RECENT DEVELOPMENTS

Stichting Mothers of Srebrenica v. Netherlands: Does U.N. Immunity Trump the Right of Access to a Court?

I. OVERVIEW

The Stichting Mothers of Srebrenica, a nonprofit group representing the relatives of the victims of the Srebrenica Massacre, brought suit against the Netherlands State and the United Nations in the European Court of Human Rights (ECtHR).[1] The event in question, where thousands of Serb men were murdered against the backdrop of the Yugoslavian War, is a historical tragedy that has attracted significant international attention and a number of legal actions seeking justice for the victims. Whereas some individual perpetrators and governments that sanctioned the genocide have been held legally accountable for their actions,[2] the role played by the United Nations, specifically in its failure to prevent the genocide, has not been examined on its merits.

The Stichting Mothers of Srebrenica initiated their proceedings in the Dutch domestic court system. While all three Dutch courts upheld

1. Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, ¶ 1 (Eur. Ct. H.R. 2013).

2. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (holding the general in command of the Army of the Republika Srpska (VRS) guilty for aiding and abetting genocide and crimes against humanity and imposing a thirty-five-year sentence); Selimović v. Republika Srpska, Case No. CH/01/8365, Decision on Admissibility and Merits, ¶¶ 211-212 (H.R. Chamber for Bosn. & Herz. Mar. 7, 2003) (holding the Republic Srpska violated the European Convention on Human Rights (ECHR), awarding damages, and ordering the Republic Srpska to investigate and disclose information regarding missing captives); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 438 (Feb. 26) (holding Serbia and Montenegro failed in their obligation to prevent genocide).

U.N. immunity, the nuances of their reasonings differed.[3] The initial suit was filed in the District Court of The Hague on June 4, 2007.[4] The petitioners claimed that the Netherlands State and the United Nations failed to protect the victims of the massacre and therefore bore responsibility under both Dutch civil law and international law.[5] They argued that under international agreements, the United Nations and the Netherlands State were directly accountable for the actions of the Dutch peacekeeping force in Srebrenica.[6] Prominently, they also contended that U.N. immunity granted under article 105, section 1 of the United Nations Charter is not absolute, but exists only to the extent necessary to complete its tasks, and that providing immunity would violate both article 6, section 1 of the European Convention on Human Rights (ECHR), which guarantees victims access to a court, and *jus cogens* prohibitions against genocide.[7] The United Nations responded with a letter asserting its absolute immunity with no intention to waive such immunity and left its defense to be conducted by the Netherlands State.[8] The district court did not rule on the merits of the case, but endorsed the immunity of the United Nations, finding that the case pertained to peacekeeping activities clearly within the functional immunity of the United Nations.[9] It also found that immunity is not per se overridden by lack of access to an alternative court, nor is it overridden by *jus cogens*.[10] The district court held that it therefore lacked jurisdiction to hear claims against the United Nations.[11]

The case then progressed to The Hague Court of Appeal, where the petitioners additionally argued that upholding the absolute immunity of the United Nations would allow the Netherlands State to evade its legal liability by imputing its actions to the United Nations and that the United

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3. *See Stichting Mothers of Srebrenica*, App. No. 65542/12, ¶¶ 54-94 (highlighting the lower courts' focuses in each of the three trials); Otto Spijkers, *The Immunity of the United Nations Before the Dutch Courts*, 51 MIL. L. & L. WAR REV. 361 (2012) (expounding on the different legal theories presented in evaluation of U.N. immunity during the three Dutch trials).

4. Mothers of Srebrenica v. Netherlands, No. 295247/HA ZA 07-2973, ¶ 1.1 (Hague Dist. Ct. July 10, 2008) (Neth.).

5. *Id.* ¶¶ 2.1-.2. Their legal argument under civil law is based on two points: (1) that the "safe area" was declared in exchange for the Serb combatant forces giving up their arms, effectively leaving them without the possibility of self-defense in the course of an attack, and (2) that a tort was committed by sending in troops who lacked adequate training and weapons and by failing to provide the requested air support. *Id.*

6. *Id.*

7. *Id.* ¶ 3.4.

8. Spijkers, *supra* note 3, at 364-65.

9. *Mothers of Srebrenica*, No. 295247/HA ZA 07-2973, ¶¶ 5.1, .12, .21.

10. *Id.* ¶ 5.24.

11. *Id.* ¶ 6.1.

Nations' failure to establish a tribunal system for private lawsuits, as it is obliged to do under article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations (Privileges and Immunities Convention), leaves domestic courts as the only avenue for redress.[12] The court of appeal did not accept these arguments either because it could not predict the Netherlands State's future defense, reasoning that the petitioners still were free to sue the perpetrators of the crime and the Netherlands State.[13] The court upheld the district court's decision interpreting the U.N. Charter to provide absolute immunity, applying the criteria established in a previous ECtHR case, *Waite & Kennedy v. Germany*, and emphasized the United Nations' "special position" among international organizations as needing the greatest protection against legislation.[14] The court of appeal also reasoned that while committing genocide violates a *jus cogens* norm, failure to prevent it does not, and therefore there were no grounds to argue immunity should be overridden.[15]

The Supreme Court of the Netherlands similarly upheld absolute immunity for the United Nations, despite the petitioners' argument that the court of appeal had interpreted the U.N. Charter to provide far more immunity that is actually granted under treaty to the United Nations.[16] Among other points of law, the petitioners argued that the ability to seek monetary damages from other parties did not provide sufficient access to a court because they were not seeking only compensation, but recognition from the United Nations that it failed in its duty to prevent their family members from injury in an act of genocide.[17] They also contended that failure to prevent a *jus cogens* violation could be recognized under international law as defeating immunity.[18] Additionally, they claimed that the lower court erred by not discussing whether the United Nations should have waived its immunity on moral grounds.[19] The Dutch Supreme Court decided that not only is the immunity of the United Nations to be interpreted as absolute, but also that the court of appeal erred in even considering the *Waite & Kennedy* criteria, because

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12. *Mothers* of Srebrenica v. Netherlands, No. 200.022.151/01, ¶ 5.11 (Hague Cir. Mar. 30, 2010) (Neth.).
13. *Id.* ¶¶ 5.11, .13.
14. *Id.* ¶¶ 5.6-.7; *see also* Waite & Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393.
15. *Mothers of Srebrenica*, No. 200.022.151/01, ¶ 5.10.
16. Mothers of Srebrenica v. Netherlands, No. 10/04437, ¶ 4.2 (Sup. Ct. Neth. Apr. 13, 2012).
17. *Id.* ¶ 3.2.1.
18. *Id.* ¶ 4.1.1.
19. *Id.*

the U.N. Member States agreed in article 103 of the U.N. Charter that the Charter prevails over any other conflicting agreements, such as the ECHR.[20] Though the Dutch courts determined that they would not hear a claim against the United Nations, the case against the Netherlands State is ongoing.[21]

Exhausting their options on the national level, the Stichting Mothers of Srebrenica moved their arguments to an international venue, elevating the suit to the ECtHR.[22] First, they contended that under article 6 of the ECHR, granting immunity to the United Nations deprived them of their right of access to a court.[23] Second, they claimed that under article 13 of the ECHR, such immunity allowed the Netherlands State to evade any liability by shifting the blame entirely to the United Nations, effectively rendering their claims futile.[24] The ECtHR *held* that immunity granted to the United Nations was appropriate under international law and rejected the article 13 claim as manifestly ill-founded. *Stichting Mothers of Srebrenica v. Netherlands*, App. No. 65542/12 (Eur. Ct. H.R. 2013).

II. BACKGROUND

A. The Massacre

In the early 1990s, the Socialist Federal Republic of Yugoslavia began collapsing as the individual republics comprising the state declared their independence.[25] In the course of the complex war that ensued, the Army of the Republika Srpska (VRS), which was composed mostly of the Serb ethnic group, waged attacks against the municipality of Srebrenica, an ethnically Bosniac area of Eastern Bosnia.[26] For strategic and political reasons, the Bosnian government refused to evacuate civilians from this region.[27] On April 16, 1993, the United Nations Security Council adopted a resolution in response, declaring Srebrenica a "safe area" to be "free from any armed attack or any other hostile act."[28] A Dutch battalion (Dutchbat), under control of the United Nations Protection Force (UNPROFOR), was stationed in the "safe area,"

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20. *Id.* ¶¶ 4.3.4-.3.5.
21. Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, ¶¶ 95-96 (Eur. Ct. H.R. 2013).
22. *Id.* ¶¶ 112-113.
23. *Id.* ¶ 112.
24. *Id.* ¶ 113.
25. *Id.* ¶¶ 5-6.
26. *Id.* ¶¶ 8-13.
27. *Id.* ¶¶ 13-14.
28. *Id.* ¶ 15.

amounting to approximately 400 lightly armed troops.[29] On July 10, 1995, the VRS hostile forces invaded Srebrenica.[30] The Dutchbat commander, unable to meet the threat with the small Dutchbat unit, requested air support from the United Nations, which never arrived.[31] The United Nations then passed a second resolution entreating withdrawal of the hostile forces.[32] Ignoring the resolution, the VRS systematically murdered at least 7000 Bosnian men and raped countless Bosnian women.[33] This act was later determined by the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY) to constitute an act of genocide.[34] In 2002, the incumbent Dutch government resigned its office due to the numerous reports that indicated some level of responsibility of the Netherlands State.[35] The United Nations has since also recognized some level of moral responsibility, reporting:

> The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica. Through error, misjudgment and an inability to recognize the scope of the evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder. . . . The tragedy of Srebrenica will haunt our history forever.[36]

A spokesperson for the United Nations Secretary-General Ban Ki-Moon later reiterated the United Nations' support for litigation against the perpetrators of the genocide by publicly expressing 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."[37]

B. Immunity for the United Nations

Conferring immunity upon specific actors in the international sphere is a practice with deep historical roots.[38] Traditionally, immunities

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29. *Id.* ¶ 16.
30. *Id.* ¶ 17.
31. *Id.* ¶¶ 16-17.
32. *Id.* ¶ 18.
33. *Id.* ¶¶ 19, 54.
34. *Id.* ¶ 128.
35. *Id.* ¶¶ 29-30.
36. U.N. Secretary-General, *Report Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶ 503, U.N. Doc. A/54/549 (Nov. 15, 1999).
37. Marie Okabe, Office of the Spokesperson for the Sec'y-Gen., *Highlights of the Noon Briefing*, U.N. (June 8, 2007), http://www.un.org/sg/spokesperson/highlights/index.asp?HighD=6/8/2007&d_month=6&d_year=2007.
38. *See* YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 93-94 (2004).

were extended to the sovereigns of nations, nations themselves, and their diplomatic representatives.[39] The rise of international institutions following World War II added an additional tier of entities receiving certain immunities, because international organizations often built in provisions for immunity in their constituent documents, in separate agreements on privileges and immunities, or in the host state agreements for establishing the headquarters of the organization.[40] The importance of having some level of immunity for these international actors is generally agreed upon by scholars, although the extent of such immunity is intensely debated. The United Nations currently maintains it possesses absolute immunity in the courts of its Member States.[41] However, this has not kept aggrieved parties from trying, through a multitude of legal theories, to seek justice.[42] In recent years, the United Nations has been increasingly named as a party in lawsuits, and there is a growing movement of legal professionals calling for some system of accountability for the actions of the United Nations and its officers.[43]

The U.N. Charter spells out the organization's expectation of immunity in article 105: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for

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39. *Id.* at 93-95.

40. August Reinisch, *Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations—An Introduction*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 6 (August Reinisch ed., 2013). More controversially, immunities are sometimes inferred through customary international law. *Id.*

41. *See* Anthony J. Miller, *The Privileges and Immunities of the United Nations*, 6 INT'L ORGS. L. REV. 7, 41 (2009) (explaining that the U.N. Office of Legal Affairs will routinely request the department of state in the country where the litigation arises to apply its immunity or, if necessary, send a request directly to the court). The drawbacks of allowing the absolute immunity of the United Nations to be pierced are often expressed. If the United Nations was subject to domestic litigation, they could be summoned to court for their actions in a conflict, in the state where the conflict is occurring, thus jeopardizing peacekeeping operations. Parties of the conflict may do this purposefully in order to frustrate U.N. Security Council actions. It also could expose the United Nations to lawsuits in countries where the judiciary does not meet international standards. *See* Mothers of Srebrenica v. Netherlands, No. 200.022.151/01, ¶ 5.7 (Hague Cir. Mar. 30, 2010) (Neth.).

42. *See generally* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 40 (providing a comprehensive analysis of the domestic case law of multiple countries regarding immunities conferred to international organizations).

43. *See id.*; *see also* 2012 U.N. Jurid. Y.B. 264-68, U.N. Doc. ST/LEG/SER.C/50 (discussing delegations' advocacy for criminal accountability of U.N. personnel); Anastasia Telesetsky, *Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice*, 21 MINN. J. INT'L L. 75, 112 (2012) (envisioning a role for ICJ advisory opinions to increase accountability of the United Nations); Int'l Law Ass'n [ILA], *Accountability of International Organisations*, 71 INT'L L. ASS'N REP. CONF. 164, 219 (2004) (describing immunity as a barrier).

the fulfillment of its purposes."[44] An immunity provision is also found in article II, section 2 of the Privileges and Immunities Convention, which states that the United Nations "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[45] However, it is not clear from these two provisions just how far that immunity extends. There are varying interpretations on whether these two provisions are repeating the same principle, that the United Nations possesses functional immunity, or if the second provision widens the scope of immunity to provide absolute immunity.[46] An alternative theory is that any activity of an international organization is either official or ultra vires, so therefore every act must be covered under functional immunity.[47] This theory essentially converts functional immunity into absolute immunity.[48] The prevalent trend in national courts is to interpret these provisions as granting de facto absolute immunity to the United Nations, with a minority of national courts construing the provisions as conceding only functional immunity, along the same lines that sovereign nations enjoy.[49] It also follows from these provisions that the United Nations is free to waive its immunity, though the grounds under which it is legally or morally obliged to waive its immunity are unsettled.

Courts have also differentiated the United Nations from other international organizations, claiming that though there are circumstances where immunity may fail in a smaller international organization, the United Nations has unquestionable absolute immunity.[50] The court in *Brzak v. United Nations* expresses this concisely: "[W]hatever immunities are possessed by other international organizations, the [Privileges and Immunities Convention] unequivocally grants the United Nations absolute immunity without exception."[51] The Dutch Supreme Court also underscored the special nature of the United Nations:

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44. U.N. Charter art. 105, para. 1.

45. Convention on the Privileges and Immunities of the United Nations art. 2, § 2, *adopted* Feb. 13, 1946, 4 U.N.T.S. 15.

46. August Reinisch, *Introductory Note: Convention on the Privileges and Immunities of the United Nations*, AUDIOVISUAL LIBR. INT'L L., http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html (last visited Apr. 7, 2014).

47. Reinisch, *supra* note 40, at 9.

48. *Id.*

49. *Id.*

50. *See* Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010).

51. *Id.*

"[T]here are no grounds for assuming that the ECtHR's reference to 'international organisations' also included the UN."[52]

In the combined decision of *Behrami v. France* and *Saramati v. France*, the ECtHR additionally extended this immunity to contracting parties who are carrying out the objectives of the U.N. Security Council.[53] In *Behrami*, the court held that a death resulting from unexploded cluster bombs was attributable to the United Nations, not to the North Atlantic Treaty Organization (NATO) forces that actually placed the bombs, and therefore the claim was inadmissible.[54] Similarly, in *Saramati*, the court held that the extrajudicial detention of a man was attributable to the United Nations, not the French Kosovo Force troops that ordered the arrest, and therefore the claim was inadmissible.[55] The court reasoned that the Privileges and Immunities Convention "cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by [U.N. Security Council] Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court."[56]

Some scholars believe that the universal ratification of the Privileges and Immunities Convention is sufficient to establish U.N. immunity as customary international law.[57] However, a growing movement calls for an end to this custom, exclaiming, "[I]mmunity cannot mean impunity."[58] There is a push towards establishing criminal liability for U.N. officers and peacekeeping contingents that violate local laws, especially in cases of rape or sexual harassment.[59] The United

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52. Mothers of Srebrenica v. Netherlands, No. 10/04437, ¶ 4.3.3 (Sup. Ct. Neth. Apr. 13, 2012).

53. *See* Behrami v. France, App. No. 71412/01, Saramati v. France, Germany, and Norway, App. No. 78 66101 (Eur. Ct. H.R. 2007).

54. *Id.* ¶¶ 5, 143.

55. *Id.* ¶¶ 8-17, 141.

56. *Id.* ¶ 149.

57. *See* Kibrom Tesfagabir, *The State of Functional Immunity of International Organizations and Their Officials and Why It Should be Streamlined*, 10 CHINESE J. INT'L L. 97, 107 (2011).

58. *See* Kim Ives, *Lawyers for Haiti Cholera Victims Tell UN: "Immunity Cannot Mean Impunity,"* HAÏTI LIBERTÉ (Apr. 17, 2012), http://www.haiti-liberte.com/archives/volume5-39/Lawyers%20for%20Haiti.asp (emphasis omitted); 2012 U.N. Jurid. Y.B. 265, U.N. Doc. ST/LEG/SER.C/50 (discussing the "imperative to guard against impunity").

59. *See* 2012 U.N. Jurid. Y.B. 264-68, U.N. Doc. ST/LEG/SER.C/50; Tom Dannenbaum, Comment, *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*, 51 HARV. INT'L L.J. 113 (2010); Joseph Guyler Delva, *Pakistani U.N. Peacekeepers Sentenced in Haiti Rape Case*, REUTERS (Mar. 12, 2012, 11:40 PM), http://www.reuters.com/article/2012/03/13/us-haiti-un-

Nations has also recently reformed its internal system of administrative justice, increasing its capacity to ameliorate disputes between the United Nations and its staff, though the new system is heavily critiqued.[60] However, in relation to liability under private law for its acts and omissions, the United Nations is steadfast in asserting its absolute immunity.

C. The Effect of Access to a Court on Immunity

One limitation on immunity that has spurred much litigation is the conflict that arises when granting immunity leaves the petitioners without access to a court to redress their grievances. Under the Privileges and Immunities Convention, "The United Nations shall make provisions for appropriate modes of settlement of . . . [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."[61] However, no such permanent body has been set up, leaving those who wish to redress injustices caused by the United Nations without a venue to bring suit.[62] This creates a problem in jurisdictions where individuals are entitled to have access to a court, such as under article 6, section 1 of the ECHR, which states that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," and under article 13, which provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[63] There is much

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idUSBRE82C06C20120313; Steve Stecklow, *Sexual-Harassment Cases Plague U.N.*, WALL ST. J. (May 21, 2009, 11:59 PM), http://online.wsj.com/news/articles/SB124233350385520879.

60. *See* Tamara A. Shockley, *The Evolution of a New International System of Justice in the United Nations: The First Sessions of the United Nations Appeals Tribunal*, 13 SAN DIEGO INT'L L.J. 521 (2012). Domestic courts generally hold that they do not have jurisdiction to hear disputes between the United Nations and its staff members. *See, e.g.*, Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010).

61. Convention on the Privileges and Immunities of the United Nations, *supra* note 45, art. 8, § 29.

62. The United Nations established an internal system of administration of justice in 2009, including a dispute tribunal and an appeals tribunal, to provide a venue for United Nations staff to contest administrative decisions, mostly relating to appointments, benefits and entitlements, employee classification, disciplinary issues, and separation from service. U.N. Secretary-General, *Administration of Justice at the United Nations*, U.N. Doc. A/66/275, ¶¶ 1, 37 (Aug. 8, 2011). This internal mechanism is not a venue in which parties such as the Stichting Mothers of Srebrenica could bring suit. *See id.*

63. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, § 1, art. 13, Nov. 4, 1950, 213 U.N.T.S. 221.

debate over how the two competing principles—the right of access to a court and the United Nations' right to immunity—relate.

The landmark ECtHR case of *Waite & Kennedy*[64] opened up the doors for suits against international organizations where a grant of immunity would deny the parties access to a court.[65] The case involved two British nationals engaged in a labor dispute with the European Space Agency, an intergovernmental organization.[66] The European Space Agency had a provision for immunity built into its convention, along with a duty to waive immunity if it would impede justice.[67] The ECtHR created a two-part test to determine if a limitation placed on the right of access to a court was compatible with article 6, section 1 of the ECHR.[68] The court rejected compatibility when (1) the limitation "does not pursue a legitimate aim" and (2) "there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[69]

In a sister case against the European Space Agency, the ECtHR laid out the criteria for establishing a legitimate aim, requiring that the aim be "an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments" and "in the interest of the good working of these organisations."[70] Proportionality is assessed in relation "to the objective of enabling international organisations to perform their functions efficiently."[71] Most importantly, the court listed the availability of alternate means to achieve access to a court as a material factor in determining whether to grant the international organization immunity.[72] This suggests that there may exist some instances, such as where granting immunity would deny the petitioners access to a court, in which U.N. immunity may be penetrated.

III. THE COURT'S DECISION

In the noted case, the ECtHR declined to deviate from international precedent and upheld absolute immunity for the United Nations despite the petitioners' arguments that it violated their right of access to a court. The court excluded from its scope the issues of whether the United

64. Waite & Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393.
65. *See id.*; Reinisch, *supra* note 40, at 10.
66. *Waite & Kennedy*, 1999-I Eur. Ct. H.R. 393, ¶¶ 10-12.
67. *Id.* ¶ 38.
68. *Id.* ¶ 59.
69. *Id.*
70. Beer & Regan v. Germany, App. No. 28934/95, ¶ 53 (Eur. Ct. H.R. 1999).
71. *Id.* ¶ 55.
72. *Id.* ¶ 58.

Nations, or any other entity or person, holds responsibility for the Srebrenica genocide as well as whether the United Nations had a legal or moral obligation to waive its immunity in the case of the Srebrenica genocide.[73] The court also briefly addressed two procedural issues, the standing of the Stichting Mothers of Srebrenica[74] and the propriety of the Dutch Supreme Court in declining to seek an advisory opinion from the Court of Justice of the European Union.[75]

Outlining the relevant jurisprudential principles for the remaining claims, the court noted that the right of access to a court is firmly established by article 6, section 1 of the ECHR.[76] That right may be limited by the state, but only within the confines of the *Waite & Kennedy* criteria—requiring that the limitation must "pursue a legitimate aim" and have a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[77] In the context of the noted case, the court reasoned that granting immunity to international organizations was a legitimate aim because it was both important for the good working of the organizations and for strengthening international cooperation.[78] The court then underscored that the right of access to a court is important in a democratic society and that states cannot be allowed the unrestrained ability to remove "a whole range of civil claims or confer immunities from civil liability on categories of persons."[79] However, limitations on the right of access to a court cannot categorically be considered disproportionate.[80] In the case of a contradiction between

73. Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, ¶ 137 (Eur. Ct. H.R. 2013).

74. Proceedings in the ECtHR are open only to those who are "victims" of a violation by a states party of the rights agreed upon in the ECHR. The court interpreted the word "victim" to be applied only in the case where there is a "sufficiently direct link between the applicant and the damage which he or she claims to have sustained as a result of the alleged violation." *Id.* ¶ 114. The court failed to recognize the Stichting Mothers of Srebrenica as a victim as described in the ECHR, reasoning that as a foundation, it "has not itself been affected by the matters," despite the fact that individuals within the organization were affected. *Id.* ¶ 116. Despite the lack of standing, the court continued with an analysis of the case. *Id.* ¶¶ 114-117.

75. The court held that the Dutch Supreme Court's summary judgment to not request a preliminary ruling from the Court of Justice of the European Union was sufficient, despite the complexity and novelty of the issue. *Id.* ¶¶ 171-173. The court stressed that detailed answers to each argument were not required to issue a summary judgment and that the court may simply endorse the lower court's decision. *Id.* ¶ 174.

76. *Id.* ¶ 139.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

the right of access to a court and immunity for international organizations, they must be construed, to the extent possible, to be harmonious.[81]

In addressing the Stichting Mothers of Srebrenica's claims, the court recognized three distinct issues: (1) the nature of the immunity enjoyed by the United Nations, (2) the effect that the nature of the petitioners' claim had on such immunity, and (3) the effect that the absence of an alternate jurisdiction had on such immunity.[82] First, the court held that the national courts did not have jurisdiction to hear claims against the United Nations when those claims related to actions of the U.N. Security Council.[83] The court recognized that there were various interpretations of the nature of immunity for international organizations and determined that "it is not [the ECtHR's] role to seek to define authoritatively" the scope of the United Nations' immunity.[84] It also recognized a presumption that the U.N. Security Council cannot intend for its acts to require a Member State to breach principles of international law.[85] It distinguished this case from all previous authority in the ECtHR because the actions the petitioners questioned were those of the U.N. Security Council.[86] The U.N. Security Council's operations are "fundamental to the mission of the United Nations to secure international peace and security."[87] Because this case derived from questioning the use, or lack of use, of these powers, allowing it to proceed would impede the mission of the United Nations.[88] Therefore, the U.N. Charter cannot be interpreted in a way that would allow domestic courts to review U.N. Security Council operations.[89] The court supported this conclusion by referencing an advisory opinion issued by the ICJ, which states, "[C]laims against the United Nations shall not be dealt with by national courts."[90]

Second, the court held that the nature of the claim, in this case a *jus cogens* prohibition on genocide, did not support overriding the United Nations' immunity from civil litigation in national courts.[91] The court recognized that previous case law had allowed a violation of a *jus cogens*

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81. *Id.*
82. *Id.* ¶ 140.
83. *Id.* ¶ 154.
84. *Id.* ¶¶ 141-143.
85. *Id.* ¶ 145 (citing Al-Jedda v. United Kingdom, App. No. 27021/08 (Eur. Ct. H.R. 2011)).
86. *Id.* ¶¶ 150-152.
87. *Id.* ¶ 154.
88. *Id.*
89. *Id.*
90. *Id.* ¶ 155 (citing Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29)).
91. *Id.* ¶ 158.

norm to override the immunity of an international organization from criminal liability.[92] However, the noted case did not concern criminal liability, but civil litigation, and therefore no support existed in international law to override the United Nations' immunity on the basis that the civil claim against it was of a particularly severe nature.[93] The court also rejected the idea that the statements made by the U.N. Secretary-General or the former president of the ICTY calling for justice for the survivors lent any support for revoking immunity.[94]

Third, the court held that invoking immunity of the United Nations from litigation in domestic courts, combined with the absence of an alternate jurisdiction, did not ipso facto violate the right of access to a court.[95] The court did admit that there was, "beyond doubt," no court available to the applicants under Dutch domestic law or through channels established by the United Nations.[96] However, regardless of whether the United Nations does or does not have a duty in the U.N. Charter to create a dispute settlement body to hear the noted case, the Netherlands State was not required to hear the claim in its courts.[97]

Finally, the court addressed the petitioners' claim that article 13 of the ECHR was violated, allowing the Netherlands State to forgo responsibility by transferring blame to the United Nations.[98] Article 13 provides, "Everyone whose rights and freedoms set forth in [the] Convention are violated shall have an effective remedy before a national authority."[99] The court instead analyzed this claim under article 6, section 1 of the ECHR, which provides, "[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[100] The court reasoned that the criterion for article 6, section 1 is stricter than that of article 13, and therefore, the former article absorbs the latter.[101] The court found no evidence that the Stichting Mothers of Srebrenica would be denied access to a court for purposes of litigating against the Netherlands State.[102] The court

92. *Id.* ¶ 157.
93. *Id.* ¶ 158.
94. *Id.* ¶ 160.
95. *Id.* ¶ 164.
96. *Id.* ¶ 163.
97. *Id.* ¶ 165.
98. *Id.* ¶¶ 166-168.
99. *Id.* ¶ 176 (citing Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 63, art. 13).
100. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 63, art. 6.
101. *Stichting Mothers of Srebrenica*, App. No. 65542/12, ¶ 177.
102. *Id.* ¶ 167.

supported this assertion by referencing previous instances where the Hague Court of Appeal had been willing to hear cases against the Netherlands State and Dutchbat in connection with the Srebrenica Massacre and by noting that appeals from the petitioners' initial domestic lawsuit against the Netherlands State were still pending in Dutch national courts.[103] The court therefore rejected the article 13 claim as manifestly ill-founded.[104]

IV. ANALYSIS

The noted case joins a growing list of others that set a precedent for upholding the United Nations' absolute immunity. In addition to the ECtHR, this list includes the ICJ (through an advisory opinion)[105] and domestic courts in multiple countries,[106] including U.S. federal courts.[107] Currently, the United Nations is the only body that is given such a wide-ranging blanket of absolute immunity. As the most powerful international organization in the world, it seems imbalanced not to subject the United Nations to judicial scrutiny. However, as the ECtHR indicated, the noted case may not have provided convincing arguments for restricting that immunity.

The immunity of the United Nations should not be evaluated standing alone; it should be viewed within the historical context of the rise and fall of immunities granted by sovereign nations as a courtesy to their neighbors. Immunity is not a static institution, but adapts as the world changes around it. Immunities were first recognized in the fourteenth century as absolute personal immunities for sovereign heads of state, which then expanded into absolute immunity for the state itself.[108] Diplomatic envoys were then regarded as extensions of the sovereign and thus also received absolute immunity.[109] It was not until the nineteenth century that these immunities began to be subject to limitations.[110] The participation of states in commercial activities led to the restriction of their civil immunity to public acts.[111] Civil immunity for

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103. *Id.*

104. *Id.* ¶ 170.

105. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 56 (Apr. 29).

106. *See* Reinisch, *supra* note 40 (providing a comprehensive analysis of domestic case law regarding immunities conferred to international organizations).

107. *See* Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010).

108. SIMBEYE, *supra* note 38, at 93.

109. *Id.* at 95.

110. *Id.* at 96-97.

111. *Id.* at 98.

diplomats was similarly limited to official functions following the Vienna Diplomatic Convention, though they retained absolute criminal immunity in the receiving state.[112] A more recent series of cases has eroded personal immunity for criminal activity conducted by heads of state.[113]

These immunities and restrictions have evolved over hundreds of years, whereas finding a balance between immunity and culpability for international organizations has taken place only over the course of a few decades. The evolution of rules surrounding state immunity are important to keep in mind because they often inform the courts' decisions on the immunity of international organizations.[114] Whether we view U.N. immunity as a subset of the immunity of international organizations or as a new strand of immunity necessitating separate considerations, the extent of that immunity is likely still in a state of flux. The growing number of cases involving the United Nations and controversial literature on U.N. immunity attest to this claim. The question then becomes, Why was the noted case not a successful opening for asserting that the United Nations possesses functional, and not absolute, immunity?

One possibility is that this simply was not the right case to challenge U.N. absolute immunity. The court made clear that even if the standard of functional immunity was used, the U.N. Security Council's resolutions and actions are so vital to its mission to secure international peace and security that they would fall within the limits of functional immunity, thereby rendering the question of whether it falls within the much broader scope of absolute immunity obsolete.[115] Also, the duty to waive immunity, or have it set aside "for the most compelling reasons,"[116] was likely not implicated by the facts of the noted case. Though there is an obligation recognized by the ICJ upon states to "employ all means reasonably available to them so as to prevent genocide so far as possible," the ECtHR did not find the United Nations' role in violating an international norm to be particularly compelling in a civil case, though it leaves open the possibility that it would hold differently in a criminal

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112. *Id.* at 99-101.

113. *Id.* at 128.

114. *See, e.g.*, Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, ¶ 158 (Eur. Ct. H.R. 2013).

115. *Id.* ¶ 154.

116. *Id.* ¶ 124 (quoting Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 61 (Apr. 29)).

case.[117] Additionally, the court did not recognize a conflict between the right of access to a court and immunity, calling attention to the fact that the victims have had access to several courts in previous proceedings and that the proceedings in the Dutch domestic courts against the Netherlands State are ongoing.[118] While the court did not comment on the merits of the case against the United Nations, it did allude that the identical suit against the Netherlands State may not have a legal basis.[119]

A second possibility is that this case was not successful because the wrong venue was chosen. The ECtHR stated, "[I]f any State were to exercise jurisdiction over the United Nations, that State should be the one within whose territory the organisation had its seat or the acts complained of had taken place; in the present case, that excluded the Netherlands."[120] However, the court was also clear in its stance that no Member State has jurisdiction over claims against the United Nations.[121] This dilemma arises from the fact that international dispute resolution was designed at the outset to resolve issues between states, not between individuals and international organizations.[122] As a result, every court can fall back on the nonjusticiability of cases against the United Nations. The court's contemplation that perhaps the state in which the organization is headquartered might exert jurisdiction will soon be tested because a nonprofit group out of Haiti has recently sued the United Nations in the U.S. federal court system for their role in the cholera outbreak.[123] While the complaint does not currently make arguments relating to U.N. immunity, it does emphasize the obligation of the United Nations to "provide appropriate modes of settlement for third-party private law claims," which the United Nations has not done despite being legally bound to do so in the Privileges and Immunities Convention.[124] In the absence of the United Nations clearly defining the scope of its own immunity and setting up an adjudication system for private parties, domestic and international courts are stepping in to speculate.

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117. *Id.* ¶ 52. The court reasoned, "[T]he present case does not concern criminal liability, but immunity from domestic civil jurisdiction. International 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 *jus cogens*." *Id.* ¶ 158.

118. *Id.* ¶¶ 42-53.

119. *Id.* ¶ 168.

120. *Id.* ¶ 70.

121. *Id.* ¶¶ 154-155.

122. Dannenbaum, *supra* note 59, at 125.

123. Class Action Complaint at 1, Georges v. United Nations, No. 13 CV 7146 (S.D.N.Y. filed Oct. 9, 2013).

124. *Id.* at 3-4.

Conceivably, the closer courts come to ruling against U.N. absolute immunity, the more pressure will be placed on the United Nations to address the situation.

V. CONCLUSION

Two trends seem to be emerging in international law: a growing number of courts refusing to hear claims due to the United Nations' assertion of absolute immunity and a growing number of plaintiffs who wish to hold the United Nations accountable for its actions. U.N. immunity is sometimes upheld for good reasons, such as furthering the mission of preventing war and increasing peace and stability in the world. Sometimes, though, immunity means that an individual is denied an opportunity for justice because the accused is shielded behind the cloak of U.N. immunity. Unfortunately, the power to alter the judicial treatment of cases involving the United Nations lies within the United Nations itself. This is a task the United Nations is unlikely to take on unless national courts and courts like the ECtHR begin to waiver in their stance on absolute immunity.

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