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Questioning the UN's immunity in the Dutch Courts; unresolved issues in the Mothers of Srebrenica litigation

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by Benjamin E. Brockman-Hawe*

I. Introduction

Providing victims with a judicial forum where they can air their grievances and obtain redress for violations of their rights is regarded as the cornerstone of an international culture of accountability, and restrictions on the right of access to a court must not run afoul of international law's prohibition on the denial of justice.¹ The operation of international organizations, on the other hand, is predicated on the notion that shielding them from the normal processes of the law by providing for their immunity before national courts is the only way to ensure their effectiveness.² When an international organization tasked with promoting human rights is itself accused of human rights violations these two international norms run afoul of one another, and any resulting incompatibility must be resolved.

The tension between immunity and the accountability of international organizations was recently dealt with by the Dutch Court of Appeals in the case Mothers of Srebrenica, et al v. The State of the Netherlands & the United Nations. The case is not the first before Dutch Courts in which plaintiffs have sought to hold the Netherlands responsible for the failure of Dutch troops operating under a UN-mandate to prevent the 1995 attacks against Bosnian Muslims at Srebrenica,³ but it is the first suit seeking to hold the UN jointly and severally responsible as well. This contribution examines the judgment of the Dutch Court of Appeals, which affirmed the decision of the lower court to dismiss the suit against the UN for lack of jurisdiction.

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1 See Golder v. United Kingdom, E CtHR App. No. 4451/70 (21 February 1975) para. 34 (stating that “in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”). The right of access to a Court is enshrined in many important human rights texts, including Article 10 of Universal Declaration of Human Rights, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6(1) of the European Convention on Human Rights (ECHR), as well as the General Assembly of the United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, annex to G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (March 21, 2006).

2 Eric Robert 'The Jurisdictional immunities of international organisations: the balance between the protection of the organisations' interests and individuals rights' in Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon (2007) at pp. 1 436 - 1438

3 Judgment in the case between [H.N.] v. the State of the Netherlands (Ministry of Def. and Ministry of Foreign Affairs), District Court in the Hague, case no. 265615, Judgment of 10 Sept. 2008 (dismissing claims against the Netherlands as there was no evidence that the Dutch government “cut across the United Nations command structure” by ordering Dutch troops to ignore or disobey UN orders). The plaintiffs have appealed the ruling. A separate complaint was also recently lodged against three individual Dutch soldiers who were members of the Dutch troop contingent assigned to protect civilians at Srebrenica. 'Srebrenica victims file complaint against Dutch peacekeepers' JURIST (7 July 2010 ) available at <http://jurist.org/paperchase/2010/07/srebrenica-victims-file-complaint-against-dutch-peacekeepers.php>
II. Background

The Mothers of Srebrenica case stems from the notorious July 1995 attacks against Bosnian Muslims perpetrated by Bosnian Serb forces in the East Bosnian enclave of Srebrenica. Various courts, including the International Court of Justice, Court of Bosnia and Herzegovina and the International Criminal Tribunal for the former Yugoslavia have examined the attacks and confirmed that they amounted to genocide. The events leading up to the atrocities of July 1995 were recently summarized thusly by Trial Chamber II of the ICTY in the case of Prosecutor v. Popovic, et al:

In early July, these two United Nations protected areas [Srebrenica and Žepa], established as havens for civilians caught up in the calamity of war, were the subject of intense military assault by Bosnian Serb Forces. The United Nations protection forces in both places were disabled and rendered powerless. In Srebrenica, the terrified Bosnian Muslim population fled to the nearby town of Potočari. There, in the face of a catastrophic humanitarian situation, the women, children and the elderly were ultimately loaded onto packed buses and transported away from their homes in Eastern Bosnia. For a large proportion of the male population, who were separated, captured or had surrendered, a cataclysmic fate awaited them. Thousands of them were detained in horrific conditions and subsequently summarily executed.

In 1996 the Dutch government asked the Dutch Institute for War Documentation to explain the failure of the United Nations Protection Force (UNPROFOR), specifically its 400-strong Dutch troop component (Dutchbat) to effectively deter the Srebrenica attacks. In 2002 the Institute published its findings, which blamed the Dutch Government and senior military officials for handing over Bosnian Muslim civilians to Serb forces and the UN for failing to provide proper support to Dutchbat. The Report focused on the command relationship between the United Nations and the Dutch battalion, noting that the latter was unambiguously under the 'operational control' of the former, but that Dutchbat acted independently with respect to its logistical arrangements (ie its administration of the Srebrenica Safe Zone).
The events of July 1995 became a permanent stain on the reputation of the United Nations and the Dutch government. In 1999 then-Secretary General of the UN Kofi Annan stated that “the tragedy of Srebrenica will haunt our history forever.” This sentiment was echoed by current Secretary-General Ban Ki-Moon who acknowledged in at a memorial ceremony in July 2010, that “[t]he United Nations made serious errors of judgment in Srebrenica, which weigh heavy on our collective memory and conscience.” In 2002 the entire Dutch Cabinet resigned over the events in Srebrenica.

On 4 June 2007 a civil action against Government of The Netherlands and the United Nations was commenced at the District Court of The Hague by the Mothers of Srebrenica Association (a Bosnian NGO) and ten individual plaintiffs. The plaintiffs sought joint and several compensation and acknowledgement of moral responsibility for the events at Srebrenica from both defendants. On 10 July 2008 the District Court determined that it was not competent to hear the action brought against the United Nations on account of its immunity from suit before national courts. The Court of Appeal upheld the verdict of the District Court, in the process considering whether (a) the state could assert the immunity of the UN, (b) the immunity enjoyed by the UN was absolute or limited in scope, and (c) a conflict with the right of access to a court justifies setting aside the UN’s immunity. This commentary will discuss these three aspects of the Appeals Court's decision, referencing the District Court decision where necessary to illustrate important points of convergence or departure.

III. The Immunity of the United Nations

A. Pleading the UN's Immunity before Dutch Courts

The United Nations routinely declines to appear before national courts, instead invoking its immunity through letters sent to the Permanent Representative of the host state of the national court where

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10 Secretary-General, at commemoration of Srebrenica massacre, stresses need for all, including united nations, to learn from past errors, Department of Public Information, SG/SM/13008 (July 2010) available at <http://www.un.org/News/Press/docs/2010/sgsm13008.doc.htm>


12 Judgment in the Incidental Proceedings, in the case between the Foundation Mothers of Srebrenica et al. versus the Netherlands and the United Nations, District Court The Hague, case no. 295247, judgment of 10 July 2008 [hereinafter District Court Judgment] para. 2.1, 6.1

jurisdiction is sought. 14 The *Mothers of Srebrenica* case proved to be no exception, and it was left to the State of The Netherlands to plead the immunity of its co-defendant before the Dutch courts. Because the plaintiffs raised objections relating to the capacity of the State to petition on behalf of its co-defendant,15 the Dutch courts were faced with the procedural question of whether the State had an 'interest in the outcome of the proceedings' sufficient to justify its affirmation of the immunity of the UN before each Court. 16 The District and Appeals Court agreed that the State had “a reasonable interest in a Netherlands court not delivering any judgments which conflict with the immunity granted to the UN [...] because in that case the State, to whom such ruling should be imputed under international law, would violate its obligations arising from [Article 105 of the Charter and Article II(2) of the Convention.]”17

Because they operate in a national sphere where separation-of-powers principles predominate, domestic courts are ill-equipped to balance conflicting international obligations contracted by their host states. 18 These problems are exacerbated when one of the obligations in question concerns the fundamental rights of a petitioner. Keeping in mind that in *Mothers of Srebrenica* the Dutch courts faced the difficult choice of either forcing the state to violate its UN Charter responsibilities or setting the stage for a claim that the Netherlands was in violation of its international law obligation to provide access to a court, it is unsurprising that both the District and Appeals courts allowed the state to intervene and reveal its legal and political priorities. It is also important to note that these decisions allowed the State to discharge its duty *vis-a-vis* the ICJ's majority decision in *Cumaraswamy* “to inform its courts of the position taken by the Secretary-General” concerning the immunity of the UN and ensure that they consider the issue of immunity *in limine litis* 19 (although there is no indication that *Cumaraswamy*...
influenced the Dutch courts).

**B. The Scope of the Immunity of the United Nations**

The UN’s procedural immunity from suit before national courts is provided for in general terms by Article 105(3) of the UN Charter, which states that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”\(^\text{20}\) The Privileges and Immunities Convention further defines these immunities in Article 2(2), which states that “[t]he United Nations […] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”\(^\text{21}\) The seemingly functionally-limited grant of immunity provided for in the UN Charter has historically been regarded as embodying a standard of absolute immunity, insofar as “international organizations can only act within the scope of their functional personality[; therefore] there is no room left for non-functional acts for which immunity would be denied.”\(^\text{22}\) However, in recent years a shift has taken place, and the scholarly community now generally encourages courts to adopt a ‘strict-functionality’ test which would limit the application of the UN’s immunity to activities that are necessary for the exercise of its functions or fulfillment of its purposes.\(^\text{23}\)

The *Mothers of Srebrenica* argued that a strict-functional grant of immunity was all that could have been granted to the UN by The Netherlands, on the grounds that “the Convention cannot extend further than the superior ranked UN Charter.”\(^\text{24}\) The question of the scope of the immunity granted to the UN would prove to be a point of departure between the Dutch Appeals and District Courts. The District Court seemed to favor the approach suggested by the plaintiffs;\(^\text{25}\) although it denied that the UN

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21 Convention on Privileges and Immunities of the United Nations, GA/Res 22(I) UNDoc A/PV.31 adopted 13 February 1946, UNDoc. A/RES/22(I) (entered into force in September 1946), 1 UNTS 15. The Netherlands has been a party to this treaty since April 1948.

22 August Reinisch and Ulf Andreas Weber 'In the Shadow of Waite and Kennedy' 1 Int'l Organizations Law Review 59, 63 (2004). See also A. Reinisch, International Organizations before National Courts 331-334 (2000) [hereinafter 'National Courts'] (noting that “the idea of functional immunity is rather imprecise insofar as it could refer both to the rationale of granting immunity at all [or] a certain content of immunity to be accorded” and that “a number of scholars and judges consider […] 'functional' and 'absolute' [to be] synonymous qualifications.”); *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008) (holding that the United Nations is absolutely immunized from suit before United States courts).


Immunities Convention and UN Charter ‘offered grounds for restricting immunity’ the District Court dismissed the case on the grounds that the impugned acts fell within the functional scope of the UN’s immunity. The Appeals Court was less receptive to this approach, and decided that Article 2(2) of the UN Convention and Article 105(3) of the UN Charter granted the United Nations “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.”

The Dutch Appeals Court is one of only a handful of judicial institutions that have evaluated the scope of the UN’s immunity on the basis of the international law obligations embodied in the UN Convention and Charter and not the national implementing legislation giving those obligations domestic effect. Interestingly, the Appeals Court decision conflicts with that of the Belgian Civil Tribunal, one of the few other courts to ever consider the relationship between the UN Charter and Convention immunity provisions. Whereas the Civil Tribunal hinted that it would have applied a restrictive theory of immunity if Section II of the Convention had not expanded the UN’s immunity beyond ‘what necessity strictly demands for the fulfillment of the [UN’s] purposes’, the Dutch Appeals Court concluded that the Convention had not gone “beyond the scope allowed by Article 105 of the Charter” in the course of ‘implementing’ the Charter protections.

Unfortunately the Court went on to adduce that “the question that needs to be addressed is not whether the invocation of immunity in this particular case at 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.” Answering in the affirmative, the court took note of the

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26 District Court Judgment, supra note 12, at para. 5.15. ‘The District Court also asserted, in dicta, that “in international law practice the absolute immunity of the UN is the norm and is respected”.’

27 Ibid at para. 5.12. (“[I]t is particularly for acts within this framework that immunity from legal process is intended.”) Additionally, the District Court suggested that national courts could review the acts of the UN for compatibility with Article 105 with “the greatest caution and restraint’ and ‘if and insofar as it has scope for testing […] it proceeds’[w]ith the utmost reticence.” District Court Judgment, supra note 12, at para. 5.15.

28 Appeals Court Judgment, supra note 13, at para. 4.2.


31 Appeals Court Judgment, para. 4.4.

32 Ibid at para. 5.1.
risk that the UN - the sole international body authorized to exercise ‘far reaching powers’ in the maintenance or restoration of peace and security - would be prevented from fulfilling its purpose by opportunistic or frivolous litigation if it were afforded anything less that absolute immunity. 33

The ‘in-general’ test suggested by the Appeals Court has found support amongst academics 34 and is consistent with the decisions of other national courts that have accepted the UN’s absolute immunity. 35 However, to suggest that a national court cannot decide whether immunity is ‘necessary’ for the functioning of the international organization in a given case is problematic for legal and policy reasons. First, the decision ignores the reality that the UN’s immunity is restricted, and does not extend indefinitely to cover all situations where its application would be convenient. The OLA, for example, has argued time and again that the immunity granted in the UN Convention and Charter does not extend to its participation in commercial enterprises, 36 a position that was recently affirmed by the High Court of Kenya. 37 This comports with the General Assembly’s understanding that immunities had an ‘outer limit’ beyond which “no privileges and immunities which are not really necessary should be asked for.” 38 The OLA has also gone one step further and acknowledged that how the UN goes about fulfilling its mandate may impact the scope of the UN’s immunity. In a recent memo the OLA acknowledged that participation in a competitive bidding process by UN subsidiary organs, even when the bidding was done in order to further their raison d’être (‘assisting States’), 39 might strip the UN system organizations of their immunity before

33 Ibid at para. 5.1 and 5.7.
34 Dekker, supra note 19. (asserting that “if a national court could decide whether immunity was ‘necessary’ for the functioning of the international organization in a given case, the essence of functional immunity would be lost for all practical purposes.”).
35 See e.g. Manderlier v Organisation des Nations Unies et l’État Belge (Ministre des Affaires Etrangères), Court of Appeals of Brussels, 15 September 1969, 69 ILR 139.
36 Office of Legal Affairs, ‘Advisability of the United Nations entering into a profit-making joint venture with a private publishing firm — Purpose of the current commercially oriented activities of the united nations — Participation in a profit-oriented commercial joint venture could put the status and character of the organization in question’, 23 July 1990 UN Jurid. Y. B. 257 (wherein OLA acknowledged that if “the organization were to participate in a commercial joint venture, it would … have to waive its privileges and immunities, the granting of which would no longer be justified.” See also Miller, supra note 14, at p. 21 fn 45 (describing other incidents in which the OLA of the UN has recommended against undertaking a particular activity, on the grounds that it would exceed the functional mandate of the UN and expose it to liability); Frederik Rawski ‘To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations’ 18 Conn. J. Int’l L. 103, 123 (2002) (noting that “application of the Convention has been inconsistent and UN rhetoric has been confused. At various times, both the broad and narrow interpretations of immunity protections have been invoked, with [UN] officials sometimes calling for a waiver and other times defining certain activities outside the scope of immunity”).
37 Tanad Transporters Ltd., Applicant, v. United Nations Children’s Fund, Ruling of 1 July 2009, 2009 UN Jurid Y.B. 488 (holding that “for the applicant to succeed in its claim that this court has jurisdiction to hear the dispute, it must establish that the commercial activity exercised by the respondent is outside its official function. In the present application, it is clear that the transportation agreement between the applicant and the respondent related to the official function of the respondent”).
39 Participation of Organizations of the United Nations system in Competitive Bidding Exercises Conducted by Governments, Note prepared by the General Legal Division of the Office of Legal Affairs, 2000 UN Jurid. Y.B. 418, 421 (noting that “the United Nations system organizations have been established by their member States, in significant measure, expressly for the purpose of assisting States.”)
domestic courts. The restrictive nature of the UN’s immunity is further affirmed in the opinion of the International Court of Justice in the ‘Certain Expenses of the United Nations’ case, which determined that the purposes of the UN “are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited.”

Second, it is troubling that the ‘in-general’ test shifts the focus of the inquiry from the scope of the grant of immunity as provided for in foundational documents of the UN to the degree of dependency on immunity. While Appeals Court reasonably relied on the ‘special nature’ of the UN in deciding to uphold the decision to dismiss the case, there is nothing to prevent future courts from looking to other factors with more capricious results. Imagine the situation in which two identical claims are brought against an organization afforded broad immunity. In one of these cases the plaintiffs seek substantial damages which, if awarded, would bankrupt an international organization. In the second case a much more modest amount is sought. By the Appeals Court’s logic the first case might be dismissed for the sole reason that it has the potential to impair the functioning of the accused organization, whereas the second claim might not be dismissed at all (assuming that the organization in question lacked a mandate sufficient to justify the conclusion that it relied on its immunity to function).

Finally, the assumption that underlay the Appeals Court formulation of the ‘in-general’ test – that providing for the absolute immunity of the UN is the only way to insulate it from malicious or frivolous litigation and provide for its effective functioning – does not correspond with today’s realities. Considering the position of international organizations in the contemporary world, Steven Herz has concluded that;

The argument that international organizations need expansive immunities to achieve their organizational purposes overlooks the current size, stature, and influence of many of these institutions. Expansive jurisdictional immunity arguably may have been a functional requirement a half century ago when these international organizations were fledgling, under-resourced, and politically precarious. But this is hardly the case today. The most prominent international organizations are now well-funded and firmly established in the international system, and have considerable legal and political resources at their disposal to defend their independence and organizational prerogatives. In fact, the power and influence of the more prominent organizations have expanded to the point where they are largely insulated from overreaching by most of their member states.

40 Ibid. (“If the practice of United Nations system organizations competing with private companies for business were to be pursued, it cannot be a priori excluded that the immunity of such organizations might be challenged in court. Whether this would occur and the possible results are difficult to predict. Even if the United Nations system organizations were to prevail in such legal actions, the institution of such actions conceivably could have other implications.”)


Although in all probability the impugned acts and decisions fall within the scope of the UN’s functional immunity, it is nevertheless unfortunate that the Court chose the path of least resistance and immunized the UN from suit in a manner that far exceeds its legitimate functional needs and contravenes the demands of international law and public policy. In light of this shortcoming other courts adjudicating claims against international organizations should be wary of following the precedent set by the Dutch Court of Appeals.

C. Providing access to a Court; immunity and the jurisdiction of the Dutch courts

In the final section of its judgment the Court addressed the appellant’s arguments that the immunity of the UN should be set aside by the Dutch courts on the basis of their right of access to a court as embodied in Article 6 ECHR and Article 14 ICCPR. According to the Court, the duty of the Netherlands to provide access to a court was not displaced by Article 103 of the UN Charter, which provides that in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under another international agreement, their Charter obligations prevail. According to the Court;

[the] development of international law since 1945, the year the Charter was signed, has not stopped and shows an increasing attention for and recognition of fundamental rights, that cannot be ignored by the Court of Appeal. Moreover, as is clear from the preamble to the Charter and article 1 subsection 3 of the Charter, the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms. It is implausible that Article 103 of the Charter intends to impair the enforcement of such fundamental rights.

It is true that Article 103 was not drafted for the purpose of freezing human rights at 1945 levels, but it was intended to preempt the displacement of the terms of the UN Charter by subsequent treaties, even human rights treaties, which would seem to be precisely the situation faced by the Appeals Court in Mothers of Srebrenica. The failure to address this issue head-on erodes confidence in the soundness of its opinion.

The decision to test Article 103 against the right of access embodied in 6 ECHR and Article 14 ICCPR and not against the right as a matter of customary law capable (as the Appeals Court acknowledged earlier in its opinion) of being invoked independently of the preceding provisions is unfortunate for three reasons. First, had the Court stuck with its customary law approach it could have

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43 Appeals Courts Judgment, supra note 13, at para. 5.5
44 Ibid.
45 Ibid at para. 5.1.
sidestepped the Article 103 issue entirely since the UN Charter asserts no primacy over international custom. Second, testing the Charter against the ECHR and ICCPR predisposed the Court towards considering the right of access only has it has found limited expression through those treaties, as opposed to its potentially broader and less hamstrung customary international law manifestation.

Finally, the decision to consider the right of access as either a treaty or custom based norm depending on the circumstances highlights other gaps in the opinion. For example, the principles of fairness demands that the Court should have shown a similar flexibility with respect to law favoring the UN and interpreted the duty to enforce the UN’s immunity as an obligation imposed by customary international law, applicable even to states that have not acceded to the UN Convention.

It is also interesting that the Appeals Court at no point made an affirmative finding that Article 6 was engaged, and instead merely assumed that the case fell within the remit of the ECHR despite the fact that a complaint alleging a violation of the right of access is arguably incompatible with the European Convention. According to this argument, because the ECHR obliges States only to extend ECHR protections to everyone ‘within their jurisdiction’ granting immunity to an international organization removes the acts of that organization from the scope of national jurisdiction, rendering the terms of the European Convention inapplicable. The English courts have followed the “no-conflict” approach in denying the relevance of Article 6 to international immunities. In the case of Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) Lord Bingham of the House of Lords questioned the applicability of Article 6 ECHR to claims brought against a foreign state for torture and expressed confusion with respect to the notion that “a state can be said to deny access to its court if it has no access to give.”

This reasoning was followed with respect to organizational

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46 Ibid. at para. 5.2.
48 Appeals Court Decision, supra note 19, paras. 5.2 – 5.5
49 Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (2006) UKHL 26, para. 14. See also the opinion of Lord Millett in Holland v Lampen-Wolfe (2000) 1 WLR 1573, 1588. See David Jones, ‘Article 6 ECHR and Immunities Arising in Public International Law’ 52 ICLQ 463, 472 (2003) (suggesting that the approach of Lord Bingham is to be recommended in certain cases and noting that “as a matter of principle, Article 6 should have no application where international law requires a grant of immunity”).

The European Commission of Human Rights in Graham Dyer v. United Kingdom (App. No. 10475/83) adopted the opposite position and concluded that Article 6 did not permit a State Party to avoid its European convention obligations by granting immunities to potential defendants. It justified its position in the following manner:

Were Article 6 para. I to be interpreted as enabling a State Party to remove the jurisdiction of the courts to determine certain classes of civil claim or to confer immunities from
immunities in 2008 by Justice Tomlinson, who denied the necessity of considering the relationship between UNESCO’s immunity and Article 6 ECHR because the UK “possessed no jurisdiction over UNESCO unless UNESCO chose to waive its immunity [when the UK became party to the ECHR].” It is regrettable that the Appeals Court did not choose to engage in a meaningful judicial dialogue and address this jurisdictional concern.

After determining that the right of access to a court applied to the case vis-à-vis Article 6 ECHR the Appeals Court considered whether the immunity of the UN reflected an appropriate restriction of that right. The Court applied the criteria developed by the ECtHR in Beer and Reagan v. Germany, and Waite and Kennedy, according to which immunities that do not inhibit the ‘essence’ of the right to access, serve a legitimate goal or exist disproportionate to the object intended to be effectuated by their grant are lawful restrictions of Article 6 ECHR rights. The legitimacy requirement was disposed of quickly by concluding that immunity had been granted for the purpose of promoting the effective operation of the UN. Here again the practice of the English courts diverges from the Dutch. In the UNESCO case Justice Tomlinson found that the ‘appropriate question’ to ask with respect to the legitimacy of the immunity of a UN subsidy was whether the grant pursued the legitimate aim of compliance with obligations owed in international law. It is suggested that the Dutch Appeals Court has adopted the correct position. First, it is not unimaginable that a state would choose to grant an international organization greater immunity than is demanded by the organizations Charter, any treaties to which the state is a party or even customary international law. In the absence of a general rule to the effect that only the narrowest possible immunities may be approved, the ‘purpose’ test reflects the more relevant inquiry. Additionally, Justice Tomlinson’s ‘compliance’ test is derived from the Grand Chamber of the ECtHR’s

liability on certain groups in respect of their actions, without any possibility of control by the Convention organs, there would exist no protection against the danger of arbitrary power. (para. 6).

This approach was subsequently followed by the ECtHR in Waite and Kennedy and Beer and Reagan. The UK intervened as a third party in a recent case before the ECtHR and invited the Court to reconsider the Commission’s logic in Dyer. The ECtHR declined to do so and treated the grant of immunity at issue in that case as conflicting with Article 6 ECHR. See Association SOS Attentats v France, ECtHR App. No. 76642/01 4 October 2006 at para. 27.


Matthias Kloth, Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights 28-30 (2010) (suggesting that the approach of the English Courts is flawed because national courts have jurisdictions until it is affirmatively removed by the grant of immunity.)

Appeals Court Judgment, supra note 13, at para. 5.1 citing Beer and Regan v. Germany, ECtHR App. No. 28934/95 (18 February 1999) and Waite and Kennedy v. Germany, ECtHR App. No. 26083/94 (18 Feb. 1999). The question of whether the plaintiffs had recourse to an alternative fora was an ‘important aspect’ of the proportionality inquiry but would not be determinative. Appeals Court Judgment supra note 13, at para. 5.2.

Ibid

decisions in a trio of state-immunity cases in which compliance with international law was identified as a legitimate aim only to the extent that it was linked with the pursuit of “comity and good relations between States through the respect of another State’s sovereignty.” The ‘compliance’ test is therefore preoccupied with the maintenance relations between actors equally capable of striking at each other, and cannot be analogized to the relationship between states and international organizations, which are inherently constrained in their decision-making by the needs and interests of member states.

The proportionality of the grant was assessed in light of the ‘special position’ of the UN as the only international organization authorized to use force to preserve international peace. According to the Appeals Court:

[...] 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.

Neither the plaintiff’s allegations that the UN had failed to do enough to prevent the Srebrenica genocide nor the fact that the UN had failed to establish a forum where the claimants could have their case against the UN heard were sufficiently ‘compelling’ to justify a finding that

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56 Appeals Court Decision, supra note 13, para. 5.7. Many commentators feel that the negative consequences and risk of exposure to biased courts or politicized proceedings has been vastly overstated. Gaillard, supra note 23, pp. 5-8; Paust, supra note 23, at p. 10; Werzer, supra note 51, at p. 140 (“Even if one accepts the argument that there are several reasons against subjecting UN organs and personnel operating on the basis of a Chapter VII mandate to local courts, the UN is under the obligation to respect and protect international human rights. In case the human right of access to a court is restricted, the availability of effective alternative legal remedies has to be ensured.”); Elizabeth Abrahams ‘The Sins of the Savior: holding the United Nations accountable to international human rights standards for executive order detentions in its mission in Kosovo’ 52 Am. U. L. Rev. 1291, 1334 (2003) (“if the [Secretary General] feared the lack of independence from a local judiciary, even with international judges, the U.N. should have provided for the hybridization of authority rather than complete usurpation of judicial involvement.”); A.S. Muller, International Organisations and their Host States: Aspects of their Legal Relationship 271 (1997).

the grant of immunity was disproportionate to its objectives. With respect to the first of these claims, the Appeals Court observed that the UN had neither committed nor assisted in the commission of the Srebrenica genocide, and that although the accusations made that the UN had failed to prevent the genocide were 'serious', setting aside the immunity on the grounds suggested by the applicants might "be latched onto too easily [by other courts], which could lead to misuse." Guido den Dekker and Jessica Schechinger have called attention to the Appeals Court's insinuation that it might have withdrawn the UN's immunity had the organization been accused of the 'more serious' crimes of committing or assisting in the commission of genocide as opposed to the 'lesser' wrong of failing to prevent the Srebrenica massacre. Although the Appeals Court did not explain its reason for drawing this distinction, the disparity can perhaps be justified on the basis of the customary nature of the former prohibitions versus the treaty-norm status of the latter affirmative duties. Thus, the Appeals Court has distinguished itself as the only domestic court to ever suggest that the 'absolute' immunity of the United Nations might be curtailed on grounds other than a conflict with a constitutional right. The Appeals Court finally examined whether the UN's failure to constitute an alternative forum through which the plaintiffs could seek redress could compel the Dutch courts to revoke the organization's immunity. Whereas the District Court had declined to consider this claim at all, the Appeals Court subsumed this question into its analysis of the right of access. The Appeals Court conceded that the UN had failed to establish an adjudicatory mechanism capable of compensating the plaintiffs and that the status-of-forces agreement negotiated between the Netherlands and the UN provided no means by which to hold the organization accountable but concluded that the right of access to a court had not been

57 Appeals Court Decision, supra note 13, para. 5.7. See also 'Cumawamy', supra note 19, at para. 61 (Wherein the ICJ indicated that States could disagree for the 'most compelling reasons with the Secretary-General's decision to not waive immunity).
58 Appeals Court Decision, supra note 13, para. 5.10
59 Ibid.
60 Ibid. Dekker, supra note 19, pp. 6-7. They have also identified a confusing aspect of this ruling, namely that because "the general interest connected with UN immunity...and the risk of abuse of domestic court proceedings would not change [even if the UN had been accused of the 'more serious' offenses, it is] unlikely that the test of proportionality would result in a different outcome."
61 Gattini, supra note 41. Contra Toope, supra note 41.
63 Appeals Court Decision, supra note 13, para. 87
64 Ibid at para 5.24.
65 The UN and Bosnia and Herzegovina agreed in May 1993 that ‘any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the courts of Bosnia and Herzegovina do not have jurisdiction […] shall be settled by a standing claims commission to be established for that purpose. ‘Agreement on the
impaired because alternative forums existed where the appellants could hold responsible “two categories of parties liable for the damages incurred by the Mothers of Srebrenica, namely the perpetrators of the genocide and the State.” With respect to the claims against the Netherlands (which the Association et al had reproached “for the same things as the UN”), Dutch courts would give a “substantive assessment of the claim” even if the State sought to avoid responsibility by arguing that the actions of Dutchbat soldiers were attributable to the UN.

This aspect of the Appeals Court's decision is problematic to the extent that it equates the jurisdiction of the claim lodged against the Dutch state with that of the claim lodged against the UN. All defendants are not created equal, and even where a claim brought against two co-defendants accuses each of an identical violation of the law, the responsibility for individual acts that en masse make up a larger deficiency for which the co-defendants are jointly accused will vary among those defendants, along with the forms of liability to which each defendant, through its unique contribution, has exposed itself and the degree to which each defendant can be held responsible for making reparations. The United Nations is an essential and necessary party to the litigation, and on this basis the Appeals Court should have examined the specific question of whether there was an alternative forum through which the UN could have been held accountable.

IV. Concluding Remarks

It is inevitable that in the course of peace support operations UN forces will injure civilians and damage their property. Despite this, there have been few cases in which individuals have attempted to bring suit against United Nations, alleging its responsibility for wrongful conduct. In the only other
known instance (over forty years old now) the Belgian Civil Tribunal was asked to set aside the immunity of the UN and hold it accountable for violations of customary international law. In the course of deciding the claims the Court rejected the application of Article 10 of the Universal Declaration of Human Rights and ECHR Article 6, holding that the former was a mere “collection of recommendations” lacking legal force and that the latter was “concluded between fourteen European states only” and could not be imposed on the United Nations. Compared to Manderlier the Appeals Court’s decision in Mothers of Srebrenica is remarkable, inasmuch as the court did not deny the obligatory nature of the right of access. Indeed, the decision is a testament to the newfound willingness of contemporary judges to justify the UN's immunity on the basis of its consistency with other norms of international law. Unfortunately for potential plaintiffs the Appeals Court decision probably also reflects the high water mark for claims brought against the UN before domestic courts. The Mothers of Srebrenica litigation is a rarity, in that it involves a combination of sympathetic defendants with a legitimate legal complaint against the UN who have no other fora in which their claim can otherwise be brought. If a national court is unwilling to set aside the immunity of the UN under the present circumstances it is indeed difficult to imagine a situation in which the disproportionality between the grant of immunity and the right of access would be great enough to justify doing so.

The Mother of Srebrenica Association have appealed the decision to the Dutch Supreme Court and have expressed their readiness to bring the Netherlands before the European Court of Human Rights.

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70 In 2000 preliminary steps were taken by two Australian attorneys to sue the United Nations on behalf of two Rwandan families for the organisations complicity in the Rwandan genocide. Charges do not appear to have actually been filed, as the United Nations threatened to invoke its immunity from suit before national courts. Karen MacGregor 'Survivors sue UN for 'complicity' in Rwanda genocide' The Independent, 11 January 2000 available at <http://www.independent.co.uk/news/world/africa/survivors-sue-un-for-complicity-in-rwanda-genocide-727146.html>.

71 Manderlier, supra note 22, at p. 451 – 452. See Van Diepen van der Kroef, Writ of Summons, 18 June 2008, para. 463 available at <http://www.vandiepen.com> (asserting that “[t]o the extent that the numbers argument in 1966 was valid, that is at present certainly not the case given that now 46 countries have acceded to the ECHR. The second argument, that the ECHR does not apply to the UN, is also incorrect. The ECHR confers on civilians a direct right of access to the court, which means that the court before which a claim is brought must allow access. By so doing it is not imposing the EECHR on the the UN, but rather offering protection to the acknowledged – also by the UN – human right of access to the court.”). Reinsch argues that the approach of the Civil Tribunal has “not gained persuasive strength over the years”, but the numbers-argument appears to have played a role in the recently decided UNESCO case. UNESCO, supra note, at page 484-485 (noting that the obligation to provide for the immunity of United Nations organs is “owed to virtually the entire international Community” and arguing that there is “no room for ‘reading down’ the provisions of the 1947 Convention in order to take account of the provisions of the subsequent ECHR, a treaty which is binding upon only a minority of the parties to the 1947 Convention.”). Contra Reinsch, supra note, at p. 77.

72 The Appeals Court itself noted in dicta that 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.” Appeals Court Decision, supra note 13, para. 5.14.

73 See Van Diepen van der Kroef, Writ of Cassation, 1 July 2010, available at <http://www.vandiepen.com>. The plaintiffs have also requested that the Supreme Court refer the case to the European Court of Justice, arguing that the Court of Justice is the body charged with determining whether a grant of absolute immunity “tallies with the law of the European Community.” Ibid. para 8.6. The same request was made of (and rejected by) the Dutch Court of Appeal. Appeal Court Decision, supra note 13, para. 5.14.
if necessary. As a test case for claims against the UN the ultimate outcome of the case has far reaching implications for 21st century peacekeeping operations. It is hoped that as the case works its way through the Courts a persuasive analytical framework for balancing the rights and entitlements at stake capable of withstanding the substantial scrutiny to which it will be subjected will emerge.