serve as an example of "UN loyalty,"[27] that is, cooperation and mutual respect between the EU and UN levels, which is the precondition for the functioning of a multilevel system.

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Immunity of international organizations—United Nations—European Convention on Human Rights—right of access to courts—jus cogens

STICHTING MOTHERS OF SREBRENICA v. NETHERLANDS. Application No. 65542/12. Decision on Admissibility. *At* http://hudoc.echr.coe.int.
European Court of Human Rights, June 11, 2013.

On June 11, 2013, in *Stichting Mothers of Srebrenica*,[1] a chamber of the European Court of Human Rights found that the Dutch courts' grant of immunity to the United Nations in a case brought by and on behalf of relatives of individuals killed by the Army of the Republika Srpska in and around Srebrenica in July 1995 did not run afoul of Articles 6 and 13 of the European Convention on Human Rights (Convention).[2] Those provisions guarantee, respectively and among other things, the right of access to a court and the right to "an effective remedy before a national authority" if any Convention right is violated. Having found that the challenged decisions accorded with Dutch obligations under the Convention, the chamber declared the application before the Court inadmissible as "manifestly ill-founded" and "rejected" it pursuant to Article 35(3)(a) and 4. The chamber's decision was unanimous.

The underlying case had been brought by the applicants before the District Court of The Hague in June 2007. It pertained to the activities of the United Nations Protection Force (UNPROFOR), which had been established by Security Council resolution in 1992 as "an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."[3] The suit named as defendants the United

[27] *See* CLEMENS A. FEINÄUGLE, THE EXERCISE OF PUBLIC AUTHORITY IN INTERNATIONAL LAW 358 (2011) (Eng. summary). See also Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 43, 49 (2010), who favors a "soft constitutionalist approach" that seeks to mediate the relationship between the norms of the different legal systems.

[1] Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12 (Eur. Ct. H.R. June 11, 2013) [hereinafter Decision]. Judgments and decisions of the Court are available at http://hudoc.echr.coe.int.

[2] The chamber also found that the first-named applicant—Stichting Mothers of Srebrenica, a Dutch foundation that was "set up for the express purpose of promoting the interests of surviving relatives of the Srebrenica massacre"—lacked standing to lodge an application concerning the alleged violations of the Convention. Decision, paras. 116–17. Article 34 of the Convention requires that applicants be the "victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34, Nov. 4, 1950, ETS No. 5, 213 UNTS 222. As with previous applications by nongovernmental organizations that were established "with no other aim than to vindicate the rights of alleged victims," the Court found that Stichting Mothers of Srebrenica was not a "victim" within the meaning of Article 34 as it "ha[d] not itself been affected by the matters complained of." Decision, paras. 115–16. Consequently, its application had to be rejected in accordance with Article 35(4) of the Convention. This decision, though, had no effect on the Court's further consideration of the case, because it was uncontested that the individual applicants, who alleged the same violations of the Convention as Stichting Mothers of Srebrenica, had standing before the Court.

[3] SC Res. 743, para. 5 (Feb. 21, 1992).

Nations and the Netherlands, which maintained an infantry battalion (Dutchbat) in Srebrenica as part of UNPROFOR. The plaintiffs made claims under both civil law and international law. Under Dutch civil law, they asserted, first, that the defendants had "entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica 'safe area' in exchange for the disarmament of the ARBH [Army of the Republic of Bosnia and Herzegovina] forces present," and, second, that the defendants "had committed a tort . . . against them by sending insufficiently armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support" (para. 55). Under international law, the applicants averred that Dutchbat had failed to prevent the genocide in Srebrenica, as it was obligated to do under the Genocide Convention,[4] and that "the actions of Dutchbat were attributable to both the State of the Netherlands and the United Nations" (para. 56). The plaintiffs sought a declaration that the defendants had acted wrongfully and compensation for those wrongful acts.

The United Nations did not appear before the district court. Upon a motion to intervene in or join the proceedings against the United Nations, the Dutch government asserted that the Dutch courts lacked jurisdiction over the United Nations pursuant to Article 105(1) of the UN Charter[5] and Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations (General Convention).[6] In response, the applicants claimed that the United Nations' purported immunity under these treaties was overridden by Article 6 of the European Convention and by the provisions of the Genocide Convention. In July 2008, the district court found that it had no jurisdiction over the United Nations, notwithstanding the provisions of the European Convention and the Genocide Convention. This decision was affirmed by both the Court of Appeal of The Hague in March 2010 and the Supreme Court of the Netherlands in April 2012.[7] The United Nations' immunity having been upheld, the case was resumed at the district court against the Netherlands alone, which argued that Dutchbat's acts, wrongful or not, were attributable solely to the United Nations and consequently the Netherlands could not be held responsible for them (para. 95). In October 2012, the plaintiffs lodged the present application with the European Court asserting that the Dutch courts' decisions on UN immunity contravened the European Convention.

In its decision, the chamber focused on Article 6(1) of the Convention, which provides in pertinent part that "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by [a] . . . tribunal." To the Court, there was no question that the article had been properly invoked, as the claim against the United Nations was a civil one and all the other requirements for the article's application were satisfied, including that the substantive claim against the United Nations was "arguable" under Dutch law (paras. 119–20). Did recognition of the United Nations' immunity therefore violate the applicants' access to a court as provided for by Article 6?

[4] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

[5] Article 105, paragraph 1 of the Charter provides: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

[6] Article II, section 2 of the General Convention, Feb. 13, 1946, 1 UNTS 16, provides in pertinent part: "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."

[7] Mothers of Srebrenica Ass'n v. Netherlands, Dist. Ct. The Hague July 10, 2008, No. 07-2973; App. Ct. The Hague Mar. 30, 2010, No. 200.022.151/01; Sup. Ct. Neth. Apr. 13, 2012, No. 10/04437, *at* http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956 (Eng. trans.).

The Court began by enunciating the principles that applied to the case. It noted that the "right of access" under Article 6 "is not absolute, but may be subject to limitations" (para. 139(b)). Though states were permitted a margin of appreciation in implementing the right of access, any limitation must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right [was] impaired" (*id.*). Further, limitations on the right must "pursue a legitimate aim" and have "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (*id.*). The Court observed that in general the accordance of immunity to international organizations was a "legitimate objective" because it "ensur[ed] the proper functioning of such organisations free from unilateral interference by individual governments" (para. 139(c)). Such immunity, as well, could not "in principle be regarded as imposing a disproportionate restriction on the right of access to a court" (para. 139(f)). Indeed, "[j]ust as the right of access to a court is an inherent part of the fair trial guaranteed in [Article 6], so some restrictions on access must likewise be regarded as inherent" in that guarantee (*id.*). The Court also emphasized the importance of interpreting the Convention "in harmony with other rules of international law," including those pertaining to immunity (para. 139(e)).

Applying these principles, the Court rejected the applicants' contention that the immunity accorded to the United Nations in this case breached the obligations contained in Article 6. Beginning with a consideration of the "nature of the immunity enjoyed by the United Nations" (para. 140), the Court distinguished this case from previous cases (disputes between an international organization and its staff; claims imputing to a state the alleged wrongful acts of an international organization of which it is a member or of which it is the host state; allegations concerning the acts of a state undertaken as a consequence of its membership in an international organization). Thus, it characterized the present dispute as "[a]t its root . . . based on the use by the Security Council of its powers under Chapter VII" of the Charter because Dutchbat had operated pursuant to this authority (para. 152). The Court explained that since operations under Chapter VII resolutions "are fundamental to the mission of the United Nations to secure international peace and security, the [European] Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations" (para. 154). To do so "would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations" (*id.*). This constraint did not mean, though, that the United Nations could not be held responsible for its acts. As explained by the International Court of Justice in its advisory opinion in *Difference Relating to Immunity from Legal Process*, which the chamber quoted, "the question of immunity from legal process is distinct from the issue of compensation" (para. 155).[8] Even so, claims against the United Nations "shall not be dealt with by national courts but shall be settled in accordance with [the provisions of] Section 29" of the General Convention (*id.*).[9]

Next, the Court considered whether the particular nature of the claim before the Dutch courts—founded on the prohibition of genocide, a *jus cogens* rule—created an obligation

[8] Quoting Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 ICJ REP. 62, para. 66 (Apr. 29).

[9] Quoting *id.* Article VIII, section 29 of the General Convention, *supra* note 6, provides in pertinent part: "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party . . . ."

under Article 6 to abrogate any immunity that the United Nations might enjoy. The Court rejected this assertion. Citing the 2012 judgment of the International Court of Justice in *Jurisdictional Immunities of the State*,[10] which, under customary international law, had upheld the immunity of a state from the jurisdiction of a foreign state's courts despite underlying claims that were based on violations of *jus cogens*, the chamber concluded that "[i]nternational law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*" (para. 158). This reasoning was especially valid here, the European Court continued, since "the matters imputed to the United Nations in the present case . . . ultimately derived from resolutions of the Security Council acting under Chapter VII of the United Nations Charter and therefore had a basis in international law" (para. 159).

The Court then evaluated whether the absence of any alternative jurisdiction for the applicants to effectuate their Convention rights altered its conclusions concerning the compatibility of UN immunity with Article 6. Referring to its previous cases *Waite and Kennedy* and *Beer and Regan*,[11] the Court explained that the lack of a "reasonable alternative means to protect effectively their rights under the Convention" should be "considered . . . a 'material factor' in determining whether granting an international organisation immunity from domestic jurisdiction was permissible under the Convention" (para. 163). Clearly, no such "alternative means" were available via either Dutch law or the United Nations, but that deficiency was still not dispositive in this case (*id.*). "It does not follow," the chamber reasoned, "that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court" (para. 164). Again citing the International Court of Justice's judgment in *Jurisdictional Immunities*, the chamber rejected such a categorical approach. In addition, it rejected any suggestion that *Waite and Kennedy* and *Beer and Regan* could also be "interpreted in such absolute terms" (*id.*).

Finally, the Court rejected the contention, raised by the applicants under Article 13 but considered by the Court under Article 6, that the Netherlands was "attempt[ing] . . . to evade its accountability" by seeking "to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the United Nations," which had been granted immunity (para. 166).[12] The Court noted that this claim was speculative, as in two other cases brought by relatives of persons who were killed at Srebrenica (*Mustafić v. Netherlands* and *Nuhanović v. Netherlands*), the court of appeal, reversing the district court, had rejected the Dutch government's attempt to avoid responsibility on these grounds.[13] Nor had the district court yet decided the issue in this case. In any event, whether a claim could be brought against the Dutch government for the acts of Dutchbat was a question of substantive law and "Article 6 §1 does not guarantee

[10] Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening) (Int'l Ct. Justice Feb. 3, 2012) [hereinafter *Jurisdictional Immunities*].

[11] Waite v. Germany, 1999-I Eur. Ct. H.R. 393; Beer v. Germany, App. No. 28934/95 (Eur. Ct. H.R. Feb. 18, 1999) (reported by August Reinisch at 93 AJIL 933 (1999)).

[12] Because the applicants raised no other claims concerning Article 13, the Court did not consider its jurisprudence under that provision. Decision, para. 177.

[13] *See infra* text at and note 29.

any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (para. 168).[14]

* * * *

Over the past twenty years, as international organizations have widened the scope of their work, particularly in obligating states to take actions against individuals, for example through the imposition of sanctions, and as these organizations themselves have operated directly on individuals through engagement in peacekeeping and postconflict administration, attempts have been made to subject their acts to review to ensure that they accord proper respect for human rights.[15] In the *Kadi* cases, for example, challenges to European Commission regulations implementing Security Council sanctions resolutions have twice been upheld by the European Court of Justice because of a lack of adequate mechanisms for persons to contest their listing.[16] And in *Nada*, the Grand Chamber of the European Court of Human Rights found that Switzerland's implementation of Security Council sanctions interfered with the applicant's rights under the European Convention.[17] The suit brought by the applicants in the present case is part of this trend, which aims at subjecting the public acts of international organizations to judicial scrutiny.[18]

Yet this case is also part of a trend that upholds the immunity of international organizations (and states) from judicial review of their public acts, absent their consent. The applicants had focused their submissions on two arguments: first, that, for the purpose of Article 6, the *jus cogens* obligations of the Genocide Convention trumped those of the Charter and the General Convention,[19] and, second, that Article 6, per *Waite and Kennedy* and *Beer and Regan*, required that "the applicants [have] available to them reasonable alternative means to protect effectively their rights under the Convention."[20] Both arguments were rejected. The first challenge failed when the chamber unquestioningly applied to international organizations the

[14] The Court also rejected the applicants' claim that the Dutch Supreme Court's refusal to seek a preliminary ruling from the European Court of Justice (on the issue of "the interrelation between the jurisdictional immunity granted to the United Nations and the principle of effective judicial protection enshrined in European Union law") was improperly based on "summary reasoning" in breach of Article 6. Decision, paras. 171, 173–75.

[15] *See generally* GUGLIELMO VERDIRAME, THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS? (2011); Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321 (2011).

[16] Commission v. Kadi, Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P (Eur. Ct. Justice July 18, 2013) (reported by Clemens A. Feinäugle at 107 AJIL 878 (2013)); Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)).

[17] Nada v. Switzerland, App. No. 10593/08 (Eur. Ct. H.R. Sept. 12, 2012).

[18] *See, e.g.*, Abdelrazik v. Canada (Minister of Foreign Affairs) (2009), [2010] 1 F.C.R. 267; Her Majesty's Treasury v. Ahmed, [2010] UKSC 2, [2010] 2 A.C. 534. *See generally, e.g.*, Riccardo Pavoni, *Human Rights and the Immunities of Foreign States and International Organizations*, *in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 71 (Erika de Wet & Jure Vidmar eds., 2012); Antonios Tzanakopoulos, *Domestic Court Reactions to UN Security Council Sanctions*, *in* CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 54 (August Reinisch ed., 2010).

[19] Citing *Jorgić v. Germany*, 2007-III Eur. Ct. H.R. 263, the chamber noted that the prohibition of genocide in the Genocide Convention was a *jus cogens* rule and implicitly assumed that the obligation to prevent genocide (not just the obligation not to commit genocide) fell within that category and hence bound the United Nations. Decision, para. 157.

[20] *Waite*, *supra* note 11, para. 68; *Beer*, *supra* note 11, para. 58. On this line of cases, see August Reinisch & Ulf Andreas Weber, *In the Shadow of* Waite and Kennedy: *The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternate Means of Dispute*

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International Court of Justice's conclusions respecting state immunity.[21] The second challenge failed when the chamber distinguished its own precedent. *Waite and Kennedy* and similar cases before national courts, such as *Western European Union v. Siedler*, had dealt with private disputes, including employment cases, not public law matters.[22] In the present case, however, as in some others where immunity had withstood an Article 6 challenge,[23] the acts of the international organization that the plaintiffs sought to impugn were taken pursuant to the organization's core mission. The Court stressed repeatedly in its decision, as it had in previous cases,[24] that the core mission at issue here was of singular importance (the maintenance of international peace and security). Hence, the need for immunity, and the independence that such immunity confers on organizations, was, as a policy matter, critical. Article 6 had to be read accordingly.[25]

The chamber's decision is significant both for potential plaintiffs and for states, in addition to international organizations. Recognition of the primacy of international organization immunity in these types of cases will impel victims who seek to vindicate their rights judicially to sue states in their home courts. Further, in those suits, plaintiffs will need to prevent states from shifting the attribution of the alleged wrongful acts from themselves to the (immune) organization or other states.[26] Victims who seek to assign blame directly to international organizations will need to lobby for the establishment of nonjudicial panels (such as commissions of inquiry) to investigate and issue findings concerning their alleged wrongful acts, as organizations have immunity only from legal process. They will also need to exert political pressure on international organizations to accept responsibility, pay reparations, and take additional remedial actions or establish claims commissions or other mechanisms of dispute settlement. Further, victims may seek to establish the responsibility of international organizations indirectly and implicitly through the prosecution of individuals or through other judicial proceedings. For those fighting for accountability, this approach is not optimal, as the difficulties encountered by the victims of the Haiti cholera epidemic demonstrate, yet such indirect review

Settlement, 1 INT'L ORG. L. REV. 59 (2004); August Reinisch, *Privileges and Immunities*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 132, 142–46 (Jan Klabbers & Åsa Wallendahl eds., 2011).

[21] Indeed, the chamber's reliance on the International Court's judgment was remarkable, and its decision had the effect of bringing international organization immunity in line with sovereign immunity from foreign court jurisdiction.

[22] *E.g.*, W. Eur. Union v. Siedler, Cour de Cassation, Dec. 21, 2009, No. S.04.0129.F (Belg.), INT'L L. DOMESTIC CTS. 1625 (in French), *available at* http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20091221-7 (in French) (reported by Jan Wouters, Cedric Ryngaert, and Pierre Schmitt at 105 AJIL 560 (2011)).

[23] *E.g.*, Bundesgericht [Federal Supreme Court] [BGer] July 12, 2010, 136 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 379 (Switz.) (upholding the immunity of the Bank of International Settlements against an Article 6 challenge).

[24] *See* Behrami v. France, Joined App. Nos. 71412/01 & 78166/01 (Eur. Ct. H.R. May 2, 2007) (reported by Pierre Bodeau-Livinec, Gionata P. Buzzini, & Santiago Villalpando at 102 AJIL 323 (2008)).

[25] Because the Court's analysis was limited to Security Council resolutions under Chapter VII, questions about the precedential scope of the decision will remain.

[26] Though it is possible to prevent a state from shifting attribution, *see infra* note 29, the Court's precedents create confusion in this area. *Compare Behrami*, *supra* note 24, *with* Al-Jedda v. United Kingdom, App. No. 27021/08 (Eur. Ct. H.R. July 7, 2011), 50 ILM 950 (2011) (reported by Miša Zgonec-Rožej at 106 AJIL 830 (2012)).

of the acts of international organizations can be successful under certain conditions, as the *Kadi* and *Nada* cases attest.[27]

Perhaps sensitive to the potential charge that its decision will hamper accountability, the chamber recounted at great length the multiple investigative commissions and inquiries into the Srebrenica massacre. It quoted at length the 1999 report of the UN secretary-general on Srebrenica, which concluded that the "international community as a whole [including the Security Council and the UN Secretariat] must accept its share of responsibility."[28] It described the contents of the 2002 report of the State Institute for War Documentation, which findings led to the resignation of the Dutch government then in office. And it canvassed and summarized many other investigations and court proceedings, including the 2001 French and 2003 Dutch parliamentary inquiries, the 2003 report of the Republika Srpska's investigative commission, the judgments of the International Criminal Tribunal for the Former Yugoslavia in the *Krstić* case, the 2003 decision of the Human Rights Chamber for Bosnia and Herzegovina in *Selimović*, and the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of Genocide*. The chamber's recounting of these investigations, which takes up 33 paragraphs of a 178-paragraph decision or nearly 20 percent (paras. 21–53), was unnecessary to the disposition of the case. Though nowhere stated explicitly, the chamber's extensive review implied that the wrong that the applicants sought to vindicate before the Dutch courts had in fact been recognized and that responsibility had already been allocated, including to the United Nations. In other words, immunity does not necessarily lead to a lack of accountability.

In this regard, the chamber also noted that, even though the United Nations' immunity was upheld, the applicants' claim against the Netherlands remained. And indeed, in the wake of the recent judgments of the Supreme Court of the Netherlands in *Mustafić* and *Nuhanović*, which rejected the Dutch government's attempt to deny that any of Dutchbat's wrongful acts were attributable to it,[29] Stichting Mothers of Srebrenica and the other applicants in this case may yet get some satisfaction—just not from the United Nations.

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[27] Indeed, indirect attacks on the acts of international organizations by challenging state implementation of the directives of organizations or by seeking to hold states liable for acts taken under the authority of an organization can restrict the independence of organizations just as much as direct challenges. In this way, whereas upholding the immunity of international organizations in cases like this is important symbolically and monetarily, in practice a successful defense by an organization of its immunity may be less consequential than it appears, as organizations depend on states to effectuate their decisions. Thus, if the Netherlands can be held liable for Dutchbat's failures, then future UN operations could be impaired because states might be unwilling to contribute troops for fear of liability or may insist that the United Nations agree to indemnify them should they be required to pay damages (even absent a finding of UN responsibility or dual responsibility).

[28] Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, para. 501, UN Doc. A/54/549 (Nov. 15, 1999).

[29] Netherlands v. Mustafić, No. 12-03329 (Sup. Ct. Neth. Sept. 6, 2013); Netherlands v. Nuhanović, No. 12-03324 (Sup. Ct. Neth. Sept. 6, 2013), *at* http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/default.aspx (Eng. trans.). In these cases, there was a basis for Dutch responsibility that could be argued to have been unique to these victims, and there was no finding of UN responsibility or dual responsibility. Thus, it is not certain that the applicants in *Stichting Mothers of Srebrenica* will be successful at the district court in holding the Netherlands responsible.