APPLICATION BY THE MOTHERS OF SREBRENICA TO THE EUROPEAN COURT OF HUMAN RIGHTS AGAINST THE DECISION OF THE SUPREME COURT OF THE NETHERLANDS[1]

I. The Parties

A. The Applicants

1. The foundation "Stichting Mothers of Srebrenica", established on 28 November 2006, registered office at Keizersgracht 75, 1015 CE Amsterdam, The Netherlands. The Foundation is a legal entity under Dutch law with full legal capacity, formed with a view to bringing a collective action within the meaning of Article 3:305a BW (Netherlands Civil Code). In accordance with its articles the Foundation promotes the interests of surviving relatives of the genocide committed in and around the UN 'safe area' Srebrenica in 1995 by, *inter alia*, bringing the present judicial proceedings. The Foundation has, in addition to its idealistic interest, also a financial interest in its claims, given that the Foundation has the object of offering financial help to the surviving relatives;
2. Mrs Munira Subašić, born on 8 May 1948 in Burati, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Stara Jezera Br. 142, Vogošća, Bosnia and Herzegovina;
3. Mrs Zumra Šehomerović, born on 15 November 1951 in Karačići, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Braće Krešo 2, Vogošća, Bosnia and Herzegovina;
4. Mrs Kada Hotić, born on 11 May 1945 in Kula Grad, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Ul. Jošanićka 149, Vogošća, Bosnia and Herzegovina;
5. Mrs Sabaheta Fejzić, born on 28 July 1956 in Sase, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Gornja Josanica I do 9, Vogošća, Bosnia and Herzegovina;
6. Mrs Kadira Gabeljić, born on 1 January 1955 in Lipovac (nationality: Bosnia and Herzegovina). Permanent address: Blagovac 1-99, Vogošća, Bosnia and Herzegovina;
7. Mrs Ramiza Gurdić, born on 6 June 1953 in Presjeka, Bosnia and Herzegovina (nationality:

[1] The official application has been submitted in line with the registration form of the ECHR but the content is exactly the same.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

Bosnia and Herzegovina). Permanent address: Ljesevo, Odžak Br. 754, Ilijaš, Sarajevo, Bosnia and Herzegovina;

8. Mrs Mila Hasanović, born on 4 May 1946 in Stop, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Aleja Lipa 42, Sarajevo, Bosnia and Herzegovina;
9. Mrs Šuhreta Mujić, born on 27 May 1948 in Abdulići, Bosnia and Herzegovina (nationality: Bosnia and Herzegovina). Permanent address: Polomska BB, Ilijaš Podlugovi, Sarajevo, Bosnia and Herzegovina;
10. Applicant No. 10;
11. Applicant No. 11;

Hereafter referred to as "the Applicants".

The Applicants are represented by Dr. A. Hagedorn, M.R. Gerritsen, J. Staab and S.A. van der Sluijs, all of whom are lawyers at Van Diepen Van der Kroef Advocaten in Amsterdam, the Netherlands. (see **Annex 1** for the written authorities)

Van Diepen Van der Kroef Advocaten
Dijsselhofplantsoen 16-18
1077 BL Amsterdam
The Netherlands
phone: +31 (0)20 5 74 74 74
fax: +31 (0)20 5 74 74 75

B. The High Contracting Party

The Applicants submit that the violations of Article 6 ECHR by the judiciary of the Netherlands, namely the violation of the right of access to a court by the qualification of the UN's immunity as "absolute", and the violation of the right to a fair trial by the failure to state reasons for the refusal to submit questions for a preliminary ruling to the Court of Justice of the European Union, as well as the violation of the right to an effective remedy as laid down in Article 13 ECHR, are attributable to the State of the Netherlands (hereafter referred to as "the State").

II. Statement of the Facts

The first act of genocide in Europe since the Second World War took place in the East Bosnian

enclave of Srebrenica in July 1995. Srebrenica had been designated by the UN as a 'safe area'. At the time of the genocide, a Dutch battalion (hereafter "Dutchbat") was in charge of the 'safe area' in the context of the UNPROFOR mission. The Applicants hold the State and the UN jointly responsible for not preventing the genocide and for not preventing other severe human rights violations in the 'safe area' Srebrenica. After the fall of Srebrenica, 8,000-10,000 citizens of Bosnia-Herzegovina were murdered by Bosnian Serbs. These murdered citizens had taken refuge within the enclave, and, more specifically, in and around the compound of Potocari. The State's and the UN's acts and omissions in the context of the implementation of various UN resolutions, according to which the enclave Srebrenica was declared a 'safe area', are in violation of international obligations such as the obligation to prevent genocide and other severe violations of human rights. The State and the UN have therefore acted wrongfully towards Applicants 2-11 – all of whom are surviving relatives of the victims of the aforementioned genocide and victims of severe violations of human rights - and towards the Foundation representing the interests of the victims' relatives. (See Writ of Summons, **Annex 2**)

Prior to instituting a legal action, the Applicants brought their complaints to the attention of the UN and the State of the Netherlands. Neither the UN nor the State showed any willingness to enter into negotiations for an amicable settlement of the Applicants' claims.

The Applicants applied on 4 June 2007 to the District Court of The Hague requesting it:

- to grant a judicial declaration that the UN and the State of the Netherlands are guilty of an attributable failure in the fulfilment of their obligations towards the Applicants;
- to grant a judicial declaration that the UN and the State of the Netherlands acted unlawfully towards the Applicants;
- to grant a judicial declaration that the UN and the State of the Netherlands breached their obligations to prevent genocide, as laid down in the Genocide Convention;
- to hold the UN and the State of the Netherlands jointly liable to pay compensation for the loss and injury suffered by the Applicants as well as damages yet to be determined by the court, and to settle these according to law;
- to hold the UN and the State of the Netherlands jointly liable to pay the individual Applicants 2-11 an advance of EUR 25,000 per person of the compensation to be awarded;
- to hold the UN and the State of the Netherlands jointly liable to pay the costs of the proceedings.

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telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

On 10 July 2008 the District Court (**See Annex 3**) declared itself to lack competence to hear the Applicants' case against the UN because of the jurisdictional immunity of the UN. The UN did not appear in court, but sent, on 17 August 2007, a letter to the Permanent Representative of the State of the Netherlands to the UN, invoking its immunity. The State subsequently pleaded that claim to immunity on behalf of the UN.

In its decision of 30 March 2010, the Court of Appeal of The Hague (**See Annex 5**) confirmed the judgment of the District Court on different grounds. The Court of Appeal reviewed whether the immunity of the UN under the circumstances of the case at hand was compatible with Article 6 ECHR, as set out in the judgment of the ECtHR in *Waite & Kennedy*.[2] However, it found that the complaints of the Applicants that the UN had acted contrary to the obligation to prevent genocide and that the UN had failed to provide for an adequate alternative legal remedy were insufficient to deviate from the immunity of the UN. Furthermore, the Court of Appeal stated that it saw, despite explicit demands of the Applicants, no reason to refer questions for a preliminary ruling to the Court of Justice of the European Union (hereafter: ECJ).

The Applicants subsequently brought an appeal in cassation to the Supreme Court of the Netherlands (hereafter: the Supreme Court). The Advocate-General to the Supreme Court made his opinion known on 27 January 2012 (**See Annex 8**). In its judgment of 13 April 2012, the Supreme Court (**See Annex 9)** confirmed the qualification by the Court of Appeal of the immunity of the UN as "the most far-reaching". The Supreme Court agreed with the Court of Appeal that a distinction should be made between state immunity and the immunity of the UN. However, the Supreme Court decided that the Court of Appeal was wrong to apply the test set out by the ECtHR in *Waite & Kennedy*, since there is, according to the Supreme Court, no reason to assume that the term 'international organisations' used in the decision in *Waite & Kennedy* was meant to apply to the UN. The Supreme Court interpreted the ECtHR's decision in *Behrami/Saramati*[3] to mean that the UN Charter has supremacy over obligations arising from the ECHR. Accordingly, the Supreme Court declared that the immunity of the UN is "absolute", and that it is the duty of the Member States of the UN to maintain that immunity.[4] Referring to the ECtHR's decision in *Al-Adsani*[5] and to the

[2] ECHR Appl. No. 26083/94, Waite and Kennedy v. Germany, Judgment of 18 February 1999.
[3] ECHR Appl. No. 71412/01 and 78166/01, Behrami and Behrami v. France and Saramati v. France, Decision of 2 May 2007.
[4] Supreme Court 13 April 2012, para. 4.3.6.
[5] ECHR Appl. No. 35763/97, Al-Adsani v. United Kingdom, Judgment of 21 November 2001.

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recent decision of the International Court of Justice (hereafter: ICJ) in *Germany v. Italy*,[6] the Supreme Court concluded that there was no exception to the UN's immunity in cases of alleged violations of *ius cogens*. According to the Supreme Court, the question of immunity is a preliminary procedural issue, to be resolved prior to any assessment of the merits of the case. Furthermore, the Supreme Court concluded from the decision of the ICJ in *Germany v. Italy* that there is no state practice supporting the contention that immunity is to be granted only when there are sufficient and effective alternative remedies. Despite the fact that the Supreme Court had previously declared that there are important differences between state immunity and the immunity of the UN, it did not assume that the conclusion of the ICJ in *Germany v. Italy* would be different with regard to the immunity of the UN.

Like the Court of Appeal, the Supreme Court saw no reason to refer any questions for a preliminary ruling to the ECJ. The Supreme Court refrained from stating reasons for the refusal, and stated merely that there were no legal questions raised that were "important for the coherence or the development of the law". The Supreme Court dismissed the appeal of the Applicants.

The Applicants observe that it has been an admitted fact between the parties to the national proceedings that the UN has failed to provide an adequate legal remedy as laid down in Section 29 of the Convention on the Privileges and the Immunities of the UN.[7] The decision of the Supreme Court to qualify the immunity of the UN as 'absolute' has as a consequence that the UN is the only international organisation in the world that is placed above the law and that escapes judicial review in any form. The victims of the Srebrenica genocide and other severe human rights violations are left without any effective remedy. However, the UN is a political organisation, and its decisions are primarily dependent on the political will of the member states. What is more, a majority of the 193 member states of the UN are guilty of the violation of fundamental rights. A large number of citizens of the relevant countries are at the mercy of arbitrariness, lawlessness, corruption and

[6] ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), Judgment of 3 February 2012.

[7] The Court of Appeal at The Hague stated in its judgment of 30 March 2010, case number 200.022.151/01 (**Annex 5**) in legal ground nr. 5.11: "*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 disputes of private law character to which the UN is a party. That the UN has 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." That finding has not been contested in the proceedings before the Supreme Court (see **Annex 9**).*

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repression.[8]

III. Statement of alleged violations of the Convention and/or Protocols and of relevant arguments

Introduction

The Applicants' complaint (Part III) is threefold, namely (A) that the Supreme Court violated Article 6 ECHR by qualifying the immunity of the UN as 'absolute', thereby refusing to grant the Applicants access to a court, (B) that the decision of the Supreme Court and the course of action of the State means that the acts and omissions of the UN can never be subject to the scrutiny of any domestic court and that, accordingly, there is a violation of Article 13 ECHR, and (C) that the Supreme Court violated Article 6 ECHR by giving insufficient grounds for its refusal to refer questions for a preliminary ruling to the Court of Justice of the European Union. In Parts IV-VI the Applicants will make the required statements for the admissibility of the application.

A. No access to a court

The Applicants respectfully request Your Court to consider their complaint under Article 6 § 1 ECHR, and to find that the Applicants did not have access to a court because of the absolute immunity granted by the judiciary of the Netherlands to the UN.

The Applicants complain about two violations of Article 6 ECHR by the judiciary of the Netherlands, attributable to the State. These violations occurred in the context of civil proceedings in which the Supreme Court gave a final judgment on 13 April 2012. Although the Applicants want to emphasize that their application to Your Court only concerns the acts and omissions of the judiciary of the Netherlands, they nevertheless find a summary of the role of the UN and the background of the case indispensable for a true understanding of their complaints under Article 6 ECHR.

A.1 Introduction

A.1.1 After the genocide of the Jews in Europe during the Second World War, the United Nations was set up in 1945 "*to save succeeding generations from the scourge of war, (…) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and*

[8] See, for instance, the Annual Report (2012) of Amnesty International: http://www.amnesty.org/en/annual-report/2012/press-release.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
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respect for the obligations arising from treaties and other sources of international law can be maintained (…)."[9]

A.1.2 Over the years, the UN has acquired far-reaching competences and it is the most important international organisation in the world, with an almost universal membership. The UN endeavours to maintain international peace and security by prohibiting the use of force and by promoting the rule of law and respect for human rights:
"*For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency*."[10]

The essence of the rule of law is that everyone is subject to law and if necessary must answer for his or her conduct to a court of law.[11] The principles of effective legal protection, the right of access to a court and the right to a fair trial are universally recognised as fundamental rights, and are guaranteed by Article 6 ECHR, and also by other international human rights instruments.

A.1.3 On 10 December 1948 the General Assembly of the UN adopted the Universal Declaration of Human Rights (hereafter: UDHR) proclaiming the rights laid down in the UDHR "*as a common standard of achievement for all peoples and all nations*".[12] Article 8 of the UDHR states that "*[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*" Furthermore, Article 10 UDHR provides that "*[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*" The UN Millennium Declaration reaffirmed the UN's commitment to

[9] UN Charter Preamble.
[10] S/2004/616, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.
[11] The International Law Association (hereafter: ILA) has stated in its Berlin report (2004, p. 5) that "power entails accountability".
[12] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, Preamble.

the UDHR.[13] More recently, the UN General Assembly has stated that "*[w]e all have the duty to step up our efforts to promote and protect all human rights and to prevent, stop and redress all human rights violations.*"[14] Moreover, the UN has several human rights bodies, such as the Office of the High Commissioner for Human Rights and the Human Rights Council, which supervise the promotion and protection of human rights in the UN Member States.

A.1.4 The UN enjoys certain immunities in the context of its task of protecting international peace and security, and of promoting the rule of law and human rights. Article 105 paragraph 1 of the UN Charter reads: "*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.*" Accordingly, the immunity of the UN, like the immunity of many other international organisations, possesses a functional character. The immunity of the UN is justified by, and also finds its limits in, the necessity that the organisation must be able to carry out its tasks in an independent manner.[15] This does not mean exclusively the general purposes of the UN but also those purposes that result from a specific resolution. Where an international organisation relies on its claim to immunity, it should be determined whether there exists a functional need for that immunity.

A.1.5 The immunity from jurisdiction of states is different from the functional immunity of international organisations both in respect of its scope and in respect of its foundation. The immunity of states is based upon the principle of sovereign equality of states and results from the maxim '*par in parem non habet imperium*': among equals no-one has dominion.[16] In practice this means that the court of the one state cannot give judgment in a case in which another state is a defendant. This rule of state immunity does not violate the right of access to a court, since it is always possible to institute proceedings against the relevant state in its own courts. Accordingly, state immunity is in principle reconcilable with Article 6 ECHR and Article 14 ICCP.[17]

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[13] UN General Assembly, Resolution 55/2 of 8 September 2000.
[14] UN General Assembly, Resolution 63/116, Declaration on the sixtieth anniversary of the Universal Declaration of Human Rights.
[15] See P.H. Kooijmans, *Internationaal Publiekrecht in vogelvlucht*, 9th edn., 2002, pages 175-176. See also J.L. Kunz, "Privileges and immunities of international organisations", 41 American Journal of International Law (1947), p. 847.
[16] See for example: ECHR Appl. No. 35763/97, 21 November 2001, Al-Adsani v.The United Kingdom, pt. 54; P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, 9th edn., 2002, page 67.
[17] For this reason Van der Plas correctly concludes: '*In contrast to proceedings against international organisations, there is in principle always a ready alternative in the case of proceedings against States: the court of the defendant State.*' See C.G. van der Plas, *De taak van de rechter en het IPR*, Kluwer 2005, p. 265.

A.1.6 The functional immunity of the UN laid down in Article 105 of the UN Charter has been given further elaboration in the Convention on the Privileges and Immunities of the UN (hereafter: the Convention), adopted by the General Assembly of the UN on 13 February 1946. Section 2 of the Convention states that "*[t]he UN (…) shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity*." There is thus an express possibility for the UN to waive its claim to immunity. Furthermore, when it was asked in an Advisory Opinion to interpret the concept of immunity as laid down by Article 105 of the UN Charter and the Convention, the ICJ has made clear that the 'presumption' of immunity (of a special rapporteur) of the UN "*can only be set aside for the most compelling reasons and is to be given the greatest weight by national courts.*"[18] The ICJ thus made clear that a weighing of interests must be performed by the national courts, which can find "compelling reasons" that justify setting aside the immunity of the UN.

A.1.7 Furthermore, Section 29 of the Convention states that:

"*The UN 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 UN is a party;

(b) *disputes involving any official of the UN who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.*"

This provision shows that the drafters of the Convention saw the need for a legal remedy created by the UN itself, to avoid a situation where the immunity of the UN would give rise to a de facto denial of justice.[19] In this respect, a parallel can be drawn between the scope of state immunity, which is balanced by the existence of a legal remedy before the accused state's own courts, and the scope of the functional immunity of the UN, which can be waived or can be set aside for the most compelling reasons and for which specific remedies on the UN level should be created. The immunity of the UN is – in theory – reconcilable with the requirements of the right of access to a court and the right to a fair trial as guaranteed by Article 6 ECHR as long as a careful balance is made between the claim to immunity, the possibility of a waiver, and the availability of alternative legal remedies.[20]

[18] ICJ 29 April 1999, Advisory Opinion on a Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights (Malaysia), para. 61.

[19] A. Reinisch, "The immunity of international organisations and the jurisdiction of administrative tribunals", Chinese Journal of International Law (2008) 2, p. 287-289.

[20] J.L. Kunz, "Privileges and immunities of international organisations", 41 American Journal of International Law (1947), p. 852, 861.

A.1.8 The Applicants observe that the foregoing conclusion regarding the functional immunity of international organisations in concrete cases is supported by the judgment of the ECtHR in *Waite & Kennedy*. That case concerned two employees of the European Space Organisation, ESA. Those employees were dismissed and brought an employment claim before the German court. The German court held that it had no jurisdiction to hear the claim because of the immunity of ESA. The employees complained about that judgment to the ECtHR relying on Article 6 ECHR. Your Court ruled as follows (paragraphs 67 and 68):

'*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.*

(…)

'*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.'*

Consequently, the ECtHR held, in paragraph 69 of the judgment, that the immunity invoked by ESA prevailed only because an alternative effective judicial remedy was available.

A.2 The fall of Srebrenica

A.2.1 In the early 1990s, the international community was confronted by the devastating war in the Balkan area. Despite calls for robust intervention, the UN failed to respond adequately and in a timely fashion. The UN admitted that grave errors of judgement,[21] failures in the communication within the UN and between the UN and its contributing Member States,[22] and significantly divergent interpretations of UNPROFOR's mandate,[23] came to a dramatic climax when more than 8,000 Bosnian Muslims were massacred in and around the UN 'safe area' Srebrenica.[24] In view of the 8,000 dead Bosnian Muslims, the Applicants find the terms 'error of judgement' and 'failures in the communication' inappropriate.

The very thing that the UN was meant to prevent from ever happening again – genocide – took place

[21] UN Report of the Secretary-General "The Fall of Srebrenica", A/54/549, 14 November 1999, p. 104, 107.
[22] UN Report "The Fall of Srebrenica", p. 102-103, 106-107.
[23] UN Report "The Fall of Srebrenica", p. 104.
[24] See the Applicant's writ of summons for an extensive summary of the events before, during and after the fall of Srebrenica, **Annex 2**, paras. 6-287.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

because of "*human and institutional failings, at many levels.*"[25]

A.2.2 After the war, multiple reports were drafted to analyse what had gone wrong. UN Secretary-General Kofi Annan acknowledged that errors of judgement and fundamental mistakes were made, and he concluded that "*the international community as a whole must accept its share of responsibility for allowing this tragic course of events by its prolonged refusal to use force in the early stages of the war. This responsibility is shared by the Security Council, the Contact Group and other Governments which contributed to the delay in the use of force, as well as by the United Nations Secretariat and the mission in the field.*"[26]

A.2.3 Moreover, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Krstic* found that it had been proven beyond a reasonable doubt that "*genocide, crimes against humanity and violations of the laws or customs of war were committed against the Bosnian Muslims, at Srebrenica, in July 1995.*"[27] The ICTY also concluded that "*at the stage when the Bosnian Muslim men were divested of their identification en masse, it must have been apparent to any observer that the men were not being screened for war crimes. (…) the removal of their identification could only be an ominous signal of atrocities to come*."[28] Furthermore, the ICTY found that the intent of the Bosnian Serbs was initially limited to isolating and reducing the size of the enclave Srebrenica, but that it was quickly extended to genocide and ethnic cleansing when they realized that no resistance was being offered "*by the Bosnian Muslims or the international community*."[29] In that regard, account must be taken of the judgment of the ICJ in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, which confirmed that genocide was committed in Srebrenica.

A.2.4 The judgment of the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* was also important as it elucidated the obligation to prevent genocide under Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: the Genocide Convention) adopted by the UN in 1948. The ICJ stated that the obligation to prevent genocide is an obligation of conduct, not of result. It is an obligation to employ all means reasonably available to a State so as to prevent genocide as far as possible. Responsibility is incurred "*if the State manifestly failed*

[25] UN Report of the Secretary-General "The Fall of Srebrenica", A/54/549, 14 November 1999, p. 105.
[26] UN Report "The Fall of Srebrenica", p. 107.
[27] Case IT-98-33, Krstic, Judgment of the Trial Chamber of the ICTY of 2 August 2001, pt. 599.
[28] ICTY Krstic Trial Chamber decision pt. 160.
[29] ICTY Krstic Trial Chamber decision pts. 33 and 568. Also admitted by the UN, p. 264 of the UN Report "the Fall of Srebrenica".

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to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide." In this context, the ICJ found that it is "*irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. (…) the possibility remains that the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.*"[30]

A.2.5 The current Secretary-General of the UN, Ban Ki-moon, declared in response to the Applicants' writ of summons of 8 June 2007: "*that the survivors of the Srebrenica massacres are absolutely right to demand justice for the most heinous crimes committed on European soil since World War II. The Secretary-General joins them in that demand, without reservation, and expresses his deepest sympathies to them and to the relatives of those brutally executed at Srebrenica, almost 12 years ago. (…)*"[31]

A.2.6 Furthermore, Patrick Robinson, former President of the ICTY, critically commented on the fact that no access to justice was open to the victims of the war in the former Yugoslavia to obtain compensation, despite the fact that they had a right under international law to such access:
"(…) *Currently, there is no effective mechanism by which victims can seek compensation for their injuries, despite the fact that their right to such compensation is firmly rooted in international law. (…) But to date, nothing has been done, and I fear that failure by the international community to address the needs of victims of the conflicts that occurred in the former Yugoslavia will undermine the Tribunal's efforts to contribute to long-term peace and stability in the region.*"[32]

A.2.7 The UN has elected not to appear in the proceedings brought before the Dutch courts by the Applicants against the UN and the State of the Netherlands. The UN wrote to the Permanent Representative of the State at the UN that its policy was not to appear in legal proceedings. Despite the fact that the UN is being held partly responsible for the fact that genocide could occur in Europe for the first time since the Second World War - and even right in front of UN troops who were deployed precisely to prevent that genocide - the UN refuses to depart from its policy of

[30] ICJ Bosnia and Herzegovina v. Serbia and Montenegro, pt 430.
[31] 'Secretary-General fully supports call for justice in Srebrenica massacres' (see: www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=857 .
[32] Address of 8 October 2009 to the General Assembly of the UN, available at: http://www.icty.org/x/file/press/pr_attachments/pr1335a.pdf .

claiming immunity in this matter. (See writ of summons, **Annex 2**, pts. 14-18, 21-27 and 78-84)

A.2.8 The State has invoked the absolute immunity of the UN on behalf of the UN, and the judiciary of the Netherlands has granted such absolute immunity. Immediately after the decision of the Supreme Court of 13 April 2012, the State delivered a statement of defence in the proceedings against itself that had been stayed for almost 5 years. The Applicants call the attention of Your Court to the fact that in this statement of defence, the State of the Netherlands has pleaded that the acts and omissions before, during and after the fall of Srebrenica, were entirely attributable to the UN, thereby denying all responsibility in this matter. First the State achieved that the UN is granted absolute immunity, then the State is pleading that all acts and omissions of Dutchbat are only attributable to the UN. Through this course of action, the State has behaved immorally towards the Applicants, causing great injustice and showing a lack of respect for the Applicants and for the rule of law.[33]

A.3 Violation of Article 6 ECHR by the judgment of the Supreme Court

A.3.1 The Applicants complain that the Supreme Court has violated the right of access to a court as protected by Article 6 § 1 ECHR. The structure of the arguments supporting the decision of the Supreme Court is as follows. Firstly, the Supreme Court stated in point 4.3.3 that the UN did not fall within the concept 'international organisation' as used by the ECtHR in *Waite & Kennedy*. Secondly, the Supreme Court argued (points 4.3.5 - 4.3.6) that the ECtHR's decision in *Behrami/Saramati* meant that the obligations emanating from the ECHR, including the obligations resting upon the judiciary of each ECHR Contracting Party, did not apply in cases concerning the UN. It therefore qualified the UN's immunity as 'absolute'. Moreover, the Supreme Court found that neither the severity of the complaints (i.e., failure to prevent genocide and other severe human rights violations) nor the absence of an alternative judicial remedy formed a reason to deny the UN its claim to immunity. The Applicants argue that the Supreme Court violated Article 6 § 1 ECHR (the right of access to a court) for the following reasons.

The UN is an international organisation

A.3.2 The arguments of the Supreme Court (point 4.3.3) pertaining to exclude the UN from the scope of the *Waite & Kennedy* judgment as not being an 'international organisation' as meant in that decision, find no basis in the case law of the ECtHR. Such a distinction is not made in the

[33] See, however, the ILA Berlin Report, p. 22, according to which states should avoid a "jurisdictional gap".

judgment of Your Court in *Waite & Kennedy*, nor can any clause be found excluding the UN from the normal use of the term 'international organisation', as suggested by the Supreme Court in any other decision of the ECtHR or of the ICJ, nor in international legal practice or literature. More specifically, no such distinction has been made between the UN and other international organisations in the International Law Commission's (hereafter: ILC) Draft Articles on the Responsibility of International Organizations (hereafter DARIO 2011).[34] The Applicants draw Your Court's attention to the fact that the UN has commented extensively on a draft version of the DARIO 2011.[35] In these comments, the UN did not make any distinction between itself and other international organisations. For example, in its General Comments, the UN points out the difference between states and international organisations, and emphasizes the fact that there are differences between international organisations themselves, but the UN does not exclude itself from the term 'international organisation'.[36] In its comments on draft Article 2 (Use of terms), the UN even offers to "provide the Commission with a brief description of the United Nations instruments that would typically fall within the current definition of the "rules of the organization" (…)", thereby making clear that it considers itself to fall within the general definition of an 'international organisation.[37] The Applicants also refer to the UN's comment according to which "the Commission is encouraged to consider further the practice of the United Nations and other international organizations (…)".[38] The UN clearly considers itself comparable to other international organisations for the purposes of the application of the rules governing the responsibility of international organisations. Furthermore, the distinction made by the Supreme Court is not made either in the Institut de Droit International's (hereafter: IDI) Resolutions,[39] nor in the International Law Association's (hereafter: ILA) reports on the accountability of international organisations.[40] As a matter of fact, the Supreme Court has considered the availability of an alternative (judicial) remedy a material factor in the assessment of

[34] DARIO 2011 Article 2(a) (and commentary) gives a definition of 'international organization' that encompasses both the UN and all other international organisations.
[35] UN General Assembly A/CN.4/637/Add.1, ILC, 67th session, "Responsibility of international organizations – Comments and observations received from international organizations".
[36] UN General Assembly A/CN.4/637/Add.1, ILC, 67th session, "Responsibility of international organizations – Comments and observations received from international organizations", p. 4.
[37] UN General Assembly A/CN.4/637/Add.1, ILC, 67th session, "Responsibility of international organizations – Comments and observations received from international organizations", p. 6.
[38] UN General Assembly A/CN.4/637/Add.1, ILC, 67th session, "Responsibility of international organizations – Comments and observations received from international organizations", p. 9.
[39] See for instance the Resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", 1995.
[40] See for instance the final report (Berlin 2004), p. 4: the scope of the ILA Committee's work is broadly defined as encompassing "[international organisations] in the traditional sense", including the UN among other international organisations throughout the report.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

the immunity claimed by other international organisations before the Dutch courts.[41] Therefore, the reasoning of Your Court in *Waite & Kennedy* should equally apply to the Applicants' case, and the Supreme Court should have assessed whether the UN's immunity was permissible under the ECHR, taking into account the fact that the Applicants had no reasonable alternative means to protect their rights.

The judiciary of the Netherlands must respect Article 6 ECHR

A.3.3 The Supreme Court was wrong to conclude from Your Court's judgment in *Behrami/Saramati* that the judiciary of the Netherlands is not bound to conduct a review in the light of the ECHR. The question at issue in *Behrami/Saramati* was whether certain acts or omissions were attributable to the UN or to a Contracting Party, and whether the ECtHR had jurisdiction over the matter. The ECtHR concluded that the action of KFOR and the inaction of UNMIK were attributable to the UN. In that context, the ECtHR declared itself to lack competence *ratione personae*. However, the *Behrami/Saramati* case, and more specifically, the arguments of the ECtHR in paragraphs 146-149 on which the Supreme Court relied so heavily to dismiss the Applicants' appeal for cassation, are solely about the competence *ratione personae* of the ECtHR vis-à-vis the UN. In the present case, the question whether the judiciary of the Netherlands is bound to respect Article 6 ECHR when deciding a question of immunity of an international organisation is very different.

A.3.4 The ILA has observed that a state "*cannot by delegation (…) avoid responsibility for breaches of its duties under international law*", and that "*in case of the existence of an international obligation for States not only to respect but also to (…) "secure" (ECHR) such respect [for human rights], there is a conventional legal obligation for Member States to ensure through adequate supervision that [international organisations] act within the constraints of applicable law*." Moreover, states should avoid creating a "jurisdictional gap" by the transfer of certain powers to an international organisation.[42] The ILA emphasises that "*[n]o situation should arise where an [international organisation] would not be accountable to some authority for an act that might be deemed illegal*."[43]

[41] See for instance Supreme Court of the Netherlands, 23 October 2009, LJN BI9632, *Nederlandse Jurisprudentie* (*NJ*) 2009, 527, para. 3.5.
[42] ILA Berlin report (2004), p. 18-19. See also K. Wellens, "Fragmentation of international law and establishing an accountability regime for international organisations: the role of the judiciary in closing the gap", Michigan Journal of International Law (2004), p. 4-5.
[43] ILA Berlin report (2004), p. 26.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

A.3.5 Furthermore, the ECtHR has emphasized the principle of subsidiarity in the case *Kudla v. Poland*, according to which it is first and foremost for the Member States to safeguard the ECHR rights, and to provide relief to individuals "before having to set in motion the international machinery of complaint before the [ECtHR]."[44] It can therefore be concluded that the obligation to ensure access to a court and a fair trial under Article 6 ECHR rests primarily upon the judiciary of the Netherlands, as organs of an ECHR Contracting Party, irrespective of the subject-matter of the instituted proceedings or the identity of the parties involved.

A.3.6 In the light of the foregoing arguments, the Applicants conclude that the Supreme Court violated Article 6 § 1 ECHR by qualifying the UN's immunity as 'absolute'. Qualifying the UN's immunity as 'absolute' has as an effect that it "remove[s] from the jurisdiction of the courts a whole range of civil claims or confer[s] immunities from civil liability on categories of persons"[45] without offering any alternative protection of fundamental rights. This amounts to an equally 'absolute' denial of justice, which is manifestly inconsistent with the rule of law. The Supreme Court should have interpreted the UN's immunity in a way that was most in harmony with the State's obligations under the ECHR, and it should therefore not have excluded the Applicants' case from the protection of Article 6 ECHR.

The right of access to a court

A.3.7 The Applicants submit that Your Court's well-established case law about the right of access to a court applies equally to their case. The Applicants refer to the line of judicial decisions set out in *Waite & Kennedy*, and confirmed and summarised in *Cudak* and other recent judgments.[46]

A.3.8 According to this consistently and continuously confirmed line of judicial decisions, the right to a fair hearing, as guaranteed by Article 6 § 1 ECHR, must be construed in the light of the principle of the rule of law, which requires that all litigants must have an effective judicial remedy enabling them to assert their civil rights.[47] Everyone has the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 ECHR embodies the 'right to a court', of which the right of access, that is, the right to institute

[44] ECHR Appl. No. 30210/96, Kudla v. Poland, Judgment of 26 October 2000, para. 152.
[45] See ECHR Appl. No. 15869/02, Cudak v. Lithuania, Judgment of 23 March 2010, para. 58.
[46] ECHR Appl. No. 15869/02, Cudak v. Lithuania, Judgment of 23 March 2010, paras. 54-59; ECHR Appl. No. 34869/05, Sabeh El Leil v. France, Judgment of 29 June 2011, paras. 46-54; ECHR Appl. No. 156/04, Wallishauser v. Austria, Judgment of 17 July 2012, paras. 59-60.
[47] ECHR Appl. no. 47273/99, Běleš and Others v. the Czech Republic, para. 49.

proceedings before courts in civil matters, constitutes one aspect only.[48]

A.3.9 The Applicants recognize that the right of access to a court secured by Article 6 § 1 ECHR is not absolute but may be subject to limitations, and that the Member States enjoy a certain margin of appreciation. However, the Applicants emphasize that the final decision as to the observance of the ECHR's requirements rests with Your Court. It must be satisfied that the limitations applied do 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 is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[49]

A.3.10 Moreover, it should be remembered that the ECHR is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of 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.[50] It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 ECHR – namely, that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the ECHR enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons.[51]

A.3.11 Furthermore, the national courts must interpret the Convention on the Privileges and Immunities of the UN in the light of the rules set out in the Vienna Convention on the Law of Treaties (hereafter: the "Vienna Convention"), Article 31 § 3 (c) of which indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. Furthermore, Article 32 of the Vienna Convention allows for recourse to supplementary means of interpretation, if the interpretation under Article 31 were to lead to "manifestly absurd or unreasonable" results. The Convention on the Privileges and Immunities of the UN can therefore not be interpreted in a vacuum, at least not if the interpretation would lead to an absolute immunity

[48] ECHR Appl. No. 4451/70, Golder v. the United Kingdom, 21 February 1975, para. 36, and ECHR Appl. no. 42527/98, Prince Hans-Adam II of Liechtenstein v. Germany, para. 43.
[49] See Waite and Kennedy v. Germany, para. 59; ECHR Appl. no. 28945/95, T.P. and K.M. v. the United Kingdom, para. 98; and ECHR Appl. no. 37112/97, Fogarty v. the United Kingdom, para. 33.
[50] See ECHR Appl. No. 22924/93, Aït-Mouhoub v. France, 28 October 1998, para. 52.
[51] See ECHR Appl. No. 17101/90, Fayed v. the United Kingdom, 21 September 1994, para. 65.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

and to denying the victims their right of access to a court. The national courts and the ECtHR itself must therefore be mindful of the ECHR's special character as a human rights treaty. They must also take the relevant rules of international law into account, including those relating to the grant of immunity to international organisations emanating from the case law of the ECtHR and from recommendations made by international bodies ILC and ILA.[52]

The interpretation of the UN's functional immunity

A.3.12 The Applicants submit that account must be taken of Article 105 of the UN Charter, which forms the basis of the UN's immunity, and the practical elaboration that this Article has been given in Section 2 and Section 29 of the Convention on the Privileges and Immunities of the UN. The Supreme Court completely ignored Section 29 of the Convention, with the result that it is not an interpretation in good faith within the meaning of Article 31 of the Vienna Convention. Furthermore, the Applicants find the decision of the Supreme Court to be at variance with Article 32 of the Vienna Convention in that the result of that decision is manifestly absurd and unreasonable. Firstly, the decision of the Supreme Court places the UN above the law and exempts the UN from any judicial control. No other entity in the world enjoys this status and it is contrary to Section 29 of the Convention which obliges the UN to create such a judicial control.[53] Secondly, this result is the opposite of the fundamental purpose of the UN as the protector of human rights and promoter of the rule of law.

A.3.13 The Supreme Court relied solely on the decisions of the ECtHR in *Al-Adsani v. UK*,[54] and of the ICJ in *Germany v. Italy*[55] to dismiss the Applicants' arguments in cassation. However, those cases were about the immunity of states, which is, as the Supreme Court has acknowledged in point 4.2 of its decision, significantly different from the immunity of international organisations. It is in matters such as the characterization of immunity as 'functional' or not, that the difference

[52] See for instance ILA Berlin Report p. 33-34: "…the right to adequate means of redress, in case of violation of rights, is a basic international human rights standard, which should always prevail over the functional needs of an international organisation."

[53] See also A. Reinisch and U.A. Weber, "In the shadow of Waite and Kennedy", International Organizations Law Review (2004), 59-110, referring, inter alia to the decision of the ICJ in the Curamaswamy case (1999), para. 66 and the decision of the ICJ in the Effects of Awards case (1954), p. 57, in which the ICJ stated that "it would hardly be consistent with the expressed aim of the [UN] Charter to promote freedom and justice for individuals (…) that [the UN] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."

[54] ECHR Appl. No. 35763/97, Al-Adsani v. United Kingdom, Judgment of 21 November 2001.

[55] ICJ Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), Judgment of 3 February 2012.

between state immunity and immunity of international organisations is at its greatest; therefore the Supreme Court could not rely on these cases for the dismissal of the Applicants' arguments.

A.3.14 More particularly, the Supreme Court (point 4.3.11) cited the judgment of the ICJ in *Germany v. Italy* in a manner that was not in good faith. For example, the Supreme Court cites paragraph 91, but omits the last sentence: "In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; (…)". The ICJ itself pointed out the limited scope of its conclusions. State immunity, as already stated in point A.1.5 above, has a rationale and scope that is completely different from an international organisation's functional immunity. There is always the possibility of a proceeding being brought before the accused state's own courts. Secondly, it is important to note that Germany had made "significant steps" to make reparations to Italian victims of war crimes.[56] The statement of the ICJ that the entitlement of a State to immunity is not dependent on the existence of effective alternative means of securing redress[57] is made in a factual context in which "claims have been subject of extensive intergovernmental debate".[58] Indeed, Germany had acknowledged its international responsibility, and it had made payments to the Italian State, intended for the compensation of victims of war crimes. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy, according to which – in short – the Federal Republic of Germany paid compensation to Italy in order to settle claims based on and related to, rights and circumstances that arose during the period from 1 September 1939 to 8 May 1945.[59] The payments were made against final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the Agreements.[60] A lump sum settlement was the normal practice in the aftermath of the war.[61] However, where a State decides to invest those funds "to rebuild its national economy and infrastructure, rather than distributing them to individual victims among its nationals (…)", there would be no reason to allow these individuals to start proceedings against a state that had already provided for compensation.[62] Furthermore, the settlement of other claims can, as the ICJ pointed out in paragraph 104, be subject of further negotiations between states, who are hierarchically equal. The particular case of *Germany v. Italy*, does not lend itself to

[56] ICJ Germany v. Italy, para. 99.
[57] ICJ Germany v. Italy, para. 101.
[58] ICJ Germany v. Italy, para. 102.
[59] ICJ Germany v. Italy, para. 24.
[60] ICJ Germany v. Italy, paras. 24 and 25.
[61] ICJ Germany v. Italy, para. 102.
[62] ICJ Germany v. Italy, para. 102.

comparison with the case of the Applicants. Although the UN Secretary General calls upon the international community as a whole to "accept its share of responsibility for allowing this tragic course of events (…)",[63] the UN has subsequently refused to act on this responsibility in the form of payment of compensation or a waiver of immunity. The State has never admitted any responsibility for not preventing the genocide or other severe human rights violations, nor offered any form of compensation to the (relatives of) the victims. Moreover, the State has refused to even talk to the Applicants. The Supreme Court was therefore wrong to rely on the judgment of the ICJ in *Germany v. Italy*.

A.3.15 As explained in points A.1.6 - A.1.8 above, the immunity of the UN as laid down in Article 105 of the UN Charter is a functional immunity, which requires a balancing of interests. The Applicants submit that the Supreme Court should have given Article 105 of the UN Charter a textual interpretation. The phrase "*such (…) immunities as are necessary for the fulfilment of its purposes*" implies a preliminary inquiry into the merits of a case, namely, to determine what the purposes of the UN were, and whether in the concrete case jurisdictional immunity is necessary. It is not, contrary to the Supreme Court's arguments, a purely procedural preliminary issue.

A.3.16 Furthermore, the term 'necessary' used in Article 105 of the UN Charter excludes from a semantic point of view the qualification of the UN's immunity by a national court as 'absolute', unless the purposes of the UN require it to be above the law. Since the Preamble of the UN Charter, as the Applicants have indicated in point A.1.1 above, makes clear that the UN has as its fundamental purposes not only the maintenance of international peace and security, but also the promotion of the rule of law and of human rights, it cannot be accepted that the fundamental right of access to a court finds no application in proceedings against the UN. In particular, the protection of human rights was part of the basis of the mandate of UNPROFOR. As Dannenbaum remarks: "*Put simply, one cannot violate human rights on the grounds that one is promoting human rights*."[64]

A.3.17 Moreover, Your Court has ruled in *Al-Jedda v. UK*[65] that "*there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security*

[63] UN Secretary General Report "The Fall of Srebrenica", p. 107.
[64] Karl T. Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers", *Harvard International Law Journal* (1), 2010, p. 137.
[65] ECHR Appl. No. 27021/08, Al-Jedda v. UK, Judgment of 7 July 2011, para. 102.

Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations." Although the case of *Al-Jedda* pertained to the interpretation of UN Security Council Resolutions, the Applicants find that the same presumption must apply to the interpretation of the UN Charter and the Convention. The phrase "*such (…) immunities as are necessary for the fulfilment of its purposes*" in Article 105 of the UN Charter must therefore be interpreted in a way which is most in harmony with the right of access to a court. The Supreme Court violated Article 6 § 1 ECHR by interpreting the immunity of the UN as 'absolute'. Instead, the immunity of the UN should be interpreted as strictly functional, requiring under certain circumstances that it be waived, or that it be set aside for "the most compelling reasons", and in any case – in the light of Section 29 of the Immunities Convention – requiring the UN to make alternative remedies available.

Balance of interests

A.3.18 When considering whether or not to grant immunity from jurisdiction, a balance of interests must be made in the light of the procedural guarantees laid down in Article 6 ECHR. As Your Court made clear in *Waite & Kennedy*, granting jurisdictional immunity to an international organisation can only be compatible with Article 6 § 1 ECHR if the immunity pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[66] The Applicants argue that immunity from jurisdiction, especially when that immunity is functional, is not acceptable in the case of allegations concerning genocide and war crimes. Moreover, the ICJ has made clear in the authoritative Advisory Opinion about the immunity of the UN and its agents that the immunity of the UN can be set aside for "*the most compelling reasons*".[67]

A.3.19 Although the UN's – inadequate – intervention in Srebrenica fell within its general aim of maintaining international peace and security, the Applicants submit that in this particular case, where the intervention was characterised by widespread institutional failures, granting immunity to the UN does not pursue a legitimate aim, since it deprives the Applicants of the very essence of their right of access to a court. Even if, theoretically, the immunity of the UN is found to pursue a legitimate aim, it is manifestly not proportionate to the aim pursued.

A.3.20 The Applicants argue that the Supreme Court should have conducted a balance of interests in

[66] Waite & Kennedy, para. 59.
[67] See ICJ Advisory Opinion – Malaysia, footnote 14 above.

accordance with the judgment in *Waite & Kennedy*, and that the Supreme Court should have concluded, in accordance with the text of Article 105 of the UN Charter and the interpretation of the UN's immunity by the ICJ, that there were compelling reasons not to grant immunity in this case. The Applicants refer to the summary of the facts of the case in their submissions in the national proceedings (**See Annex 2**). Moreover, the Applicants refer to the findings of the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*[68] and of the ICTY in the *Krstic* case,[69] both giving a detailed account of the genocide and other severe human rights violations that occurred in and around the UN 'safe area' Srebrenica. Furthermore, the Applicants refer to the Report of the UN Secretary-General, "The Fall of Srebrenica", already referred to above in points A.2.1 and A.2.2, in which the UN Secretary-General admitted that the atrocities happened because of "*human and institutional failings, at many levels*",[70] for which the UN Security Council, the UN Secretariat, and the mission in the field should accept responsibility.[71] In the light of these grave circumstances, the Applicants maintain that the Supreme Court should have found that granting immunity to the UN would have the disproportionate result of denying (the surviving relatives of) the victims of the genocide and severe human rights violations any access to justice.

A.3.21 In that context, the Applicants submit that the Supreme Court should have taken into account the fact that the UN had a possibility – and obligation - to waive its immunity. The UN could have matched its rhetoric about assuming responsibility for its failures before, during and after the fall of the 'safe area' Srebrenica with the provision of actual relief to the victims of the genocide and other severe violations of human rights, but it chose not to do so.[72] The UN has failed to provide an adequate legal remedy as laid down in Section 29 of the Convention on the Privileges and the Immunities of the UN.[73] The UN has acknowledged that errors of judgement and fundamental mistakes were made and the UN has to accept its responsibility for not preventing the genocide that took place in Srebrenica.[74] Given the circumstances of this case, the UN had the obligation to waive any possible right to claim immunity. Indeed, a similar rule is contained in the Convention in various

[68] Bosnia and Herzegovina v. Serbia and Montenegro, ICJ Judgment of 26 February 2007.
[69] Case IT-98-33, Krstic, Judgment of the Trial Chamber of the ICTY of 2 August 2001, and of the Appeals Chamber of 19 April 2004.
[70] UN Report "The Fall of Srebrenica", p. 105.
[71] UN Report "The Fall of Srebrenica", p. 107.
[72] See the speech delivered on 25 July 2012 by the UN Secretary General: "Standing in this place before all these, our victims, I pledge again, I appeal to you all: Let us honour them with our memories and let us [do them] justice with our actions. Never Srebrenica, nowhere to no one." Available at: http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=1602.
[73] See footnote 6 above.
[74] See point A.2.2 above.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

articles dealing with the immunity of Member States, officials and experts,[75] 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. Giving an account of the non-prevention of genocide cannot damage the interests of the UN. One of the primary objectives of the UN is after all the prevention of genocide. The UN was therefore obligated to waive any possible right to claim immunity. By balancing the interests in the light of the procedural guarantees laid down in Article 6 ECHR, the Supreme Court should have taken into account the obligation of the UN to waive any possible right to claim immunity. As the UN has not waived its possible right to claim immunity, the Supreme Court should have concluded that there were compelling reasons not to grant immunity to the UN in this case.

Conclusions

A.3.22 The Applicants conclude that immunity is not acceptable if there is no other legal remedy available, referring in particular to Your Court's judgment in *Waite & Kennedy*. The UN failed to set up a dispute settlement body as referred to in Section 29 of the Convention. The Supreme Court should therefore have concluded that immunity was not permissible under Article 6 § 1 ECHR. However, the Supreme Court has failed even to mention Section 29 of the Convention, which is not an interpretation in good faith in accordance with the Vienna Convention, or at least is a manifestly insufficient statement of reasons under Article 6 ECHR.

A.3.23 The Applicants reiterate that the UN was set up in response to the genocide committed during the Second World War, to maintain international peace and security and to promote the rule of law and human rights. Immunity from jurisdiction might perhaps be appropriate under certain circumstances to ensure that the functioning of the UN with respect to these aims is not unreasonably impeded. However, the case of the Applicants is different. The genocide happened despite the presence of UNPROFOR troops who were deployed in Srebrenica specifically to prevent this genocide.[76] This failure of UNPROFOR and the UN, and the failure to prevent and to respond adequately to other severe human rights violations, touches the very reason for the existence of the UN.

The grant of immunity to an international organisation, such as the UN, is intended to protect the

[75] See Section 14, 20 and 23 of the Convention.
[76] UN Security Council Resolution 819 (16 April 1993), referring to the order of the ICJ in the case of Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), 8 April 1993. See specifically the Order, paras. 48 and 52.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

functioning of the international organisation, here the UN, in the fulfilment of its purposes. However, when the organisation has clearly failed to achieve its most fundamental purpose – and it has admitted that it did so – the objective of immunity becomes meaningless.

A.3.24 Since the UN has not provided for any remedy – despite the fact that Section 29 of the Immunities Convention calls for such alternative remedies, and has done so since 1946 -, and since there is no democratic mechanism that can suitably deal with the Applicants' complaints, the only relief available to the Applicants is the 'judicial accountability' offered by national courts. The Applicants submit that by assuming jurisdiction over their case, the national courts can even contribute to the fundamental aims of the UN, since the judicial accountability resulting from the proceedings brought by the Applicants enhances the legitimacy of the UN. Moreover, the heightened scrutiny of the acts and omissions of the UN and of the State that contributed troops to the UN mission could make future interventions in conflicts more effective and efficient. The Applicants conclude that the immunity of the UN cannot be absolute.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

B. Violation of Article 13 ECHR – the right to an effective remedy

B.1 Article 13 ECHR guarantees the availability at national level of a remedy by which to complain about a breach of the ECHR rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant ECHR complaint and to grant appropriate relief. The scope of the obligation under Article 13 ECHR varies depending on the nature of the applicant's complaint under the ECHR, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State.[77]

B.2 The Applicants point out that, since the ECHR protects rights that are not theoretical or illusory but practical and effective, it is important in the present case to consider the measures that the State actually took, or sought to take, in response to the Applicants' specific situation.[78] In this connection, the Applicants consider in particular that the State did not sufficiently take into account the realities of the case, especially the complete absence of alternative (judicial) remedies at the UN level, which was an admitted fact between the parties.[79] The Applicants further emphasize the fact that both the State and the UN have refused to even talk to the Applicants, that the UN refused to appear in court but merely sent a short note to the Dutch permanent representative of the UN, and that the State subsequently did everything it could to claim the immunity of the UN before the Dutch courts. Even though the note of the UN was procedurally not an admissible defence, the State was allowed to plead the immunity on behalf of the UN up until the last instance, notwithstanding its clear own interest in having that immunity granted.

B.3 What is even worse, the State subsequently tries to benefit from the result it achieved in those proceedings (i.e., the UN's alleged absolute immunity), by shifting all responsibility for what happened before, during and after the fall of Srebrenica to the UN, in the proceeding currently pending before the District Court of The Hague. By doing so, the State might ultimately succeed in depriving the Applicants of all possible remedies for the violation of their fundamental rights. The

[77] See ECHR Appl. No. 10593/08, Nada v. Switzerland, Judgment of 12 September 2012, para. 207; Appl. No. 28340/95, Büyükdağ v. Turkey, 21 December 2000, para. 64, with the cases cited therein, especially Aksoy v. Turkey, 18 December 1996, *Reports* 1996-VI, para. 95.
[78] ECHR Appl. No. 10593/08, Nada v. Switzerland, Judgment of 12 September 2012, para. 195.
[79] See para. 5.11 of the decision of the Court of Appeal, **Annex 5.**

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

State has done nothing to protect the rights of the Applicants under the ECHR, but everything to deprive them of these rights.

B.4 In the light of the ECHR's special character as a treaty for the collective enforcement of human rights and fundamental freedoms,[80] the Applicants argue that the State could not validly confine itself to bringing forward the UN's claim to immunity, but should have taken – or at least had attempted to take – all possible measures to balance the competing interests of, on the one hand, the efficient functioning of the UN with, on the other, the interest of the Applicants' to have an effective remedy for the violation of their rights. The State failed to take all possible measures to harmonise its duties as a UN Member State with the obligations emanating from the ECHR (and customary international law) to protect the Applicants' fundamental rights.[81] The State actually did the contrary: instead of harmonizing its duties under the ECHR and those under the UN Charter, it just blindly promoted the interests of the UN. Moreover, the State itself had an interest in the UN's claim to immunity, which it used as a shield to escape judicial review of its own acts shortly after the decision of the Supreme Court, thereby showing disrespect towards the legitimate interests of the Applicants, who recall that they are the (relatives of) victims of genocide and other severe human rights violations. The State thus let its own interest prevail over the fundamental rights of these victims.

B.5 The Applicants further refer to the finding of the ECJ in *Kadi* that "*it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations*".[82] The Applicants are of the opinion that the same reasoning must be applied, *mutatis mutandis*, to the present case, taking into account the active role of the State in defending the UN's claim to immunity and the fact that the UN Charter in no way dictated such a result.[83]

[80] See, for example, ECHR Soering v. the United Kingdom, 7 July 1989, cited above, para. 87, and Ireland v. the United Kingdom, 18 January 1978, para. 239.
[81] ECHR Appl. No. 10593/08, Nada v. Switzerland, Judgment of 12 September 2012, para. 196-197.
[82] ECJ Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351, para. 299. See also ECHR Appl. No. 10593/08, Nada v. Switzerland, Judgment of 12 September 2012, para. 212.
[83]See for example ICJ 29 April 1999, Advisory Opinion on a Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights (Malaysia), para. 61.

B.6 The State and the Supreme Court failed to observe that the UN Charter requires the UN to act in accordance with its purposes and principles (Article 24 § 2 of the UN Charter), which include respecting human rights and fundamental freedoms (Article 1 § 3 of the UN Charter). The course of action of the State during the national proceedings and the decision of the Supreme Court to grant absolute immunity to the UN have as a consequence that the conformity of the impugned acts and omissions with the ECHR, the Genocide Convention, and other (customary) international obligations, can never be subject to the scrutiny of any domestic court. Accordingly, the right of the Applicants to an effective remedy (Article 13 ECHR) has been violated by the actions of the State and the decision of the Supreme Court.

B.7 In the light of the foregoing conclusions, the Applicants would like to point out to Your Court that their case has to be placed in a broader context. The blatant refusal of the UN to provide legal remedies at all and even in cases of apparent human rights violations, such as the Nada case[84], makes evident the risk of granting absolute uncontrolled power to the UN.

[84] ECHR Appl. No. 10593/08, Nada v. Switzerland, Judgment of 12 September 2012.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

C. Insufficient grounds for the refusal to refer preliminary questions to the ECJ

The Applicants request Your Court to find that the Supreme Court of the Netherlands did not give any, or at least gave manifestly insufficient reasons for its refusal to refer questions for a preliminary ruling to the Court of Justice of the European Union under Article 267 TFEU, in violation of the Applicants' right to a fair trial under Article 6 § 1 ECHR. In support of this complaint, the Applicants submit the following arguments.

C.1 The Applicants have explicitly requested the Supreme Court to refer questions to the Court of Justice of the European Union (hereafter: ECJ) for a preliminary ruling under Article 267 TFEU. In essence, the Applicants have submitted that the ECJ's judgment in *Kadi/Al Barakaat*,[85] in which the relation between UN Security Council Resolutions and EU fundamental rights was at issue (i.e., the rule of law, Article 47 of the Charter of Fundamental Rights of the EU, and Article 6 ECHR), makes clear that there should always be a judicial remedy, even for acts of the UN. More particularly, the Applicants have substantiated their request by extensively referring to case law and literature, and they have suggested the following questions:

"*Is it compatible with the law of the European [Union], 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 of Justice and under the circumstance that no effective legal remedy exists?"

C.2 The Supreme Court dismissed the request of the Applicants by merely stating that it "*finds no reason to submit questions to the European Court of Justice for a preliminary ruling (...) This needs, in accordance with art. 81 RO, no further substantiation, since the complaints do not require the answering of legal questions in the interest of the coherence or the development of*

[85] ECJ Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

the law." Article 81 RO[86] allows the Supreme Court – under certain circumstances - to keep its statement of reasons to a minimum. If this declaration of the Supreme Court can at all be considered a statement of reasons, the Applicants submit that it is manifestly insufficient for a refusal to refer questions to the ECJ under Article 267 TFEU, thereby violating the right to a fair trial under Article 6 ECHR.

C.3 According to Article 267 TFEU the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties, where a court or tribunal of a Member State considers that such a decision is necessary to enable it to give judgment. Furthermore, Article 267 TFEU provides that a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law has an obligation to refer such a question to the ECJ. Therefore, the Supreme Court as the court of last resort in these proceedings, had, in principle, an obligation to refer questions to the ECJ that it found necessary for the resolution of Applicants' case.[87]

C.4 In the *CILFIT* case[88] the ECJ clarified the circumstances under which the highest national court of a Member State can refuse to refer a question to the ECJ, namely, when (i) the question raised is irrelevant for the dispute at hand, (ii) when previous decisions of the ECJ have already dealt with the point of law in question (*acte éclairé*), and (iii) when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*). As to this latter point the ECJ has further stated that such can only be the case if the national judge is convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ.[89]

C.5 Moreover, Your Court has made clear in the case *Ullens de Schooten* that the refusal to refer a question for a preliminary ruling may infringe the right to a fair trial under Article 6 § 1 ECHR.[90] In that case Your Court observed that a refusal to refer a question to the ECJ for a preliminary ruling violates Article 6 § 1 ECHR if that decision is arbitrary, i.e., when the applicable rules do not

[86] "RO" is the abbreviation for the Wet op de Rechterlijke organisatie [Act on the composition of the judiciary and the organisation of the justice system].
[87] The high importance of the preliminary reference procedure in the EU system of judicial protection and coherence of law is further emphasized by the ECJ's decision in *Köbler* (ECJ Case C-224/01, Gerhard Köbler v Republik Österreich [2003] ECR I-10239). In that case the ECJ made clear that a Member State can incur liability if a national court of last resort violates EU law.
[88] ECJ Case 283/81, Srl CILFIT and Lanificio di gavardo SpA v Ministry of Health [1982] ECR 3415.
[89] CILFIT paras. 10-20
[90] ECHR Application nos. 3989/07 and 38353/07 Ullens de Schooten and Rezabek v Belgium, Judgment of 20 September 2011.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

provide an exception to the duty to refer, or if the reasons for the refusal do not correspond with the reasons meant by the applicable rules. Moreover, a refusal to refer a question to the ECJ is arbitrary if it is not adequately reasoned. Your Court has pointed out that national highest courts must state the reasons for their refusal to refer a question to the ECJ under Article 267 TFEU with reference to the exceptions set out in the ECJ's *CILFIT* case.[91]

C.6 In the light of the foregoing considerations, the mere statement of the Supreme Court that it "*finds no reason to submit questions to the European Court of Justice for a preliminary ruling (...) This needs, in accordance with art. 81 RO, no further substantiation, since the complaints do not require the answering of legal questions in the interest of the coherence or the development of the law*", constitutes a clear violation of the right to a fair trial under Article 6 ECHR.

C.7 First of all, the Supreme Court was wrong to apply Article 81 RO in view of the facts of the case and the arguments submitted by the Applicants. Furthermore, the Applicants observe that Article 81 RO does not provide for an exception to the duty to refer a question to the ECJ. Article 81 RO merely has as its object to alleviate the task of the Supreme Court by limiting its duty to state reasons in case of dismissal of obviously meritless arguments under Dutch law.[92] The Applicants, unlike the applicant in the case *John v. Germany*,[93] have elaborately pleaded and substantiated their request for a preliminary ruling under Article 267 TFEU. There was therefore no reason to dismiss the request with a simple reference to Article 81 RO. The Applicants refer to their various written submissions in the national procedure, see **Annex 4,** paras. 199 – 206**, Annex 6,** ground 8**, and Annex 7,** paras. 48-69. Especially in the light of the ECJ's judgment in *Kadi/Al Barakaat*, the promotion of the EU Charter of Fundamental Rights to treaty status, the pending accession of the EU to the ECHR, and the future accession of Bosnia and Herzegovina to the EU, it is absolutely unconvincing that there are no relevant questions that can be submitted to the ECJ in the interest

[91] See *Ullens de Schooten*, paragraphs 59 and 62: "…cela signifie que les juridictions nationales dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne qui refusent de saisir la Cour de justice à titre préjudiciel d'une question relative à l'interprétation du droit de l'Union européenne soulevée devant elles, sont tenues de motiver leur refus au regard des exceptions prévues par la jurisprudence de la Cour de justice."

[92] Article 81 RO reads: "If the Supreme Court considers that a complaint that has been filed cannot result in cassation and does not warrant the answering of questions of law in the interests of the uniform application of the law or the development of the law, it may confine itself to this consideration when stating the grounds for its decision." [Lawyers' translation] See also D.J. Veegens, E. Korthals Altes and H.A. Groen (eds.), *Cassatie in Burgerlijke Zaken*, Asser-serie procesrecht, 4th edn. Deventer: Kluwer 2005, p. 393-394. See also the critical comment of E.A. Alkema in *NJ* 1997, 21.

[93] ECHR Appl. No. 15073/03, Lutz John v Germany, Decision of 13 February 2007.

of the unity and/or the development of the law. The conditions for the application of Article 81 RO were therefore not fulfilled in this case.

C.8 Furthermore, the Supreme Court has violated its obligations under the law as expounded by the ECJ in the *CILFIT* case. A refusal to refer a question to the ECJ might have been acceptable (a contention that the Applicants nevertheless expressly wish to contest) had it been duly reasoned in accordance with the criteria laid down in *CILFIT*. More specifically, the Supreme Court did not specify (i) if and why the questions raised were irrelevant for the dispute at hand, (ii) if and which previous decisions of the ECJ have already dealt with the point of law in question, nor (iii) that the correct application of EU law was so obvious as to leave no scope for any reasonable doubt and, moreover, that the matter would be equally obvious to the courts of the other Member States and to the ECJ.

C.9 Firstly, the Applicants submit that their case raises various questions that could have been submitted to the ECJ for preliminary ruling on the interpretation of EU law, the answer to which could have significantly affected the outcome of the national proceedings. More particularly, the question raised by the Applicants about the relation between the European principle of effective judicial protection and the alleged jurisdictional immunity of the UN, in the situation of a complete lack of remedies at the UN level, and the alleged violation of *ius cogens* norms, especially after the judgment in *Kadi/Al Barakaat* by the ECJ, is highly relevant for this case. If the Supreme Court found this question to be irrelevant to the case in terms of EU law, it should have provided reasons for that conclusion.

C.10 Secondly, the Applicants observe that it is obvious that the ECJ has never dealt with a similar case, so the questions raised by the Applicants could never have been qualified as "*actes éclairés*". It is the first time that the immunity from jurisdiction of the UN is challenged on the basis of European fundamental rights and obligations, more specifically the ECHR, the Charter of Fundamental Rights of the European Union, and principles derived from the constitutional traditions common to the EU Member States.

C.11 Thirdly, the Applicants submit that the correct application of EU law was far from obvious in this case. The Applicants refer to the aforementioned *Kadi/Al Barakaat* judgment, and the subsequent discussion in the legal literature, as well as to decisions of national courts after the

Kadi/Al Barakaat judgment, which show a diverging practice.[94] If the Netherlands Supreme Court found the case at issue to be an "*acte clair*", it should have given reasons for that decision, and it should also have substantiated why it thought that the matter would be equally obvious to the ECJ and to the courts of other Member States.

C.12 Lastly, the Applicants observe that there were no principles of national (procedural) law that exceptionally relieved the Supreme Court of its duty to refer any relevant and necessary questions to the ECJ, such as the principle of *res judicata* in the *Ullens de Schooten and Rezabek* case.

[94] See General Court of the EU, case T-85/09, Yassin Abdullah Kadi v Commission (Kadi II), [2010] ECR II-5177, referring in paragraph 122 to various national judgments. See, in particular, the decision of the Court of Appeal of The Hague of 26 April 2011, Case no. 200.063.360/01, JB 2011, 160, which faithfully applies the ECJ's *Kadi/Al Barakaat* standard of judicial review in paragraph 5.5.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

IV. Statement relative to article 35 § 1 ECHR

Final decision:

13 April 2012, Hoge Raad der Nederlanden (Supreme Court of the Netherlands) (**Annex 9**).

Other decisions:

Court of Appeal of The Hague of 30 March 2010 (**Annex 5**)

District Court of the Hague of 10 July 2008 (**Annex 3**)

There was no other appeal or other remedy available to the Applicants.

V. Statement of the object of the application and provisional claim for just compensation

The Applicants respectfully request Your Court to declare that by granting absolute immunity to the UN, the State of the Netherlands has violated the right of access to a court as guaranteed by Article 6 § 1 ECHR.

The Applicants respectfully request Your Court to declare that the State, by doing everything it could to claim the UN's immunity without taking measures to protect the fundamental rights of the Applicants, and the Supreme Court, by granting absolute immunity to the UN, violated the right to an effective remedy as laid down in Article 13 ECHR.

The Applicants respectfully request Your Court to declare that the Supreme Court has failed to state reasons for refusing to refer questions for a preliminary ruling to the Court of Justice of the European Union, which constitutes a violation of the right to a fair trial as protected by Article 6 ECHR.

Furthermore, the Applicants respectfully request Your Court that they be awarded appropriate compensation for material and immaterial damages and for the costs referable to legal proceedings under Article 41 ECHR. As the total amount of the Applicants' damages can not yet be fully ascertained, the Applicants request Your Court to allow them to submit further evidence of these damages in a later stage of the proceedings.

VI. Statement concerning other international proceedings

The Applicants have not submitted the above complaints to any other proceedings of international investigation or settlement.

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com

VII. List of documents (no original documents, only photocopies, do not staple, tape, or bind documents)

1. Written authorities
2. Writ of Summons
3. Judgment of the District Court of The Hague
4. Statement of Appeal
5. Judgment of the Court of Appeal of The Hague
6. Writ of Cassation
7. Explanatory memorandum
8. Opinion of the Advocate-General
9. Judgment of the Supreme Court of the Netherlands

VIII. Declaration and signature

We hereby declare that, to the best of our knowledge and belief, the information we have given in the present application form is correct.

Amsterdam, 11 October 2012

Dr. A. Hagedorn M.R. Gerritsen P.S. Phoa J. Staab S.A. van der Sluijs

Van Diepen Van der Kroef Advocaten, P.O. Box 76729, 1070 KA Amsterdam, The Netherlands
telephone: 0031 20 - 574 74 74, fax: 0031 20 - 574 74 75, e-mail: a.hagedorn@vandiepen.com