

WRIT OF CASSATION  
SUPREME COURT OF THE NETHERLANDS

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Today,

two thousand and ten;

upon the application of:

1. the **Association Mothers of Srebrenica** , having its registered office in Amsterdam, at  
Dijsselhofplantsoen 14-18;
2. Mrs **Sabaheta Fejzić**, resident in Vogošća (Municipality of Sarajevo), at Gornja Jošanica I  
do 9, Bosnia-Herzegovina;
3. Mrs **Kadira Gabeljić**, resident in Vogošća (Municipality of Sarajevo), at Blagovac  
1-99, Bosnia-Herzegovina;
4. Mrs **Ramiza Gurdić**, resident in Sarajevo, at Lješevno, Odžak Br. 754, Ilijaš, Bosnia-  
Herzegovina;
5. Mrs **Mila Hasanović**, resident in Sarajevo, at Aleja Lipa 42, Bosnia-Herzegovina;
6. Mrs **Kada Hotić**, resident in Vogošća (Municipality of Sarajevo), at Ul. Jošanička 149,  
Bosnia-Herzegovina;
7. Mrs **Šuhreta Mujić**, resident in Sarajevo, at Polomska BB, Ilijaš Podlugovi, Bosnia-  
Herzegovina;
8. Plaintiff 8;
9. Mrs **Zumra Šehomerović**, resident in Vogošća (Municipality of Sarajevo), at Braće Krešo 2,  
Bosnia-Herzegovina;

10. Mrs **Munira Subašić**, resident in Vogošća (Municipality of Sarajevo), at Stara Jezera Br. 142, Bosnia-Herzegovina;
11. Plaintiff 11;

This case is handled by M.R. Gerritsen, Dr. A. Hagedorn, J. Staab, S.A. van der Sluijs;

I have,

**TO:**

1. **The State of the Netherlands** (Ministry of General Affairs), having its seat in The Hague, delivering my writ at the Office of the Procurator General to the Supreme Court of the Netherlands at Kazernestraat 52, The Hague, and leaving a copy of this writ with:
2. the organisation with legal personality **The United Nations**, having its seat in New York City (NY 10017), New York, United States of America, on First Avenue at 46th Street, not having a recognized seat in the Netherlands, therefore delivering my writ at the Office of the Procurator General to the Supreme Court of the Netherlands, established in The Hague, at Kazernestraat 52, having spoken with and leaving two copies of this writ, as well as two copies of the English translation thereof, with:

Stating the request to have the writ served in accordance with articles 3 through 6 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, by simple delivery or, if this is not possible, by service or notification duly observing the laws of the United States of America, in both cases against the issue of a confirmation of receipt, while a third copy of this writ, as well as the English translation thereof will be immediately sent by me, bailiff, to the Respondent by registered post to the abovementioned address, and while an amount of USD 95.00 will be transferred to account number 2007107119 at Wells Fargo Bank, such in accordance with the regulation on the service and notification of judicial and extrajudicial documents in the United States of America;

**GIVEN NOTICE:**

that my Appellants ('**the Association et al.**') are appealing to the Supreme Court to overturn the judgment of the The Hague Court of Appeal ('**the Court of Appeal**') given on 30 March 2010 under Case number 200.022.151/01 ('**the Judgment**') in the proceedings between the Association et al. as Appellants and Respondents (**the State of the Netherlands and the United Nations [UN]**) as Respondents;

that should Respondent fail to appoint, on the first date specified on the roll or on another date to be set by the court, an advocate at the Supreme Court who will act as counsel in this matter in that capacity, the prescribed periods and formalities being complied with, the court will grant leave to proceed in default of appearance against Respondent and deal with the substance of the claim;

that should there be other Respondents and at least one of them has appeared in the proceedings, and if in respect of the Respondents who do not appear the prescribed formalities and periods have been complied with, the court will grant leave to proceed in default of appearance against the Respondents who do not appear, and proceedings will continue between the Appellant in Cassation and the Respondents who appear. Between all parties one judgment will be delivered that is to be considered a judgment in a defended action.

Subsequently, I, bailiff, at the date stated and as requested, a domicile having been elected and an advocate at the Supreme Court having been appointed as stated, having duly delivered my writ, have

**SUMMONED:**

the aforementioned Respondents to appear on Friday October 15 two thousand and ten, at 10.00 hours a.m., not in person but represented by an advocate at the Supreme Court of the Netherlands, at the session of the Supreme Court of the Netherlands, First Single-Judge Division charged with Civil Matters (*Eerste Enkelvoudige Kamer voor de behandeling van Burgerlijke Zaken*), to be held in the building of the Supreme Court of the Netherlands at Kazernestraat 52, The Hague.

**IN ORDER TO:**

hear it claimed and moved against the Judgment on behalf of Appellants in Cassation as follows:

**A Introduction**

1. Admissibility of the appeal in cassation

The association Association Mothers of Srebrenica ('the Association'), which represents the interests of about 6,000 surviving relatives of the fall of the enclave Srebrenica<sup>1</sup>, and ten individual surviving relatives, hereafter jointly referred to as 'the Association et al.' have summoned both the UN and the State of the Netherlands at first instance.

In its final judgment the District Court declared itself as being without jurisdiction to hear the claims brought by Association et al. against the UN, thus finally settling the claims brought by Association et al. against the UN. The District Court deferred the claim brought against the State of the Netherlands and the State of the Netherlands has as yet to file its Statement of Defence. In the contested judgment the Court of Appeal upheld this decision of the District Court with respect to the UN, so that the Court of Appeal's judgment as regards the jurisdiction with respect to the Association et al.'s claim against the UN is a final judgment, making it possible to lodge an appeal in cassation against the entire judgment of the Court of Appeal.

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1 See also no. 1 of the originating Writ of Summons and no. 1 of the Statement of Appeal.

## 2. Brief description of the events surrounding the fall of Srebrenica

The issue of the UN's immunity cannot be viewed separately from the special facts that underlie the debate about the UN's immunity in this case. The Association et al. will briefly outline the events surrounding the fall of Srebrenica in July 1995, but refers to the originating Writ of Summons for a full representation of the facts. In the Statement of Appeal, under point 94, reference was made to the facts in the originating Writ of Summons, more specifically nos. 6 through 287. The Association et al. has also referred to these facts under no. 12 of the Pleading Notes in Appeal.

In March 1993 the then commander of the 'UN Protection Force' ('UNPROFOR'), the French General Ph.P.L.A. Morillon, visited Srebrenica, which was under heavy siege. He described the situation in Srebrenica as 'a hell'. Before a multitude of Bosnian refugees Morillon declared<sup>2</sup>: "You are now under the protection of the United Nations (...) I will never abandon you."

Because of the constant attacks on the enclave, killing large numbers of civilian victims, and the threat - made by the former Serb President Slobodan Milosevic among others - that a mass slaughtering would take place if the Bosnian-Serb army would invade Srebrenica<sup>3</sup>, UN Resolution 819 was adopted on 16 April 1993 and UN Resolution 824 on 6 May 1993, declaring Srebrenica a so-called 'Safe Area'.

The UN Security Council demanded in this respect (UN Resolution 819, article 1)<sup>4</sup>: "(...)that all parties and others concerned treat Srebrenica and its surroundings as safe area which should be free from any armed attack or any hostile act." In addition to protecting the area, the UN also ought to protect the population of the Safe Area. The preamble to UN resolution 836 (4 June 1993) states in that connection<sup>5</sup>: "Determined to ensure the protection of the civilian population in safe Areas and to promote a lasting political solution (...)."

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2 Summary of the NIOD (Nederlands Instituut voor Oorlogsdocumentatie) report of 10 April 2002, entitled: 'Het officiële NIOD-rapport samengevat', hereafter referred to as: 'the summary of the NIOD report', p. 77; the UN report (report of 15 November 1999: 'Report of the Secretary-General pursuant to General Assembly resolution 53/35, The Fall of Srebrenica), no. 38; the report of the French Parliament (Rapport d'information commune sur les événements de Srebrenica), part I, p. 17-18; discussed under no. 14 of the originating Writ of Summons and no. 13 of the Pleading Notes in Appeal.

3 NIOD report of 10 April 2002, entitled: 'Srebrenica, een 'veilig' gebied', hereafter referred to as: 'the NIOD report', p. 1219 and 2891; the report of the French Parliament, part I, p. 19; discussed inter alia under no. 16 and 407 ff. of the originating Writ of Summons.

4 no. 21 of the originating Writ of Summons.

5 no. 24 of the originating Writ of Summons.

The Secretary-General expressly cited the protection of the civilian population as an UNPROFOR mandate in his statement of 9 May 1994:

"UNPROFOR understands its mission as follows: To protect the civilian populations of designated Safe Areas against armed attacks and other hostile acts, through the presence of its troops and, if necessary, through the application of air power, in accordance with agreed procedures."<sup>6</sup>

The Netherlands had agreed to make troops available to the UN. Ultimately, the Dutch troops were assigned to protect the Safe Area Srebrenica, the most dangerous and explosive part of Bosnia. In spite of this, the Netherlands decided not to opt for a battalion mechanized infantry (armoured infantry), but for the lightly armed Air Brigade. This choice was heavily criticized both within the Netherlands and abroad. Then Minister of Defence Ter Beek, however, was of the opinion that heavier armament could provoke aggression<sup>7</sup>. The first Dutch battalion Blue Helmets (Dutchbat I) was dispatched to Srebrenica in March 1994.

The Bosnian-Serb army's attack on the Safe Area Srebrenica began on 6 July 1995. Dutchbat was then requested by the Bosnian Army to return the weapons collected in by Dutchbat, in order that they could defend themselves. This request to return the weapons - as were later requests - was refused giving the statement that: "(...) it was UNPROFOR's responsibility to defend the enclave, and not theirs."<sup>8</sup> Several Dutchbat observation posts were abandoned without any struggle in the following days<sup>9</sup>. A request for Close Air Support was refused no less than seven times, in spite of the fact that all conditions for Close Air Support had been met. Secretary-General Kofi Annan would later conclude: "Even in the most restrictive interpretation of the mandate the use of close air support against attacking Serb targets was clearly warranted."<sup>10</sup> Only on 11 July 1995, six days after the attack had begun, Close Air Support was approved and given for the first time.

However, after the first bomb had been fired in the direction of the approaching Bosnian-Serbs, the Dutch Government subsequently made every attempt to halt the air strikes, because of the possible risks involved for their own troops. The UN subsequently indicated

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6 Originating Writ of Summons, no. 25.

7 Summary of the NIOD report, p. 125; discussed in no. 49 of the originating Writ of Summons.

8 NIOD report, p. 2102; UN report, nos. 240 and 477; discussed in nos. 91 and 323 of the originating Writ of Summons.

9 UN report, no. 253; discussed in no. 95 ff. of the originating Writ of Summons, with references to the relevant numbers in the NIOD report.

10 UN report, no. 480; discussed in no. 327 of the originating Writ of Summons; Pleading Notes in Appeal, no. 18.

not to have any other option than to stop the Close Air Support<sup>11</sup>. That day the enclave Srebrenica, which had been declared a Safe Area, fell without Dutchbat even firing a single shot aimed directly at the attacking Serbs<sup>12</sup>.

The people who had fled in panic sought refuge in large numbers on and around the UN compound in Potocari. The UN compound area, large enough to accommodate tens of thousands of refugees, was opened only to about 5,000 refugees. The rest of the approximately 30,000 refugees had to remain outside the UN compound<sup>13</sup>. Dutchbat decided to make the area in and around the compound a so-called 'mini Safe Area'<sup>14</sup>.

Despite the fact that the refugees repeatedly heard that they would be safe in this mini Safe Area, they were de facto handed over to the Bosnian Serbs. Both the UN military observers present in the Safe Area and the Netherlands Blue Helmets were witnesses to many war crimes<sup>15</sup>. There was neither intervention nor any reporting done of these crimes<sup>16</sup> and that was prompted by the desire 'to maintain the peace'<sup>17</sup>. This, while men were continuously being taken away and executed, while decapitated bodies were being found, women were being raped and the identity papers of so-called 'persons to be questioned' were thrown onto piles. Regarding this mountain of identity documents the Criminal Tribunal for the Former Yugoslavia (ICTY) held in its judgment that<sup>18</sup>:

"at the stage when Bosnian Muslim men were divested of their identification en masse, it must have been apparent to any observer that the men were not screened for war crimes. In the absence of personal documentation, these men could no longer be accurately identified for any purpose. Rather, the removal of their identification could only be an ominous signal of atrocities to come."

The Blue Helmets showed themselves, moreover, to be helpful with the ethnic cleansing and the deportation<sup>19</sup>. The UN compound was cleared and the route to the port, where Bosnian

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11 NIOD report, p. 2240, 2241, 2301, 2302, 2303 and 2317; UN report, no. 306; discussed in nos. 143 and 163 through 175 of the originating Writ of Summons.

12 UN report, nos. 304 and 472; discussed in no. 384 of the originating Writ of Summons.

13 NIOD report, p. 2620; discussed in no. 192 of the originating Writ of Summons.

14 Summary of the NIOD report, p. 325, discussed in no. 194 of the originating Writ of Summons.

15 NIOD report, p. 2650, 2269, 2675, 2676, 2680, 2682, 2683, 2684, 2687, 2693, 2695, 2703; discussed in nos. 212 through 233 of the originating Writ of Summons.

16 UN report, nos. 346 through 358 and no. 474; discussed in no. 252 of the originating Writ of Summons.

17 Summary of the NIOD report, p. 339; discussed in no. 248 of the originating Writ of Summons.

18 ICTY 2 August 2002, re Krstic, legal consideration 160; discussed in no. 229 of the originating Writ of Summons; Pleading Notes in Appeal no. 21.

19 NIOD report, p. 2425 and p. 2740; discussed in nos. 253 ff. of the originating Writ of Summons.

Serbs awaited the refugees, was marked out with tape so that the refugees had to leave the area in a straight line and had nowhere to conceal themselves. The Blue Helmets assisted in separating the men from the women. People leaving the UN compound were also searched by the Blue Helmets. Sharp objects were confiscated as though they were boarding an aircraft<sup>20</sup>. Without pressure being exerted by the Bosnian Serbs the Blue Helmets made the most rigorous imaginable selection of who could stay and who not<sup>21</sup>. A group of injured men confined to the sick bay in the UN compound were shoved into the container of a truck on stretchers and 'delivered' to the Serbs by the Blue Helmets<sup>22</sup>. Not one of them would ever return.

Many hundreds of the around 2,000 men and boys in and around the UN compound<sup>23</sup> were murdered there, in the area<sup>24</sup>. The remainder of them would be transported and murdered in the following days. In total almost 8,000 people would be murdered. The International Court of Justice at The Hague (ICJ)<sup>25</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>26</sup> has in that context held that genocide was committed in Srebrenica. The Court of Appeal, too, has held that it is a fact of general knowledge that genocide was committed<sup>27</sup>.

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20 Discussed in nos. 257 through 266 of the originating Writ of Summons (statements Plaintiffs).

21 Srebrenica, Het zwartste scenario, Frank Westermans & Bart Rijs, Atlas, 1997, p. 179.

22 Srebrenica, Het zwartste scenario, Frank Westermans & Bart Rijs, p. 187.

23 NIOD report, p. 2620; discussed in no. 230 of the originating Writ of Summons.

24 NIOD report, p. 2774; discussed in no. 230 of the originating Writ of Summons.

25 ICJ 26 February 2007 re Bosnia & Herzegovina / Serbia & Montenegro, specifically legal considerations 278-297; discussed in no. 397 of the originating Writ of Summons.

26 ICTY 2 August 2002, re Krstic.

27 See the contested judgment, legal consideration 5.9.

## B Complaints

### Ground 1

Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal consideration 3.2 and 3.3 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:

The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration(s) and held in the operative part that the State of the Netherlands has a sufficient interest in the interlocutory claim concerning jurisdiction.

- 1.1 The starting point is that the UN Resolutions, referred to in the introduction, provide the legitimization for the State of the Netherlands to send Dutchbat to Bosnia. Dutchbat thus acted under 'command and control' of the UN while the UN in its acts and/or failure to act was influenced by the acts and/or failure to act of the State of the Netherlands (inter alia not continuing Close Air Support at the express request of the State of the Netherlands). A combined hearing of the claims against the UN and against the State of the Netherlands is required, therefore, in order to avoid contradictory judgments.

The Association et al. has argued in the fact-finding proceedings that the State of the Netherlands lacks a sufficient interest in its motion for the Dutch court to decline jurisdiction with respect to the claim of the Association et al. against the UN, which interlocutory claim of the State of the Netherlands rested on the UN's immunity in addition to the international obligation of the State of the Netherlands to safeguard that immunity as much as possible. The Court of Appeal held under legal consideration 3.3 of the contested judgment:

"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."

- 1.2 In its decision, the Court of Appeal failed to recognize the substantive coherence of the body of facts and the strong interrelatedness of the State of the Netherlands and the UN in this case. As set out under points 347 through 375 of the Writ of Summons in the first instance, it in part concerns the same body of facts and the question to whom the conduct should be imputed, the UN and/or the State of the Netherlands. The persons performing the acts are the same as appropriate, however, the question is whether the acts were carried out under the responsibility of the State of the Netherlands and/or of the UN, and/or whether the UN and/or the State of the Netherlands can refer to the other as a justification for their acts, respectively - especially - their failure to act: The State of the Netherlands claimed to have had a UN mandate, the UN claimed to have withheld Close Air Support at the express request of the State of the Netherlands, and both legitimize their acts and/or their failure to act by referring to the other.

For this reason the Association et al. has sued the State of the Netherlands and the UN jointly in one proceeding, so that it may be established at law to whom the allegedly culpable acts respectively failures to act will be imputed. Separate proceedings might result in contradictory judgments. A second aspect is that even though acts of one party would not necessarily create a liability, such acts considered in connection with acts of the other party, in the opinion of the Association et al., may well constitute a liability. It is important that the body of facts is established in its totality and uniformly with respect to both parties, as the liability may in certain cases partly depend on the acts of the other party. One act is very much interrelated with the other act, and together they may lead to liability. All of this, in part, forms the basis for the rationale of article 7 Code of Civil Procedure (*Rv*). The body of facts, specifically the failure to act, is imputed either to the UN, or to the State, or to both, respectively, with respect to one or both Respondents a secondary liability may exist as meant in articles 6:162 Dutch Civil Code (*BW*), 6:171 *BW* and 6:172 *BW*, and regarding possible justification with respect to one or both Respondents. That decision needs to be congruent with respect to the claim against the UN and the claim against the State, in order to prevent contradictory decisions.

- 1.3 The procedural distinction made by the Court of Appeal between the proceedings against the UN and the State of the Netherlands does not do justice to the substantive coherence. The independent assessment of both procedurally different cases as determined by the Court of Appeal is not conceivable and was in fact the reason for consolidating both cases in substance in the Writ of Summons in the first instance. It is precisely the correlation between both cases that demands one single ruling on the merits of the case. It would be undesirable if it were to be ruled in different judgments that the defendant is not liable, under reference to the defendant in the other proceeding. Preventing contradictory decisions is precisely the objective of article 7 Code of Civil Procedure (*Rv*).
- 1.4 Furthermore, the Court of Appeal failed to appreciate that there is no objection to anticipate in an interlocutory claim upon the defence as to the substance in a proceeding like the present one, in which the consideration to grant immunity is in part made on the basis of the facts of the claim and the other legal procedures available to the Association et al. Starting point is that establishments of facts in the interlocutory claim concerning jurisdiction have no binding force in the main action, where the plaintiff and the defendant have the opportunity to use all available means of evidence to prove, respectively, to rebut arguments. For example: when establishing in an interlocutory claim concerning jurisdiction whether an arbitration clause was agreed upon while the agreement itself is contested, the main action is anticipated upon, which, however, does not bind the court in the main action with respect to the content of the disputed facts or rights.

No legal rule prevents assessment of facts and rights in an interlocutory claim for the benefit of a decision in the interlocutory claim, which facts and rights will also be dealt with in the main action. The Court of Appeal has thus erred at law. Respectively, should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible. The Association et al., for that matter, expects the State of the Netherlands to argue as to the merits that the acts are to be imputed to the UN and not to the State, respectively, that the UN justifies the acts and/or failure to act of the State of the Netherlands. The Association et al. has pointed out, under point 4 of the Pleading Notes in Appeal, rather similar cases that concern the same body of facts in Srebrenica, in which the State of the Netherlands has actually argued as to the merits that the acts are to be imputed to the UN<sup>28</sup>. Should the State of the Netherlands put forward the

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28 The Hague District Court, 10 September 2008, legal consideration 4.5, LJN BF 0184, 265615/HAZA 06-1671.

same defence in the main action, it will be too late to reconsider the decision in the interlocutory claim. The Court of Appeal itself, for that matter, under legal consideration 5.12 ff. also anticipates upon the defence the State may put forward as to the merits.

## Ground 2

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal consideration 3.4 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration and held in the operative part that granting default of appearance does not mean that the court considered itself competent to hear the claim of the Association et al. against the UN.**

- 2.1 Under legal consideration 3.4 the Court of Appeal held that granting leave to proceed in default of appearance against the UN does not mean that the District Court also ruled (favourably) on its international jurisdiction. The Court of Appeal states at the end of legal consideration 3.4: "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." This opinion reveals an error of law with respect to leave to proceed in default of appearance in cases dealing with international public-law jurisdiction.
- 2.2 Legally speaking, nothing can be said against the last sentence of legal consideration 3.4. If a party disputes the international jurisdiction, it should be invoked. In that respect, official testing is not relevant. In this case, however, it is not a procedural matter that is at issue, but the question to what extent the immunity of an international organization has been examined beforehand. This indeed ought to be examined ex officio and was in this case de facto raised and assessed prior to leave to proceed in default of appearance was granted. Leave to proceed in default of appearance against a non-appearing international organization can only be granted after official examination by the court of its international

public-law jurisdiction. In terms of procedural law, granting leave to proceed in default of appearance means accepting the defendant's status as a party to the proceeding<sup>29</sup>.

- 2.3 If, for that matter, the UN's immunity were to be absolute (which is the essence of the State of the Netherlands' argument prior to the leave to proceed in default of appearance, as presented in the letter of 17 September 2007 and which view was repeated and further substantiated in the Public Prosecutor's letter of 2 November 2007, which letter, pursuant to article 44 Rv, was also submitted to the District Court prior to the leave to proceed in default of appearance), the docket judge should have ruled in the context of its examination pursuant to article 139 Rv that the Dutch court has no jurisdiction, and disallowed the Association et al.'s claims against the UN<sup>30</sup>. The court has to grant default of appearance against the UN, unless it considers the claim against the UN to be unlawful or unfounded. This includes application of its own motion of the principles of incompatibility with mandatory law and public order. Immunity should be invoked by the defendant concerned after appearance. The interim motion for the Dutch court to decline jurisdiction can neither be brought by letter nor by the enjoined party. The enjoined defendant cannot be a party to legal proceedings on behalf of an enjoined party.
- 2.4 The Public Prosecutor, pursuant to article 44 Rv prior to the leave to proceed in default of appearance, referred to the letter of 17 August 2007 from the UN to the Permanent Representative of the State of the Netherlands at the UN in its Statement of Defence of 2 November 2007. The State of the Netherlands had also drawn the District Court's attention to said letter in its letter of 17 September 2007. The Public Prosecutor writes (see p. 2, paragraph 5):
- "According to the letter of 17 August 2007, the UN would not appear before a Dutch court precisely because of its immunity from jurisdiction. The latter is in accordance with the UN's long-standing practice."
- 2.5 The District Court's and the Court of Appeal's finding that the non-appearance granted does not mean that the courts rendered a decision on jurisdiction is incorrect at law, respectively incomprehensible. That consideration is contrary to article 139 Rv and the correspondence regarding jurisdiction referred to above, the UN's long-standing practice

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29 J. Spiegel, *Vreemde staten voor de Nederlandse rechter*, diss. 2001, p. 31.  
30 See also nos. 20 through 25 of the Statement of Appeal.

regarding appearance in legal proceedings knowable to the District Court, cited literature, and the incomprehensible assumption that a decision about the default of appearance had been rendered, without the docket judge having considered the arguments put forward by the parties and the Public Prosecutor.

The fact that a decision was taken with respect to the default of appearance implies that the UN was found not to have immunity in this case.

### Ground 3

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal considerations 4.1 through 5.1 first sentence of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration(s) and held in the operative part that the UN is entitled to immunity where an adequate legal remedy is absent.**

- 3.1 Under legal considerations 4.1 through 5.14, the Court of Appeal jointly considered the Association's complaints 7 through 18 against the judgment in the first instance. In its consideration, the Court of Appeal repeatedly erred at law. In the explanation below the Association et al. will maintain, where possible, the order applied by the Court of Appeal in its considerations.

Under legal consideration 4.2 of the judgment the Court of Appeal held:

"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."

And in legal consideration 5.1:

"The conclusion from the above is that the UN is entitled to immunity from prosecution."

- 3.2 The Court of Appeal's finding that the immunity of the UN is as broad as possible and that the UN cannot be brought before any national court is contrary to (international) law. Under international law the UN has a more restricted form of immunity and immunity is made dependent on, inter alia, the existence of an alternative effective legal remedy for the benefit of the person seeking justice. Moreover, in international law certain circumstances warrant exceptions to the right to immunity. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.
- 3.3 The Court of Appeal's reasoning and conclusion in the contested legal considerations 4.1 through 5.14 do not meet the requirements of article 31 of the Vienna Convention on the Law of Treaties, namely interpretation in good faith, despite the fact that the Court of Appeal claims to use such an interpretation as a point of departure. For Section 2 of the Convention cannot be considered separately from Section 29 of the Convention<sup>31</sup>. Granting far-reaching immunity to an international organization is only acceptable if at the same time a legal remedy offering sufficient safeguards is created<sup>32</sup>. Without such a legal remedy, the UN would be placed above the law. Interpreting Section 2 of the Convention without considering the other provisions of the Convention, especially Section 29, does not constitute interpretation in good faith within the meaning of article 31 of the Vienna Convention on the Law of Treaties<sup>33</sup>.
- 3.4 The Court of Appeal's factual observation under legal consideration 5.11 that the UN does not provide for a legal remedy offering sufficient safeguards should have lead to the

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31 See no. 84 of the Statement of Appeal.

32 See nos. 87 and 88 of the Statement of Appeal.

conclusion that the UN cannot be granted immunity. This is a consequence of article 6 ECHR and article 14 ICCPR, and settled ECHR Case-law (specifically *Waite & Kennedy* and *Beer & Regan*<sup>34</sup>), and the ECJ in the matter of *Al-Barakaat versus the Council of the European Union and the Commission of the European Communities*<sup>35</sup>. It is also reflected in the *Manderlier Case*<sup>36</sup>. It follows from a recent judgment of the Dutch Supreme Court of 23 October 2009<sup>37</sup> as well that without an effective alternative legal remedy there is no room for further considerations with respect to the legitimacy and proportionality in the context of granting an international organization immunity. If the international organization does not provide for an alternative effective legal remedy, there is no room for immunity. The Advisory Commission on Issues arising under Public International Law (CAVV), set up by the State of the Netherlands, in its report of 8 May 2002 (called '*Advies inzake aansprakelijkheid voor onrechtmatige daden tijdens VN-vredesoperaties*') also found that in the absence of an alternative legal remedy, the right of access to a court of law is more important than the right to immunity<sup>38</sup>; the CAVV is the most important advisory body of the State of the Netherlands with respect to international law issues. This conclusion is endorsed in literature, as described in detail in the Statement of Appeal<sup>39</sup>. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

- 3.5 Advocate-General Strikwerda has argued as follows about the relationship between immunity and the right of access to a court<sup>40</sup>, on which argument said judgment of the Dutch Supreme Court was partly based:

"It can be derived from these considerations that the restrictions on the right of access to the court, which can be the consequence of the grant of immunity from jurisdiction to the international organization and the referral of the plaintiff to the judicial process within the organization, must leave untouched the essence of the right of the plaintiff derived from Article 6 paragraph 1 ECHR, must serve a legitimate aim and must be proportional. For the Netherlands court this means that in the particular case it must be assessed whether the

33 See nos. 85 and 86 of the Statement of Appeal.

34 ECHR 18 February 1999, no. 26083/94 and no. 28934/95.

35 ECJ 3 September 2008, Case C-415/05 P; discussed in detail in nos. 199 through 206 Statement of Appeal.

36 Court of Appeal in Brussels, 15 September 1969, 69 International Law Reports 139, discussed in nos. 65 through 75 of the Statement of Appeal.

37 HR 23 October 2009, NIPR 2009, 290.

38 See article 4.5.2. of the CAVV report, no. 121 of the Statement of Appeal and no. 372 of the originating Writ of Summons.

39 See nos. 122 and 123 Statement of Appeal, with indications of source.

40 Point 14 of the opinion of the Advocate General to HR 23 October 2009, NIPR 2009, 290.

legal process within the international organization offers the plaintiff ‘reasonable alternative means’ to protect the plaintiff’s rights under Article 6 ECHR effectively.”

The most important conclusion that can be drawn from this quote is that without a legal remedy there is no right to immunity. If a legal remedy *is* provided for, there are further conditions for granting immunity. The restriction of the right of access to a court must serve a legitimate purpose and be proportional in that event.

The opinion of Advocate-General Strikwerda once again confirms that there is no room for an international organization’s immunity if an effective legal remedy offering sufficient safeguards is not provided for. Only if such a legal remedy - contrary to the present case - exists, immunity may be granted to an international organization if certain conditions are met.

In the past decade supreme courts in several European countries (Switzerland<sup>41</sup>, Italy<sup>42 43</sup>, France<sup>44</sup>, Belgium<sup>45 46</sup> and Germany<sup>47</sup>) have found in accordance with the ECHR decision in the matter of *Waite & Kennedy* that in the absence of an alternative effective legal remedy

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- 41 *Consortium X. v. Swiss Federal Government* (Conseil federal), Swiss Federal Supreme Court, 1st Civil Law Chamber, 2 July 2004, *International Law in Domestic Courts* (ILDC) 344 (CH 2004). With explicit reference to the *Waite & Kennedy* case of the ECHR, the highest Swiss court held that the available arbitration met the requirements of article 6 ECHR.
- 42 *Paola Pistelli v. European University Institute*, Italian Court of Cassation, 28 October 2005, no. 20995, *Guida al diritto* 40 (3/2006), ILDC 297 (IT 2005). The Italian court of cassation held that the right of access to a court of law had not been breached in that case, because an alternative effective legal remedy was available.
- 43 *Alberto Drago v. International Plant Genetic Resources Institute (IPGRI)*, Italian Court of Cassation, 19 February 2007, No. 3718, ILDC 827 (IT 2007). The Italian court declared itself competent to hear the dispute and dismissed the invocation of immunity, as the organization in question had failed to institute an alternative effective legal remedy.
- 44 *Cultier v. Organisation Européenne de télécommunications par satellite (Eutelsat)*, Court de Cassation, Chambre sociale, 5 June 2001, 98-44996 (“Attendu, en outre, que la court d’appel a constaté que la commission de recours, prévue par l’article 22 de l’Accord de siège pour régler les litiges susceptible de s’élever entre Eutelsat et les membres de son personnel au sujet de leurs ‘condition de service’, lesquelles visent les conditions d’exécution et de rupture des contrats de travail, avait été instituée; qu’elle a, dès lors, exactement décidé que le grief allégué de déni de justice était dépourvu de fondement”).
- 45 *Energies nouvelles et environnement v. Agence spatiale européenne*, Civ. Bruxelles (4e ch.), 1 December 2005, *Journal des tribunaux* (2006), pag. 171, 173 (“[...] pour admettre l’immunité de juridiction de l’A.S.E. [claimant] devait disposer de voies de recours alternatives.”).
- 46 *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003, *Journal des Tribunaux* (2004), 617, ILDC 53 (BE 2003). The Belgian court declared itself competent to hear the dispute and dismissed the invocation of WEU’s immunity despite the fact that WEU had instituted an alternative legal remedy. This alternative legal remedy did not meet the requirement of article 6 ECHR to safeguard a ‘fair trial’; legal consideration 62 ff. “Le recours organisé par le statut du personnel de l’UEO n’offre donc pas toutes les garanties inhérentes à la notion de procès équitable et certaines des conditions des plus essentielles font défaut. Il échet de constater dès lors que la limitation d’accès au juge ordinaire en raison de l’immunité juridictionnelle de l’UEO ne s’accompagne pas de voies de recours effectives au sens de l’article 6, § 1 de la CDEH.”.
- 47 *Hetzel v. Eurocontrol*, Bundesverfassungsgericht 59, 63. The German Constitutional Court examined whether Eurocontrol’s internal legal remedy met the requirements of an alternative effective legal remedy: legal consideration 91 “Die Ausgestaltung des Rechtsschutzes für die Bediensteten von Eurocontrol zufolge der Allgemeinen Beschäftigungsbedingungen sowie die Begründung der Gerichtsbarkeit des Verwaltungsgerichts der IAO hierfür entspricht zunächst einer weit verbreiteten Praxis internationaler Organisationen (...). Status- und Verfahrensgrundsätze des

no immunity is to be granted to an international organization and the right of access to a court of law is to prevail. For an extensive discussion of these judgments, the Association et al. refers to an article from 2008 by A. Reinisch<sup>48</sup>.

The ECHR decision in the matter of Waite & Kennedy is also endorsed in literature. Van der Plas, for example, concludes<sup>49</sup>: " (...) More specifically, it follows from ECHR Case-law that the right of access precludes the granting of immunity, if the plaintiff would otherwise not have effective judicial protection. The restriction to article 6 paragraph 1 ECHR would in that case be disproportional or affect the essence of the right of the plaintiff." Reinisch and Weber conclude<sup>50</sup>: "In the case of international organizations, which do not possess their own domestic courts, the availability of such an alternative dispute-settlement mechanism will be crucial. If claims are brought against international organizations before national courts and if they are dismissed as a result of the defendant organization's immunity, the forum state will violate the claimant's right of access to court unless it ensures that there is an alternative adequate dispute-settlement mechanism available."

The International Court of Justice in The Hague (ICJ) already in 1954, in its Advisory Opinion "Effect of awards of compensation made by the United Nations Administrative Tribunal", assumed a general obligation for the UN to set up alternative legal remedies (please note, this concerned labour disputes). The ICJ held: "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."<sup>51</sup>

- 3.6 Given the above, the Court of Appeal's decision under legal consideration 5.1 that the UN enjoys immunity is insupportable if an effective alternative legal remedy is not available. Furthermore, the Association et al. points out that, besides the non-availability of an alternative effective legal remedy, other circumstances, too, may be cause for exceptions

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Gerichts entsprechen überdies einem internationalen Mindeststandard an elementarer Verfahrensgerechtigkeit, wie er sich aus entwickelten rechtsstaatlichen Ordnungen und aus dem Verfahrensrecht internationaler Gerichte ergibt."

48 A. Reinisch, The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals, *Chinese Journal of International Law*, 2008, Vol. 7, Nos. 285-306, p. 294 ff.

49 C.G. van der Plas, *De taak van de rechter en het IPR*, 2005, Kluwer, p. 265.

50 A. Reinisch and U.A. Weber, In the shadow of Waite and Kennedy, The jurisdictional immunity of international organizations, the individual's right of access to courts and administrative tribunals as alternative means of dispute settlement, *International Organizations Law Review* 1, 2004, p. 59-110, p. 68 ff.

51 IGH, Effect of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13th 1954: I.C.J. reports 1954, p. 47, p. 57.

to the right to immunity from jurisdiction. This regards a consequence of the *ius cogens* and the exception established by the ICJ based on 'most compelling reasons', as formulated in the Advisory Opinion of the International Court of Justice<sup>52</sup>. These exceptions will be dealt with in further detail in the part 4C below.

#### Ground 4

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, under legal considerations 4.4, 4.5, 5.1, 5.2, 5.6 and 5.7 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration(s) and held in the operative part that after considering the possibilities for the surviving relatives of the victims of Srebrenica to seek justice, the UN is entitled to immunity.**

#### Part A

- 4.1 The Association et al. will now deviate from the order applied by the Court of Appeal and first address legal consideration 5.1 and the scope of article 6 ECHR, as the Association et al. believes it is important with respect to the other complaints to establish beyond doubt that the ECHR applies to the Dutch court's assessment of the Association et al.'s claims against the UN and the State of the Netherlands, and that Case-law developed in that area is an important reference point for this case. The Court of Appeal considered under legal consideration 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

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<sup>52</sup> ICJ 29 April 1999, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999, p. 62 ff., hereafter: the 'Advisory Opinion'.

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."

By this, the Court of Appeal has applied an incorrect interpretation of the law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

- 4.2 The Court of Appeal fails to appreciate that article 6 ECHR and article 14 ICCPR have direct effect and not only through customary law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible. If proceedings as meant in article 2 Judiciary Organization Act (*RO*) are conducted in the Netherlands, parties to the proceedings are in principle subject to Netherlands jurisdiction and may invoke direct application of human rights conventions, such as the ECHR. Article 6 ECHR was written as an instruction to the State Party to ensure that the judicial processes set up, respectively, maintained by that Member State meet the requirements of article 6 ECHR. Everyone who brings an action before a competent court within a State Party, therefore, may assume that the judicial process meets the requirements of article 6 ECHR, and is entitled, based on the ECHR, to a judicial process that meets the requirements of article 6 ECHR. It is unthinkable that a party in proceedings before a Dutch court would not to be able to invoke his rights as safeguarded by the ECHR and ICCPR. These are human rights, which in principle are independent upon a place of residence. Article 1 ECHR reads:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

By bringing an action before a court in a State that is party to that convention, the defendant falls within, respectively, accepts the jurisdiction of the Dutch court. Hence, everyone within the jurisdiction of the Dutch courts can invoke the provisions of Section 1 of the ECHR, including article 6 ECHR<sup>53</sup>:

*"Die EMRK gilt für alle der Herrschaft (jurisdiction) eines Staates unterstehenden Personen. Dabei ist gleichgültig, welche Staatsangehörigkeit diese Personen haben."*

Each party to a proceeding, therefore, has the (procedural) right to invoke a right granted by the ECHR, regardless of whether it concerns a natural person or a legal entity, and regardless of whether it concerns a resident, a foreigner or a stateless person<sup>54</sup>:

*"Die Rechte aus Art. 6 Abs. 1 stehen « jeder Person » zu, deren Sache - soweit sie « zivilrechtliche Ansprüche und Verpflichtungen » oder eine « strafrechtliche Anklage » betrifft - von einem Gericht zu entscheiden ist und d.h. also, dass im Zivilverfahren die Prozessparteien und im Strafverfahren jede angeklagte Person als anspruchsberechtigt in Frage kommen. Der Begriff « jede Person » umfasst natürliche und juristische Personen, Inländer, Ausländer und Staatenlose."*

The State of the Netherlands in all its appearances - including the judicial system - is bound to the ECHR<sup>55</sup>:

*"Durch Art. 1 ist die Staatsgewalt in allen Formen an die Beachtung der Konventionsrechte gebunden. Das gilt für die Gesetzgebung, Verwaltung und Rechtsprechung."*

It follows from these quotes that the Court of Appeal has applied an incorrect interpretation of the law. The Court of Appeal, for that matter, apparently based its reasoning to a large extent on the residence of the Appellants in Cassation under 2 through 11. The Court of Appeal erroneously failed to address the fact that the Association is a Netherlands legal entity with its registered office in Amsterdam. The Association is established in Amsterdam and additionally falls within the jurisdiction of the Dutch courts. A considerable number of the persons whose interests are represented by the Association Mothers of Srebrenica

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53 Frowein/Peukert, Europäische Menschenrechtskonvention, EMRK-Kommentar 3. Auflage, N.P. Engel Verlag, Kehl am Rhein, 2009, article 1, note 3, p. 15.

54 Frowein/Peukert, op.cit., article 6, note 4, p. 145.

55 Frowein/Peukert, op.cit., article 1, note 11, p. 20.

pursuant to its Articles of Association are located in the Netherlands as meant in article 1:1 BW, or, alternatively, within the EU. The Court of Appeal's interpretation of article 1 in conjunction with 6 ECHR, namely that the scope of this article is limited to residents of the Netherlands, respectively the EU, would mean that only Dutch, respectively EU, residents seeking justice in a Dutch court could invoke the ECHR. This is legally incorrect and undesirable. The Court of Appeal's interpretation would lead to two classes of parties before the same court, namely parties with a right to a fair and independent legal remedy as meant in article 6 ECHR, and parties without that right. Further discussions as to whether article 14 ICCPR in connection with article 2 ICCPR allows for another interpretation are unnecessary in this respect since in any case article 6 ECHR has direct effect. The above and the following with respect to article 6 ECHR, for that matter, applies by analogy to articles 14 and 2 ICCPR.

- 4.3 The Association et al. has an interest in the establishment of the fact that article 6 ECHR has direct effect and not by way of analogy or as a rule of customary law, as in that case ECHR Case-law, and not just a rule of customary law that can be interpreted restrictively, shall be decisive for the interpretation and scope of the right safeguarded by article 6 ECHR. The Association et al. will return to this Case-law further below.

#### **Part B**

- 4.4 Under legal consideration 5.2 the Court of Appeal further reasoned, based on the - incorrect - principle, that in the absence of an alternative effective legal remedy further restrictions to the right to a court of law would be possible in connection with immunity. The Court of Appeal held under legal consideration 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."

In this legal consideration the Court of Appeal has applied an incorrect interpretation of the law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

- 4.5 The ECHR has described in Waite & Kennedy under legal consideration 67 the foundation article 6 ECHR aims to provide:

'The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.(...)"

Under legal consideration 68 the ECHR continued:

"For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."

It follows from these quotes, inter alia, that the court, each time its considers granting immunity, needs to examine whether article 6 ECHR is sufficiently safeguarded if immunity is granted. The ECHR subsequently held that the legal remedy offered by ESA meets these requirements. The ECHR has examined and extensively substantiated that ESA's Labour Appeals Court meets these requirements. That is why this decision - in which the same

reasoning is used - is usually interpreted to mean that if no legal remedy exists, immunity may not be granted. This is also the interpretation applied by the Advocate General in HR 23 October 2009, NIPR 2009, 290 (already referred to above). If an alternative effective legal remedy exists, the requirements of legitimacy and proportionality enter the equation<sup>56</sup>. When establishing that the UN has no alternative effective legal remedy, the Court of Appeal should have found that the UN does not enjoy immunity because the basic requirement of legal protection set by the ECHR has not been met. Further examinations made by the Court of Appeal under the other legal considerations are also based on this incorrect interpretation of the law and cannot be upheld. Now that these legal considerations manifest an incorrect interpretation of the law on other grounds, too, or, alternatively, the reasoning is incomprehensible, the Association et al. will also formulate complaints with respect to these legal considerations.

### Part C

4.6 This complaint component is directed against legal considerations 4.4, 4.5, 5.6 and 5.7. In these the Court of Appeal has erred at law with respect to the character and scope of the immunity, also in relation to other provisions of international law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

4.7 Legal consideration 4.4 reads:

"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."

Legal consideration 4.5 reads:

"It would be of no avail to the Association et al. anyway if the invocation of the UN's

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<sup>56</sup> See also Waite & Kennedy, legal consideration 59.

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."

Legal consideration 5.6 reads:

"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."

Legal consideration 5.7 reads:

"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."

- 4.8 As already explained in the complaint components above, the question that needs to be answered after establishing that an alternative legal remedy exists is whether restrictions to the right to a court of law serve a legitimate goal and are proportional.
- 4.9 Under legal considerations 4.4 and 4.5 the Court of Appeal dealt with the relationship between article 105 paragraph 3 of the Charter and article II, § 2 of the Convention. The Court of Appeal's decision is based on an incorrect interpretation of the law, respectively, the reasons given for the decision are incomprehensible, as the Convention is indeed limited by the hierarchically higher Charter<sup>57</sup>. Article 105 of the Charter restricts the immunity to immunity that is necessary for the fulfilment of the purposes of the UN<sup>58</sup>, and the Convention cannot overrule that restriction, as article 103 of the UN Charter stipulates that the UN Charter is hierarchically higher than other provisions.
- 4.10 Under legal consideration 4.5, the Court of Appeal found that it is necessary for the realization of the objectives of the UN that it is granted immunity from jurisdiction in general, and that a specific examination, meant for this particular case in hand, is not relevant. This is an incorrect interpretation of the law, respectively, the reasons given are incomprehensible. The immunity from jurisdiction was never meant to apply generally and without limitation. This undeniably follows from article 105 of the UN Charter in relation to Section 29 of the Convention, which Section creates a - until now theoretical - legal remedy. This legal remedy is inextricable linked to granting immunity from jurisdiction: "The idea that immunity should be granted to international organizations only upon the condition that adequate alternative redress mechanisms are available to third parties finds a clear legal expression already in the UN General Convention which provides that the United Nations shall make provisions for appropriate modes of settlement of [...] disputes

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57 See nos. 76 through 80 of the Statement of Appeal.  
58 A. Reinisch and U.A. Weber, *op.cit.*, p. 59-60.

arising out of contracts or other disputes of a private law character to which the United Nations is a party."<sup>59</sup> As indicated by Reinisch and Weber, internal UN studies have yielded the same result<sup>60</sup>. This basic principle was not sufficiently considered by the Court of Appeal. The Court of Appeal's opinion is also incompatible with International Court of Justice (ICJ) Case-law, as set out in detail in the Statement of Appeal under numbers 89 through 95. It follows from the considerations of the ICJ in the Advisory Opinion that a weighing of interests must be conducted and that the immunity must yield in case of 'most compelling reasons'. It follows from this that immunity must be established on a case by case basis, taking into consideration the facts and rights at issue.

4.11 The scope of immunity is set out under number 61 of the Advisory Opinion:

"When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts."

This consideration regards 'experts', with respect to whom Section 23 of the Convention stipulates that the Secretary-General may only waive immunity if in his opinion immunity would impede the course of justice. In such cases, therefore, there is a legislative basis for a finding of the Secretary-General, which, moreover, can be departed from. The ICJ held that especially in a specific situation the possibility to depart from immunity exists, namely "for the most compelling reasons". The norm applied by the Court of Appeal that immunity cannot be specifically examined, ignores the criterion set forth by the ICJ. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

4.12 Additionally, the Association et al. points out that the ICJ in the Advisory Opinion explicitly addressed the question whether in this specific case the UN Rapporteur's comments were made in the function and within the scope of the mission entrusted to him, in which case immunity could be granted<sup>61</sup>. This consideration confirms that the question whether immunity is necessary for the realization of the objectives of the UN - also referred to as

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59 A. Reinisch and U.A. Weber, op.cit, p. 68-69.

60 A. Reinisch and U.A. Weber, op.cit., p.69: footnote 40.

'functional immunity' - indeed needs to be determined on a case by case basis<sup>62</sup>; for which purpose - with reference to the previous grounds - for the benefit of establishing jurisdiction, the court will indeed need to address the same facts and rights that will be at issue in the main action.

- 4.13 Under legal consideration 5.6 the Court of Appeal established that the UN's immunity in general serves a legitimate goal. That finding manifests an incorrect interpretation of the law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible. The admissibility of the action brought against the UN does not entail any influencing or impeding of the functioning of the UN in carrying out its duties. As was set out extensively in the Writ of Summons, the UN in its report on Srebrenica judged that it had made numerous errors itself. The issue in these proceedings is the question as to what the consequences of those errors are. It is not the UN's functioning as such that is at issue, but rather the question whether the UN would be protected by immunity in respect of every type of unlawful act or failure to act. As will be extensively discussed below in the context of the weighing of interests, where genocide and other grave violations of human rights are not prevented from happening there should at the very least be an account given and it cannot be that such is prevented by granting de facto absolute immunity. That applies all the more for an organization that has set itself - inter alia - the purpose of preventing genocide and permanently dedicates itself to human rights. The State of the Netherlands in its interim motion for the court to decline jurisdiction has tried to cover up this most blatant violation of human rights under the cloak of immunity. The Court of Appeal erroneously failed to examine whether not preventing genocide and not preventing other grave violations of fundamental human rights falls under the functional immunity of article 105 of the UN Charter. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.
- 4.14 It should be noted that the examination in light of the requirement that a restriction of the right of access because of immunity from jurisdiction must serve a legitimate goal is of great importance. Legitimacy is not the same as legality. The majority of the UN member states are not democratically legitimized states. There are members of the UN Security Council - some with veto rights, others without - that flout human rights. The UN's high-minded objectives exist in theory and on paper, but in reality the decision-making process is

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61 See number 47 ff. of the Advisory Opinion.

62 See also ECJ re. Zwartveld, 13 July 1990, C-2/88, Imm., legal consideration 19.

highly political. At the same time, the Court of Appeal established under legal consideration 5.7 that no international organization has such far-reaching powers, while subsequently holding that there should be as little discussion as possible in respect of the immunity. The Court of Appeal thus appears to preclude any discussion about the legitimacy of the acts of the UN. This normally is an incorrect starting point to begin with, but precisely in this case unpalatable, as this case is about the responsibility for not preventing genocide and other violations of human rights, in spite of the express promise to protect the civilians in the Safe Area. The existence of a special power for the UN entails that the question about the legitimacy needs to be asked and answered again and again. The Court of Appeal thus unduly makes human rights subordinate to what seems to be a limitless power of the UN. It does not do justice to the obligation to prevent genocide either, or, alternatively, the Court of Appeal renders the obligation toothless.

- 4.15 It was already set out above that the review criterion needs to be whether the restriction to the right of access to a court of law serves a legitimate goal and is proportional in relation to the goal pursued. ECHR Case-law since the Waite & Kennedy and Beer & Regan judgments entails that each examination needs to be conducted in light of the particular circumstances of the case<sup>63</sup>:

"As to the issue of proportionality, the Court must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case."

The legal remedy available within the international organization and the nature of the legal conflict at hand need to be taken into consideration at the same time. Because ESA offered an effective legal remedy and it concerned a labour dispute, the ECHR decided in Waite & Kennedy and Beer & Regan that the restriction to the right of access to a court was proportional in relation to the immunity accorded to ESA<sup>64</sup>. The Court of Appeal erroneously limited itself to a general assessment of the necessity of the UN's immunity, without addressing the question whether in this case according immunity was legitimate and proportional in relation to the restriction to article 6 ECHR. In doing so, the Court of Appeal erroneously failed to address the absence of an alternative effective legal remedy and failed to examine the proportionality in that context. The Court of Appeal, in the light of ECHR Case-law, also erroneously failed to include the nature of the legal conflict in its

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<sup>63</sup> See legal consideration 64 in Waite & Kennedy and legal consideration 54 in Beer & Regan.

<sup>64</sup> Waite & Kennedy, legal considerations 72 and 73, Beer & Regan legal considerations 53, 54, 62 and 63.

judgment. The Court of Appeal's reasoning under legal considerations 5.6 and 5.7 that it is not desirable in general that the UN can be sued, does not do justice to the criterion set forth by the ECHR whether in a specific situation restrictions to article 6 ECHR are permissible under the requirements of legitimacy and proportionality.

- 4.16 At the end of legal consideration 5.7 the Court of Appeal held that only compelling reasons should be allowed to lead to the conclusion that the UN's immunity is not in proportion to the goal pursued. It follows from the above that this opinion manifests an incorrect interpretation of the law. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible. According to the ECHR, a discussion about compelling reasons with respect to proportionality is only relevant after it has been established that an effective alternative legal remedy exists. This is in accordance with the principle of effective judicial protection. The Court of Appeal correctly established under legal consideration 5.11 that the UN does not provide for a legal remedy. Furthermore, when assessing the question whether compelling reasons exist, all circumstances of the case need to be considered and this includes facts and rights that will be at issue in the main action. The Court of Appeal in its decision failed to take those circumstances into consideration, or, alternatively, failed to provide sufficient grounds for this. Under legal considerations 5.8 through 5.13 the Court of Appeal discussed the weighing of compelling reasons and the conflict with the right of access to an independent court of law, but then held under legal consideration 5.14 that there was no unacceptable breach of articles 6 ECHR or 14 ICCPR. The Association et al. will address these legal considerations in detail and formulate complaints in cassation.
- 4.17 As an introduction to the complaints set out below, the Association et al. points out that the Court of Appeal represents two of the Association et al.'s arguments incomprehensibly under legal consideration 5.8 et seq. The Court of Appeal held that the Association et al. accuses the UN of not undertaking enough to prevent genocide. The Association et al., however, also accused the UN of letting other grave violations of human rights happen and of playing an active role in the separation of men and children, and by doing so accepting that these men and male children would be tortured and murdered. In the words of Dutchbat Deputy Battalion Commander, major Franken<sup>65</sup>:

"We accepted that the fate of the men was uncertain and that they indeed might end up in

the most deplorable of circumstances."

Furthermore, the UN actively co-operated in the deportation, which was also brought forward by the Association et al. in the fact-finding instances<sup>66</sup>.

Secondly, the Court of Appeal held under legal consideration 5.8 that according to the Association et al. there is no other way of obtaining redress for the Association et al. than by summoning the UN before a Netherlands court. The reasons given for this representation of the Association et al.'s arguments are incomprehensible. The Association et al. wants to establish the UN's co-responsibility, also in relation to the responsibility of the State of the Netherlands. The proceeding against the UN is important for examining the demarcation of the responsibilities of military forces in the context of this peacekeeping mission. Redress - at least in theory - could also be obtained from a party other than the UN. In addition to the above, the Association et al. seek a judicial declaration that the UN failed to perform their obligations, that the UN committed an unlawful act and that the UN did not fulfil their obligation to prevent genocide. The Court of Appeal failed to address this important aspect in its representation. It was the UN that committed itself to protecting the population of the Safe Area and the UN that disarmed the population and subsequently refused to return the weapons, as dealt with extensively under A.2 above and in the Writ of Summons in the first instance.

The UN also refused to deploy the Close Air Support. All of this was dealt with extensively in the originating Writ of Summons. The Association et al. refers in this connection to the ICJ decision of 26 February 2007, regarding *Bosnia and Herzegovina v. Serbia and Montenegro*, specifically legal consideration 431 and 463. Here the ICJ held that preventing genocide is an obligation<sup>67</sup>. This is what the UN is accused of. Under legal consideration 463 the Court of Appeal held that a judicial declaration that genocide was not prevented can be part of a redress. This is also the Association et al.'s claim. That claim concerns the UN and cannot be satisfied by a third party. The Court of Appeal erroneously gave the impression that it concerns a financial claim only, which could also be satisfied by a third party. A claim based on an unlawful act is not limited to a claim to recover financial compensation for damage. The Court of Appeal's finding that it concerns financial compensation only is incompatible

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65 See originating Writ of Summons no. 248 with indication of the source.

66 See the originating Writ of Summons nos. 253 through 266, 385, 393 and 419; Memorandum of Oral Pleadings in the first instance nos. 23, 47, 49, 63; Statement of Appeal no. 97, Pleading Notes in Appeal no. 22; these facts have remained undisputed.

with what the Association et al.'s claimed under point I and III of the petition of the originating Writ of Summons. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible. Should the unlawfulness be established, the Association et al. is not only entitled to financial compensation, but also to compensation in kind. Compensation in kind can be awarded on request and can take several different forms. An apology or a rectification, for example. These are performances that cannot be satisfied by another party. Other forms of compensation in kind are conceivable as well. Fact is that the UN promised the residents of the Safe Area Srebrenica protection by military forces against the attacks of the Serbs. That promise was repeated over and over again, even when the residents' request for the return of the weapons that had been confiscated earlier was refused. Fact is also that the UN's promise was not kept, as set out in detail above and in the proceedings in the fact-finding instances. The Association et al.'s claims based thereon - under points I and III of the petition of the originating Writ of Summons - cannot be satisfied by a third party or directed at a third party. The Association is a legal entity as meant in article 3:305a Dutch Civil Code (BW). It is true that the Association cannot claim compensation for damage from the UN on behalf of the persons whose interests it represents in accordance with its Articles of Association, but it can, inter alia, demand a declaratory judgment. This declaratory judgment can be used by the persons to whom it applies for the benefit of a claim to compensation.

- 4.18 Furthermore, in case of several liability of more than one debtor with respect to damage resulting from the same event, a creditor has the right and the privilege to choose whom he wishes to sue. Considerations of opportuneness can be a factor, so long as there is no misuse of power. Suing the UN - as a party involved - is preferred to suing (for the most part) unknown Serb perpetrators, who, for the injured party as private individuals, will be impossible to trace. The injured party lacks state power and the investigative means. In case of recourse vis-à-vis those same Serb perpetrators, the UN will be much better equipped to ensure that justice runs its course than the injured party, or even the State of the Netherlands.
- 4.19 Furthermore, the distinction between perpetrator and non-perpetrator is not that clear and in this case not as relevant as held by the Court of Appeal in legal consideration 5.10 through 5.12. The Association et al.'s accusation with respect to the UN is not about committing genocide or having genocide committed, but about not preventing genocide and

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67 Legal consideration 431.

the failure to perform the obligations the UN had set itself. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

- 4.20 The Court of Appeal has furthermore failed to appreciate - contrary to its earlier finding - that the action against the UN is a different action than the action against the State of the Netherlands and the action against the Serb perpetrators, and that the question to be answered in this case is whether and how the Association et al.'s claim against the UN is assessed by the Dutch court. The circumstance that the injured party may have another claim at their disposal is not a legally valid reason to deny them their claim against the UN. Should the Court of Appeal not have failed to appreciate this, the reasons it gives for its judgment are incomprehensible.

#### **Ground 5**

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal consideration 5.9 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration and held in the operative part that a weighing of two legal principles is involved, i.e. immunity and the right of access to a court of law, and that immunity prevails in this case.**

- 5.1 Under legal consideration 5.9 the Court of Appeal held:

"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."

This consideration manifests an incorrect interpretation of the law, respectively, the reasons given are incomprehensible, especially since other human rights, too, should have been taken into consideration in this weighing.

- 5.2 The UN's interest not to be forced to appear before a national court of law mostly serves a political interest<sup>68</sup>. It is, however, the duty of the court to uphold the law, not political interests. The Court of Appeal overlooked that this general interest was anticipated at the time the UN Charter and the Convention entered into force. At that time, Section 29 of the Convention was introduced to prevent the UN having to appear before a national court, in exchange for which the UN was granted immunity and could only be summoned before a court of law as meant in Section 29 of the Convention. The weighing of interests already took place when the Convention was created and the result is the provision of Section 29 of the Convention. It is observed that if this obligation had been fulfilled, there would, in principle, not have been a field of tension between the right to immunity and the right of access to a court of law, which demonstrates at the same time that the right of access to a court of law is of a higher order than the immunity.

This case goes beyond the interests of the Association et al. This is about restrictions on human rights, such as the right of access to a court of law, and about the obligation to prevent genocide. The latter is an international peremptory obligation, that cannot be restricted (*ius cogens*). The right of access to a court of law and the obligation to prevent genocide are of fundamental significance and both are considered to be human rights. The Court of Appeal did not conduct a review on the basis of these criteria, and has thus based itself on an incorrect norm. The right to immunity is restricted by the functional character, while *ius cogens*, by definition, does not allow for violations. A consequence of according the UN immunity in the case of not preventing genocide and other grave violations of human rights, and of the UN's failure to establish an effective legal remedy as required, could be that the UN would no longer need to respect fundamental human rights, which would then lose their fundamental character.

- 5.3 The Court of Appeal held under legal consideration 5.9 that two important principles of law

are in conflict with each other. Erroneously, the Court of Appeal limited itself to the principles of immunity and of access to a court of law, respectively, the reasons given are incomprehensible. The Court of Appeal should have included in its judgment that other grave violations of fundamental human rights have occurred as well. The Association et al. refers to numbers 386 through 417 of the Writ of Summons in the first instance, in which these violations have been discussed in detail<sup>69</sup>.

- 5.4 Important in international law as a principle are the so-called 'Four Freedoms', referred to as such by the then American President in January 1941: Freedom of speech, Freedom of religion, Freedom from fear, Freedom from want. There are certain rules of international law that are so important that in the event of a conflict between them, other rules of international law have to yield. This higher form of law is called as *ius cogens*<sup>70</sup>. The Court of Appeal erroneously failed to examine how the UN's immunity from jurisdiction relates to the *ius cogens* character of the obligation to prevent genocide. Contrary to the Court of Appeal's finding, there are more than two legal principles involved. The Association et al. has described the *ius cogens* character and specifically the prohibition on genocide as part of the Freedom from fear, inter alia under points 160 through 175 of the Statement of Appeal.
- 5.5 The prohibition on genocide is *ius cogens*<sup>71</sup>. The question to be answered here is whether the UN fulfilled its obligation under the Genocide Convention to prevent genocide. Other human rights have been violated, too, such as the right to be protected from torture, murder and rape. These human rights, too, are *ius cogens*. This *ius cogens* character should have lead to the opinion that the UN's immunity had to yield, since the right to immunity is not *ius cogens*. The Court of Appeal failed to understand and erroneously failed to address the *ius cogens* character of the norms, respectively, principles the Association et al. invokes.
- 5.6 The ECHR Case of Al-Adsani<sup>72</sup>, confirmed the character of *ius cogens* with respect to torture. As a preliminary point, it should be noted that this judgment dealt with the immunity of a State, and not that of an international organization. The question of right of access to a

68 See no. 109 Statement of Appeal.

69 See also no. 133 Statement of Appeal and the reference in it to points 412 through 417 in the originating Writ of Summons.

70 See P.H. Kooijmans, Internationaal publiekrecht in vogelvlucht, 9th ed., 2002, p. 18.

71 See ICJ 26 February 2007, legal consideration 161 and J.A. Frowein, Encyclopedia of Public International Law, Volume Three, 1997, p. 67.

court of law is different when a State is involved, since the defendant can always be brought before a court in his own country<sup>73</sup>. In the Al-Adsani Case, the plaintiff was a citizen from the State of Kuwait, who instituted an action for damages in the United Kingdom against the State of Kuwait. The plaintiff held the State of Kuwait responsible for his torture and claimed damages for the resulting injuries. The legal issue before the ECHR was whether the English court was correct in holding that immunity was attached to the State of Kuwait.

- 5.7 The ECHR dismissed the appeal to Article 6 ECHR and upheld the immunity of the State of Kuwait by the smallest possible majority of the judges, i.e. nine against eight. This already shows that even the absolute character of the immunity of States before the courts of other countries is debatable under certain circumstances.
- 5.8 The above is illustrated by the various dissenting opinions that are part of the judgment. Before discussing these in more detail, the Association et al. presents the ratio decidendi of the decision<sup>74</sup>:

"The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State."

Two words in this ratio decidendi stand out. First, the word, 'yet', whereby the ECHR indicates that the passage of time might or even will lead to another view. Second, the word 'States' in relation to the fact that immunity remains limited to the court outside the territory of State in question. Al-Adsani could have sued Kuwait in that country, in which event Kuwait could not have invoked immunity. As stated before, the Association et al. does not have such an alternative in this case. Reinisch and Weber emphasize that the need for alternative legal remedies is greater for international organizations than for States, as States can be summoned before their own national courts, which option is not available with respect to international organizations<sup>75</sup>.

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72 ECHR 21 November 2001, no. 35763/97.

73 See also nos. 62 through 64 Statement of Appeal.

74 See legal consideration 66.

75 A. Reinisch and U.A. Weber, op. cit, p. 67.

- 5.9 The dissenting opinions make it clear that in certain cases the granting of immunity for States is under pressure and should yield to the interests of the citizen whose rights have been violated. Judge Loucaides said in his dissenting opinion:

"In view of the absolute nature of torture it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of State immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid to any legal liability whatsoever."

(...)

"In my opinion, they (*addition by lawyers: the relevant immunities*) are incompatible with Article 6 § 1 in all those cases where their application is automatic without a balancing of the competing interests as explained above."

- 5.10 The joint dissenting opinion of six other judges of the ECHR (including the President) provide a clear insight into the legal reasoning that should be followed in respect of States. All the judges agreed that the prohibition on torture is *ius cogens*<sup>76</sup>. According to the dissenting opinion, in the event of conflict between a rule that is *ius cogens* and another rule of international law (such as immunity), that other rule must yield<sup>77</sup>:

"In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule."

- 5.11 Hence, the following conclusion follows from this rule of precedence<sup>78</sup>:

"The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."

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76 See legal considerations 60-61.

77 See legal consideration 1 of the dissenting opinions.

78 See legal consideration 3 of the dissenting opinions.

- 5.12 Besides the fact that it follows from the dissenting opinions that in the event of a greater violation of the *ius cogens* rule there is a great likelihood that a possible immunity would have to yield, such also follows literally from the judgment itself. The ECHR has explained in fact under legal consideration 55 that a balancing must be undertaken. It must be determined whether the restriction of the right of access to a court of law of article 6 ECHR (the restriction was that only the courts of Kuwait had jurisdiction) is proportional in relation to the object that is sought to be effected with immunity. It is obvious that in the event of a greater violation or a violation of the weightier norms of *ius cogens* the hierarchically lower rule of immunity must first yield. The Association et al. points out the distinction between the torture of an individual (as in the Al-Adsani Case) and the genocide and numerous other violations of human rights in Srebrenica. The grounds underlying the decision in the judgment of the ECHR and the dissenting opinion lead to the conclusion that in the case of the prohibition on genocide being a rule of *ius cogens*, the immunity of a State would be subordinated to the rights of the individual.
- 5.13 There is no higher norm in international law than the prohibition on genocide. That is, this norm is hierarchically higher than the other norms at issue in this legal dispute. Its enforcement is an important reason for the existence of international law and the most important international organization, the UN. That entails that where genocide has not been prevented, no immunity attaches to the international organisation, or, alternatively, immunity should yield. It is of importance that the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) have established that genocide has taken place and the Court of Appeal correctly held under legal consideration 5.9 that it regards a fact of general knowledge. A greater recrimination than not preventing genocide cannot be made of an international organization, except the actual commission of genocide. The UN had adopted several Resolutions in which it committed itself to deploying military forces in Srebrenica, in order to prevent genocide. That immunity does not yield is irreconcilable with the functional character of the immunity of the UN. The Court of Appeal should have concluded that there was a violation of *ius cogens* and that the interests of the Association et al. weighed more heavily than the UN's interest in immunity. The decision that the immunity of the UN weighed more heavily in this case would mean that the UN has an absolute power. Such power would not be subject to restrictions and mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is limited and regulated by the law. An immunity as far-reaching as the Court of Appeal has assumed is contrary to the rule of

law and additionally undermines the credibility of the UN as the champion of human rights<sup>79</sup>.

- 5.14 The Association et al. is with the above of the view that the Secretary-General of the UN in this case had the obligation to waive any possible right to immunity, respectively, that an invocation of immunity should not be honoured. Indeed, a similar rule is contained in the Convention in various articles dealing with the immunity of Member States, officials and experts<sup>80</sup>, to the effect that a review should be conducted to ascertain whether the course of justice is impeded by any grant of immunity. Should that interference not damage the interests of the UN, the claim to immunity should yield. The Association et al. wonders how giving an account of the non-prevention of genocide could damage the interests of the UN. One of the primary objectives of the UN is after all the prevention of genocide as a peremptory norm of international law (*ius cogens*).

#### Ground 6

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal consideration 5.10 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration and held in the operative part that immunity does not yield to the right of access to a court of law.**

- 6.1 Under legal consideration 5.10 the Court of Appeal held:

"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

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<sup>79</sup> See also no. 174 Statement of Appeal.

<sup>80</sup> See Section 14, 20 and 23 of the Convention.

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."

The Court of Appeal misunderstood and too narrowly interpreted the assertions of the Association et al. and in addition erred at law.

- 6.2 Legal consideration 5.10 reveals an error of law, because the Court of Appeal here also conducted a review that is not supported by the criteria of international justice. The Association et al. refers to the above. Furthermore, the Court of Appeal's reasoning with respect to the first three sentences of legal consideration 5.10 is incomprehensible. The Association et al. has accused the UN and the State of the Netherlands of much more than not preventing genocide. The Association et al. has blamed the UN and the State of the Netherlands for the non-prevention of numerous other violations of human rights (in spite of obligations to that effect under UN Resolutions and also subsequently in the form of a direct commitment to the population, together with obligations to that effect pursuant to treaties, and in spite of the military forces present locally), for the non-reporting of war crimes, and for actively co-operating in the deportation. Greater recriminations, except for pulling the trigger themselves, are virtually inconceivable. In view of the nature and scope of genocide, it is not only important who committed the genocide. Bearing in mind the Genocide Convention and ICJ Case-law, not preventing genocide is one of the gravest recriminations conceivable. The other recriminations made against the UN, too, are very serious in nature.

The Court of Appeal has thus applied an incorrect criterion with respect to the question what recriminations would be grave enough to bar immunity. The Court of Appeal has failed to fully appreciate the decision of the ICJ. The Court of Appeal held that the recriminations may be serious, but not that pressing that immunity should yield. It follows from ICJ's legal considerations 430, 431 and 438<sup>81</sup> that the obligation to prevent genocide is a very serious, weighty obligation, and that it was known at the time that there was a serious risk of genocide in Srebrenica<sup>82</sup>. With that knowledge, everything possible should have been undertaken to prevent genocide. That obligation cannot be trivialized and by doing so the Court of Appeal has erred at law, respectively, the reasons given are incomprehensible.

- 6.3 The Court of Appeal held - or, alternatively, the reasons given under 5.10 lead to the conclusion - that the UN itself has not committed crimes against humanity. This finding fails to recognize that breaching the obligation to prevent genocide constitutes a crime against humanity. The purpose of the Genocide Convention is to prevent genocide and every attempt to mitigate this obligation does not do justice to ICJ Case-law in the Serbia and Montenegro v. Bosnia and Herzegovina Case<sup>83</sup>. Co-operating in the deportation of the population is a crime against humanity. The same goes for separation of the men and women. While to any neutral observer this deportation was the signal of atrocities to come, UN soldiers made the strictest possible selection of the population, leading to the murder of thousands of men and male children, and a the expelling of large group of survivors<sup>84</sup>:

"at the stage when Bosnian Muslim men were divested of their identification en masse, it must have been apparent to any observer that the men were not screened for war crimes. In the absence of personal documentation, these men could no longer be accurately identified for any purpose. Rather, the removal of their identification could only be an ominous signal of atrocities to come."

- 6.4 The Court of Appeal's finding at the end of legal consideration 5.10, with respect to potential misuse by suing the UN, is incorrect at law and incomprehensible. Incorrect at

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81 ICJ 26 February 2007, re Bosnia & Herzegovina v. Serbia & Montenegro; discussed in nos. 128 through 139 Statement of Appeal.

82 the NIOD report, p. 1219 and 2891; the report of the French Parliament, part I, p. 19; discussed inter alia under no. 16 and 407 ff. of the originating Writ of Summons

83 ICJ 26 February 2007, re Serbia and Montenegro v. Bosnia and Herzegovina.

84 See judgment in the first instance of 2 August 2002 of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (Yugoslav Tribunal), v. Radislav Krstic, legal consideration 160.

law because the UN itself is solely responsible for the non-existence of the legal remedy provided for in the Charter, which would legitimize the UN's immunity. It should not be disregarded that the UN itself has the power to implement that legal remedy as yet at any time.

Furthermore, the sentences in question are difficult to comprehend due to a double-negative and the Court of Appeal has gone beyond the ambit of the dispute as defined by the parties. Parties have not submitted anything with respect to such misuse, which misuse, for that matter, also cannot be understood in the light of the severity of the events that took place in Srebrenica. Interpretation with respect to the possibility of misuse is distinctly one-sided and does not do justice to the arguments of the Association et al. The Association et al. has indicated, however, that a de facto absolute immunity of the UN, even in case of grave violations of human rights, can be a motive for national troops that have been made available to violate human rights knowing that civil proceedings are ruled out.

#### Ground 7

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal considerations 5.11 through 5.14 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration(s) and held in the operative part that in the weighing between the right to immunity and the right of access to a court of law, the right to immunity prevails in this case.**

##### 7.1 Under legal consideration 5.11 the Court of Appeal held:

"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."

Under legal consideration 5.12 the Court of Appeal held:

"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."

Under legal consideration 5.13 the Court of Appeal held:

"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."

Legal consideration 5.14 is the conclusion from these legal considerations. Considerations 5.11 through 5.14 manifest an incorrect interpretation of the law, respectively, the reasons given are incomprehensible.

- 7.2 It is not contested in this proceeding and it has been determined by the Court of Appeal that the UN does not offer an alternative effective legal remedy, as stipulated in Article VIII § 29 in the preamble and under (a) of the Convention. As shown above, when establishing that fact no further assessment should have been carried out and the right of access to a court of law should have prevailed in conformity with article 6 ECHR and the settled ECHR Case-law.
- 7.3 The Court of Appeal incorrectly held that there are alternative parties that can be sued; in addition, the reasons given for this finding are incorrect and especially incomprehensible. This finding is in conflict with article 6 ECHR. The right of access to a court of law to bring an action before a court does not apply only once it has been established that there are no other parties that can be sued with respect to the same event that gave rise to liability, including the failure to act. Article 6 ECHR deals with "the determination of his civil rights and obligations (...)". The subject matter of the actions of the Association et al. is the rights vis-à-vis the UN. These rights cannot be established by suing a third party. The interpretation of article 6 ECHR cannot be restrictive<sup>85</sup>:

*"Die vorrangige Bedeutung, die in demokratischen Gesellschaften dem Recht auf faires Verfahren zukommt, steht einer restriktiven Auslegung der Vorschrift entgegen."*

The Association et al. demands vis-à-vis the UN that it be established (as described in the

body of the originating Writ of Summons) that the UN failed to perform their obligations, alternatively that they acted unlawfully vis-à-vis the Association et al.; that the UN be held liable for payment of compensation; and that the UN have failed to perform the obligations arising under the Genocide Convention. The obligations of the UN (entered into, inter alia, under the Genocide Convention and UN Resolutions, and arising as a result of direct commitments made to the population of the Safe Area - reference is made to the originating Writ of Summons) are of a different order than the rights the Association et al. can assert against the State and the perpetrators and the legal actions based thereon are different, too.

It is of essential importance in the proceeding how the allocation of roles between the troops dispatched by the State and the responsibility of the UN were implemented during the mission and the fall of the Safe Area.

An additional factor here is the defence raised by the State in other proceedings that its acts are to be imputed to the UN. Should that defence be successful (as was the case in the matter before the District Court of The Hague of 10 September 2008)<sup>86</sup>, the only party that can be sued is the UN, now that the State of the Netherlands has effectively employed the UN as a justification. Article 6 ECHR is not taken account of if the Court of Appeal's interpretation is followed with respect to the claims brought against the UN by the Association et al., as that would deprive the Association et al. of the possibility of having its civil rights determined in a court proceeding vis-à-vis the party who is actually responsible.

The Court of Appeal's interpretation of article 6 ECHR thus constitutes an impermissible restriction to the right of access to a court of law. It is not and never has been the Association et al.'s objective to find a solvent debtor and the Association et al. has made no such submission. The Association et al.'s action vis-à-vis the UN is for the most part aimed at recognition of the failings of the UN, and not exclusively at financial compensation. The Association et al. points out that it still remains to be seen whether the UN is solvent. The Court of Appeal's line of reasoning about finding a solvent debtor has nothing to do with article 6 ECHR. In particular not in the Court of Appeal's line of reasoning where the Court of Appeal previously held that each of the victims has her own claim vis-à-vis the UN on the one hand, and the State of the Netherlands on the other; especially in the Court of Appeal's

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<sup>85</sup> See Frowein-Peukert, *op.cit.*, article 6, note 2 and the Case-law referred to.

<sup>86</sup> District Court of The Hague of 10 September 2008 legal consideration 4.5; LJN BF0184, 265615 / HA ZA 06-1671.

view these are two separate claims, each to be judged separately and, therefore, each in a legal remedy that meets the requirements of article 6 ECHR. Article 6 ECHR guarantees that a dispute between parties involving their civil rights and obligations will be heard by an independent and impartial tribunal established by law.

- 7.4 The line of reasoning under legal consideration 5.12 that the State of the Netherlands cannot invoke immunity from prosecution before a Dutch court is not relevant in relation to article 6 ECHR, where, according to the Court of Appeal's earlier finding, it regards two independent claims against formally two separate parties. The issue in the proceeding brought against the State and the UN is about the demarcation of responsibilities of the State and the UN individually as well as jointly. The Court of Appeal's finding that in any event a judgment about the events in Srebrenica will be given, is a misconception. If the invocation of the immunity of the UN is honoured, and the acts of the State are imputed to the UN and no dual attribution takes place<sup>87</sup>, no judgment will even be given about the State's acts with respect to the events in Srebrenica, but the proceedings will end without any substantive judgment and the Association's action will thus - essentially - be dismissed as inadmissible. It is precisely about the acts and failure to act of Dutchbat that a judgment is requested from the court. If the UN is not included in the assessment and the acts and the failure to act of Dutchbat are imputed to the UN, no substantive judgment on this will be made. It follows from Waite & Kennedy (especially legal consideration 58) that an assessment as to the merits forms part of a proceeding that meets the requirements of article 6 ECHR. Merely hearing the case without making a decision as to the merits is not sufficient. The Court of Appeal's line of reasoning means in essence that in case of a UN mission only the country dispatching troops can be sued. That line of reasoning, however, means that the UN will never be affected since it has no troops of its own. The UN's immunity has thus in fact been declared absolute, which is not acceptable and also not compatible with the Court of Appeal's own principle that immunity is not absolute. This makes the Court of Appeal's reasoning inconsistent.
- 7.5 Legal consideration 5.12, for that matter, is incompatible with legal consideration 3.3 and to that extent the judgment suffers from an absence of grounds. The Court of Appeal's finding under 3.3 that the case against the UN and the State are separate proceedings, and subsequent finding under legal consideration 5.12 that the connection is such that access to a court of law in one proceeding would also safeguard the rights under article 6 ECHR in the

other proceeding, are incomprehensible. In addition, the finding under legal consideration 3.3 that both cases will be judged separately is not correct in the light of - possible - dual attribution. If the proceedings would be independent, they could result in conflicting final judgments. The State in addition to the UN could be held responsible, while the UN would be considered not responsible in another judicial decision. Both 'separate' proceedings could, as far as responsibility is concerned, point to the other party that is not involved in that particular proceeding. It would thus be 'established' twice that a party is responsible, while that party escapes responsibility in the proceeding in question. That would be an incorrect and undesirable course of events.

- 7.6 Contrary to the Court of Appeal's finding under 5.13, ECHR Case-law does not entail that fairly far-reaching restrictions to article 6 ECHR are considered acceptable. This certainly cannot be deduced from the *Fayed v. United Kingdom Case*<sup>88</sup>, which dealt with a company-law dispute: ,i.e. the sale of Harrods Department Store to the Fayed family. The family had started a public campaign to improve its image, in order to make the takeover acceptable to the general public. After the sale, the question was raised whether the information supplied by Fayed was correct. An inspector was appointed in the proceeding to examine the matter. The issue was whether article 6 ECHR would be breached if no judicial process would be allowed against findings in an inspector's report on the Applicants' financial position, which findings and publication thereof would damage the Applicants' reputation. The ECHR in this case also applied settled Case-law that a weighing of interests must take place between the legitimacy of the restriction on the right of access to a court of law and access to legal protection<sup>89</sup>. The ECHR concluded that in the matter of the reputation damage the restriction on the right of access to a court of law was proportional, as an inspector reporting on a company's financial position would otherwise not be able to report independently. These are matters that differ in every aspect from the present case. The ECHR pointed out under legal consideration 76 that Applicants' reputation damage was the result of a campaign started by Applicants themselves and that the general interest in objective information prevails. The ECHR also held under legal consideration 77 and 78 that Applicants had had a fair chance to acquaint themselves with, and comment on the inspector's findings. Furthermore, Applicants had the possibility to challenge the appointment of the inspector<sup>90</sup> and had been allowed to correct misstatements of fact<sup>91</sup>. In

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87 See originating Writ of Summons nos. 347-369.

88 ECHR 21 September 1990, no. 17101/90.

89 See legal consideration 71.

90 Legal consideration 78.

that respect, they did have access to a court of law. Overall it cannot be said that the ECHR, in the light of the Fayed v. United Kingdom Case, has permitted restrictions on article 6 ECHR, let alone far-reaching restrictions. By referring to that judgment, the Court of Appeal has erred at law. Firstly, the ECHR held that legal protection was indeed available to Applicants, which is not the case for the Association et al. Secondly, the ECHR deemed the circumstances of the case to be of essential importance. Those circumstances are of an essentially different order in the present case. In the judgment cited above possible reputation damage was the key element, while grave violations of human rights - it should be noted that several international courts have established that genocide has taken place - are at issue in the present case. In addition, the Fayed Case certainly did not concern a violation of human rights with an *ius cogens* character.

7.7 It is noteworthy, however, that while the ECHR in its judgment addressed the circumstances of the Fayed v. United Kingdom Case in great detail, which is a requirement pursuant to ECHR Case-law, the Court of Appeal, as set out above and below, left essential aspects undiscussed.

7.8 What has been pointed out in points 4.17 through 4.20 applies here also, and these points are to be considered repeated and included here:

- the issue is not only about financial compensation, which compensation could possibly also be paid by another party, but particularly about establishing what is right at law and about other forms of compensation for damage that can only be satisfied by the UN itself;
- the victims, respectively, their surviving relatives will not be able to find the perpetrators, while the UN, in case of recourse, has the resources to do so;
- in case of joint and several liability, the creditor has the right to choose which debtor he wishes to sue.
- the action against the UN is a different action than the action against the State of the Netherlands.

## Ground 8

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal considerations 4.1 through 5.14**

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91 Legal consideration 44 and 45.

of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:

The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the aforementioned legal consideration(s) and held in the operative part that the right of access to a court of law in this case yields to immunity.

- 8.1 On 3 September 2008, the European Court of Justice rendered a decision<sup>92</sup> that is also of great importance to the present case, about the relation between UN Resolutions and fundamental rights arising under the EU Treaty, including article 6 ECHR. The European Court of Justice, however, ruled primarily on the basis of the principle of effective legal remedy (Article 47 of the Charter of fundamental rights of the European Union). This principle is comparable in content to article 6 ECHR, but is qualified by the European Court of Justice as an autonomous European fundamental right. The Association et al. has expressly invoked this principle, but the Court of Appeal erroneously failed to examine in the contested judgment whether this principle had been upheld. The Court of Appeal has thus applied an incorrect interpretation of the law, respectively, should the Court of Appeal not have failed to appreciate this, the reasons given for its judgment are incomprehensible.
- 8.2 The judgment cited above concerned European Community action. The judgment shows that the European Court of Justice considered a review of the fundamental rights of the Community legal order necessary also with respect to Resolutions adopted under the UN Charter, such for the protection of European citizens. The European Court furthermore held that an effective legal remedy is a fundamental right in the Community legal order that may not be breached.
- 8.3 The European Court of Justice ruled in the Al-Barakaat Case that courts must observe the fundamental rights at all times and that UN rules do not take precedence<sup>93</sup>. The Court of Appeal should have examined whether article 47 of the Charter of fundamental rights of the European Union had been safeguarded and should have granted access to a court of law.

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92 CJEC, 3 September 2008, Case C-415/05 P, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities.

8.4 In so far as the Supreme Court of the Netherlands should find that the UN enjoys immunity also in this case, the Association et al. requests the Supreme Court to refer the following questions to the European Court of Justice for a preliminary ruling. The questions to be referred to the European Court of Justice for a preliminary ruling could be phrased as follows:

"Is it conform the law of the European Community, to interpret Article 105 UN Charter together with Section 29 Convention on the Privileges and Immunities of the UN in such manner that within the Member States the UN enjoys absolute immunity, despite the fact that no effective legal process exists within the UN?

Is the European fundamental right on effective legal protection to be interpreted in such manner that this right may be subject to restrictions in the Member States, in particular, the restrictions that are consequential on the right to immunity of the UN? If so, do such restrictions on this fundamental right apply under all circumstances, more especially under the circumstance that a large group of surviving relatives have brought proceedings against the UN for the failure to prevent a genocide established as being such by the International Court and under the circumstance that no effective legal remedy exists?"

8.5 The most striking aspect of the Al-Barakaat Case is that the EU recognizes autonomous fundamental rights, which are protected by article 6 paragraph 3 of the Treaty on European Union (version of 1 December 2009). This includes the right to an effective legal remedy, as expressed in article 47 of the Charter of fundamental rights of the European Union. If the exercise of responsibilities by the UN has consequences within the European Community, it should be examined whether these consequences are contrary to these European fundamental rights. These fundamental rights cannot be set aside arbitrarily.

8.6 The national court, based on settled European Case-law, is obliged to interpret national law within the spirit of the law of the European Community<sup>94</sup>. The issue whether autonomous European fundamental rights are guaranteed must be weighed by the national court where reason to do so exists. Should it be found that the UN has absolute immunity, then there arises the issue of violation of the right to an effective legal remedy that is guaranteed in the European Community. In that case the European Court of Justice is the proper body to determine whether that judgement tallies with the law of the European Community.

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93 Reference is made to points 199 ff. of the Statement of Appeal.

94 E.g. CJEC 9 March 2004, Case C-397/01 bis C-403/01, Pfeiffer at al./DRK.

8.7 Article 267 of the Treaty on the Functioning of the European Union provides that the European Court of Justice shall rule on the interpretation of the European Convention by way of preliminary questions. The entire law of the European Community falls within the European Convention, including the autonomous fundamental rights, even where they have not been codified. The Association et al. points out that it is not a condition of referring such a question relating to this interpretation that a measure of a European body is required. All that is required is the interpretation of the European Convention, of which the autonomous fundamental rights form a part. Article 267 of the Treaty on the Functioning of the European Union provides that the Supreme Court, as the last instance, shall refer preliminary questions if European law - in particular fundamental rights<sup>95</sup> - is involved. The European Court of Justice has repeatedly confirmed that it is obligatory for the highest national court to refer questions for a preliminary ruling<sup>96</sup>:

"The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national Case-law that is not in accordance with the rules of Community law from coming into existence in any Member State (...)."

#### Ground 9

**Misapplication of the law and/or non-compliance with procedural requirements upon penalty of nullity, because the Court of Appeal, in legal considerations 4.1 through 5.14 of the judgement and in the operative part of the contested judgment, incorrectly and/or incomprehensibly held and/or decided as expressed in the contested judgment, in view of one or more of the following reasons, to be read together where necessary:**

**The Court of Appeal erroneously, or, alternatively, incomprehensibly, or, alternatively, insufficiently, or, alternatively, insufficiently substantiated, found in the**

<sup>95</sup> See Lenz/Borchardt, EU-Verträge, Kommentar nach dem Vertrag von Lissabon, 5th ed., 2010, art. 267 note 6, p. 2546.

<sup>96</sup> CJEC, C-99-00, Kenny Roland Lyckeskog, Slg. 2002, I-4839 no. 14; C-337/95, Parfums Christian Dior, Slg. 1997, I-6013, no. 25.

**aforementioned legal consideration(s) and held in the operative part that in this case the immunity of the UN does not yield to the right of access to a court of law.**

- 9.1 Furthermore, the Court of Appeal has applied an incorrect interpretation of the law by not weighing fundamental legal principles and provisions that are important in this case, or, alternatively, failed to discuss such a weighing in its judgment, or, alternatively, the reasons given for its judgment are incomprehensible.
- 9.2 At first instance the Association et al. argued already in the originating Writ of Summons that there was no issue of waiver in the present case given that it has been shown that no immunity attaches to the UN as a result of Article 105 of the UN Charter<sup>97</sup>. Insofar as in these proceedings a functional necessity for immunity might exist the Association et al. argues - alternatively - that the UN should have waived any claim to it and that in the absence of such a waiver an invocation of immunity should not be honoured<sup>98</sup>. The following serves as an explanation.
- 9.3 The Convention states that the immunity of the UN should remain limited to cases where a functional necessity for immunity exists. Section 14 of the Convention provides:
- "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."
- 9.4 A similar provision is included under Section 20, for the 'Officials' of the UN and in Section 23 for 'Experts on missions'. For the same reason other conventions on immunity include an obligation to waive immunity where a claim to such immunity would result in denial of justice<sup>99</sup>. Although a similar provision is not expressly stated for the UN itself, it should apply for the UN also that immunity should not serve to prevent claims for compensation,

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97 See number of the originating Writ of Summons.

98 See nos. 81 through 83 Statement of Appeal.

99 A. Reinisch and U.A. Weber, *op.cit.*, p. 72-73 with source footnote 55.

but rather that the 'course of justice' should prevail. Moreover, it should be emphasized yet again that this case concerns the worst possible violations of human rights. Frowein also comes to the conclusion that in this type of cases the UN are obliged to waive any possible claim to immunity<sup>100</sup>. The ECHR in *Waite & Kennedy*<sup>101</sup> also addressed the question under what circumstances an international organization should waive its immunity. Where the UN wrongfully failed to meet their obligation to waive immunity, the court should not honour that invocation of immunity. The Court of Appeal's judgment gave no evidence of a review as to the UN's obligation to waive immunity in this case.

- 9.5 The Court of Appeal also erroneously failed to address article 32 of the Vienna Convention on the Law of Treaties.

Article 32 reads:

"Recourse may be made 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."

The Association et al. fails to understand why the Court of Appeal in its interpretation of Article 105 of the UN Charter did not at least address the question whether the result of that interpretation does not lead to a result that was unreasonable or absurd. After all, the victims of a genocide (which occurred under the eyes of the UN, when the UN had promised protection) are denied every possible legal remedy, and that while Section 29 of the Convention guarantees a legal remedy. The words 'unreasonable' and 'absurd' are even rather euphemistic for the situation in which the victims of this genocide are placed. That conclusion serves to justify having recourse to supplementary means of interpretation. Of particular importance in this context are the purposes for which the UN was instituted, including the protection of human rights, and thus including the right of access to justice.

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100 J.A. Frowein in the article *UN-Verwaltung gegenüber dem Individuum - legibus absolutus in: Allgemeines Verwaltungsrecht - Zur Tragfähigkeit eines Konzepts*, 2008, p. 333 - 347; submitted at first instance as Exhibit to the Memorandum of Oral Pleading.

101 *Waite & Kennedy*, in legal consideration 38.

Also of importance is that the UN has stated more than once to consider itself bound to human rights treaties and therefore obliged to prevent genocide<sup>102</sup>. Also of importance for interpretation are the circumstances under which the treaty was concluded. One of the cornerstones of the formation was the universal desire and necessity to prevent genocide in the future. Where it should be observed that granting immunity in this case, in the absence of an alternative effective legal remedy, conflicts with the realization of the purposes and leads to frustration of fundamental human rights, article 105 paragraph 1 of the UN Charter should not be interpreted in the way that the Court of Appeal has done. The right of access to a court of law must prevail. As was written by the Catholic historian Lord John Dahlberg-Acton in 1887 as an argument against introducing papal infallibility<sup>103</sup> :

"I cannot accept your canon that we are to judge Pope and King unlike other men with a favourable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt, and absolute power corrupts absolutely."

The international organization that has the most far-reaching powers in the world should not be above the law.

**THEREFORE:**

may it please the Supreme Court of the Netherlands to set aside the judgment against which appeal in cassation was lodged, costs to be determined by the Supreme Court.

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102 See for example the originating Writ of Summons, nos. 389 and 401 and no. 38 of the Pleading Notes in Appeal.

103 Lord John Dahlberg-Acton, Letter to Bishop Mandell Creighton, April 1887.