usually available if an action instituted by it (in this case: the State) is dismissed.

5.6. The State's own interest in its ancillary claim follows particularly from its obligation under international law by virtue of article 105 subsection 1 of the UN Charter. Under this treaty the State has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective of how far it extends. Pleading the immunity in proceedings before a national court of law at least falls within the bounds of possibility. It is not important in this regard that the State itself is also a defendant, in this case alongside the UN. Now that the State is already a party to the proceedings in its own right, it does not need to follow the - in principle much more cumbersome - course of an ancillary claim of third-party intervention. Neither does the possibility of which the State now makes use prejudice the fact that in our system of law there are also other options for (organs of) the State to obtain a Court's opinion on its jurisdiction regarding a non-appearing defendant. All these options exist side by side and do not exclude each other. The diversity of the possibilities is an expression of the seriousness of the State's aforesaid obligation under international law rather than that it impairs it. In view of all this the Court does not adopt the assertion by the Association et al. that the State's adopted course of action in the ancillary claims is unacceptable. Neither can it be said that this course of action is humanly or morally unacceptable to such a degree that legal consequences should be attached.

5.7. In this incident the State's possible defence regarding the action brought against it is out of order. Anything the Association et al. argued or presumed in this respect therefore is now left undiscussed.

5.8. The assertion by the Association et al. that only the UN itself could have invoked immunity if it had appeared fails already by virtue of the State's own interest established here.

5.9. Then the principal question in this incident comes up for discussion: whether the UN enjoys immunity or not. The Court should first of all base itself at this stage - in which the UN has not given a substantive reaction to the claims by the Association et al. and the State has not responded yet - upon what, according to the writ of summons, the Association et al. founded themselves in their actions against the UN and the State. Essentially, they argue that in 1995 in the Bosnian enclave Srebrenica genocide was committed and that the UN in the execution of its peace-keeping mission in Bosnia-Herzegovina did not prevent or stop this genocide, which took place as it were right in front of it. In spite of promises made by the UN to the citizens in question concerning their protection and safety, the murders (also crimes under international law) did occur. Anticipating its defence in the principal case the State argued that the Bosnian Serbs did indeed commit genocide. The State acknowledges in itself the failure of the UN mission in question, which was based on Chapter VII of the UN Charter ("Action with respect to threats to peace, breaches of the peace and acts of aggression") and in which Dutchbat participated, Dutch troops who had been made available to the UN for this purpose. The State only holds the Bosnian Serbs responsible for the crimes committed under international law, however; according to the State neither the UN nor the State are at fault for it. They could not prevent or stop the genocide.

5.10. Point of departure in answering the principal question detailed in 5.9 is the rule of article 13a of the General Provisions (Kingdom Legislation) Act. In this civil action the Court will have to take into consideration the international-law exceptions to normal procedural rules, including article 7 of the Code of Civil Procedure. By virtue of the latter article the Court, if it has jurisdiction with regard to one of the defendants (in this case the State), also has jurisdiction with regard to another defendant involved in the same action (in this case the UN), if - as is not contradicted here – there exists such coherence between the actions against the separate defendants that reasons of efficiency warrant a joint hearing.

5.11. Applicable then, first of all, is the international-law rule of article 105, subsection 1 of the UN Charter, as detailed in article II, paragraph 2 of the Convention. For the interpretation and applicability of this and other international-law rules the Court bases itself upon prevailing law as it finds expression in, amongst other things, the international-law practice. At issue in this case is not a possible state immunity, but the immunity of an international organization, laid down in a treaty in so many words. Between these types of immunity, which are very dissimilar to each other, there is no hierarchical relationship; the one type does not extend "further", in general terms, and is not more "important" than the other. Decisive for the establishment of meaning of standards of immunity of international institutions is what the parties to the treaty agreed to in the founding treaty in question, having due regard to article 31 and 32 of the Vienna Convention on Treaties. With regard to the UN it is true that it is indisputably the most important international institution in the international community, with an almost universal membership among states.

5.12. The reproaches on which the Association et al. have based their actions against the UN relate to acts (and omissions) in the implementation of the peace-keeping mission in question, which is based on resolutions by the UN Security Council by virtue of the aforesaid Chapter VII of the UN Charter. The UN acts objected to fall within the functional scope of this organization. It is particularly for acts within this framework that immunity from legal process is intended.

5.13. Point of departure is that the UN itself, according to its letter to the Dutch Permanent Representative to the UN, referred to in 1.1 and dated August 17, 2007, expressly invokes its immunity. As far as the Court knows the UN to date has always invoked its immunity with regard to actions within the functional framework referred to just now, and no exceptions were ever made in practice. The Association et al. have not put forward anything from which the opposite follows. On the basis of this the Court concludes that in international-law practise the absolute immunity of the UN is the norm and is respected.

5.14. The Court dismisses the argument by the Association et al. that the immunity of the UN only exists in those instances in which the domestic court addressed - in this case, a court in the Netherlands – actually considers the acts and omissions the UN is blamed for as "necessary" by virtue of the restrictive subordinate clause "as are necessary for the fulfilment of its purposes". In view of, inter alia, the manner in which the norm of article 105, subsection 1 of the UN Charter was detailed in the Convention, it is in principle not at the discretion of a national court to give its opinion on the "necessity" of the UN actions within the functional framework described in 5.12. A testing on the merits or comprehensive testing is also contrary to the ratio of the immunity of the UN as enshrined in international law. The Court subscribes to the State's assertion that for this reason domestic courts should not assess the acts and omissions of UN bodies on missions such as the one in Bosnia-Herzegovina but with the greatest caution and restraint. It is very likely that more far-reaching testing will have huge consequences for the Security Council's decision-making on similar peace-keeping missions.

5.15. Neither does the available, but scant, jurisprudence about the scope of the standard of article 105, subsection 1 of the UN Charter afford grounds for the conclusion that a national court, if and insofar as it has scope for testing, can proceed in any other way than with the utmost reticence. In its advisory opinion of April 29, 1999 on the immunity of a UN worker the International Court of Justice ruled that wrongful acts possibly committed by the UN are not open to assessment by national courts, but should take place in the context of specific dispute settlement as provided for in article VIII, paragraph 29 of the Convention (Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62, paragraph 66). There are no legal grounds for the assertion that the lack of an adequate provision within the meaning of article VIII, paragraph 29 warrants a infringement of the principal rule of article 105, subsection 1 of the UN Charter, even irrespective of (1) whether it is at issue in this case and of (2) the question what scope for testing the court would have.

5.16. Now that the interpretation of article 105 of the UN Charter does not offer grounds for restricting the immunity, the question arises whether other international-law standards - outside of the UN frame of reference - prompt a different opinion. This inquiry into conflicting standards is necessary because there are insufficient grounds for accepting a full and unconditional prevailing of international-law obligations of the State under the UN Charter over other international-law obligations of the State. The rule of article 103 of the UN Charter invoked by the State does not always and right away bring relief in the event of conflicting obligations of a peremptory nature (ius cogens) or conflicting human rights obligations of an international customary law nature.

5.17. According to the Association et al. article 105 subsection 1 of the UN Charter is incompatible with mandatory standards derived from, inter alia, international law on genocide (the Genocide Convention) and the articles 14 ICCPR and 6 ECHR.

5.18. The Genocide Convention comprises as principal rule the penalization of genocide. From article 1 of this Convention it is clear that the parties to the treaty, including the Netherlands, undertake to prevent genocide - and therefore not to commit the crime themselves - as well as to punish it.

5.19. Neither the text of the Genocide Convention or any other treaty, nor international customary law or the practice of states offer scope in this respect for the obligation of a Netherlands court to enforce the standards of the Genocide Convention by means of a civil action. The Contracting parties are obliged to punish all acts defined by this Convention as genocide within the boundaries set in article VI of the Convention. Also, as stated before, the states are bound to prevent genocide and therefore to refrain from committing it themselves. The states are also bound to clearly set out obligations on the extradition of suspects of genocide, but the Convention does not provide for (any obligation pertaining to) the enforcement of the standards of enforcing the prohibition on genocide via a civil law action. It should be noted here that the International Court of Justice expressed an opinion in 2007 about the substance of obligations of parties to the Genocide Convention and in that context omitted to discuss any obligation by states to enforce the Convention in civil law actions (ruling of February 26, 2007 on the application of the Convention on the Prevention and Punishment of the Crime of Genocide in the case of Bosnia

and Herzegovina v. Serbia and Montenegro, paragraphs 155-179).

5.20. In its judgment of November 21, 2001 the European Court for Human Rights ruled in the case of Al-Adsani v. the UK (no. 35763/97) that there is no scope for an infringement of the in principle existing immunity of a national state, in that case Kuwait, with regard to a civil action because of conflict with the prohibition on torture laid down in article 3 ECHR. As there is no evidence that later the European Court for Human Rights deviated from this line the Court concludes that there is no generally accepted standard in international-law practice on the basis of which current immunities allow exception within the framework of enforcement in civil law of the standards of ius cogens, like the prohibitions on genocide and torture. That the issue in this case was the relationship between state immunity and the prohibition on torture and not the relation between the immunity of international organizations and the prohibition on genocide does not lead to a different opinion in the present case. Just as little as there is any basis in law for a hierarchy between different types of immunity, there are no grounds for a hierarchy between different standards of ius cogens.

5.21. The Court concludes from what it related in 5.18 – 5.20 that from the Genocide Convention or similar mandatory international-law standards in line with it, such as the prohibition on torture, no grounds can be derived for an exception to the standard referred to above of the UN's absolute immunity. This means that the Court does not get to a prioritizing of conflicting international-law standards. For a weighing of interests such as advocated by the Association et al. there is no scope.

5.22. The Court arrives at the same conclusion with regard to the right of access to a court of law guaranteed in article 6 ECHR, a fundamental element of the right to a fair trial. The European Court of Human Rights jurisprudence offers insufficient grounds for an interpretation of article 6 ECHR in the sense that in this respect it prevails over international immunities. The right of access to a court of law is for its substance and purport largely dependent on existing international-law obligations. This applies in particular and in any case with respect to obligations towards the UN, as is evident from the judgments of the European Court of Human Rights dated May 31, 2007 in the cases against Behrami v. France (no. 71412/01) and Saramati v. France, Germany and Norway (no. 78166/01). In these cases the European Court of Human Rights ruled that the ECHR should not be an impediment to the effective implementation of duties by international missions in Kosovo under UN responsibility. By virtue of this, states cannot, according to the Court, be held liable for the actions of national troops they made available for international peace-keeping missions. The Court concludes that this same ratio implies that article 6 ECHR cannot be a ground for exception to the - as said before, absolute - immunity under international law of the UN itself. The UN therefore cannot be brought before a domestic court just on the grounds of the right to access to a court of law guaranteed in article 6 ECHR.

5.23. The Court is aware of the existence of, on the face of it, conflicting jurisprudence of the European Court of Human Rights in the judgments of February 18, 1999 in the cases of Beer and Regan v. Germany (no, 28934/95) and Waite and Kennedy v. Germany (no. 26083/94). In these judgments the Court expressed its concern that the foundation of international organizations and their corresponding immunities are only compatible with article 6 ECHR if the institutions involved offer a reasonable alternative for the protection of the rights under the ECHR. If this is not the case the ECHR prescribes that the international institution's immunities invoked are not respected.

5.24. Nevertheless, the Court does not consider it necessary in the light of this jurisprudence to investigate whether an alternative remedy is available at the UN to the Association et al. In this respect the Court considers as follows. The UN was founded before the ECHR came into force. There can be no question therefore of a restriction of the protection of human rights under the ECHR by transfer of powers to the UN. Moreover, the UN is an organization with, as said before, an almost universal membership. The international organization that the judgments of Beer and Regan v. Germany and Waite and Kennedy v. Germany related to, namely, the European Space Agency, was founded in 1980 and therefore some considerable time after the entering into force of the ECHR. This organization has a restricted - European - membership. The UN's position therefore is very dissimilar to it. The ECHR has actually taken the special position of the UN as a point of departure in the aforementioned cases of Behrami v. France and Saramati v. France, Germany and Norway. All this justifies the conclusion that the European Court of Human Rights' motivations in the cases of Beer and Regan v. Germany and Waite and Kennedy v. Germany do not apply to the UN. It deserves special mention that if this were the case under the ECHR primarily that state would be liable for not allowing access to a court of law as a result of the primacy of international-law immunities within whose territory the institution in question has its seat or the asserted wrongful act was committed. In the present case this is certainly not the Netherlands.

5.25. Testing against article 14 ICCPR does not lead to a different outcome.

5.26. The Court's inquiry into a possible conflict between the absolute immunity valid in international law of the UN and other standards of international law does not lead to an exception to this immunity.

5.27. On the basis of the above the State's ancillary claim to have the Court declare it has no jurisdiction in the case of the Association et al. against the UN should be allowed.

5.28. In view of this outcome the State's second ancillary claim to intervene as a third party or, alternatively, to join the defendant in the action of the Association et al. against the UN does not need to be taken into consideration.

5.29. The Association et al. should be ordered to pay the costs of this incident as the party against whom the judgment is given.

6. The judgment

The Court

in the incident to have the Court declare it has no jurisdiction

6.1. declares that it has no jurisdiction to hear the action against the United Nations;

6.2. orders the Association et al. to pay the costs of this incident, on the side of the State estimated up to this judgment at EUR 1,356 for the fees of the procurator litis plus statutory interest due fifteen days from today and at EUR nil for disbursements;

6.3. declares this order of the Court be provisionally enforceable as far as possible;

in the incident to be allowed to intervene as a third party, or alternatively, to join the defendant in the action

6.4. concludes that a decision in this incident need not be forthcoming;

in the principal case

6.5. refers the case to the cause-list of September 24, 2008 for statement of defence on the side of the State.

This judgment was given by Messrs H.F.M. Hofhuis, LL.M., D. Aarts, LL.M. and G.K. Sluiter, LL.M. and was pronounced in public on July 10, 2008.