15-455

In the
United States Court of Appeals
for the
Second Circuit

DELAMA GEORGES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DESILUS GEORGES AND ALL OTHERS SIMILARLY SITUATED, ALIUS JOSEPH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIE-CLAUDE LEFEUVE AND ALL OTHERS SIMILARLY SITUATED, LISETTE PAUL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FRITZNEL PAUL AND ALL OTHERS SIMILARLY SITUATED, FELICIA PAULE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JEAN RONY SILFORT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

UNITED NATIONS, UNITED NATIONS STABILIZATION MISSION IN HAITI, EDMOND MULET, FORMER UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI, BAN KI-MOON, SECRETARY-GENERAL OF THE UNITED NATIONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF EUROPEAN LAW SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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INTEREST OF AMICI CURIAE

Amici curiae[1] are professors and scholars of European and human rights law who have substantial experience researching, publishing and litigating on the approach of European courts to international organization immunity.[2] In particular, *amici* possess expertise in how courts confronted with international organization immunity in jurisdictions outside the United States have applied such immunity in a manner that comports with international law and respects individuals' human right to access effective remedies. *Amici* have a strong interest in ensuring that immunity is not interpreted in a way that violates this right. They submit their brief in support of Plaintiffs-Appellants' position that immunity should not be accorded in this case, where doing so would deny Plaintiffs-Appellants' access to any means to obtain redress for the harms they have suffered.

Therefore, *amici* respectfully seek to leave to file an *amicus curiae* brief pursuant to Fed. R. App. P. 29 and Local Rule 29.1, in support of Plaintiffs-Appellants' Principal Appellate Brief and in support of reversal of the District

[1] The Plaintiff-Appellants have consented to the participation of *Amici* in this case. Because the Defendants- Appellees have not appeared in this case, their consent could not be requested pursuant to Fed. R. App. P. 29 and Local Rule 29.1, *Amici Curiae* represent that no party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

[2] A complete list of *amici* appears in the appendix hereto.

Court's decision to dismiss their case. The proposed brief is submitted herewith.

ARGUMENT

1. INTRODUCTION

The present case involves a question of increasing importance as international organizations ("IO") have come to play a greater role globally: how to balance the immunity necessary for these organizations to conduct their work without interference with the fundamental need to protect individuals' rights against abuse. Although the precise questions presented in this case are new to US courts, they are similar to questions that European courts in IO host countries have long wrestled with. More than half a century of jurisprudence on this topic in European courts demonstrates that most courts apply a balancing approach to IO immunity. In return for granting immunity, they require IOs to provide reasonable alternative means for the adversely affected individuals to seek remedies. Considering the fundamental importance of access to justice for safeguarding human rights protection in individual cases, these cases call for a tailored approach. Given the UN's complete denial of access to reasonable alternative means in the present case, this Court should deny Defendants immunity for their responsibility in Haiti's cholera epidemic and afford the Plaintiffs access to the Court.

2. THE RIGHT TO A REMEDY IS CENTRAL TO PROTECTING INDIVIDUALS' HUMAN RIGHTS

As the Plaintiffs in this case have been denied access to any alternative form of process for the harms they have experienced, a grant of immunity to the UN would be an effective denial of their right to a remedy.[3] The due process rights of effective remedy and access to court are not only human rights in and of themselves, but they also operate as a mechanism for ensuring the observance of other human rights. The lack of a remedy is, in effect, synonymous with the lack of a right. *See* Dinah Shelton, *Remedies in International Human Rights Law* 29 & 100 (2d ed. 2005); *see also Simoncioni and Others v. Germany and President of the Council of Ministers*, Corte cost., 29 ottobre 2014, No. 238/2014, Gazz. Uff. 45, ILDC 2237, ¶ 3.4 (It.) ("It would be arduous to identify what would be left of a right if it could not be vindicated before a court in order to obtain effective protection…The right to a judge and to effective judicial protection of inviolable rights is certainly among the grand principles of legal civilization of any democratic systems of our times.") Indeed, the UN itself has recognized the fundamental importance of this right in article 8 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N.

[3] The right of access to courts is a crucial component of the human right to an effective remedy, a key due process rights. The UN defines the right to a remedy to include: "(*a*) Equal and effective access to justice; (*b*) Adequate, effective and prompt reparation for harm suffered; and (*c*) Access to relevant information concerning violations and reparation mechanisms." Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

Doc. A/RES/217(III) (Dec. 10, 1948), and has recently affirmed it by adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). European courts have also acknowledged this fundamental importance, and there is an increasing tendency in case law towards safeguarding individuals' due process rights, even in cases where they are balanced against other weighty public interests. *See e.g.*, Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n* , 2008 E.C.R. I-06351, ¶¶ 342-44, 363, 368-70 [hereinafter *Kadi I*]; *A & Others v. United Kingdom*, 2009-II Eur. Ct. H.R. 137, 234 (weighing the validity of procedures in the United Kingdom's Special Immigration Appeals Commission ("SIAC") given their implications for individual due process rights); *Sec'y of State for Home Dep't v. AF (FC) & Another*, [2009] UKHL 28, [59], [71], [116], [119] (appeal taken from Eng. & Wales) (U.K.) (following *A & Others* in weighing European human rights to due process against national security concerns). While courts in Europe, like those in the US, regularly acknowledge that there are legitimate grounds to grant immunity to IOs before domestic courts, these courts also recognize that such immunity can directly interfere with individuals' ability to enjoy the right to a remedy if IOs do not provide a reasonable alternative means of resolving disputes. Hence European courts have broadly accepted that granting such immunities is only lawful if balanced with

adversely affected individuals' due process rights. *See, e.g.*, *Waite and Kennedy v. Germany*, 1999-I Eur. Ct. H.R. 393.

3. A REASONABLE ALTERNATIVE MEANS OF ACHIEVING JUSTICE IS A MATERIAL FACTOR IN DETERMINING WHETHER AN ORGANIZATION CAN LAWFULLY ENJOY IMMUNITY

The case at hand, like most cases that involve IO immunity, essentially concerns a conflict between two opposing principles: on the one hand, the immunity that allows an IO to conduct the functions it was established to conduct, and on the other hand the obligation of states to uphold an individual's right of access to court. Not all of the cases considered by European Courts have directly involved the UN, in part because cases against an IO are most likely to be brought where that IO is headquartered. However, as discussed below, European courts have often dealt with immunity agreements that are similar or even identical in their terminology to the Convention on the Privileges and Immunities of the United Nations ("CPIUN") — as in the numerous cases concerning UN Specialized Agencies. *Compare* CPIUN, § 2, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, *with* Convention on the Privileges and Immunities of the Specialized Agencies, § 4, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter CPISA] ("The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process…."); *Compare also* CPIUN, *supra*, § 29 *with* CPISA, *supra*, § 31 ("Each specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other

disputes of private character to which the specialized agency is a party."). Further, the important principles underpinning the European jurisprudence in this area, and particularly the fundamental importance of the access to justice, are still applicable even where the cases deal with different sources of immunity.

3.1. The European Court of Human Rights has Definitively Established the Importance of the Availability of a Reasonable Alternative Means of Redress for a Finding of Immunity

A seminal case resolving a conflict between immunity and the right of access to a court is the European Court of Human Rights' ("ECtHR") decision in *Waite and Kennedy v. Germany*, in which that court issued a clearly articulated ruling on how the balance should be drawn. 1999-I Eur. Ct. H.R. 393. The Court recognized the importance of IOs in fostering international cooperation, and acknowledged that the right of access to court contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], is not absolute. *Waite and Kennedy*, 1999-I Eur. Ct. H.R., ¶¶ 59, 63. However, the Court also emphasized that States continue to be responsible for guaranteeing the rights laid down in the ECHR to all people within their jurisdiction. *Id*., ¶ 67. Therefore, it concluded that a material factor in assessing the lawfulness of a state's grant of immunity is whether the organization in question has a system in place that provides a "reasonable alternative means" for individuals to obtain effective protection of their rights under the ECHR. *Id*., ¶ 68; *see also* Riccardo

Pavoni, *Human Rights and the Immunities of Foreign States*, in *Hierarchy in International Law: The Place of Human Rights,* 104-05 (Erika de Wet & Jure Vidmar eds., 2012) (emphasizing the crucial importance of the availability of a "reasonable alternative means" in European jurisprudence before and after *Waite and Kennedy*).

The ECtHR has emphasized the importance of the availability of a "reasonable alternative means" in its last two opportunities to confront questions of IO immunity, *Klausecker v. Germany*, App. No. 415/07, Eur. Ct. H.R. (2015) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-151029, and *Perez v. Germany*, App. No. 15521/08, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-151049. In *Klausecker*, the plaintiff sought to challenge the German courts' refusal to hear his employment dispute with the European Patent Office. *Klausecker*, ¶¶ 6-16. In upholding the German court's decision, the Court relied on the availability of an internal arbitration process, emphasizing:

> Having regard to the importance in a democratic society of the right to a fair trial, of which the right of access to court is an essential aspect, the Court therefore considers it ***decisive*** whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention.

Id., ¶ 69 (emphasis added). In *Perez*, the court elaborated on this principle in ruling that national courts could decline to enforce immunity if the alternative means for redress were inadequate. The plaintiff brought suit directly before the ECtHR, arguing that she had implicitly exhausted the requirement of exhausting

domestic remedies because the German courts would grant immunity to the UN Development Program ("UNDP"), and dismiss her case. *Perez*, ¶¶ 47-50. The Court disagreed, holding that the German courts would have jurisdiction to review the plaintiff's claims. This holding was based in important part on its finding that the internal dispute resolution mechanism that UNDP had made available to the plaintiff was structurally deficient and would likely fail to meet the human rights protections required by the German constitution and the ECHR. As such, the German court could have declined to enforce the UNDP's immunity. *Id*., ¶¶ 82-90. Thus both of these cases confirmed the centrality of the availability of a "reasonable alternative means" to a grant of IO immunity for the ECtHR.

3.2. National Courts in Europe Require a Reasonable Alternative Means in Order to Grant Immunity to IOs

The *Waite and Kennedy* balancing test is representative of the approach taken by European courts. Several domestic courts in European nations where UN agencies and other IOs are headquartered engaged in a "reasonable alternative means" test before the ECtHR's decision in the *Waite and Kennedy* case, and subsequent to that decision, European courts have widely adopted this test. *See* August Reinisch, *The Personality, Privileges, and Immunities of International Organizations before National Courts—Room for Dialogue***,** in *The Privileges and Immunities of International Organizations in Domestic Courts*, 332 (August Reinisch ed., 2013). These courts review the balance

between the right to an effective remedy and the immunity of IOs both in the light of Article 6 of the ECHR, and domestic constitutional law. Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 Int'l Org. L. Rev. 121, 136 (2010). The jurisprudence of Italy, France, Belgium, and the Netherlands is particularly relevant to this case, and is discussed in detail below.

In Italy, courts have linked immunities to the right of access to justice since 1955, when the Italian Supreme Court denied the immunity of the UN International Refugee Organization, a specialized agency governed by the CPISA, due to a lack of procedural rules regarding its arbitral process. *Maida v. Admin. for Int'l Assistance*, Cass., sez. un., 27 maggio 1955, 39 Rivista di diritto internazionale 546 (1956) (It.), *English summary in* 23 I.L.R. 510 (1955); *see* CPISA, *supra*, Annex X (applying clauses without modification to the IRO); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166. The Italian courts consider the legality of immunity to be conditional on individual claimants' access to alternative remedies.[4] These alternative means may consist of internal procedures, as long as these are independent and impartial. *Pistelli v. Eur. Univ.*

[4] This linkage is true both for questions of IO immunity and for those of state immunity, as illustrated by a recent case, *Simoncioni and Others v. Germany and President of the Council of Ministers*, *supra*, in which the Italian Constitutional court declined to grant Germany immunity from allegations of humanitarian law violations during World War II given the lack of alternative fora for victims to seek redress.

Inst., Cass., sez. un., 28 ottobre 2005, No. 20995, ILDC 297 ¶¶ 14.1-14.3 (It.); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166. Italian courts regard upholding an IO's immunity as unlawful in cases where the procedures for an alternative remedy are inadequate. *See Drago v. Int'l Plant Genetic Res. Inst.*, Cass., sez. un., 19 febbraio 2007, No. 3718, ILDC 827 ¶ 6.6 (It.); Riccardo Pavoni, *Italy*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166.

French, Belgian, and Dutch courts are also among those that apply a form of the "reasonable alternative means" test. French courts have regularly refused to allow immunity where reasonable alternative means are not available. The French Court of Appeal withheld immunity from UNESCO, a UN agency, deciding that immunity from jurisdiction should not be a means to escape from the principle of *pacta sunt servanda*, which in that case required the UN agency to appoint an arbitrator as per the arbitration clause in the contract it had entered with the claimant. *UNESCO v. Boulois*, Cour d'Appel [CA] [regional court of appeal] Paris, 14e Ch. A, June 19, 1998, Revue de l'Arbitrage 1999, II, 343 (Fr.), *translated in* 1999 Y.B. Com. Arb. XXIV 294. The Court of Appeal required this arbitration even though UNESCO's presence in France is governed by the France-UNESCO agreement and CPISA, which confer absolute immunity in language virtually identical to that of CPIUN. *Compare* CPIUN, *supra*, § 2 *with* France-UNESCO Headquarters Agreement, Fr.-U.N., art. 12,

July 2, 1954 ("The Organization, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process …") *and* CPISA, *supra*, § 4. In another case, the French Court of Cassation decided to give no effect to the near-absolute immunity conferred by the Agreement Establishing the African Development Bank because there was no internal tribunal that could decide a dispute between the Bank and a former employee. *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] [supreme court for judicial matters], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (Fr.); *see also* Agreement Establishing the African Development Bank, ¶ 52, Aug. 4, 1963, 510 U.N.T.S. 3; Genevieve Bastid Burdeau, *France*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 118. Moreover, in the case of the Arab League, the Court of Cassation ruled that IOs cannot invoke immunity with regard to acts that are by their nature and purpose excluded from the 'sovereignty' of the organization and that granting immunity in that case would result in a violation of Article 6 of the ECHR. *Ligue des Etats Arabes*, Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., Oct. 14, 2009, Bull Civ. I, No. 206 ¶ 3 (Fr.).

Belgium's highest court, the Court of Cassation, rejected the immunity of the Western European Union because the IO's internal dispute settlement procedure did not meet the required guarantees, and could not be regarded as a fair and equitable legal process. *W. European Union v. Siedler*, Cour de

Cassation [Cass.] [supreme court for judicial matters], Dec. 21, 2009, AJIL Vol. 105, No. 3, pp 561 (July 2011), No. S.04.0129.F (Belg.) In the Netherlands, the District Court of The Hague held that it was not enough for the dispute settlement procedure of the Permanent Court of Arbitration to exist on paper. Rosanne Van Alebeek & Andre Nollkaemper, *The Netherlands,* in in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 166 (citing *Pichon-Duverger* v. *PCA*, District Court of The Hague (sub-district section), judgment in the incidental proceedings, June 27, 2002, cause list no. 262987/02-3417 (not published)). While the procedure was included in the Headquarters Agreement, it was never functionally established. The court rejected the IO's immunity, based in part on the argument that immunity would violate the right to access to court. *Id*.

4. THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS IS INHERENTLY LIMITED TO INSTANCES OF FUNCTIONAL NECESSITY AND SHOULD NOT APPLY TO ACTS THAT ARE OF A PRIVATE NATURE OR NOT NECESSARY TO THE IO'S CORE FUNCTIONS

European courts have found that IO immunity is justified in certain circumstances, but not all IO acts are of a similar type nor require the same shield from national court jurisdiction.

4.1. IO Immunity Follows from Functional Necessity, and Should Not Be Upheld Where No Necessity Exists

Many courts have held that IO immunity follows from the idea of functional necessity. Jan Klabbers, *An Introduction to International Institutional*

Law 132 (2d ed. 2009). IOs possess immunity to the extent that it enables them to effectively carry out the tasks entrusted to them by Member States without undue interference. Henry Schermers & Niels Blokker, *International Institutional Law: Unity Within Diversity* 252-253 (4th ed. 2003). Thus, the immunities granted to IOs constitute "a more limited breed of international immunities" compared to those of states. Charles H. Brower, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1, 18 (2000). Functional necessity is a ground for immunity, but at the same time also a limitation thereof, since an IO's immunity is intended to cover only conduct that is necessary for it to carry out its functions. Schermers & Blokker, *supra* at 253.

Certain acts and omissions are more closely related to the core of an IO's functions than others, and this should affect the balancing test that determines whether IOs are entitled to immunity. The French court in the *African Development Bank* case discussed above found this requirement that immunity be necessary to an IO's function even where there was a written agreement that facially conferred near absolute immunity. In denying the Bank's immunity, the Court held that: "the fact that ADB is forced to defend itself before a French Court on the merits of the dispute over the dismissal of Mr. Degboe is not such as to impair ADB's efficient functioning." *Banque africaine de developpement, Bull. civ. V, No. 04-41.012 (Fr.).*

4.2. IO Immunity Should Not Be Upheld in Instances Where IOs Commit Acts of a Private Nature or Acts That Do Not Fall Within Their Core Functions

Generally, IOs are established by States to carry out certain functions, Klabbers, *supra*, at 7, and exercise elements of public authority delegated to them. Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 Ger. L. J. 1375, 1381 (2008); Klabbers, *supra*, at 185. This does not mean, however, that all IO conduct can be qualified as an exercise of public authority. Certain conduct IOs engage in is simply incidental to their main purpose, and can be characterized as being of a private nature.

Under the doctrine of State immunity, *acte jure imperii* (acts of a sovereign nature) are distinguished from *acte jure gestionis* (acts of a private nature). Hazel Fox and Philippa Webb, *The Law of State Immunity* 23 (3d ed. 2013). Today, States only enjoy immunity before the courts of other States in relation to acts that can be qualified as *iure imperii*: acts that involve the exercise of an element of State sovereignty. *Id*. In contrast, when a State operates in a manner similar to a private party, such as entering into a simple contract or committing a tort of a private nature, it cannot rely on its immunity before the courts of another State. *See*, *e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). (“Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts *(jure imperii),* but not as to those that are

private or commercial in character *(jure gestionis)*"); *see also Typaldos Console di Grecia v Manicomio di Aversa*, cass., sez. un., 16 marzo 1886, Giur. It. I, 228 (It.).

With regard to IO conduct, a number of European courts have drawn a similar distinction between: 1) conduct that is closely related to the core of an IO's functions or entails an exercise of public authority; and, 2) conversely, conduct that touches upon the functions of the IO in a more peripheral manner or cannot be distinguished from conduct of a private entity. *See Ligue des Etats Arabes* at ¶ 3; Rosanne Van Alebeek & Andre Nollkaemper, *The Netherlands*, in *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra*, at 196, (citing *Pichon-Duverger* v. *PCA*, District Court of The Hague (sub-district section), judgment in the incidental proceedings, June 27, 2002, cause list no. 262987/02-3417 (not published)). *Food & Agric. Org. v. INPDAI*, Cass., sez. un., 18 ottobre 1982, No. 5399, 87 ILR 1 (It.) ("whenever [IOs] acted in the private law domain, they placed themselves on the same footing as private persons …, and thus forwent the right to act as sovereign bodies that were not subject to the sovereignty of others."). Where an IO's conduct entails no element of public authority, and does not touch upon the core of the exercise of its functions, there is no reason to shield it from judicial scrutiny. In the present case, the personal injury results from tortious conduct in waste disposal that is ancillary to the UN's mandate of supporting political stability in Haiti. Thus it is clear that the conduct complained of does not entail

an exercise of public authority and there is no reason that the UN should be shielded from the jurisdiction of the courts in the absence of a reasonable alternative means of vindicating plaintiffs' rights.

5. ALTHOUGH THE UN HAS ENJOYED IMMUNITY FOR CONDUCT RELATED TO CORE FUNCTIONS UNDER CHAPTER VII OF THE UN CHARTER, SUCH RULINGS ARE NOT RELEVANT TO THIS CASE

Where cases challenge the discharge of the UN's core functions of protecting international peace and security, European courts have found more compelling reasons to uphold immunity, but such facts do not exist in the case at bar. Decisions by the UN Security Council ("UNSC") in fulfillment of its core functions were at issue in the *Mothers of Srebrenica* case, considered by the Dutch courts and the ECtHR. The particular circumstances in the *Mothers of Srebrenica* case were different from those in the cases discussed in Section 3 above. The case concerned the conduct of a Dutch military force operating within the peacekeeping mission established in the former Yugoslavia by the UNSC. Surviving relatives sought to hold the UN accountable through Dutch courts for the abandonment of the peacekeeping force's duty to protect a group of Bosnian Muslims. The Dutch Supreme Court found that under these circumstances the UN enjoyed absolute immunity. *Stichting Mothers of Srebrenica v. Netherlands*, LJN: BW1999, ILDC 1760 ¶ 4.3.6 (Neth). The ECtHR subsequently held that the Dutch ruling did not violate Article 6 of the ECHR. *Stichting Mothers of Srebrenica and Others v. Netherlands*, App. No. 65542/12, Eur. Ct. H.R. (2013).

The ECtHR was careful to distinguish the *Mothers of Srebrenica* case from earlier cases in which it decided upon the immunity of a variety of IOs. *Id*., ¶¶ 149-151. It held that at the root of the case was "a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under Chapter VII of the [UN Charter to act to preserve international peace and security]." *Id*., ¶ 152. The court found that the UNSC's use of its powers for the maintenance of international peace and security could not be subjected to the jurisdiction of domestic courts, since doing so would "interfere with the fulfillment of the key mission of the United Nations in this field." *Id*., ¶154. Accordingly, the Court considered the absence of an alternative remedy not to carry sufficient weight to outweigh the interest of the UN to retain immunity for the UN peacekeeping force's failure to prevent the Srebrenica massacre. *Id*., ¶¶ 163-165, 169. This ruling may be justified by the understanding that any review of such conduct would immediately implicate the operational decisions taken by the UNSC and would entail judicial scrutiny of the UNSC's use of its special powers under Chapter VII.

However, the *Mothers of Srebrenica* case can be strictly distinguished from the issue presently under consideration. While both cases concern a situation in which the UN deployed a peacekeeping mission, the circumstances in the *Mothers of Srebrenica* case, and the type of acts complained of, differ entirely from the case of the cholera outbreak in Haiti. While the conduct complained of in regard to the inaction of the UN peacekeeping force in

Srebrenica touches upon the core of the UNSC's mandate carried out during active armed conflict, the present case instead concerns conduct that lies outside of the UN's mandate under Chapter VII, which has nothing to do with proper waste management. A review of the merits of this case would therefore in no way interfere with the exercise by the UNSC of the special powers it was granted under the UN Charter.

As when applying any balancing test, it is important to consider the particular circumstances of a case when striking a balance between an IO's immunity and the individual right to a remedy. *See generally*, Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. Rev. 585 (1988). Assessing the UN's immunity calls for a tailored approach, instead of the application of a one size fits all absolute immunity. In the present instance there is no reason why requiring the UN to have a reasonable alternative means available to the individuals concerned, as a condition for obtaining immunity before domestic courts, would lead to an inappropriate result in drawing the balance between the interests concerned.

6. EVEN IN CASES INVOLVING UNSC DECISIONS UNDER CHAPTER VII OF THE UN CHARTER, EUROPEAN CASE LAW INCREASINGLY EMPHASIZES ACCESS TO JUSTICE, AND THIS PRINCIPLE MUST BE UPHELD IN THIS CASE

Notwithstanding the ruling in *Mothers of Srebenica*, European courts that have been confronted with similar conflicts between the UN's core functions, and protection of individual rights have increasingly emphasized the importance

of safeguarding due process rights. While these cases do not directly concern the UN's immunity, the applicable norms and underlying interests are remarkably similar. Both situations concern obligations grounded in the UN Charter and require decisions that recognize the important functions carried out by the UNSC while at the same time observing an obligation to provide access to justice and safeguard individuals' human rights. *See* Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-03649, ¶¶ 287-88 (understanding the review of the implementation of targeted sanctions in the context of the concept of immunity); *Kadi I*, 2008 E.C.R. I-06351, ¶¶ 321-22 (same). The fundamental principle that can be inferred from these cases is that, where the UN's resolutions are implemented and the UN has not provided a remedy for violations of rights resulting from that implementation, national courts must provide a remedy, because the right of access to a remedy is too important to be abrogated.

This is illustrated by a number of cases involving targeted sanctions: measures taken by the UNSC under Chapter VII directly targeted at specifically designated individuals. Upon designation by a UNSC Sanctions Committee, all UN Member States are obliged to take measures against these individuals, such as freezing of their assets. *See*, *e.g.*, S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1390, ¶ 2(a), U.N. Doc. S/RES/1390 (Jan. 16, 2002). The relevant UNSC resolutions leave no room for States to guarantee targeted individuals any of their due process rights. As a result, a

number of cases have been brought challenging states' implementation of targeted sanctions as violations of human rights.

The seminal decision in this line of cases is that of the European Court of Justice in *Kadi I.* 2008 E.C.R. I-06351. That court found the European Union's ("EU") implementation of the targeted sanction regime to be in conflict with EU constitutional principles because individuals adversely affected by these measures would have no avenue for independent review. *Id.*, ¶¶ 285, 326. It held that since no effective remedy was available for the targeted individuals at the UN level, the court must itself provide for such protection. *Id*., ¶¶ 321-26. This reasoning is analogous to that underlying the 'reasonable alternative means doctrine' discussed above.

The same requirement that due process rights be safeguarded can be witnessed in the ECtHR's decisions in the cases of *Nada* and *Al-Dulimi*, both of which also concerned the implementation of targeted sanctions. In *Nada*, the Court ruled that the State involved in implementing these measures should provide the individuals concerned with an effective remedy. *Nada v. Switzerland*, 2012 Eur. Ct. H.R. 1691, ¶ 209. It found this especially to be the case since these individuals would find no adequate remedy at the UN level. *Id*., ¶ 213. Similarly, the Court held in *Al-Dulimi* that "as long as there is no effective and independent judicial review, at the level of the [UN], … it is essential that such individuals and entities should be authorized to request the review by the national courts of any measure adopted pursuant to the sanctions

regime." *Al-Dulimi & Mont. Mgmt. Inc. v. Switzerland*, 2013 Eur. Ct. H.R. 1173, ¶¶ 114-20. Since there was no judicial review at the UN level, the Court engaged in a full review. *Id*., ¶¶ 121-22.

In addition, the ECtHR has held in several instances, including the *Nada* case, that obligations created by the UNSC need to be interpreted in accordance with obligations under human rights law. *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305, ¶ 102; *Nada*, 2012 Eur. Ct. H.R. 1691, ¶¶ 170-71. It read from the UN Charter that the UNSC "shall discharge its duties in accordance with the Purposes and Principles of the United Nations." UN Charter Art. 24, para. 2. The purposes of the UN include encouraging respect for human rights and fundamental freedoms. Accordingly, the Court concluded that it must be presumed that the UNSC does not intend states to take measures that would result in a breach of their obligations under the ECHR. *Al-Jedda*, 2011-IV Eur. Ct. H.R. 305, ¶ 102; *Nada*, 2012 Eur. Ct. H.R. 1691, ¶ 171; *See also Stichting Mothers of Srebrenica v. Netherlands*, [2010] LJN: BL8979, ILDC 1760 ¶ 5.5 (Court of Appeal) (Neth.). Since encouraging respect for human rights is one of the purposes of the UN, obligations following from the UN's immunity should be interpreted from the perspective that it is not the intention of the UN to deny individuals' right to access to justice, or to shield itself from responsibility in instances not concerning the exercise of the core of the UNSC's special powers under Chapter VII. Allowing immunity in such cases, including for the UN's tortious conduct in the case at bar, would be tantamount to ignoring the UN's

own purposes and principles as laid down in its constituent document, the UN Charter.

In this line of decisions, which has been followed by other courts in Europe, *see, e.g.*, *Ahmed & Others v. HM Treasury* [2010] 4 All ER 745 (U.K. Sup. Ct.); *Ahmed & Others v. HM Treasury (No. 2)*, Note, [2010] 4 All ER 829 (U.K. Sup. Ct.); *Netherlands v. A & Others*, [2012] LJN:BX8351, ILDC 1959 ¶ 3.6.2 (Neth.), these courts clearly indicate what they consider an appropriate balance between observing an obligation under Chapter VII of the UN Charter and upholding individuals' due process rights. In the targeted sanctions cases, European courts have clearly held that the important interests of facilitating international cooperation and maintaining international peace and security do not outweigh the equally important interest of guaranteeing individuals' access to justice. This is also particularly true in instances such as the one at hand, which do not at all touch upon the core of the UNSC's exercise of its Chapter VII powers.

CONCLUSION

Granting immunity in this case is not in accordance with the UN's own purposes and principles of encouraging and promoting respect for human rights. Moreover, European courts have consistently held that where the immunity of international organizations is in question, courts should draw a careful balance between the interests at stake, giving great weight to the availability of a reasonable alternative means of seeking a remedy, and also considering whether

a grant of immunity is necessary for the conduct of an IO's core functions. Here, the UN has not provided the victims any reasonable alternative means for protecting their rights, and was not acting within the core of its mandate under Chapter VII of the UN Charter. For those reasons, the District Court's decision to grant immunity is inconsistent with the careful balancing approach applied in European jurisprudence on this issue.

Dated: June 3, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 5,806 words.

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/s/: Monica Iyer

June 3, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2015, a true and correct copy of the foregoing document was served via mail, on the following:

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ADDENDUM

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SUPREME COURT

LORD PHILLIPS P, LORD HOPE DP, LORD RODGER, LORD WALKER, LADY HALE, LORD BROWN AND LORD MANCE SCJJ

5–8 OCTOBER 2009, 27 JANUARY 2010

Terrorism – Sanctions – Freezing of funds and economic resources – United Nations Resolutions requiring freezing of funds and economic resources of terrorists – Resolutions given effect by Orders in Council – Whether Orders lawful – United Nations Act 1946, s 1 – Terrorism (United Nations Measures) Order 2006, SI 2006/2657 – Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952.

The Terrorism (United Nations Measures) Order 2006 (the TO) and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (the AQO) were Orders in Council made under powers conferred by s 1[a] of the United Nations Act 1946. Section 1 of the 1946 Act provided that 'If … the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied'. The TO and the AQO originated in certain United Nations Security Council Resolutions, including one which required all states to 'freeze without delay funds and other financial assets or economic resources of persons who commit terrorist acts or participate in or facilitate the commission of terrorist acts' (the security council resolution). Article 4(1)[b] of the TO conferred a conditional power on HM Treasury to give a direction that a person was designated for the purpose of the TO; under art 4(2) '[t]he conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be—(a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism …'. Both Orders prohibited any person from dealing with funds or economic resources belonging to or held by a designated person or from making funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a designated person. Art 3[c] of the AQO

a Section 1, so far as material, is set out at [12], below

b Article 4, so far as material, is set out at [25], below

c Article 3, so far as material, is set out at [30], below

defined 'designated persons' for its purposes as '(1)(a) Usama bin Laden, (b) any person designated by the Sanctions Committee, and (c) any person identified in a direction'. Four persons, A, K, M and G, were informed that directions had been made against them by the Treasury under the TO and that the effect of the directions was to prohibit them from dealing with their funds and economic resources and to prevent anyone notified of the freeze from making funds, economic resources or financial services available to them or for their benefit. G was also informed that the United Nations Security Council Sanctions committee had added his name to its consolidated list which meant that he was also a designated person under the AQO. A fifth person, HAY, was also informed that his name had been added to the consolidated list and that as a result he was a designated person under the AQO. Both orders provided that the High Court could set aside a direction on the application of the person identified in the direction. A, K, M and G applied to set aside the directions and G also sought judicial review of the AQO. The judge quashed both orders on the ground that they were ultra vires s 1 of the 1946 Act. Allowing the Treasury's appeal in part, the Court of Appeal held that the excision of the words 'or may be' from art 4(2) of the TO ('reasonable grounds for suspecting that the person is or may be …') meant that the test of reasonable suspicion was within the ambit of the general power under s 1 of the 1946 Act and that the relevant provisions of the AQO were also lawful although a person who had been designated under art 3(1) was entitled to seek judicial review of the merits of the decision. HAY then applied for judicial review of his listing. The judge granted his application and declared that the AQO was unlawful in so far as it applied to HAY. A, K, M and G appealed, as did the Treasury in HAY's case. Before the Supreme Court A, K, M, G and HAY relied on, inter alia, the principle of legality, the principle that a power conferred by Parliament in general terms was not to be taken to authorise the doing of acts by the donee of the power which adversely affected the legal rights of the citizen or the basic principles on which the law of the United Kingdom was based unless the statute conferring the power made it clear that such was the intention of Parliament; they argued that the TO went further than the security council resolution required and that the freezing orders were disproportionate and oppressive. In relation to the AQO they argued that access to a court to challenge interference with rights was a fundamental right protected by the principle of legality.

Held – (1) The TO was ultra vires s 1(1) of the 1946 Act. By introducing the reasonable suspicion test as a means of giving effect to the security council resolution the Treasury had exceeded their powers under s 1(1), going beyond what was necessary or expedient to comply with the relevant requirements of the security council resolution. It affected adversely the basic rights of the citizen without the clear authority of Parliament. The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the 1946 Act were being debated made it impossible to say that it had squarely confronted those effects and had been willing to accept the political cost when that measure had been enacted. The security council resolution was not phrased in terms of reasonable suspicion; it referred to persons who committed or attempted to commit terrorist acts. The standard of proof was not addressed and the question of how persons falling within the ambit of the decision were to be identified was

left to the United Nations member states. It had not been necessary to introduce the reasonable suspicion test in order to reproduce what the security council resolution required. Exceptional measures which had been taken in the United Kingdom to combat terrorism, such as control orders imposed on the basis of reasonable suspicion, were measures treading the boundary of what was compatible with respect for fundamental rights and the rule of law. They should not be treated as the norm. If measures such as those in the TO affecting directly very basic domestic law rights of citizens and others lawfully present in the United Kingdom were to be taken it was for Parliament to deliberate and determine that the benefits of giving the Treasury such powers outweighed the potential disadvantages and that it was accordingly expedient to adopt those measures in order to enable the United Kingdom to fulfil its obligations under the security council resolution (see [42]–[47], [51], [53], [57], [58], [60], [61], [131], [133], [137], [138], [143], [172], [174], [176], [177], [192], [197], [201], [225], [230], [231], below).

(2) (Lord Brown dissenting) Article 3(1)(b) of the AQO, which had the effect of denying a designated person a means of subjecting listing to judicial review, was ultra vires s 1(1) of the 1946 Act. The regime to which G and HAY had been subjected had deprived them of access to an effective remedy. There was nothing in the listing or de-listing procedures that recognised the principles of natural justice or provided for basic procedural fairness. By enacting the general words of s 1(1) Parliament could not have intended to authorise the making of the AQO which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts (see [76], [77], [80]–[82], [149], [154], [155], [181]–[185], [187], [240], [241], [248], [249], below).

(3) Accordingly, the appeals of A, K, M, G would be allowed, the TO would be quashed, art 3(1)(b) of the AQO would be quashed, the appeal of the Treasury in HAY's case would be allowed only to the extent of setting aside the declaration that the AQO as a whole was ultra vires (see [61], [83], [143], [156], [177], [187], [188], [231], [249], [251], below).

Decision of the Court of Appeal [2009] 2 All ER 747 reversed.

Notes

For application of Security Council measures by the United Kingdom, see 61 *Halsbury's Laws* (5th edn) (2010) para 526.

For the United Nations Act 1946, s 1, see 10(1) *Halsbury's Statutes* (4th edn) (2010 reissue) 598.

For the Terrorism (United Nations Measures) Order 2006, SI 2006/2657, see 20 *Halsbury's Statutory Instruments* (2008 issue) 627 (see note 'Further orders' to SI 2001/3363).

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Appeals

Ahmed and others v HM Treasury; al-Ghabra v HM Treasury

Mohammed Jabar Ahmed, Mohammed Azmir Khan, Michael Marteen (formerly known as Mohammed Tunveer Ahmed) and Mohammed al-Ghabra (A, K, M and G), the subjects of freezing orders over their assets in accordance

with the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 and the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952, appealed with permission of the House of Lords Appeal Committee given on 3 March 2009 from the decision of the Court of Appeal (Sir Anthony Clarke MR and Wilson LJ, Sedley LJ dissenting in part) on 20 October 2008 ([2008] EWCA Civ 1187, [2009] 2 All ER 747) allowing in part the appeal of HM Treasury from the decision of Collins J on 24 April 2008 ([2008] EWHC 869 (Admin), [2008] 3 All ER 361) quashing both Orders. JUSTICE appeared as an intervener. The facts are set out in the judgment of Lord Hope.

R (on the application of Youssef) v HM Treasury

HM Treasury appealed with permission of the House of Lords Appeal Committee given on 28 July 2009 from the decision of Owen J on 14 July 2009 ([2009] EWHC 1677 (Admin)) in proceedings for judicial review brought by Hani El Sayed Sabaei Youssef (or Hani al-Seba'i) (HAY) by which he declared that the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 was unlawful in so far as it applied to HAY. JUSTICE appeared as an intervener. The facts are set out in the judgement of Lord Hope.

Tim Owen QC and *Dan Squires* (instructed by *Birnberg Pierce and Partners*) for A, K and M.

Rabinder Singh QC, *Richard Hermer QC* and *Alex Bailin* (instructed by *Tuckers*) for G.

Raza Husain and *Dan Squires* (instructed by *Birnberg Pierce and Partners*) for HAY.

Jonathan Swift, Sir Michael Wood and *Andrew O'Connor* (instructed by the *Treasury Solicitor*) for the Treasury.

Michael Fordham QC, *Shaheed Fatima* and *Iain Steele* (instructed by *Clifford Chance LLP*) for JUSTICE.

Judgment was reserved.

27 January 2010. The following judgments were delivered.

LORD HOPE DP (with whom Lord Walker and Lady Hale agree).

[1] On 13 December 2006 the appellant Mohammed al-Ghabra, referred to in these proceedings as 'G', was informed that a direction had been made against him by HM Treasury (the Treasury) under art 4 of the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (the TO) and that he was a designated person for the purposes of that order. He was told that the direction had been made because the Treasury had reasonable grounds for suspecting that he was, or might be, a person who facilitated the commission of acts of terrorism. He was also told that, in light of the sensitive nature of the information on which the decision had been taken, it was not possible to give him further details and that the effect of the direction was to prohibit him from dealing with his funds and economic resources and to prevent anyone notified of the freeze from making funds, economic resources or financial services available to him or for his benefit. On 2 August 2007 the appellants Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen (formerly known as Mohammed Tunveer Ahmed), referred to in these

proceedings as 'A', 'K' and 'M', received letters in almost identical terms telling them that a direction had been made against them under art 4 of the TO by the Treasury.

[**2**] A few days after G had been told that he had been designated under the TO he received a letter from the Foreign and Commonwealth Office saying the Sanctions Committee of the Security Council of the United Nations (otherwise known as 'the 1267 Committee': see [18], below) had added his name to its consolidated list, that this meant that he was subject to a freezing of his funds, assets and economic resources and that these measures were binding on all United Nations member states with immediate effect and had been implemented in United Kingdom law. No mention was made at that stage of the domestic measure under which the restrictions were being imposed on him. But in March 2007 he was told that his listing meant that he was deemed to be a designated person under the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 (the AQO).

[**3**] In September 2005 Hani El Sayed Sabaei Youssef (or Hani al-Seba'i), referred to in these proceedings as 'HAY', was told that his name had been added to the consolidated list by the 1267 Committee. As a result he too was deemed to be a designated person under the AQO. His interest in these proceedings is virtually identical to those of G and A, K and M. So, although his case comes before this court on an appeal by the Treasury to which he is the respondent (see [35]–[37], below), I shall refer to him and to G and A, K and M as 'the appellants' when I need to refer to all these designated persons collectively.

[**4**] The TO and the AQO were made by the Treasury in purported exercise of the power to make Orders in Council which was conferred on them by s 1 of the United Nations Act 1946. In each case the orders were made to give effect to resolutions of the United Nations Security Council which were designed to suppress and prevent the financing and preparation of acts of terrorism. The orders provide for the freezing, without limit of time, of the funds, economic resources and financial services available to, among others, persons who have been designated. Their freedom of movement is not, in terms, restricted. But the effect of the orders is to deprive the designated persons of any resources whatsoever. So in practice they have this effect. Persons who have been designated, as Sedley LJ observed in the Court of Appeal, are effectively prisoners of the state: *A v HM Treasury* [2008] EWCA Civ 1187 at [125], [2009] 2 All ER 747 at [125], [2009] 3 WLR 25. Moreover the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree: see *R (on the application of M) v HM Treasury* [2008] UKHL 26, [2008] 2 All ER 1097n. In that case, which concerned the payment of social security benefits to the spouses of listed persons living in the United Kingdom, the House of Lords referred a question to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Council Regulation (EC) 881/2002 (OJ 2002 L139 p 9) to which the Al-Qa'ida and Taliban (United Nations Measures) Order 2002, SI 2002/111 gave effect.

[**5**] The procedure that s 1 lays down enables orders under it to be made by the executive without any kind of Parliamentary scrutiny. This is in sharp contrast to the scheme for the freezing of assets that has been enacted by Parliament in Pt 2 of the Anti-terrorism, Crime and Security Act 2001. Orders made under that Act must be kept under review by the Treasury, are time

limited and must be approved by both Houses of Parliament: ss 7, 8 and 10. The systems that have been provided for in the TO and the AQO are far more draconian. Yet they lie wholly outside the scope of Parliamentary scrutiny. This raises fundamental questions about the relationship between Parliament and the executive and about judicial control over the power of the executive.

[**6**] The case brings us face to face with the kind of issue that led to Lord Atkin's famously powerful protest in *Liversidge v Anderson* [1941] 3 All ER 338 at 361, [1942] AC 206 at 244 against a construction of a defence regulation which had the effect of giving an absolute and uncontrolled power of imprisonment to the minister. In *The Case of Liversidge v Anderson : The Rule of Law Amid the Clash of Arms* (2009) 43 The International Lawyer 33, p 38 Lord Bingham of Cornhill, having traced the history of that judgment, said that—

> 'we are entitled to be proud that even in that extreme national emergency there was one voice – eloquent and courageous – which asserted older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom.'

The consequences of the orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the United Nations Act 1946 has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.

THE LEGISLATIVE BACKGROUND: THE HISTORY

[**7**] To set the scene for the discussion that follows, it is necessary to trace the history of the various measures that have led to the appellants being dealt with in this way.

[**8**] An examination of the legislative background must begin with the Charter of the United Nations. It was signed in San Francisco on 26 June 1945 as the Second World War was coming to an end. It came into force on 24 October 1945. The preamble records the determination of the United Nations to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. Member states bound themselves to maintain international peace and security, to take collective measures for the prevention and removal of threats to the peace and to promote and encourage respect for human rights and for fundamental freedoms: art 1.

[**9**] No principled objections were raised against a strong Security Council. In order to achieve the goal of maintaining peace states were willing to submit to a central organ in a manner that hitherto had been unprecedented: *The Charter of the United Nations, A Commentary*, ed Bruno Simma (2nd edn, 2002) p 703. Article 2 of the Charter states:

> 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles …

> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter …'

Article 24 confers the primary responsibility on the Security Council for the maintenance of international peace and security. Article 25 provides: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

[**10**] Chapter VII sets out the action to be taken with respect to threats to the peace, breaches of the peace and acts of aggression. Article 39, which introduces this chapter, provides that it is for the Security Council to determine the existence of any such threat and to make recommendations or decide what measures shall be taken in accordance with arts 41 and 42 to maintain or restore international peace and security. Article 41 states:

> 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

Article 42 provides for the measures that may be taken if the Security Council considers that measures provided for in art 41 would be or have proved to be inadequate. An example of its use can be found in Security Council Resolution 1546 (2004) which was adopted by the Security Council on 8 June 2004 which gave authority for a multi-national force to take all necessary measures to contribute to the maintenance of peace and security in Iraq: see *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 1 AC 332. This case is concerned with measures that have been taken under art 41.

[**11**] Among a number of miscellaneous provisions in Ch XVI is art 103, with which the complementary provision in art 25 must be read. It provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Treaty provisions that are incompatible with ius cogens are void. As for the rest, art 103 does not say that treaty provisions between states which are incompatible with the Charter are void. What it says is that the Charter has higher rank, and that obligations derived from the Charter must prevail. As *Simma* p 1295 observes, the Charter aspires to be the 'constitution' of the international community accepted by the great majority of states. Obligations under decisions and enforcement measures under Ch VII prevail over other commitments of the members concerned in international law. As art 103 is concerned only with treaty obligations between member states it says nothing about the relationship between the Charter and the rights and freedoms of individuals in domestic law. In that regard, art 55(c) states that the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms. But the obligation in art 25 is unqualified, and the regime in Ch VII leaves it to the Security Council to judge whether the measures that it decides upon are consistent with the objects of the Charter.

[**12**] The United Kingdom gave effect to the Charter in domestic law by means of the United Nations Act 1946. Section 1 of that Act provides:

> '(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order …'

Subsection (4) of that section as originally enacted provided that any such order was not to be deemed to be or contain a statutory rule to which s 1(4) of the Rules Publication Act 1893 applied. That section which was repealed by s 12 of the Statutory Instruments Act 1946, required publication of an order in the London Gazette at least 40 days before it was made.

[13] As I said in *R (on the application of Stellato) v Secretary of State for the Home Dept* [2007] UKHL 5 at [10], [2007] 2 All ER 737 at [10], [2007] 2 AC 70, the opportunity for scrutiny of delegated legislation by Parliament is determined by the provisions of the enabling Act. Four procedures are available: affirmative resolution procedure; negative resolution procedure; simply laying; and no parliamentary stage at all. In the case of Orders in Council made under s 1 of the United Nations Act 1946 the procedure is simply laying before Parliament. All statutory instruments that are laid before Parliament are considered by the Joint Committee on Statutory Instruments. But its role is confined to assessing the technical qualities of the instrument. This is to be contrasted with the procedure which applies to an instrument upon which proceedings may be taken in either House. Under that procedure every draft instrument is considered by the Merits of Statutory Instruments Committee with a view to determining whether or not the special attention of the House should be drawn to it on grounds of a more general character. These include (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House and (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act.

[14] This level of scrutiny does not apply to the procedure that was chosen for Orders in Council made under s 1 of the United Nations Act 1946. They are not instruments upon which proceedings may be taken in either House. They are laid before Parliament for its information only, not for scrutiny of their merits or for debate. The effect of s 1 of the 1946 Act is that decisions as to the provisions that orders made under it may or should contain lie entirely with the executive.

[15] When he introduced the United Nations Bill at its second reading in the House of Lords on 12 February 1946 the Lord Chancellor, Lord Jowitt, said that art 41 was the only article of the Charter that required immediate legislation in order to put His Majesty's Government in a position to fulfil their obligations as a member of the United Nations, and that when the Security Council took a decision there was an obligation on the government to give effect to it: 139 HL Official Report (5th series) cols 373–375, 12 February 1946. For the opposition, Viscount Swinton said that he believed that a Bill to enable the government to do things by Order in Council would have the complete, unanimous and enthusiastic support of everybody in the House, as if the

United Nations was to succeed it must be able to take effective action and that action must be prompt and immediate: col 377. Viscount Samuel, supporting the motion, said that the Bill made provision for the eventuality that coercive measures might become necessary by the United Nations 'against some State which is indulging, or is apparently about to indulge in acts of aggression': col 378. The Lord Chancellor did not suggest, in his brief reply, that this was an incorrect summary of the purpose of the enactment: col 379.

[**16**] Remarks made during the second reading of the Bill in the House of Commons on 5 April 1946 cast further light as to what its purpose was understood to be at that time. Introducing the Bill, the Minister of State, Mr Philip Noel-Baker, said that it would play its part in the vitally important measures for keeping the peace, as clashes between governments such as those which might have become wars might occur again: 421 HC Official Report (5th series) col 1516, 5 April 1946. Other speakers referred during the debate to the use of non-military, diplomatic and economic sanctions as a means of deterring aggression between states. There was no indication during the debates at second reading in either House that it was envisaged that the Security Council would find it necessary under art 41 to require states to impose restraints or take coercive measures against their own citizens. The question whether it would be appropriate, if it were to do so, for the government to be given power to introduce such measures by Orders in Council in the manner envisaged by the Bill was not discussed.

THE SECURITY COUNCIL RESOLUTIONS

[**17**] The world has not, of course, been immune to threats to international peace and security since 1945. Numerous Security Council Resolutions (SCRs) have been made calling upon the members of the United Nations to take measures under art 41. Prior to the terrorist attacks that were perpetrated on 11 September 2001 (9/11) in New York, Washington and Pennsylvania they were directed primarily to the interruption by means of sanctions of economic and other relations between states. As the Security Council's practice evolved they were directed to what states themselves might or might not do. For example, by SCR 1189 (1998) the Security Council declared that every state has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts. But the bombing of United States embassies in Nairobi and Dar es Salaam in 1999 showed that the spectre of international terrorism was not capable of being defeated by measures directed to the transactions of states as such.

[**18**] In response to these outrages the Security Council directed its attention to the activities of the ruling regimes. SCR 1267 (1999) provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban or by any undertaking owned or controlled by them: para 4(b). A Sanctions Committee was established to oversee implementation of these measures, known as the 1267 Committee. SCR 1333 (2000) took this process a step further. It provided by para 8(c) that all states should freeze funds and other financial assets of Usama bin Laden and individuals and entities associated with him to ensure that no funds were made available for the benefit of any person or entity associated with him, including the Al-Qaida organisation. Although previous practice did not go that far, it has not been suggested that it lay outside the powers of the Security Council under

art 41 to direct the taking of collective measures at an international level against individuals. The drafting history indicates the contrary. The wording of art 41 was the product of the agreement reached by the Four Powers at Dumbarton Oaks that it should contain an enumeration of the non-military measures that could be taken which was illustrative and non-exhaustive: *Simma* p 737.

[**19**] SCR 1333 (2000) was followed by a series of resolutions refining and updating the measures that were to be taken to deal with Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267 (1999). At the hearing of this appeal the most recent was SCR 1822 (2008). It was followed and reaffirmed by SCR 1904 (2009), which was adopted on 17 December 2009. The preamble to SCR 1822 (2008) declared that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security, reiterated the Security Council's condemnation of these persons and stressed that terrorism could only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all states. By para 1 it required all states to take all the measures previously imposed by previous resolutions with respect to Al-Qaida, Usama bin Laden and the Taliban 'and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) ("the Consolidated List")', including:

> '(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory …'

[**20**] Paragraph 8 of SCR 1822 (2008) reiterated the obligation of all member states to implement and enforce the measures set out in para 1 and urged all states to redouble their efforts in that regard. Paragraph 9 encouraged all member states to submit to the 1267 Committee for inclusion on the consolidated list names of individuals, groups, undertakings and entities participating by any means in the financing or support of acts or activities of Al-Qaida, Usama bin Laden and the Taliban and other individuals, groups, undertakings and entities associated with them. The persons on that list are the persons to whom the prohibitions in SCR 1267 (1999) and subsequent resolutions applied. Provision was made in paras 19–23 for de-listing and in paras 24–26 for review and maintenance of the consolidated list. Individuals, groups, undertakings and entities have the option of submitting a petition for de-listing directly to a body known as the Focal Point. The committee is directed to work, in accordance with its guidelines, to consider petitions for removal from the consolidated list of those who no longer meet the criteria established in the relevant resolutions.

[**21**] On 28 September 2001, as part of its response to 9/11, the Security Council broadened its approach to the problem still further. It decided that action required to be taken against everyone who committed or attempted to

commit terrorist acts or facilitated their commission. It adopted SCR 1373 (2001). The preamble to this resolution recognised the need for states to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. In para 1 it was declared that the Security Council had decided that all states shall—

> '(a) Prevent and suppress the financing of terrorist acts;
> (b) Criminalize the wilful provision or collection … of funds by their nationals or in their territories with the intention that the funds should be used … to carry out terrorist acts;
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled … by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities … [and]
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available … for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled … by such persons and of persons and entities acting on behalf of or at the direction of such persons.'

In para 2 it was declared that the Security Council had decided that all states shall, among various other measures—

> '(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice …'

Provision was made in para 6 for establishing a Committee of the Security Council, consisting of all its members, to monitor implementation of the resolution. In para 8 the Security Council expressed its determination to ensure the full implementation of the resolution, in accordance with its responsibilities under the Charter. This resolution was followed by SCR 1452 (2002) which was adopted on 20 December 2002.

[22] In order to give effect to SCR 1333 (2000) and its successors within the European Community, the Council adopted Council Regulation (EC) 881/2002 (OJ 2002 L139 p 9) ordering the freezing of the funds and other economic resources of the persons and entities whose names appear on a list annexed to that regulation. Practice has varied among member states as to whether to implement their obligations under the United Nations Charter in parallel with their obligation to legislate in their national legal orders in conformity with Council Regulation (EC) 881/2002. Reports of the member states to the 1267 Committee indicate that 11 of the 27 member states appear to have relied on Council Regulation (EC) 881/2002 alone. The remaining 16 member states, including the United Kingdom, have adopted their own legislative measures which run in parallel with the regulation.

THE ORDERS IN COUNCIL: THE TERRORISM ORDERS

[23] The United Kingdom Parliament had already enacted the Terrorism Act 2000 for the creation of a criminal regime dealing with the funding of terrorism. It received the Royal Assent on 20 July 2000. In response to the events of 9/11 the Bill which became the Anti-terrorism, Crime and Security Act 2001 was presented to Parliament on 12 November 2001. It received the Royal Assent on 14 December 2001. It was followed by the Prevention of Terrorism Act 2005, which received the Royal Assent on 11 March 2005, the Terrorism Act 2006 which received the Royal Assent on 30 March 2006 and the Counter-Terrorism Act 2008 which received the Royal Assent on 26 November 2008. Part 2 of the 2001 Act provided for the making of freezing orders. The 2005 Act provided for the making of control orders. The 2006 Act, among other things, amended the definition of terrorism in the 2000 and 2001 Acts to eliminate disparities between its definition in domestic law and that in various international conventions to which the United Kingdom is a party. The 2008 Act introduced a procedure for setting aside financial restrictions decisions taken by the Treasury. The restrictions that were imposed on the appellants in this case were made by the Treasury under s 1 of the United Nations Act 1946. They were not made under powers that were specifically designed for that purpose by primary legislation.

[24] Effect was first given to SCR 1373 (2001) by the Terrorism (United Nations Measures) Order 2001, SI 2001/3365, which was made on 9 October 2001, laid before Parliament on the same day and came into force on 10 October 2001. The wording of its leading provision was modelled on that of the SCR. Article 3 of the order provided:

> 'Any person who, except under the authority of a licence granted by the Treasury under this article, makes any funds or financial (or related) services available directly or indirectly to or for the benefit of—(a) a person who commits, attempts to commit, facilitates or participates in the commission of acts of terrorism, (b) a person controlled or owned directly or indirectly by a person in (a), or (c) a person acting on behalf, or at the direction of, a person in (a), is guilty of an offence under this Order.'

[25] The TO was laid before Parliament on 11 October 2006 and came into force on 12 October 2006. As its preamble records, it was made to give effect to SCR 1373 (2001) and SCR 1452 (2002). By art 20(1) it revoked the 2001 Order. In place of art 3 of that order there is a new art 3, which is in these terms:

> '(1) For the purposes of this Order a person is a designated person if—(a) he is identified in the Council Decision, or (b) he is identified in a direction.
> (2) In this Part "direction" (other than in articles 4(2)(d) and 5(3)(c)) means a direction given by the Treasury under article 4(1).'

Article 4 provides:

> '(1) Where any condition in paragraph (2) is satisfied, the Treasury may give a direction that a person identified in the direction is designated for the purposes of this Order.
> (2) The conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be—(a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; (b) a person identified in the Council Decision; (c) a person

owned or controlled, directly or indirectly, by a designated person; or (d) a person acting on behalf of or at the direction of a designated person …

(4) The Treasury may vary or revoke a direction at any time.'

Article 5(4) provides that the High Court or, in Scotland, the Court of Session may set aside a direction on the application of the person identified in the direction.

[**26**] Article 7 of the TO provides:

'(1) A person (including the designated person) must not deal with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2) unless he does so under the authority of a licence granted under article 11.

(2) The prohibition in paragraph (1) applies in respect of—(a) any person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; (b) any designated person; (c) any person owned or controlled, directly or indirectly, by a person referred to in sub-paragraph (a) or (b); and (d) any person acting on behalf or at the direction of a person referred to in sub-paragraph (a) or (b).

(3) A person who contravenes the prohibition in paragraph (1) is guilty of an offence …'

Article 7(6) defines the phrase 'deal with' in terms which are designed to catch every conceivable kind of transaction in respect of funds and economic resources. Article 8 provides that a person must not make funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in art 7(2) unless he does so under the authority of a licence granted under art 11. Licences under art 11 may be general or granted to a category of persons or to a particular person, may be subject to conditions and may be of indefinite duration or subject to an expiry date. The Treasury may vary or revoke the licence at any time.

[**27**] On 8 July 2009 a further order in this sequence, the Terrorism (United Nations Measures) Order 2009, SI 2009/1747, was laid before Parliament. It came into force on 10 August 2009. Like the 2001 and 2006 terrorism orders, it was made under s 1 of the United Nations Act 1946 to give effect to SCR 1373 (2001). It revoked the TO, but it provided that persons such as A, K, and M and G who had been designated under the TO were to remain subject to its terms until 31 August 2010 unless their designation was revoked by that date: art 26(4). On 22 October 2009, two weeks after the hearing of these appeals had been concluded, G was informed that his designation under the TO had been revoked and that he had been redesignated under the 2009 Order. On 30 October 2009 A, K and M were redesignated under the 2009 Order and their designations under the TO were likewise revoked.

[**28**] There are some differences between the 2006 and the 2009 Orders, such as to the definition of dealing with an economic resource, which ameliorate to some degree the onerous effects of the regime on spouses and other third parties who interact with the designated person. The prohibitions that the 2009 Order imposes on making funds or financial services available for his benefit, and on making economic resources available to him or for his benefit, apply only if the benefit that he obtains or is able to obtain is significant: arts 12(4)(a), 13(3)(a), 14(4)(a). An additional pre-condition for designation has been introduced by art 4(1)(b). The Treasury must consider that the direction is

necessary for purposes connected with protecting members of the public from the risk of terrorism. But, subject to these minor adjustments, the impact of the regime on the designated person himself is just as rigorous as it was under the TO, and the phrase 'reasonable grounds for suspecting' in art 4(2) of the 2006 Order has been retained in the 2009 Order: see art 4(2). So, although the 2009 Order is not before the court in these proceedings, the arguments that have been directed to the TO can be taken to apply to it also. They have not been superseded by the action that the Treasury has taken since the end of the hearing on 8 October 2009.

THE AL-QAIDA AND TALIBAN ORDER

[**29**] The Treasury's response to the Security Council's direction by a series of resolutions including SCR 1452 (2002) that measures that were to be taken to deal with Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267 (1999) was to make the 2002 Order. It was replaced by the AQO, which was laid before Parliament on 15 November 2006 and came into force on 16 November 2006. As in the case of the TO, this order sets out a rigorous system of prohibitions and licences which is applied to persons who are designated persons for its purposes.

[**30**] Article 3 defines the expression 'designated persons'. It provides:

> '(1) For the purposes of this Order—(a) Usama bin Laden, (b) any person designated by the Sanctions Committee, and (c) any person identified in a direction, is a designated person.
>
> (2) In this Part "direction" … means a direction given by the Treasury under article 4(1).'

Article 4 sets out the Treasury's power to designate in these terms:

> '(1) Where any condition in paragraph (2) is satisfied, the Treasury may give a direction that a person identified in the direction is designated for the purposes of this Order.
>
> (2) The conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be—(a) Usama bin Laden; (b) a person designated by the Sanctions Committee; (c) a person owned or controlled, directly or indirectly, by a designated person; or (d) a person acting on behalf of or at the direction of a designated person …
>
> (4) The Treasury may vary or revoke a direction at any time.'

Article 5(4) provides that the High Court or, in Scotland, the Court of Session may set aside a direction on the application of the person identified in the direction or any other person affected by the direction.

THE FACTS

[**31**] Two of the three cases before this court are appeals against orders made by the Court of Appeal on 30 October 2008. In the first case, A, K and M are brothers aged 31, 35 and 36. They are United Kingdom citizens and, at the time of their designation, lived in East London with their respective wives and children. A and K no longer live with their families, and their current whereabouts are unknown. Their solicitor, with whom they have not been in contact for a number of months, attributes their disappearance to the

damaging effects upon them and their families of the regimes to which they were subjected by the Treasury. It placed an extraordinary burden on their wives, created significant mental health difficulties and led ultimately to the breakdown of their marriages. M's marriage has also broken down, but he has continued to have a close relationship with his children. He lives at his ex-wife's address where his children live also.

[**32**] A, K and M have never been charged or arrested for terrorism related offences. By letters dated 2 August 2007 they were informed that directions had been made in respect of each of them under art 4 of the TO. They received letters which stated that the direction had been made because the Treasury had reasonable grounds for suspecting that 'you are, or may be, a person who facilitates the commission of acts of terrorism' but that, in light of the sensitive nature of the information on which it was taken, they were unable to give them further details. Their solicitors requested further information. By a letter dated 12 September 2007 the Treasury provided further details about the factual basis for the decision to make the directions, to the extent that this was said to be possible given the sensitive nature of some of the material relied upon. It was said that an Al-Qaida linked operative had identified A and M as East London based Al-Qaida facilitators and that M and his brother K had travelled to Pakistan with the intention of delivering money to contacts there and participating in terrorist training.

[**33**] In the second case, G was informed by a letter dated 13 December 2006 in almost identical terms to that received by A, K and M that a direction had been made against him under art 4 of the TO. A few days later he received a letter from the Foreign and Commonwealth Office saying that the 1267 Committee of the Security Council had added him to its consolidated list and that this meant that he was subject to a freezing of his funds, assets and economic resources. He was told that these measures were binding on all United Nations member states and had been implemented in United Kingdom law. He was told that he could petition the Committee to seek de-listing. He was not told until later that his listing had been at the request of the United Kingdom. It was not until March 2007 that he was told that his listing meant that he was a designated person under the AQO. Article 3(1)(b) provides that for the purposes of that order any person designated by the Committee is a designated person. It appears to have been assumed on his behalf that a direction was made against him under art 4(1) of the AQO. But there is no evidence that this ever happened, and it would have been unnecessary as he was a designated person for the purposes of that order simply by reason of the fact that he had been listed.

[**34**] A, K, M and G issued proceedings in the Administrative Court seeking orders under art 5(4) of the TO setting aside the directions made against them in pursuance of that Order by the Treasury. G also sought an order under art 5(4) of the AQO setting aside 'the direction made against him' under art 4(1) of that Order 'in so far as the court considers that such a direction has been lawfully made'. The proceedings were consolidated. On 24 April 2008 Collins J held that the TO and the AQO were ultra vires and he quashed both orders: [2008] EWHC 869 (Admin), [2008] 3 All ER 361. He gave the Treasury permission to appeal, and the orders that he made were stayed pending the hearing of an appeal. On 30 October 2008 the Court of Appeal (Sir Anthony Clarke MR and Wilson LJ, Sedley LJ dissenting in part) allowed the appeal in part ([2009] 2 All ER 747, [2009] 3 WLR 25). It held that the words 'or may be' in art 4(2) of the TO were not warranted by the SCR, and that,

a although these words could be severed from the rest of art 4(2), as all the directions had included these words it was necessary to quash the directions. It also held that the provisions of the AQO were lawful but that a person who was designated under art 3(1) was entitled to seek judicial review of the merits of the decision. A, K, M and G were given leave to appeal by an appeal committee of the House of Lords on 3 March 2009.

b [**35**] The third proceedings were brought by HAY, who also is resident in the United Kingdom. He is 49 years of age, is married and lives in London with his wife and four of his children. He and his wife are Egyptian nationals and have lived in the United Kingdom since 1994. His name was added to the consolidated list by the 1267 Committee on 29 September 2005. As a result he c became a designated person for the purposes of the AQO in terms of art 3(1)(b). Unlike G, the proposal that his name be added to the list was not made by the United Kingdom. It provided no information to the 1267 Committee in relation to its decision to add his name to the list. But, as it is a member of the 1267 Committee, the United Kingdom had access to all the information available to the committee that was relied upon at the time of its d decision. In December 2005 his solicitors wrote both to the Treasury and to the Foreign and Commonwealth Office requesting disclosure of the state that had proposed HAY's addition to the consolidated list and of the information that the committee had relied on in reaching its decision. The Foreign and Commonwealth Office made repeated requests over a long period to the nominating state and to the committee in an attempt to satisfy these requests. e As a result an Interpol Red Note relating to HAY was sent to his solicitors under cover of a letter dated 26 September 2008. It was made clear in this letter that this was not the only information provided to the committee. But the United Kingdom did not have permission to release any other information, and the nominating state refused to allow its identity to be disclosed.

f [**36**] HAY issued a claim for judicial review on 9 February 2009 in which he sought a merits based review of the information relied upon by the 1267 Committee. In the alternative he sought an order quashing the AQO, at least in so far as it applied to him. On 7 April 2009 he submitted an amended claim form which indicated that he was proceeding only on the basis that the AQO was ultra vires. Shortly before the hearing the Foreign Secretary g completed a review of the information available to him as to whether HAY continued to meet the criteria applied by the 1267 Committee to determine whether or not a person should be on the consolidated list. The 1267 Committee, for its part, is presently undertaking a review of the cases of all persons whose names appeared on the list as at June 2008. HAY is in the second tranche of these cases. A decision in his case is unlikely to be reached in the h near future. The Foreign Secretary has made an application for HAY's name to be removed from the list, as he considers that HAY's listing is no longer appropriate: see [82], below.

[**37**] Owen J granted HAY's application for judicial review and made a declaration that the AQO was unlawful in so far as it applied to HAY: [2009] EWHC 1677 (Admin). He concluded that the AQO was ultra vires the United j Nations Act 1946 but he declined to make a quashing order. He held that the practical effect of the AQO was to preclude access to the court for protection of what HAY contended were his basic rights: para [45]. The Treasury appealed against this decision, and by an order dated 14 July 2009 Owen J gave it permission under the leap frog provisions to appeal to the House of Lords so that its appeal could be heard together with the appeals by A, K, M and G. In

response to representations made by HAY's solicitors the Treasury amended his licence conditions which enable his wife to obtain welfare benefits, with the result that she is no longer required to provide monthly reports on how the family spend their money. Otherwise, despite the Foreign Secretary's view that listing is no longer appropriate, the freezing regime remains in place. The Treasury's position is that HAY and his family must remain subject to the AQO unless and until the 1267 Committee decides to remove him from the consolidated list.

[**38**] The effect of the regimes that the TO and the AQO impose is that every transaction, however small, which involves the making of any payments or the passing of funds or economic resources whatever directly or indirectly for the benefit of a designated person is criminalised. This affects all aspects of his life, including his ability to move around at will by any means of private or public transport. To enable payments to be made for basic living expenses a system of licensing has been created. It is regulated by the Treasury, whose interpretation of the sanctions regime and of the system of licensing and the conditions that it gives rise to is extremely rigorous. The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating, as the cases of A and K illustrate. As already mentioned (see [28], above), the effects on third parties have been ameliorated to some extent in the case of designations made under the 2009 Order. Some transactions are affected only if they are 'significant'. But, taken overall, the regime that is imposed under it remains to a high degree restrictive and, so far as the designated person himself is concerned, just as paralysing.

[**39**] Sir Anthony Clarke MR accepted that the orders are oppressive in their nature and that they are bound to have caused difficulties for the appellants and their families: [2009] 2 All ER 747 at [25], [2009] 3 WLR 25. Wilson LJ said that they imposed swingeing disabilities upon those who were designated: para [152]. In *R (on the application of M) v HM Treasury* [2008] 2 All ER 1097n the House of Lords described the regime as applied to HAY's wife as disproportionate and oppressive and the invasion of the privacy of someone who was not a listed person as extraordinary: para [15]. The appellants have all been subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive. For example, HAY has been denied access to any funds since September 2005. His only permitted subsistence support is in kind provided by his wife. She is permitted, by licence from the Treasury, to access welfare benefits, which are the family's sole source of support. But she may spend money only on what the Treasury determines are 'basic expenses'. Until recently she was required to report to the Treasury on every item of household expenditure, however small, including expenditure by her children.

THE ISSUES

[**40**] As Mr Owen QC for A, K and M said at the outset of his submissions, the fundamental issue in this case is whether the Treasury was empowered by s 1 of the United Nations Act 1946 to introduce an asset freezing regime by means of an Order in Council. He submitted that the TO was ultra vires on three grounds: (1) illegality because it was passed without parliamentary approval, (2) lack of legal certainty and proportionality and (3) the absence of

procedures that enabled designated persons to challenge their designation. For G, Mr Rabinder Singh QC submitted that the AQO was likewise ultra vires the United Nations Act 1946, and that both the TO and the AQO were unlawful by virtue of s 6 of the Human Rights Act 1998 because they were incompatible with art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) and with art 1 of the First Protocol. For HAY, Mr Husain submitted that the AQO was ultra vires the United Nations Act 1946 because it violated his client's right of access to a court for an effective remedy.

[**41**] Some of the issues raised by these submissions are common to both orders, and others arise under only one of them. They can perhaps best be grouped as follows:

Both orders

(1) Are the orders ultra vires the United Nations Act 1946 by reference to the principle of legality?

(2) Are the orders incompatible with the convention rights under the 1998 Act?

The TO

(3) If it is not ultra vires on one or other of the previous grounds, is the TO ultra vires the United Nations Act 1946 because its terms go beyond those required by the SCR?

The AQO

(4) Is the AQO ultra vires the United Nations Act 1946 because it violates the right of effective judicial review?

SECTION 1 OF THE UNITED NATIONS ACT 1946

[**42**] As the scope of the power conferred by s 1(1) of the United Nations Act 1946 is in issue, it is first necessary to examine its wording: see [12], above, where its full terms are set out. It provides that if the Security Council of the United Nations calls upon the government to give effect to any of its decisions under art 41:

> '… His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.'

The question is what limits, if any, there are on the power conferred by this subsection. According to its own terms, it extends to 'any' measures mandated by the Security Council. The word 'any' gives full weight to the obligation to accept and carry out the decisions of the Security Council that art 25 of the Charter lays down. But the provisions that may be imposed by this means in domestic law must be either 'necessary' or 'expedient' to enable those measures to be 'applied' effectively.

[**43**] Mr Swift for the Treasury said that the words 'necessary' and 'expedient' were directed to the content of the Order in Council, not the legislative route by which its provisions were given the force of law. I agree, but I do not think that the legislative route that s 1 contemplated can be left out of account. The exclusion of s 1(1) of the 1893 Act by s 1(4) and the direction that the Order is to be forthwith after it is made laid before Parliament are important pointers to the kind of measure that was envisaged when this provision was enacted. They

indicate that it was anticipated that the measures that the Security Council was likely to call for would require urgent action rendering parliamentary scrutiny impracticable. As Mr WS Morrison said in the course of the debate at second reading, the procedure possessed 'the necessary combination of speed and authority to enable instant effect to be given to the international obligations to which we are pledged': 421 HC Official Report (5th series) col 1517.

[**44**] The section leaves the question whether any given measure is 'necessary' or 'expedient' to the judgment of the executive without subjecting it, or any of the terms and conditions which apply to it, to the scrutiny of Parliament. In the context of what was envisaged when the Bill was debated in 1946, which was the use of non-military, diplomatic and economic sanctions as a means of deterring aggression between states, the surrender of power to the executive to ensure the taking of immediate and effective action in the international sphere is unsurprising. The use of the power as a means of imposing restraints or the taking of coercive measures targeted against individuals in domestic law is an entirely different matter. A distinction must be drawn in this respect between provisions made 'for the apprehension, trial and punishment of persons offending against the Order' (see the concluding words of s 1(1)) and those against whom the order is primarily directed. So long as the primary purpose of the order is within the powers conferred by the section, ancillary measures which are carefully designed to ensure their efficacy will be also. The crucial question is whether the section confers power on the executive, without any parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals.

[**45**] It cannot be suggested, in view of the word 'any', that the power is available only for use where the Security Council has called for non-military, diplomatic and economic sanctions to deter aggression between states. But the phrase 'necessary or expedient for enabling those measures to be effectively applied' does require further examination. The closer those measures come to affecting what, in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131, Lord Hoffmann described as the basic rights of the individual, the more exacting this scrutiny must become. If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive. In *Chester v Bateson* [1920] 1 KB 829 at 837, Avory J referred to Lord Shaw of Dunfermline's warning in *R v Halliday* [1917] AC 260 at 287, [1916–17] All ER Rep Ext 1284 at 1300 against the risk of arbitrary government if the judiciary were to approach actions of government in excess of its mandate in a spirit of compliance rather than that of independent scrutiny. The undoubted fact that s 1 of the United Nations Act 1946 was designed to enable the United Kingdom to fulfil its obligations under the Charter to implement Security Council resolutions does not diminish this essential principle. As Lord Brown says in para [194], the full honouring of these obligations is an imperative. But these resolutions are the product of a body of which the executive is a member as the United Kingdom's representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.

[**46**] If authority were needed for these propositions it is to be found in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577; sub nom *R v*

Secretary of State for the Home Dept, ex p Pierson [1998] AC 539, [1997] 3 WLR 492. Lord Browne-Wilkinson said ([1997] 3 All ER 577 at 590–591, [1998] AC 539 at 573):

> 'I consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statute as being impliedly limited. In my judgment there is such a principle. It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions …'

Having examined the authorities, he said ([1997] 3 All ER 577 at 592, [1998] AC 539 at 575):

> 'From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'

[**47**] I would approach the language of s 1 of the United Nations Act 1946, therefore, on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it. The words 'necessary' and 'expedient' both call for the exercise of judgment. But this does not mean that its exercise is unlimited. The wording of the Order must be tested precisely against the words used by the Security Council's resolution and in the light of the obligation to give effect to it that art 25 lays down. A provision in the order which affects the basic rights of the individual but was unavoidable if effect was to be given to the resolution according to its terms may be taken to have been authorised because it was 'necessary'. A provision may be included which is 'expedient' but not 'necessary'. This enables provisions to be included in the Order which differ from those used by the resolution or are unavoidably required by it. But it does not permit interference with the basic rights of the individual any more that is necessary and unavoidable to give effect to the SCR and is consistent with the principle of legality.

[**48**] The points that I have just made may be taken from the wording of s 1 itself. But underlying them is a more fundamental point, which is whether measures of the kind which are before us in this case should have been made by Order in Council at all. Concern about excessive use of the power that s 1 of the United Nations Act 1946 confers is not new. In February 1999 the House of Commons Foreign Affairs Committee drew attention to the way a resolution of the Security Council about the imposition of sanctions against Sierra Leone had been implemented by an Order in Council made under s 1 of the United Nations Act 1946. The SCR did not define Sierra Leone, leaving the extent of its application ambiguous. The Order in Council defined it in terms which removed any ambiguity but arguably went beyond the scope of the SCR. This was thought by the committee to create a significant pitfall for anyone inside or outside the Foreign and Commonwealth Office who had read the SCR but not the Order in Council.

[**49**] In its report the committee said that the way in which the Order in Council was dealt with was unacceptable as it was subject to no parliamentary procedure. Had it been necessary for a minister to appear before a Standing Committee on Delegated Legislation or to defend the order on the floor of the House of Lords, it was likely that wider attention would have been given to its true meaning and extent. It recommended that the United Nations Act 1946 be amended so that delegated legislation made under s 1 was subject to affirmative resolution in both Houses of Parliament and that any sanctions order approved by a minister of the Foreign and Commonwealth Office be brought specifically to the attention of the Foreign Affairs Committee: *Second Report of the Foreign Affairs Select Committee on Sierra Leone*, Session 1998–1999, HC Paper 116-I, 9 February 1999. In its response (Cm 4325, 1999) the government said that it was willing to keep the working of the United Nations Act 1946 under review, but that application of the affirmative procedure to sanctions orders would put the United Kingdom in breach of its international obligations if an order was not approved. The recommendation that such orders be brought to the attention of the Committee has not been adopted, nor has s 1 of the United Nations Act 1946 been amended.

[**50**] The government's reason for declining to follow the Select Committee's recommendations may have appeared sufficient at the time of its response. But the case for avoiding scrutiny in the interests of certainty has been weakened by the change of direction that the Security Council has adopted for the freezing of assets to suppress terrorism. Other member states have not found it necessary in this context to rely exclusively on an unlimited delegation of the power to give effect to Security Council resolutions to the executive. Australia gave effect to the post-9/11 SCRs initially by means of regulations passed under the Charter of the United Nations Act 1945. But it then made provision for an asset freezing regime by the Suppression of the Financing of Terrorism Act 2002 which inserted a new Pt IV into the 1945 Act. New Zealand initially implemented SCR 1373 (2001) by means of regulations made under its United Nations Act 1946, but has replaced them by an asset regime under the Terrorism Suppression Act 2002. The regimes that both Australia and New Zealand have introduced by means of primary legislation are exacting. But they contain various, albeit limited, safeguards and in so far as they interfere with basic rights of the individual that interference has been expressly authorised by their respective legislatures.

[**51**] As I have already noted (see [23], above), the United Kingdom Parliament had already enacted the 2000 Act for the creation of a criminal regime dealing with the funding of terrorism before the events of 9/11. In response to those events, at a time when the general perception was that further terrorist attacks of that kind were likely to occur, the 2001 Act was enacted. It received the Royal Assent on 14 December 2001. The focus of attention now was on threats to the United Kingdom and its residents from foreign states and foreign nationals. No mention was made of the Security Council's resolutions in the long title. But Pt 2 of the Act, which makes provision for the making of freezing orders, appears to have been modelled on the initiatives that it had already taken both by the Security Council and, under s 1 of the United Nations Act 1946, by the Treasury by means of the 2001 Order (see [24], above).

[**52**] Section 4 of the 2001 Act provides:

a '(1) The Treasury may make a freezing order if the following two conditions are satisfied.

(2) The first condition is that the Treasury reasonably believe that—(a) action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons, or (b) action constituting a threat to the life or property of one or more nationals of the
b United Kingdom or residents of the United Kingdom has been or is likely to be taken by a person or persons.

(3) If one person is believed to have taken or to be likely to take the action the second condition is that the person is—(a) the government of a country or territory outside the United Kingdom, or (b) a resident of a
c country or territory outside the United Kingdom.

(4) If two or more persons are believed to have taken or to be likely to take the action the second condition is that each of them falls within paragraph (a) or (b) of subsection (3); and different persons may fall within different paragraphs.'

d Where the conditions that s 4 sets out are satisfied, the prohibitions contained in the freezing order extend to all persons in the United Kingdom and all persons elsewhere who are United Kingdom nationals: s 5(2). It prohibits persons from making funds available to or for the benefit of a person or persons specified in the order. Section 5(3) provides:

e

'The order may specify the following (and only the following) as the person or persons to whom or for whose benefit funds are not to be made available—(a) the person or persons reasonably believed by the Treasury to have taken or to be likely to take the action referred to in section 4; (b) any person the Treasury reasonably believe has provided or is likely to provide
f assistance (directly or indirectly) to that person or any of those persons.'

[**53**] Detailed provision is made in Sch 3 for the content of freezing orders, including a system for the granting of licences authorising funds to be made available. Orders made under the Act are subject to the affirmative resolution
g procedure (s 10), and they cease to have effect after two years (s 8). To a large degree, the power to make freezing orders under this Act enables the Treasury to do what paras 1(d) and 2(d) of SCR 1373 (2001) require (see para [21], above). But it is more precisely worded, and it contains various safeguards. Although the test in s 4(2)(b) is that action which is a threat to the life or property of one or more nationals or residents of the United Kingdom has
h been or is likely to be taken, it is by no means obvious that the power that it confers was not available for use in the appellants' cases. In their letter dated 12 September 2007 to A, K and M's solicitors, in which further details were given about the factual basis for the decision to make the directions in their cases, the Treasury referred to various contacts between those appellants and persons in Pakistan who were engaged in terrorist activities. The persons with
j whom they are said to have been in contact would appear to satisfy the conditions in sub-s (2)(b) of s 4, and they would appear to be persons of the kind referred to in s 5(3)(b). Yet the Treasury have, it seems, chosen not to make use of the powers given to them by this Act, preferring to use the general power under s 1 of the United Nations Act 1946. Mr Swift said that this was a matter for political control. By this I think he meant it was no business of the

court to interfere. For the reasons already given in para [45], above, I disagree. In my opinion the rule of law requires that the actions of the Treasury in this context be subjected to judicial scrutiny.

[**54**] Against that background I now turn to the issues that have been raised about the validity of the TO and the AQO, and the directions that have been made under them, in these appeals.

THE TO

[**55**] The Treasury's initial response to SCR 1373 (2001) was to make the 2001 Order. The key provision in this order is to be found in art 3: see [24], above. For convenience I will set it out again here. It was in these terms:

> 'Any person who, except under the authority of a licence granted by the Treasury under this article, makes any funds or financial (or related) services available directly or indirectly to or for the benefit of—(a) a person who commits, attempts to commit, facilitates or participates in the commission of acts of terrorism, (b) a person controlled or owned directly or indirectly by a person in (a), (c) a person acting on behalf, or at the direction, of a person in (a), is guilty of an offence under this Order.'

The wording of this article was closely modelled on that of para 1(d) of the SCR. Article 4, which was headed 'Freezing of Funds' and was modelled on para 1(c) of the SCR, provided that where the Treasury had reasonable grounds for suspecting that the person by, for or on behalf of whom any funds were held was or might be a person described in art 3, it might by notice direct that those funds were not to be made available to any person, except under the authority of a licence granted by the Treasury under that article.

[**56**] The TO, which was made in 2006 and replaced the 2001 Order, introduced the system, to which objection is taken in this case, for persons to be designated if they are identified in a direction given by the Treasury. The power to designate is set out in art 4: see [25], above. It provides in para (2)(a) that the Treasury may give a direction if they have reasonable grounds for suspecting that the person is or may be a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism.

[**57**] The question is whether, by introducing the words 'have reasonable grounds for suspecting that the person is or may be', the Treasury exceeded their powers under s 1 of the United Nations Act 1946. The Court of Appeal held that the introduction of the 'reasonable grounds for suspecting' test was within the ambit of that section, provided that the person's right to challenge the direction was preserved: but that there was no warrant in the SCR for the addition of the words 'or may be' and that, as the directions under the TO were made by reference to those words, they should be quashed: [2009] 2 All ER 747 at [46], [124] and [135], [2009] 3 WLR 25. There is no appeal against its decision as to the inclusion of 'or may be', and the Treasury have made fresh directions against A, K, M and G which do not include these words. The validity of the 'reasonable grounds for suspecting' test remains in issue.

[**58**] SCR 1373 (2001) is not phrased in terms of reasonable suspicion. It refers instead to persons 'who commit, or attempt to commit, terrorist acts'. The preamble refers to 'acts of terrorism'. The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. Transposition of the direction into domestic law under s 1 of the United Nations Act 1946 raises questions of

judgment as to what is 'necessary' on the one hand and what is 'expedient' on the other. It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires. It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it. The facts of these cases show how devastating their imposition can be on the restricted persons and their families. This raises fundamental questions, such as the standard of proof that should be required, whether the directions should be capable of being challenged by an effective form of judicial review and whether they should last indefinitely or be time limited. The validity of the introduction of the reasonable grounds test must be assessed in the light of the entire system that the TO provides for. Is it acceptable that the exercise of judgment in matters of this kind should be left exclusively, without any form of Parliamentary scrutiny, to the executive?

[**59**] Mr Swift submitted that the reasonable grounds test was within the scope of the SCR. He accepted that the less direct the link to the wording of the SCR, the greater the scope for argument about the order's legality. But he submitted that the test was needed to enable restrictions directed by the Security Council to work effectively and that it was soundly based on international practice. Mr Guthrie, the Head of HM Treasury's Asset Freezing Unit, said in his witness statement that this is the standard that is applied by the United Nations International Task Force. It had overall support among states. The SCR contemplated interference with the economic and other rights of those affected by it. The objection that the designated person had no access to an effective judicial remedy had been met by Pt 6 of the 2008 Act, which introduced a scheme for subjecting financial restrictions decisions of the Treasury under the United Nation terrorism orders and orders made under Pt 2 of the 2001 Act to proceedings for judicial review.

[**60**] I do not think that these arguments are sufficient to meet the basic objection to the use of the powers of s 1 of the United Nations Act 1946 to impose the restrictions provided for by the TO on the grounds of a reasonable suspicion only. I can leave aside the use of unsupervised delegated powers to block access to the courts which Sedley LJ in the Court of Appeal, I think rightly, regarded as a fatal flaw in the order: [2009] 2 All ER 747 at [147]. It was common ground that, given the intensity of judicial review that would be appropriate under Pt 6 of the 2008 Act, this objection has been met by the fact that decisions of the Treasury under the United Nations terrorism orders are subject to its provisions: see s 63(1)(a) of the 2008 Act. There remains however the objection that the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses. Collins J, in his impressive judgment, described the range of powers that it conferred on the Treasury as draconian, and the AQO as even more so: [2008] 3 All ER 361 at [11]. It is no exaggeration to say, as Sedley LJ did in para [125], that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.

[**61**] I would hold that, by introducing the reasonable suspicion test as a means of giving effect to SCR 1373 (2001), the Treasury exceeded their powers under s 1(1) of the United Nations Act 1946. This is a clear example of an attempt to adversely affect the basic rights of the citizen without the clear

authority of Parliament—a process which Lord Browne-Wilkinson condemned in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577; sub nom *R v Secretary of State for the Home Dept, ex p Pierson* [1998] AC 539. As Lord Hoffmann said in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131, fundamental rights cannot be overridden by general or ambiguous words. The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the United Nations Act 1946 were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted. In my opinion the TO is ultra vires s 1(1) of the United Nations Act 1946 and, subject to what I say about the date when these orders should take effect, it together with the directions that have been made under it in the cases of A, K, M and G must be quashed.

[62] Various subsidiary arguments were advanced to the effect that the TO was ultra vires because in certain material respects it lacked legal certainty. As I consider that it is open to attack on more fundamental grounds, however, I prefer to express no opinion as to whether any of these criticisms of its terms were well founded and, if so, what would be the consequences.

THE AQO

[63] Mr Singh QC submits for the appellant G that the AQO is ultra vires s 1 of the United Nations Act 1946 and that it is also unlawful by virtue of s 6(1) of the 1998 Act. He adopted Mr Owen's submissions as part of his argument on the first point. Mr Husain for HAY, who has the benefit of a decision in his favour by Owen J in the Administrative Court, submitted that the AQO was ultra vires because it violated his right of access to a court as he was unable to obtain an effective remedy. G, it will be recalled (see [33], above), was listed by the 1267 Committee at the request of the United Kingdom. HAY's name, on the other hand, was added to the list at the request of another state in September 2005 (see para [35]). His listing is regarded by the United Kingdom as no longer appropriate. But its efforts so far to obtain the de-listing of HAY's name have proved to be unsuccessful.

[64] Unlike the TO, the AQO does not rely for its application, at least in the first instance, on a reasonable grounds to suspect test. To this extent it does, as Lord Brown says in para [197], faithfully implement the relevant SCRs. The persons who are designated persons for its purposes are (a) Usama bin Laden, (b) any person designated by the Sanctions Committee and (c) any person identified in a direction: art 3. A reasonable grounds to suspect test is introduced by art 4, which provides that the Treasury may give a direction that a person is designated for the purposes of the order if they have reasonable grounds for suspecting that the person is or may be Usama bin Laden or a person designated by the Sanctions Committee or a person owned or controlled by a designated person or acting on his behalf. Mr Swift explained that the latitude that had been built into art 4 was explicable, at least in part, by problems caused by the widespread use of assumed names by those who were engaged in terrorist activities. It is not necessary to explore the consequences of its use in the context of the AQO any further in this case, however. Both G and HAY are designated persons because their names are on the list maintained by the 1267 Committee. As they have not been subjected to freezing orders on the basis of a reasonable suspicion, the grounds on which I would hold that the TO was ultra vires do not apply to their designation under the AQO.

[**65**] The question which is common to both G and HAY is whether the AQO is ultra vires s 1 of the United Nations Act 1946 because there is no effective judicial remedy against a listing by the 1267 Committee. But I must deal first with Mr Singh's argument that the AQO is unlawful under s 6(1) of the 1998 Act which, as he explained, he advanced as an alternative to his main submission that the AQO was ultra vires s 1 of the United Nations Act 1946.

[**66**] Mr Singh's case under s 6(1) of the 1998 Act is that the AQO is unlawful because it interferes with G's rights protected by arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and art 1 of the First Protocol. He submits that G's rights under art 8 and art 1 of the First Protocol are obviously interfered with, and that his rights under art 6 are interfered with too as his designation under the AQO interfered with his civil rights but did not give him a meaningful right of access to a court which was capable of granting him an effective remedy. He frankly acknowledged that the decision of the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2008] 3 All ER 28, [2008] 1 AC 332 was against him on this branch of his argument. But he invited this court to reconsider that decision, especially in the light of the decision of the European Court of Justice (ECJ) in *Kadi v EU Council* Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872.

[**67**] In *Kadi v EU Council* the ECJ was asked to consider Council Regulation (EC) 881/2002 implementing United Nations resolutions under Ch VII of the Charter of the United Nations for the freezing of the funds and economic resources controlled directly or indirectly by persons associated with Osama bin Laden, Al Qaeda (sic) or the Taliban. It ordered the freezing of the funds and other economic resources of the person and entities whose names appeared on a list annexed to that regulation. Mr Kadi was one of those named on that list, as his name was on the list kept by the Sanctions Committee of the United Nations. He sought annulment of the regulation on the grounds that it was not competent for the Council to adopt it and that it infringed several of his fundamental rights, including his right to property and his right to be heard and to an effective judicial review. The case is important and deserves close attention because of the way the ECJ dealt with the argument about the protection of fundamental rights. Advocate General Maduro observed in para 51 of his opinion that the Community institutions had not afforded any opportunity to Mr Kadi to make known his views on whether the sanctions against him were justified and whether they should be kept in force:

> '… The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list … Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list …'

In para 52 he said that the right to effective judicial protection holds a prominent place in the firmament of fundamental rights. In paras 54 and 55 he said that had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations this might have

released the Community from the obligation to provide this within the Community legal order but that, as this was not so, Mr Kadi's claim that the regulation infringed his rights was well founded.

[**68**] In its judgment the ECJ endorsed this approach. In paras 281–283 it said that the Community was based on the rule of law, inasmuch as neither its member states nor its institutions could avoid review of conformity of their acts with the EC treaty, that an international agreement could not affect the autonomy of the Community legal system and that according to settled case law fundamental rights formed an integral part of the general principles of law whose observance the court ensured. In para 285 it said:

> 'It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the court to review in the framework of the complete system of legal remedies established by the Treaty.'

The court went on to say that it did not follow from 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 was excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Ch VII of the Charter of the United Nations: para 287. The existence within the United Nations of the re-examination procedure could not give rise to generalised immunity from jurisdiction within the internal legal order of the Community, and the Community judicature must ensure the full review of all Community acts including measures designed to give effect to resolutions adopted by the Security Council under Ch VII: paras 299 and 326. In his paper, *Terrorism and the ECJ: Empowerment and democracy in the EC legal order* (2009) 34 EL Rev 103, p 126 Professor Takis Tridimas said that the ECJ's commitment to the protection of fundamental rights was to be applauded, but that as regards the exercise of finding a balance between the overriding interests of public security and the rights of the individual it marked the beginning rather than the end of the inquiry.

[**69**] The ECJ is not alone in regarding the way the decisions under the listing system administered by the 1267 Committee are dealt with as incompatible with the fundamental right that there should be an opportunity for a review by an independent tribunal of their lawfulness. In *Abdelrazik v Minister of Foreign Affairs* [2009] FC 580 Zinn J sitting in the Federal Court of Canada said in para 51:

> 'I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness … It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.'

He found that Mr Abdelrazik's right under the Canadian Charter of Rights and Freedoms to enter Canada, his country of citizenship, which had been denied to him because he was listed and facilitating his return by purchasing an airline ticket on his behalf was precluded by the ban on transferring assets to a listed entity, had been breached. He held that the remedy to which Mr Abdelrazik was entitled required the Canadian government to take immediate action so that he be returned to Canada.

[70] In *KindHearts for Charitable Humanitarian Development Inc v Geithner* (2009) 647 F Supp 2d 857, the United States District Court for the Northern District of Ohio upheld a challenge to a provisional determination under President Bush's Executive Order no 13224 of 24 September 2001 by the Office of Foreign Assets Control of the United States Treasury Department that KindHearts was a specially designated global terrorist on the ground that blocking access to its assets pending investigation was contrary to its Fourth Amendment right to be secure against unreasonable search and seizure. The judge held that the Office's handling of KindHearts' request for access to blocked assets to pay counsel's fees had been arbitrary and capricious without individualised consideration of the facts of the case. It is worth noting that the President's Executive Order was issued before the Security Council adopted SCR 1373 (2001). This appears to be the first time that a challenge to the taking of action of that kind has been successful in the United States.

[71] Caution must however be exercised in drawing any firm conclusions from these cases. The decisions of the courts in Canada and the United States were not made under reference to an international human rights instrument such as the European convention. It should be noted too that in *Diggs v Shultz* (1972) 470 F 2d 461 the United States Federal Court of Appeals held that it lacked the authority to compel the President to comply with a United Nations SCR obligation regarding sanctions against Rhodesia, as subsequent legislation by Congress which plainly contravened the SCR had equal status to the obligation under the treaty: see also *Whitney v Robertson* (1887) 124 US 190. The ECJ was not faced in *Kadi v EU Council* with the problem that art 103 of the United Nations Charter gives rise to in member states in international law, as the institutions of the European Community are not party to the United Nations Charter. We must take our guidance from *R (on the application of Al-Jedda) v Secretary of State for Defence* [2008] 3 All ER 28, [2008] 1 AC 332. In that case the House was unanimous in holding that the obligation under art 25 of the Charter was, by virtue of art 103, to prevail over any other international agreement, including the convention. It had regard to a passage in *Behrami v France, Saramati v France* (2007) 22 BHRC 477 (para 149), which in para [36] of his opinion in *R (on the application of Al-Jedda) v Secretary of State for Defence* Lord Bingham said was a strong statement. In that paragraph the Strasbourg court said that the convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by United Nations SCRs to the scrutiny of the court, as to do so would be to interfere with the fulfilment of the United Nations' key mission to secure international peace and security.

[72] Lord Bingham gave this explanation for the conclusion that the House had reached in *R (on the application of Al-Jedda) v Secretary of State for Defence*:

> '[35] Emphasis has often been laid on the special character of the convention as a human rights instrument. But the reference in art 103 to "any other international agreement" leaves no room for any excepted

category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* [1992] ICJ Rep 3 at 126 (para 39), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] ICJ Rep 325 at 439–440 (paras 99–100) per Judge ad hoc Lauterpacht) give no warrant for drawing any distinction save where an obligation is jus cogens and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Ch VII supersede all other treaty commitments (see Simma (ed) *The Charter of the United Nations: A Commentary* (2nd edn, 2002) pp 1299–1300).

[36] I do not think that the European court, if the appellant's art 5(1) claim were before it as an application, would ignore the significance of art 103 of the charter in international law …'

In para [39], acknowledging that there was clash between a power or duty to detain exercisable on the express authority of the Security Council and a fundamental human right which the United Kingdom had undertaken to secure to those within its jurisdiction, he said that there was only one way that they could be reconciled. This was by ruling that the United Kingdom might exercise the power of detention authorised by the Security Council but must ensure that the detainee's rights under art 5 were not infringed to any greater extent than was inherent in such detention.

[73] The Security Council resolutions that were in issue in that case were made pursuant to art 42 of the Charter not, as in this case, under art 41. But Mr Singh did not suggest, in my view rightly, that it could be distinguished on that ground. What he did suggest was that the Grand Chamber of the European Court of Human Rights, before which *R (on the application of Al-Jedda) v Secretary of State for Defence* is to be heard, might reach a different view on this matter, especially in the light of the decision of the ECJ in *Kadi v EU Council*. He pointed out that, as the prohibition on the death penalty, unlike that against torture, was not ius cogens, the logical conclusion of the *Al-Jedda* approach was that a direction by the Security Council that those found guilty of terrorist acts must be sentenced to death would have to prevail over art 2 of the convention and art 1 of the Thirteenth Protocol (the Death Penalty Protocol). It was arguable that this was to drive the effect of art 103 too far: see *Soering v UK* (1989) 11 EHRR 439, [1989] ECHR 14038/88. The same could be said of the breaches of convention rights that resulted from the SCRs directing the kind of freezing regime that the AQO was designed to give effect to, especially in view of their indefinite effect and the lack of effective access to an independent tribunal for the determination of challenges to decisions about listing and de-listing.

[74] I do not think that it is open to this court to predict how the reasoning of the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* would be viewed in Strasbourg. For the time being we must proceed on the basis that art 103 leaves no room for any exception, and that the convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail. The fact that the rights that G seeks to invoke in this case are now part of domestic law does not affect that conclusion. As Lord Bingham memorably pointed out in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept*

[2004] UKHL 26 at [20], [2004] 3 All ER 785 at [20], [2004] 2 AC 323, the convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. It must be for the Strasbourg court to provide the authoritative guidance that is needed so that all the contracting states can adopt a uniform position about the extent to which, if at all, the convention rights or any of them can be held to prevail over their obligations under the United Nations Charter.

[75] But this leaves open for consideration how the position may be regarded under domestic law. Mr Singh submitted that the obligation under art 25 of the Charter to give effect to the SCRs directing the measures to be taken against Usama bin Laden, Al-Qaida and the Taliban had to respect the basic premises of our own legal order. Two fundamental rights were in issue in G's case, and as they were to be found in domestic law his right to invoke them was not affected by art 103 of the United Nations Charter. One was the right to peaceful enjoyment of his property, which could only be interfered with by clear legislative words: *Entick v Carrington* (1765) 19 State Tr 1029 at 1066, 95 ER 807 at 817 per Lord Camden CJ. The other was his right of unimpeded access to a court: *R (on the application of Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36 at [26], [2003] 3 All ER 827 at [26], [2004] 1 AC 604 per Lord Steyn. As it was put by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1 at 6, [1960] AC 260 at 286, the subject's right of access to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. As Mr Singh pointed out, both of these rights are embraced by the principle of legality, which lies at the heart of the relationship between Parliament and the citizen. Fundamental rights may not be overridden by general words. This can only be done by express language or by necessary implication. So it was not open to the Treasury to use its powers under the general wording of s 1(1) of the United Nations Act 1946 to subject individuals to a regime which had these effects.

[76] I would accept Mr Singh's proposition that, as fundamental rights may not be overridden by general words, s 1 of the United Nations Act 1946 does not give authority for overriding the fundamental rights of the individual. It does not do so either expressly or by necessary implication. The question is whether the effect of G's designation under the AQO has that effect. To some extent this must be a question of degree. Some interference with the right to peaceful enjoyment of one's property may have been foreseen by the framers of s 1, as it authorises the making of provision for the apprehension, trial and punishment of persons offending against the order. To that extent coercive steps to enable the measures to be applied effectively can be regarded as within its scope. But there must come a point when the intrusion upon the right to enjoyment of one's property is so great, so overwhelming and so timeless that the absence of any effective means of challenging it means that this can only be brought about under the express authority of Parliament. Has that point been reached in the case of those who are designated persons under the AQO?

[77] The opportunity to seek judicial review under Pt 6 of the 2008 Act is not available in the case of persons such as G who are subject to the AQO only because they have been listed by the 1267 Committee. No direction under art 4(1) of the AQO was made in his case. Even if such a direction had been made he would still be a designated person to whom the AQO applied as he has been designated by the committee: see art 3(1)(b). In the Court of Appeal Sir Anthony Clarke MR summarised the position in which G found himself in this way [2009] 2 All ER 747 at [108], [2009] 3 WLR 25:

'It is common ground that G is subject to the AQO only because he has been listed by the UN Sanctions Committee (the committee). He has never had any contact with the committee, has no idea who precisely made the decision or upon what evidence it was based, although he does now know that it was the United Kingdom government which requested that he be listed. It presumably had some evidential basis for its request. Indeed, it was presumably on the same basis as that relied upon by [HM Treasury] in making a direction for his designation under the TO and was thus said to be so sensitive that G could not be given details. As to the committee, Mr Singh stresses that there is no information in the public domain that throws any light on who its members are, what degree of independence they enjoy, what evidential test they apply and what, if any, safeguards are in place to protect the rights of the individuals affected.'

[**78**] Some further details can be obtained from the Guidelines of the Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities of 9 December 2008. They state that the committee is comprised of all the members of the Security Council from time to time, that decisions of the committee are taken by consensus of its members and that a criminal charge or conviction is not necessary for a person's inclusion in the consolidated list that the committee maintains, as the sanctions are intended to be preventative in nature. It would appear that listing may be made on the basis of a reasonable suspicion only. It is also clear that, as the committee works by consensus, the effect of the guidelines is that the United Kingdom is not able unilaterally to procure listing, but it is not able unilaterally to procure de-listing either under the 'Focal Point' procedure established under SCR 1730 (2006). Although the Security Council has implemented a number of procedural reforms in recent years and has sought improvement in the quality of information provided to the 1267 Committee for the making of listing decisions, the Treasury accepted in its response of 6 October 2009 (Cm 7718) to the House of Lords European Union Committee's Report into Money Laundering and the Financing of Terrorism (19th Report, Session 2008–2009, HL Paper 132) that there is scope to further improve the transparency of decisions made by the 1267 Committee and the effectiveness of the de-listing process. On 17 December 2009 the Security Council adopted SCR 1904 (2009) which provides in paras 20 and 21 that, when considering de-listing requests, the Committee shall be assisted by an ombudsperson appointed by the Secretary General, being an eminent individual of integrity, impartiality and experience, and that the Office of the Ombudsman is to deal with requests for de-listing from individuals and entities in accordance with procedures outlined in an annex to the resolution. While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.

[**79**] Mr Swift accepted that the principle of legality requires that the power to impose restrictions such as those that flow from designation under the AQO should be subject to judicial review. But he said that it was vital to identify the decision that had to be scrutinised. In G's case the proper focus was on art 3(1)(b) of the AQO. Its effect was that all those designated by the 1267 Committee were subject to the order. The reasons why the person had been so designated were not relevant in domestic law. He added that the United Kingdom would be setting a bad example if it were to default on its

obligation to give effect to the resolutions that had this effect. It was not open to member states to go behind the system that had been set up to meet the global challenge that was presented by terrorism.

[**80**] While I recognise the force of Mr Swift's argument, it seems to me that it does not meet the essence of Mr Singh's complaint. Nor does the fact that the AQO does what SCR 1267 (1999) and subsequent resolutions required of it. In part Mr Singh's complaint was about the inability of the 1267 Committee's procedures to provide an effective remedy. But it was also about the means that had been used in domestic law to subject G to the AQO's regime. As Zinn J said in *Abdelrazik v Minister of Foreign Affairs* [2009] FC 580 (para 51), there is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. Some steps have been taken to address this problem, but there is still much force in these criticisms. The essential point that Mr Singh makes is that G ought not to have been subjected to this by an order made under s 1 of the United Nations Act 1946 which avoids parliamentary scrutiny. This is a fundamental objection which, as in the case of the TO, is directed to the dangers that lie in the uncontrolled power of the executive.

[**81**] I would hold that G is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy. As Mr Swift indicates, seeking a judicial review of the Treasury's decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him. I would hold that art 3(1)(b) of the AQO, which has this effect, is ultra vires s 1 of the United Nations Act 1946. It is not necessary to consider for the purposes of this case whether the AQO as a whole is ultra vires except to say that I am not to be taken as indicating that art 4 of that order, had it been applicable in G's case, would have survived scrutiny.

[**82**] I would treat HAY's case in the same way. He too is a designated person by reason of the fact that his name is on the 1267 Committee's list. As has already been observed, the United Kingdom is now seeking that his name should be removed from it. By letter dated 1 October 2009 the Treasury's Sanctions Team informed his solicitors that the de-listing request was submitted on 26 June 2009 but that at the committee's first consideration of it a number of states were not in a position to accede to the request. Further efforts to obtain de-listing are continuing, but this has still not been achieved. So he remains subject to the AQO. In this situation he too is being denied an effective remedy.

CONCLUSION

[**83**] I would allow the appeals by A, K, M and G. I would declare that the TO is ultra vires and I would quash that Order. I would allow G's appeal as regards the AQO to the extent of declaring that art 3(1)(b) of that Order is ultra vires. Had the 2009 Order under which A, K, M and G have now been re-designated been before us, I would have quashed that Order too as it is open to objection on the same grounds. I would allow the Treasury's appeal in HAY's case to the extent of setting aside the declaration by Owen J that the AQO as a whole is ultra vires and substituting for it the order that I would make in G's case.

[**84**] I would however suspend the operation of the orders that I would make as regards the AQO for a period of one month from the date of the judgment to give the Treasury time to consider what steps, if any, they should now take. I would have suspended the operation of the orders in the appeals of A, K, M and G as regards the TO had it not been for the fact that they have all been re-designated under the 2009 Order. The designations made under that Order are not before the court in these proceedings. It will be for the Administrative Court to consider whether the Treasury need time to consider their position should an application be made to it for these fresh designations to be set aside. It is perhaps arguable that suspension of the order relating to the AQO is not needed in HAY's case in view of the steps that are currently being taken for him to be de-listed by the 1267 Committee. But so long as he remains on the list the United Kingdom is bound by art 25 of the Charter to treat him as a designated person and must take steps to subject him to a freezing order in this country. So I think that suspension of the order is needed in his case to enable the Treasury, if so minded, to take the steps to give effect to this obligation pending the proceedings for HAY's de-listing.

LORD PHILLIPS P.

[**85**] It is particularly appropriate that these should be the first appeals to be heard in the Supreme Court of the United Kingdom, for they concern the separation of powers. At issue is the extent to which Parliament has, by the United Nations Act 1946, delegated to the executive the power to legislate. Resolution of this issue depends upon the approach properly to be adopted by the court in interpreting legislation which may affect fundamental rights at common law or under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention).

[**86**] I am grateful to Lord Hope for the clarity with which he has performed the laborious task of describing the legislative background and history of these appeals. Although we have held that anonymity cannot be justified in this case it is convenient to continue to refer to the individuals who have been subjected to freezing orders by initials and I shall follow the example of Lord Hope in referring to them all collectively as 'the appellants'. I shall also adopt his references to the different forms of freezing order by the initials TO (the Terrorism (United Nations Measures) Order 2006, SI 2006/2657) and AQO (the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952).

[**87**] The appellants claim, for a variety of reasons, that the freezing orders made against them were ultra vires, that is, beyond the power conferred by s 1 of the 1946 Act, which is set out by Lord Hope at [12]. That section confers power on, in effect, the government, by Order in Council to make 'such provision' as appears 'necessary or expedient' for enabling 'measures to be effectively applied'. The measures in question are those that the Security Council has, pursuant to art 41 of the United Nations Charter, decided should be 'employed to give effect to its decisions' and called upon members to apply. The Security Council embodies such decisions in resolutions.

[**88**] There are three different bases for contending that the freezing orders are ultra vires. (i) The freezing orders violate rights protected by the convention. (ii) The relevant Security Council resolutions do not fall within the scope of the 1946 Act. (iii) The terms of the freezing orders do not fall within the powers of the 1946 Act.

CONVENTION RIGHTS

[**89**] The appellants did not put reliance on convention rights at the forefront of their case, but I propose to start with this ground of appeal. Section 1 of the 1946 Act was passed in order to provide a way of giving effect to this country's treaty obligations under the United Nations Charter. Executive action in the form of an Order in Council can be used to implement decisions of the Security Council under art 41 of the Charter. The 1998 Act was passed to give effect to this country's obligations under the convention. Section 6(1) of the 1998 Act prohibits the executive from action that infringes a convention right. It provides: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' The appellants contend that the freezing orders are incompatible with a number of convention rights and that, accordingly, it was unlawful to make them.

[**90**] There is another way that the 1998 Act can be deployed. Section 3 of the Act requires, in so far as possible, that legislation be read and given effect in a way which is compatible with the convention rights. It can be argued that the power to make Orders in Council conferred by s 1 of the 1946 Act must be read subject to the implied proviso that such orders must not violate convention rights.

[**91**] The appellants argue that the freezing orders violate their right to respect for family life under art 8 of the convention, their peaceful enjoyment of their possessions under art 1 of the First Protocol and their right to a fair trial under art 6. Mr Swift, for the Treasury, does not accept that, if these articles are applicable, they have been infringed by the freezing orders. His primary submission is, however, that in so far as there is a conflict between the duty of the United Kingdom to comply with Security Council resolutions under art 41 of the Charter and a duty to secure human rights under the convention, the former duty prevails. He contends that no claim will lie under s 6(1) of the 1998 Act in respect of breach of convention rights which are 'trumped' in this way by obligations under the Charter.

[**92**] The starting point of this argument is art 103 of the United Nations Charter. Article 25 requires members of the United Nations to carry out decisions of the Security Council in accordance with the Charter. Article 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[**93**] Next one must turn to the definition of 'the Convention' in s 21 of the 1998 Act: 'the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 *as it has effect for the time being in relation to the United Kingdom*' (my emphasis). In *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 3 All ER 111, [2006] 1 AC 529 the House of Lords held that this definition reflected the policy of the 1998 Act, which was to 'bring rights home', so that no claim for breach of s 6(1) would lie unless the Strasbourg court would also find a violation of the convention by the United Kingdom. It follows that the provision of s 6(1) rendering unlawful action incompatible with convention rights will not render unlawful the making of the freezing orders if the Strasbourg court accepts that the duty to comply with the Security Council resolutions takes precedence over the duty to comply with the convention.

[**94**] That is not a question that the Strasbourg court has had, directly, to resolve. The Grand Chamber did, however, make some very relevant comments when giving its decision as to admissibility in *Behrami v France, Saramati v France* (2007) 22 BHRC 477. The applicants in those cases complained of the action and inaction of members of an international security force (KFOR) that had been deployed in Kosovo pursuant to Security Council Resolution 1244 (1999). The Grand Chamber ultimately held that the applications were not admissible on the ground that the court was not competent ratione personae. This was because the individual respondents fell to be treated as part of KFOR and KFOR was exercising powers 'lawfully delegated under Ch VII of the charter by the UNSC'. In these circumstances the actions of the respondents were 'directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective' (para 151).

[**95**] Under the heading 'Relevant Law and Practice' the court made the following observations about art 103 of the United Nations Charter:

> 'The ICJ considers art 103 to mean that the charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the charter or was only a regional arrangement [*Nicaragua v USA* (*Military and Paramilitary Activities in and against Nicaragua*) (*Jurisdiction and Admissibility*) [1984] ICJ Rep 392 (para 107)]. See also [*Kadi v EU Council* Case T-315/01 [2005] ECR II-3353 at para 183], judgment of the Court of First Instance of the European Communities (CFI) of 21 September 2005 (under appeal) and two more recent judgments of the CFI in the same vein: [*Yusuf v EU Council* Case T-306/01 [2006] All ER (EC) 290, [2005] ECR II-3533 (paras 231, 234, 242–243 and 254)] as well as *Ayadi v European Council* Case T-253/02 [2006] All ER (D) 155 (Jul) at para 116). The ICJ has also found art 25 to mean that UN member states' obligations under a UNSC resolution prevail over obligations arising under any other international agreement (*Libyan Arab Jamahiriya v USA* (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*) (*Provisional measures*) (*Order of 14 April 1992*) [1992] ICJR 114 at para 42 and *Libyan Arab Jamahiriya v UK* (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*) (*Provisional measures*) (Order of 14 April 1992) [1992] ICJR 3 at para 39).' (Paragraph 27.)

[**96**] Later in its judgment the Grand Chamber cited the first paragraph of art 30 of the Vienna Convention on the Law of Treaties: '1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs' (para 35).

[**97**] The court went on to make the following observations about the convention and the United Nations acting under Ch VII of its Charter:

> '147. The court first observes that nine of the twelve original signatory parties to the convention in 1950 had been members of the UN since 1945 (including the two respondent states), that the great majority of the contracting parties joined the UN before they signed the convention and that currently all contracting parties are members of the UN. Indeed, one

of the aims of this convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at para 122, above, that the convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its contracting parties. The court has therefore had regard to two complementary provisions of the charter, arts 25 and 103, as interpreted by the International Court of Justice (see para 27, above).

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Ch VII to fulfil that aim. In particular, it is evident from the preamble, arts 1, 2 and 24 as well as Ch VII of the charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the preamble to the convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Ch VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paras 18–20, above).

149. In the present case, Ch VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC resolutions under Ch VII of the charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSC resolutions and occur prior to or in the course of such missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment of the UN's key mission in this field …'

[**98**] These passages suggest that the Grand Chamber was prepared to recognise the primacy of obligations under the United Nations Charter over obligations under the convention. That the Strasbourg court would take such an approach was accepted by the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 1 AC 332. The claimant in that case had been detained by British forces in Iraq, acting pursuant to Security Council Resolution 1546 (2004) made under art 42 of the Charter. He claimed under the 1998 Act a declaration that his detention infringed his rights under art 5(1) of the convention. The Court of Appeal [2006] EWCA Civ 327, [2007] QB 621, [2006] 3 WLR 954 held that the United Kingdom's obligations under Resolution 1546 (2004) prevailed over its obligations under the convention and that accordingly, applying *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*, no action could be founded on the 1998 Act.

[**99**] The House of Lords upheld the Court of Appeal. In para [21] of his opinion Lord Bingham of Cornhill cited the passage from *Behrami v France, Saramati v France* (2007) 22 BHRC 477 that I have set out at [97], above. He went on to hold (at [36]):

'I do not think that the European Court, if the appellant's art 5(1) claim were before it as an application, would ignore the significance of art 103 of the charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in art 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law: see, for instance, *Loizidou v Turkey* (1997) 23 EHRR 513 at 526, 530 (paras 42–43, 52), *Bankovic v Belgium* (2001) 11 BHRC 435 at 447–448 (para 57), *Fogarty v UK* (2001) 12 BHRC 132 at 142 (para 34), *Al-Adsani v UK* (2001) 12 BHRC 88 at 102–103 (paras 54–55), *Behrami's case* (para 122). In the latter case (at para 149) the court made the strong statement quoted in [21], above.'

[**100**] Mr Rabinder Singh QC, in argument advanced on behalf of G which was adopted by the other appellants, recognised that the reasoning of the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2008] 3 All ER 28, [2008] 1 AC 332, which was equally applicable to obligations arising under art 41 of the United Nations Charter, would be fatal to the appellants' claim of breach of s 6(1) of the 1998 Act. He contended, however, that the landscape had been changed by the recent decision of the European Court of Justice (ECJ) in *Kadi v EU Council* Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872. In the light of that decision it was no longer right to assume that the Strasbourg court would hold that obligations under the United Nations Charter took precedence over obligations under the convention. The decision of the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* has been challenged in an application to Strasbourg, so that the Strasbourg court will have to consider this matter in the context of that very case.

[**101**] The background to *Kadi v EU Council* was the practice adopted by the European Council of adopting regulations to give effect in the Community to United Nations resolutions under Ch VII of the Charter. Pursuant to this practice the Council adopted Regulation (EC) 881/2002 (OJ 2002 L139 p 9) in order to implement the Security Council resolutions that the United Kingdom has sought to implement by the freezing orders. Mr Kadi is one of those whose name is on the list kept by the 1267 Committee and brought proceedings seeking the annulment of the regulation on the grounds (i) that it was not competent for the Council to adopt it and (ii) that it infringed his fundamental rights. Before the Court of First Instance both grounds failed. Before the ECJ the challenge to the Council's competence failed, but the challenge based on infringement of his fundamental rights succeeded.

[**102**] The ECJ emphasised that it was concerned with the legitimacy of Regulation (EC) 881/2002 as a matter of Community law. It held:

'285. … the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the court to review in the framework of the complete system of legal remedies established by the Treaty.

286. In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

287. With more particular regard to a Community act which, like the contested Regulation, is intended to give effect to a Resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by article 220EC, to review the lawfulness of such a Resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that Resolution with jus cogens.

288. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a Resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that Resolution in international law.'

[**103**] The ECJ went on to find that the regime imposed by Regulation 881/2002 did not respect fundamental rights in a number of respects. There was no communication to those who were put on the 1267 Committee's list of the evidence relied upon to justify their inclusion. In these circumstances their rights of defence, and in particular the right to be heard, were not respected. The right to an effective legal remedy was not observed (paras 347 to 350). Because Mr Kadi suffered a significant restriction of his right to property in circumstances where he was not enabled to put his case to the relevant authorities his plea that his fundamental right to respect for property had been infringed was well founded. Regulation 881/2002, in so far as it concerned him (and another appellant whose case was heard with his), had to be annulled (paras 369 to 372).

[**104**] It is important to note that this decision was about the legitimacy of a Council regulation judged against the rules of the autonomous and self-contained regime instituted under the EC Treaty. Advocate General Maduro in his opinion had gone so far as to suggest at para 30 that—

'if the court were to annul the contested Regulation on the ground that it infringed Community rules for the protection of fundamental rights, then, by implication, member states could not possibly adopt the same measures without—in so far as those measures came within the scope of Community law—acting in breach of fundamental rights as protected by the court …'

[**105**] Mr Singh did not suggest that the decision in *Kadi v EU Council* had any direct effect on the legitimacy of the freezing orders. He simply submitted that it gave cause to reconsider the premise on which the decision of the House of Lords in *R (on the application of Al-Jedda) v Secretary of State for Defence* had been based.

[**106**] I do not believe that any firm conclusion can be drawn from the decision in *Kadi v EU Council* as to the approach that the Strasbourg court will take to the conflict between the obligations imposed by Security Council regulations and Convention obligations. In these circumstances it would not be

right to depart from the decision in *R (on the application of Al-Jedda) v Secretary of State for Defence*. As Mr Singh recognised, it follows from that decision that the appellants can found no claim on the provisions of the 1998 Act.

DO THE RESOLUTIONS FALL WITHIN THE SCOPE OF THE 1946 ACT?

[**107**] I turn to the second basis for contending that the freezing orders are ultra vires, namely that the relevant Security Council resolutions do not fall within the scope of the 1946 Act. Two separate arguments are advanced in respect of this basis. The first applies both to the TO and to the AQO. The argument was advanced by Mr Owen QC on behalf of A, K and M but adopted by the other appellants, and is as follows. The 1946 Act only permits the making of orders that transpose specific measures directed by the Security Council. The relevant resolutions do not simply direct members to implement specific measures but require them to fashion the legislative design that gives effect to the measures. This is a task for Parliament, not the executive.

[**108**] The other argument relates only to the AQO. It is that the relevant resolutions require member states to interfere with fundamental rights of individuals within their territories on grounds that those individuals will have no right to challenge before a court. It is argued that s 1 of the 1946 Act does not extend to such a resolution.

[**109**] The issues raised by this argument are issues of statutory interpretation. Treaties entered into by the United Kingdom do not take direct effect. Treaties are entered into by the government under the royal prerogative, but unless and until Parliament incorporates them into domestic law, they confer no powers upon the executive nor rights or duties upon the individual citizen—*Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523 at 544–545; sub nom *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418 at 499–500.

[**110**] The 1946 Act is designed to provide a means of giving effect to the international obligations imposed upon the United Kingdom under art 41 of the United Nations Charter. The primary arguments advanced by the appellants relate to the true interpretation of s 1 of that Act. Their arguments in relation to this have not turned on the natural meaning of the section. Rather they have relied upon a principle of construction that requires limitations to be placed on the scope of statutory powers as a matter of presumption or implication. This they have described as the principle of legality.

THE PRINCIPLE OF LEGALITY

[**111**] The appellants have put this principle at the forefront of their argument on the interpretation of the 1946 Act. Under this principle the court must, where possible, interpret a statute in such a way as to avoid encroachment on fundamental rights, sometimes described as constitutional rights. Lord Hope at [46] has cited the passages in the speech of Lord Browne-Wilkinson in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577; sub nom *R v Secretary of State for the Home Dept, ex p Pierson* [1998] AC 539 in which he described this principle. Equally pertinent is the oft-cited passage in the speech of Lord Hoffmann in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

[**112**] Lord Hoffmann went on to say that the principle of legality applied as much to subordinate legislation as to Acts of Parliament. Lord Hoffmann made it plain that the principle of legality was one that applied to the interpretation of general or ambiguous words in the absence of express language or necessary implication to the contrary. At the time of his judgment the 1998 Act had not yet come into effect and Lord Hoffmann commented that the principle of legality had been expressly enacted as a rule of construction in s 3 of the Act. I believe that the House of Lords has extended the reach of s 3 of the 1998 Act beyond that of the principle of legality.

[**113**] Section 3(1) provides: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[**114**] The convention rights are defined in s 1 to mean the rights and fundamental freedoms set out in arts 2 to 12 and 14 of the convention, arts 1 to 3 of the First Protocol and art 1 of the Thirteenth Protocol.

[**115**] The effect of s 3 has been the subject of extensive academic discussion—see the literature referred to in footnote 27 to para 4.08 in the second edition (2009) of Clayton and Tomlinson *The Law of Human Rights*. It has also been the subject of judicial consideration on a number of occasions in the House of Lords. It is not necessary to refer in detail to this body of authority. It suffices to note that it accords to s 3 a role of constitutional significance. By enacting s 3, Parliament has been held to direct the courts to interpret legislation in a way which is compatible with convention rights, even where such interpretation involves departing from the 'unambiguous meaning the legislation would otherwise bear', or the 'legislative intention of Parliament'—see *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [30], [2004] 3 All ER 411 at [30], [2004] 2 AC 557 per Lord Nicholls and *Sheldrake v DPP; A-G's Ref* (*No 4 of 2002*) [2004] UKHL 43 at [24], [2005] 1 All ER 237 at [24], [2005] 1 AC 264 per Lord Bingham. Such an interpretation must, however, be one that is 'possible' having regard to the underlying thrust or intention of the legislation.

[**116**] *Bennion on Statutory Interpretation* (5th edn, 2008) s 270 (p 823) comments that the term 'principle of legality' is likely to lead to confusion but goes on to suggest that the 'so-called principle of legality' was widened by a majority of the House of Lords in *R* (*on the application of Anufrijeva*) *v Secretary*

of State for the Home Dept [2003] UKHL 36, [2003] 3 All ER 827, [2004] 1 AC 604 so as to contradict what Lord Bingham (who dissented) called 'a clear and unambiguous legislative provision' (para [20]), the provision in question being contained in delegated legislation.

[117] The other members of the House did not, however, purport to depart from wording that was clear and unambiguous—see Lord Steyn at [31], Lord Hoffmann at [37], Lord Millett at [43] and Lord Scott at [58]. I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention. To this extent its reach is less than that of s 3 of the 1998 Act.

TRANSPOSITION AND LEGISLATIVE DESIGN

[118] Mr Owen QC for A, K and M put at the forefront of his submissions the contention that the 1946 Act authorised Orders in Council that gave effect to specific measures directed by the Security Council but not Orders in Council that themselves directed what measures should be taken. He contrasted 'transposition' that was authorised by the Act and 'legislative design' that was not. He submitted that this distinction was one that fell within the principle of legality. In a written note he clarified his submission as follows:

> 'The constitutional principle at issue in the instant case is that the recognition by the common law of the supremacy of Parliament is based on an assumption that Parliament will not surrender its law making powers to the Executive (or an international body) on an uncontrolled and uncertain basis. Unless the contrary intention is clearly and expressly indicated, no Act of Parliament will be construed as delivering a 'blank cheque' to the Executive to legislate at will in any area, simply because it is called upon to do so by an international body.'

[119] This submission was supported by the intervener. On behalf of JUSTICE, Mr Fordham QC submitted that, under the principle of legality, only Parliament could impose an asset freezing regime. Because such a regime interfered with fundamental rights, it was necessary that the controls imposed should be necessary, proportional and certain and attended with basic procedural safeguards under which the individual would secure a fair hearing and effective judicial protection. These were matters for Parliament, not the executive. These submissions overlapped with the submission that the 1946 Act could not, on its true construction, authorise Orders in Council which interfered with fundamental rights.

[120] Mr Owen turned to two New Zealand cases for support for his submission. In *Reade v Smith* [1959] NZLR 996 Turner J sitting in the Supreme Court had to consider the scope of s 6 of the Education Amendment Act 1915 (No 2), which was in the following terms:

> 'The Governor-General in Council may make such Regulations as he thinks necessary or expedient for avoiding any doubt or difficulty which may appear to him to arise in the administration of the principal Act by reason of any omission or inconsistency therein, and all such Regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding.'

He observed at 1003–1004:

> 'To anyone accustomed to the notion that the law-giving powers of the people are reposed by them in Parliament, it may come as a surprise to learn that since 1915 the Legislature appears to have surrendered these powers to the Executive as regards such matters as are covered by this section; and that not content with delegating its principal function to the Governor-General, it has purported to sign a blank cheque and to ratify in advance whatever he shall do by regulation, even if it is in conflict with the express provisions of the Education Act itself. In construing a section which at first sight may appear to carry self-abnegation so far, the Court will strive to give it a restricted interpretation, preferring to regard Parliament as not having made any more complete surrender of its powers than must necessarily follow from the plain words used.'

[**121**] In *Brader v Ministry of Transport* [1981] 1 NZLR 73 the Court of Appeal had to consider the scope of s 11 of the Economic Stabilisation Act 1948 which gave the minister power by Order in Council to make such regulations 'as appear to him to be necessary or expedient for the general purpose of this Act'. Cooke J remarked (at 78): 'It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function.' This remark was made, however, in the context of restricting the power conferred on the minister to within reasonable limits. The court went on to hold that the minister had acted intra vires in making it a criminal offence to drive a private car on specified 'carless days' with the object of saving petrol.

[**122**] These decisions fall short of supporting the proposition that the principle of legality raises a general presumption against Parliament delegating to the executive the power to make regulations that call for legislative design. *Brader v Ministry of Transport* points in the opposite direction. I reject Mr Owen's submissions on this point. I would accept, however, that a statutory provision which delegates to the executive the power to make regulations should be strictly construed and that, where the power is conferred in general terms, it may be necessary to imply restrictions in its scope in order to avoid interference with individual rights that is not proportionate to the object of the primary legislation.

[**123**] Mr Owen was on stronger ground when he submitted that some limitations had to be placed upon the power conferred by the 1946 Act. He drew attention to para 2(d) of United Nations Security Council Resolution 1373 (2001) which decides that all states shall 'Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens'. He submitted that on the Treasury's interpretation of the 1946 Act there would have been no obstacle to the government imposing by Order in Council the provisions contained in the Anti-terrorism, Crime and Security Act 2001, permitting indefinite detention of foreign nationals, or preventative measures such as control orders now contained in the Prevention of Terrorism Act 2005. When pressed in argument, Mr Swift for the Treasury accepted, with some reluctance, that such was indeed his position.

[**124**] I do not accept that the 1946 Act authorises such wide ranging legislation. The natural meaning of the wording of s 1, when read with the wording of art 41 of the Charter, imposes limits on the power granted by s 1. That power is to make such provision as appears necessary or expedient for enabling the effective application of 'measures not involving the use of armed

force' which the Security Council has decided 'are to be employed to give effect to its decisions'. Measures to which the 1946 Act refers must necessarily have a degree of specificity. They have to be capable of being 'employed' or 'effectively applied'. They will often be the means to an objective rather than the objective itself. Preventing terrorists from using the territory of the United Kingdom for terrorist acts is an objective, it is not a 'measure'. It is not something that can be 'employed' or 'applied'. Detention of foreign nationals or the imposition of control orders are measures, but they are not measures the employment of which forms any part of the decision of the Security Council that is set out in para 2(d) of Resolution 1373 (2001).

[**125**] The generality of the provisions of para 2(d) contrasts with the specificity of para 1(b), (c) and (d) of the same resolution. It is to these provisions that the TO gives effect. These provisions are specific measures. They fall within the scope of the wording of s 1 of the 1946 Act in that one can sensibly speak of provisions that are necessary or expedient to enable them 'to be effectively applied'. They can also properly be described as 'measures' that the Security Council has decided 'are to be employed to give effect to its decisions' under art 41. The TO involves a degree of legislative design, including the creation of offences and the range of penalties that relate to them, but legislation of this type is expressly provided for by s 1 of the 1946 Act.

[**126**] For these reasons I reject the submission that, whether under the natural meaning of s 1 of the 1946 Act, or under the application of the principle of legality, the TO falls outside the powers conferred by the section simply because the TO involves a degree of legislative design rather than mere transposition.

[**127**] I propose to defer consideration of the argument that the resolutions to which the AQO relates fall outside the scope of the 1946 Act in order to deal first, in relation to the TO, with the third basis for arguing that the freezing orders are ultra vires, which is that the terms of the freezing orders fall outside the scope of what is permitted by the 1946 Act.

DO THE TERMS OF THE TO FALL OUTSIDE THE POWERS OF THE 1946 ACT?

[**128**] The following points are advanced by the appellants. (i) The TO goes further than the relevant Security Council resolution requires. (ii) The freezing orders are disproportionate and oppressive. (iii) The terms of the freezing orders are uncertain. (iv) In the case of the TO adequate provision is not made to enable those designated to challenge their designation.

DOES THE TO GO FURTHER THAN THE RESOLUTION REQUIRES?

[**129**] Resolution 1373 (2001) recited that the Security Council decided that all states should:

> '1 … (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons …'

[**130**] Section 1 of the 1946 Act empowers the making by Order in Council of such provision as appears 'necessary or expedient' for enabling the measures in the resolution to be effectively applied. The conditions laid down by the TO for making a freezing order are set out in art 4(2):

> 'The conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be—(a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; (b) a person identified in the Council Decision; (c) a person owned or controlled, directly or indirectly, by a designated person; or (d) a person acting on behalf of or at the direction of a designated person.'

[**131**] The wording of the TO tracks the wording of the resolution, save that those who can be made subject to the order are not only those described in the resolution but those whom the Treasury have reasonable grounds for suspecting fall or may fall within that description. The issue is whether it can properly be said to be 'necessary or expedient' to apply this test of reasonable suspicion in order to ensure that the measures in the resolution are effectively applied to those described in the resolution. This question goes not merely to the legitimate scope of the TO but to the legitimacy of the entire TO regime.

[**132**] The Court of Appeal concluded that a 'reasonable suspicion' test fell within the scope of what appeared 'necessary or expedient' to give effect to the measures in the resolution ([2008] EWCA Civ 1187, [2009] 2 All ER 747, [2009] 3 WLR 25). The Master of the Rolls (Sir Anthony Clarke) treated this as essentially a question of the standard of proof and observed that such a test had been accepted by the Strasbourg court in relation to a similar problem arising out of the risk of terrorism. He concluded: 'I would accept such a test as lawful provided that the person concerned has a proper opportunity to challenge the decision made against him' (see [42]). He went on to hold, however, that the inclusion of the words 'or may be' went beyond what was necessary or expedient. He considered that these words widened the test of 'reasonable suspicion' to an extent that was not legitimate, albeit that '[t]here is scope for argument as to how much difference this will make' (see [47]–[49]).

[**133**] There may be a tendency to approach the requirements of the resolution by reference to other measures that have been taken in this jurisdiction to combat terrorism, such as control orders imposed on the basis of reasonable suspicion. Such, however, are exceptional measures, treading the boundaries of what is compatible with respect for fundamental rights and the rule of law. They should not be treated as the norm. Identification of the requirements of Resolution 1373 (2001) should be approached, in the first instance, by consideration of the natural meaning of its provisions. That natural meaning appears to me to be relatively clear. The object of the resolution appears from the following statement in its preamble: '*Recognizing*

the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism'.

[**134**] The first specific measure called for by the resolution in para 1(b) is that states shall: 'Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts'.

[**135**] Paragraph 2(e) adds to this:

> 'Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts …'

[**136**] Paragraph 1(c) requires the freezing of the assets of those who commit the acts that the resolution has required should be criminalised and their agents. Thus what the resolution requires is the freezing of the assets of criminals. The natural way of giving effect to this requirement would be by freezing the assets of those convicted of or charged with the offences in question. This would permit the freezing of assets pending trial on a criminal charge, but would make the long-term freezing of assets dependent upon conviction of the relevant criminal offence to the criminal standard of proof.

[**137**] The resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination.

[**138**] It may be argued that it is 'expedient' to throw the net wide in order to ensure that the criminals are caught within it, even if this is at the expense of enmeshing those who are not. But I would not give 'expedient', as used in the 1946 Act, so extravagant a scope. Whether in so deciding I am applying the principle of legality, or a simple rule of construction that confines general words within reasonable limits where fundamental rights are in play, matters not. *Bennion* would probably say that they are one and the same—see p 823.

[**139**] It is, I think, legitimate to look at the parallel series of resolutions adopted by the Security Council under art 41 that have led to the AQO for guidance on the intended scope of Resolution 1373 (2001). I have done so, but found nothing to indicate that the Security Council has decided that freezing orders should be imposed on a basis of mere suspicion. Resolution 1333 (2000) first made provision for the Committee to keep what subsequently became the consolidated list of 'individuals and entities designated as being associated with Usama bin Laden'. The scheme is that the committee determines what names should be included on the list in the light of information provided by member

states. In recent years there has been an increasing emphasis on the duty of states to specify the evidence justifying the proposal that a name be placed on the list—see Resolution 1617 (2005), para 4; Resolution 1735 (2006), para 5 and Resolution 1822 (2008), para 12.

[**140**] The 'Guidelines of the Committee for the Conduct of its Work', as amended up to 9 December 2008 provide in para 6(d):

> 'Member States shall provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions. The statement of case should provide as much detail as possible on the basis(es) for listing indicated above, including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e g intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity. States shall identify those parts of the statement of case that may be publicly released, including for the use by the Committee for development of the summary described in paragraph (h) below or for the purpose of notifying or informing the listed individual or entity of the listing, and those parts that may be released upon request to interested States.'

[**141**] Paragraph 6(c) of the guidelines provides:

> 'Before a Member State proposes a name for addition to the Consolidated List, it is encouraged, if it deems it appropriate, to approach the State(s) of residence and/or nationality of the individual or entity concerned to seek additional information. States are advised to submit names as soon as they gather the supporting evidence of association with Al-Qaida and/or the Taliban. A criminal charge or conviction is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventative in nature. The Committee will consider proposed listings on the basis of the 'associated with' standard described in paragraphs 2 and 3 of Resolution 1617 (2005), as reaffirmed in paragraph 2 of Resolution 1822 (2008). When submitting names of groups, undertakings and/or entities, States are encouraged, if they deem it appropriate, to propose for listing at the same time the names of the individuals responsible for the decisions of the group, undertaking and/or entity concerned.'

[**142**] The resolutions cited lay down specific factual tests for association with Al-Qaida and the Taliban. The statement that a criminal charge or conviction is not necessary, if applied to the TO regime, opens the door to the suggestion that freezing orders should be imposed not merely where ancillary to a criminal charge or conviction, but in circumstances where there are reasonable grounds for believing that the subject of the order has been guilty of the relevant offending—see, by way of example, the test for a freezing order under s 4 of the 2001 Act.

[**143**] Whether an Order in Council providing for the making of freezing orders on the basis of reasonable belief would fall within the scope of the 1946 Act is not a question that I would resolve in the abstract. It would be manifestly preferable for any such measure to be imposed by primary legislation, which would not be restricted by the need to keep strictly within

the requirements of the relevant resolution. For the reasons that I have given I would quash the TO on the ground that, by applying a test of reasonable suspicion, it goes beyond what is necessary or expedient to comply with the relevant requirements of Resolution 1373 (2001) and thus beyond the scope of s 1 of the 1946 Act.

[**144**] It is not necessary to address the alternative reasons advanced by the appellants for contending that the terms of the TO fall outside the powers of the 1946 Act, but I will record my agreement with the conclusions expressed by Lord Mance in paras [232] to [236] of his judgment.

THE CHALLENGE TO THE AQO

[**145**] The common law rights of G and HAY to the enjoyment of their property, to privacy and to family life are very severely invaded by the AQO. Their counsel have adopted the submissions that were advanced on behalf of A, K and M to the effect that the principle of legality renders ultra vires orders that have such draconian effect and that lack certainty. If, however, they have justifiably been placed on the consolidated list on the ground that they have been supporting the activities of Al-Qaida, Usama bin Laden or the Taliban they can reasonably expect serious interferences with those rights. Their primary complaint is that they have no right to challenge before a court their inclusion on that list. Access to a court to challenge interference with rights is, they submit, a fundamental right protected by the principle of legality.

[**146**] Access to a court to protect one's rights is the foundation of the rule of law. Mr Swift accepted that if the AQO purported to exclude access to a court it would be ultra vires. He submitted, however, that it did no such thing. Designation by the Sanctions Committee was a fact that, under English law as embodied in the AQO, resulted in the imposition of severe restrictions on the rights of the person listed. It was open to any individual who experienced such restrictions, to challenge, by judicial review proceedings, whether the AQO rendered such interference lawful. In such proceedings the appellant could put in issue the assertion that he was a person designated on the Sanction Committee's list. He could challenge the validity of the order, as indeed G and HAY had done. What he could not do was challenge the basis upon which the Sanctions Committee had placed him on the list, for that question had no relevance to his rights under English law.

[**147**] I find this argument unreal. On the Treasury's case, the relevant resolutions and the 1946 Act, when read together, have had a devastating effect on G's and HAY's rights and left them unable to make an effective judicial challenge to the reasons for treating them in this way. That results from the fact that, by the 1946 Act Parliament, in effect, granted to the Security Council the power to specify legislation that it required member states to enact and granted to the executive the power to enact that legislation by Order in Council. The stark issue is, having regard to the principle of legality did the AQO fall outside limitations, express or implied, to the scope of this legislation?

[**148**] I have already, in paras [124] to [126] identified some limitations on the scope of s 1 of the 1946 Act, derived from the language of the section. As I explained, those limitations did not place the TO outside the ambit of the section. The same, a fortiori, is true in the case of the AQO. The resolutions to which that order gives effect decide upon measures which are significantly more specific than those in the resolutions giving rise to the TO, for the application of the AQO measures is restricted to those on the consolidated list.

[**149**] The list is, however, the primary object of the challenge brought by G and HAY to the legitimacy of the AQO. Names are placed on the list at the suggestion of member states. A member state has to give particulars of its reasons for putting forward a name, but it can place an embargo on disclosing those reasons to the name, or even on disclosing the fact that it was the state responsible for the inclusion of the name on the list. That is precisely what has occurred in the case of HAY. The Security Council has shown an appreciation of the need to provide a means whereby an individual can challenge the inclusion of his name on the consolidated list. The guideline that I have quoted at [140], above makes provision for notifying a listed individual of those parts of a member state's statement of the case against him that the state identifies may be publicly released and resolutions make express provision for de-listing, including the establishment of a focal point for submitting requests for de-listing—see Resolution 1730 (2006). But these provisions fall far short of the provision of access to a court for the purpose of challenging the inclusion of a name on the consolidated list, and far short of ensuring that a listed individual receives sufficient information of the reasons why he has been placed on the list to enable him to make an effective challenge to the listing.

[**150**] Does an Order in Council that subjects individuals to severe interference with their rights to the enjoyment of property, to privacy and to family life on the ground that they are associated with terrorists, in circumstances where they are denied the right to know the case against them or to have access to a court to challenge that case, fall within the power conferred by s 1 of the 1946 Act? The natural meaning of s 1 is wide enough to extend to implementation of the measures in Resolution 1267 (1999) and the later relevant resolutions that are reproduced in the AQO. Are those measures none the less implicitly excluded from the ambit of the section under the principle of legality?

[**151**] The first question to address is whether the provisions of s 1 are subject to any implied limitation at all. As to this there was no dispute between the parties. Mr Swift accepted that, if the Security Council decided, by a resolution under art 41, that member states should obtain information from terrorist suspects by the application of torture, s 1 of the 1946 Act would not apply to that measure. I think that at the very least the powers conferred by s 1 must be limited to measures imposed by the Security Council that are intra vires. The general, albeit not universal view, is that this would exclude measures that violated jus cogens—see the discussion in the article by Tridimas and Gutierrez-Fons on *EU Law, International Law, Economic Sanctions against Terrorism: The Judiciary in Distress?* Vol 32 901 Fordham Int'l LJ, pp 930–931. The implication of this would seem to be that it must be open to the domestic courts in this country to review the vires of Security Council resolutions in order to rule on the validity of orders made under the 1946 Act—see footnote 159 to p 932 of the same article.

[**152**] It has not, however, been suggested on behalf of any of the appellants that the relevant resolutions were ultra vires. None the less they are of a kind that Parliament cannot reasonably have anticipated when enacting the 1946 Act. Article 41 gives, by way of example of the 'measures not involving the use of armed force' to which it relates, 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. These

were measures against rogue states, not by states against individuals within them, and it is no cause for surprise that, when debating the Bill in the House of Lords, Viscount Samuel remarked:

> 'This particular Bill makes provision for the eventuality that coercive measures may become necessary by the United Nations against some State which is indulging, or is apparently about to indulge, in acts of aggression. Those coercive measures may be either military or non-military – what we are accustomed to speak of under the name of sanctions, economic sanctions, or similar sanctions.' 139 HL Official Report (5th series) col 378, 12 February 1946.

[**153**] The fact that Parliament may not have anticipated the nature of the measures upon which the Security Council decided over 60 years after the 1946 Act was passed does not mean that the Act cannot, on its true construction, apply to them—see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545 at 564–565, [1981] AC 800 at 822. It is necessary to consider the intention of Parliament, reading the statute 'in the historical context of the situation which led to its enactment'—per Lord Bingham in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], [2003] 2 All ER 113 at [8], [2003] 2 AC 687. Reference to Hansard demonstrates the enthusiasm in 1946 of all sections of both Houses for the new United Nations and the Security Council, of which the United Kingdom was a permanent member. Parliament should not be presumed to have intended that the measures covered by s 1 of the 1946 Act would be restricted to measures similar to the examples in art 41 of the Charter.

[**154**] Different considerations apply, however, to the question of whether Parliament would have appreciated the possibility that the Security Council would, under art 41, decide on measures that seriously interfered with the rights of individuals in the United Kingdom on the ground of the behaviour of those individuals without providing them with a means of effective challenge before a court. I conclude that Parliament would not have foreseen this possibility, having particular regard to the reference to human rights in the preamble and art 1(3) of the Charter and to the fact that the 1946 Act was passed at a time when the importance of human rights was generally recognised, as exemplified two years later by the adoption by the General Assembly of the Universal Declaration of Human Rights. This is material, for it makes the principle of legality a realistic guide to the presumed intention of Parliament.

[**155**] Applying that principle, I share with the majority of the court the conclusion that the resolutions to which the AQO relates, in so far as they call for measures to be applied to those on the consolidated list, fall outside the scope of s 1 of the 1946 Act. I agree with Lord Mance, for the reasons that he gives, that in so far as the resolutions relate to Usama bin Laden himself, their validity is not impugned.

[**156**] For these reasons I would grant the relief proposed by Lord Hope in para [83] of this judgment. I endorse his comments in relation to the Terrorism (United Nations Measures) Order 2009, SI 2009/1747. I agree for the reasons that he gives that the operation of the order in HAY's case shall be suspended for one month from the date of judgment.

[**157**] Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country.

LORD RODGER SCJ (with whom Lady Hale agrees).

[**158**] The court is asked to decide whether, by virtue of s 1(1) of the United Nations Act 1946, Her Majesty in Council had power to enact the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 (AQO Order) and the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (TO 2006). The same question arises in respect of the Terrorism (United Nations Measures) Order 2009, SI 2009/1747 (TO 2009).

[**159**] At the time of the hearing TO 2006 was the current embodiment of the measures by which the United Kingdom implemented United Nations Security Council Resolution (SCR) 1373 (2001), which was adopted by the Security Council on 28 September 2001, in the aftermath of the 9/11 attacks on the United States. But SCR 1373 (2001) was by no means the first resolution which the Council had adopted to deal with terrorist attacks. What marks it out is that the other resolutions relate to specific incidents and specific individuals, or organisations. SCR 1373 (2001) is, by contrast, generic: it deals with 'international terrorism', with threats to international peace and security caused by 'terrorist acts'. Previous resolutions, such as SCR 1189 (1998), had, of course, included calls for states to take measures for the prevention of terrorism. But SCR 1373 (2001) was intended to go much further: the aim was to create a permanent international system for combating terrorism.

[**160**] This helps to explain certain unique, or unusual, features of SCR 1373 (2001). The Security Council envisages that its other resolutions relating to terrorist acts will have a limited life before being reconsidered and renewed, if appropriate. There is no such time limit in SCR 1373 (2001): it is intended to apply indefinitely—unless and until the Security Council decides to revoke it. The other SCRs are targeted at a particular threat—for example, SCR 1333 (2000) is directed at the Taliban and Usama bin Laden, Al-Qaida and their associates. In para 1(a) of SCR 1373 (2001), by contrast, the Security Council simply decides that all states shall prevent and suppress the financing of terrorist acts. Para 1(c) requires states to freeze without delay funds etc of 'persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'. The same thinking runs through the resolution.

[**161**] If, in these respects, SCR 1373 (2001) looks more like an international convention, this is not surprising since it really comprises selected measures which had been included in the International Convention for the Suppression of the Financing of Terrorism that was adopted by the General Assembly in December 1999. By September 2001 only a few states had ratified the convention. So SCR 1373 (2001), in effect, imposed on all states the selected obligations which would otherwise have bound them only if they had eventually decided to ratify the convention.

[**162**] Given its focus on 'terrorist acts', it is striking that the resolution does not define 'terrorism' or 'terrorist acts'. This is no accident. It would have been impossible to get agreement on a single definition. So, at the risk of some inconsistency and incoherence in their response, SCR 1373 (2001) leaves it up to states to adopt measures to combat what they regard as terrorism. In both

TO 2006 and TO 2009 the definition adopted by the United Kingdom is to be found in art 2(3)–(6). It is important to notice that this definition is extremely wide and, as a result, the power of the Treasury to make a freezing order under the TOs is much more extensive than its power under s 4 of the Anti-terrorism, Crime and Security Act 2001. For example, under art 2(3) of the TOs, 'terrorism' means the use or threat of action of the kind falling within art 2(4) which is designed to influence 'the government'—and, by art 2(6)(d), 'the government' includes 'the government … of a country other than the United Kingdom'. So under the TOs the Treasury is intended to have power to impose a freezing order to deal with a threat which is designed to influence a foreign government—something that could not be done under the 2001 Act.

[**163**] These wide provisions are entirely appropriate in a measure that is intended to allow the requirements of SCR 1373 (2001) to be effectively applied in the United Kingdom. The freezing orders that are under consideration in these appeals relate to the funds and assets of individuals who live in this country. It is therefore tempting to think of such cases as the paradigm. But that would be a fundamental error. The very premise of SCR 1373 (2001) is that terrorism is an international phenomenon.

[**164**] For example, someone living in Ruritania may facilitate acts of terrorism against the government of Utopia by transferring funds from his account in a bank in the United Kingdom to an account controlled by the terrorist in a bank in Erewhon. The hope and intention behind paras 1(b) and 2(e) of SCR 1373 (2001) is that the authorities in Ruritania will have the necessary laws and resources to prosecute the individual concerned for financing and facilitating terrorism. Equally, it is hoped that the Erewhon authorities will have the necessary powers to freeze any funds that reach the account in the bank there. But the reality may well be that, for a variety of reasons, Ruritania is not actually in a position to arrest and prosecute the individual concerned for his actions and Erewhon may not have the necessary legislation to freeze his funds. Terrorists may indeed choose to live or operate in states which are too weak to take effective action against them. And, of course, in all probability the British courts will not have jurisdiction to prosecute the individual for facilitating terrorist acts in Utopia—even supposing that he could ever be arrested or extradited to this country from Ruritania. Nevertheless, the intention behind SCR 1373 (2001) is that the United Kingdom should be able to counter the threat of terrorist acts in Utopia by freezing the individual's assets in the British bank. And the United Kingdom aims to assist in fulfilling the Security Council's intention by giving the Treasury power under TO 2006 and TO 2009 to designate the individual and to freeze his funds in the British bank.

[**165**] It follows that it could never have been the intention of the Security Council that a state should freeze only the funds of individuals whom it could itself charge with committing, attempting to commit, participating in or facilitating, acts of terrorism. It would be equally unconvincing to say that, unless someone had been charged with, or convicted of, one of these offences, his assets were to remain unfrozen. After all, the Treasury might have reliable information that showed that the individual, living in another country, was facilitating terrorism, even though there was not the slightest chance of his ever being brought to justice. It would be absurd to allow the individual to continue transferring funds to be used to carry out terrorist acts, simply because he was going to evade justice for the foreseeable future. In such a case the Treasury would not only have reasonable grounds for suspecting that the

individual was facilitating acts of terrorism; they would have a solid basis for concluding that he was actually doing so. So the international law obligation imposed on the United Kingdom by para 1(c) of SCR 1373 (2001) to freeze the individual's assets would be clear.

[**166**] The appellants, A, K, M and G, argue, however, that TO 2006 is ultra vires because it goes further and allows the Treasury to designate an individual and to freeze his assets if they 'have reasonable grounds for suspecting that [he] is or may be … a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism'. The argument is that this goes further than the terms of para 1(c) of SCR 1373 (2001) and that it is neither 'necessary' nor 'expedient', in terms of s 1(1) of the 1946 Act, for the Treasury to be given power to designate and freeze on the basis of reasonable grounds for suspicion. As Lord Mance puts it, at [230], this is to freeze 'the assets of a different and much wider group of persons on an indefinite basis' and to change 'the essential nature and target of the freezing order.'

[**167**] I acknowledge the force of the argument, but I have come to the conclusion that it should be rejected.

[**168**] In the first place, as is perhaps apparent from the variety of approaches adopted in the judgments, para 1(c) of SCR 1373 (2001) does not provide any express guidance. It simply prescribes the result that is to be achieved: freezing without delay the funds etc of persons who commit etc terrorist acts. It does not indicate how states are to identify the people in question.

[**169**] There will, of course, be no difficulty if the authorities of a state catch someone red-handed committing a terrorist act or handing over cash to a terrorist organisation. The state will freeze his assets if there are any within its jurisdiction. And, if satisfied that the information provided is accurate, other states will do the same—even though they will not have first-hand knowledge of the act in question.

[**170**] Often, however, things will not be so clear-cut. Items of information may come from a variety of sources which, if pieced together, indicate, more or less clearly, what an individual or a group is doing. How is effect to be given to para 1(c) of SCR 1373 (2001) in that situation? Lord Phillips, at para [136] of his opinion, seems to envisage that a long-term freezing order should be dependent on 'conviction of the relevant criminal offence to the criminal standard of proof' or that it would be merely 'ancillary to a criminal charge or conviction' (see [142]). I have just explained why I cannot accept that approach which would emasculate the international system that the Security Council wishes to create. I infer from what Lord Mance says, at [230], that in his view the Security Council envisages that a (long-term) freezing order should be made only against individuals who, the state is satisfied, on the balance of probabilities, have committed etc a terrorist act. In other words, even if the state thinks that there is, say, a 40 per cent chance that the individual is busy financing terrorist activities, he should be allowed to continue. I would reject that approach because it would leave a lot of loopholes and would be unlikely to conduce to achieving the Security Council's overall aim of preventing terrorist acts.

[**171**] I understand Lord Brown to opt, at [199], for a requirement that the Treasury should have reasonable grounds for *believing* that the person in question is committing, or has committed, etc terrorist acts. That seems to me to be one possible approach which would be likely to identify many people whose funds etc are to be frozen in terms of para 1(c). Plainly, however, if a

state applies that test, it will be liable to freeze the assets of a number of people who, it turns out, are not committing, or have not committed etc, terrorist acts. Nevertheless, in my view, a measure which adopted that approach could be said to be expedient for enabling the United Kingdom to fulfil its obligation under SCR 1373 (2001) to freeze the assets of those who facilitate terrorist acts.

[172] The actual test in the TOs, based on reasonable grounds for *suspecting*, is just a little less stringent than the one favoured by Lord Brown. In other words, while it may (slightly) increase the chances of catching individuals who are actually committing etc terrorist acts, it correspondingly increases the chances that someone who is not committing etc a terrorist act will have his assets frozen. Lord Hope, at [58], considers that it may well have been expedient to introduce the reasonable suspicion test to reproduce what the SCR requires, but he is of the view that the formulation of the text should be left to Parliament. In his view, therefore, TO 2006 really fails, not because it is framed too widely, but because of the 'principle of legality' (see [61]).

[173] As Lord Hope points out, there is evidence that the reasonable grounds for suspecting test would be consistent with the approach of the United Nations International Task Force. It seems to me that the expediency of the United Kingdom adopting that test really depends on a whole range of practical matters with which the members of this court are largely unfamiliar. Inevitably, much of the information about terrorist activities that is available to national authorities will come from other countries and, often, in the form of intelligence provided by overseas security services. In the case of the United Kingdom, the Treasury—and indeed the British security services—may well be in no position to make an independent assessment of the material. Similarly, it may well be that, in a significant number of cases, because of its variable quality and fragmentary nature, the available information does not permit the Treasury to go further than to say that they have reasonable grounds for suspecting that the person concerned is committing or facilitating terrorist acts. If so, then it may be better to base designation on reasonable grounds for suspicion rather than on some higher standard which could not be readily achieved and which, if applied faithfully, would mean that the Treasury failed to freeze a significant number of assets which were actually under the control of people who committed etc terrorist acts. I therefore see no sufficient reason to conclude that the test in the TOs is not expedient for enabling the United Kingdom to fulfil its obligations under para 1(c) of SCR 1373 (2001).

[174] Nevertheless, adopting that test does mean that, sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts. That is inevitable. The availability of judicial review under Pt 6 of the Counter-Terrorism Act 2008 is, of course, a palliative. But, in my view, for the reasons given by Lord Hope, at [60] and [61], the making of an order, which, in effect, amounts to permanent legislation conferring powers to affect, directly, very basic domestic law rights of citizens and others lawfully present in the United Kingdom goes well beyond the general power to make Orders in Council conferred by s 1(1) of the 1946 Act. If such measures are to be taken, it is for Parliament to deliberate and to determine that the benefits of giving the Treasury such powers outweigh the potential disadvantages and that it is accordingly expedient to adopt these measures in order to enable the United Kingdom to fulfil its obligations under SCR 1373 (2001).

[175] That is so, even though, for the reasons given by Lord Hope, at [70]–[73], the court must proceed on the basis that, having regard to arts 25 and 103 of the Charter, the United Kingdom's obligations under the SCRs

would trump any relevant obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[**176**] I consider, however, that s 1(1) would authorise Her Majesty to make an Order in Council, even with these far-reaching effects, provided that it had only a limited life-span and was replaced, as soon as practically possible, by equivalent legislation passed by Parliament. In this way the United Kingdom could promptly fulfil its obligations under the United Nations Charter.

[**177**] For these reasons TO 2006 was ultra vires and TO 2009, which is, so far as relevant, in similar terms, must also be ultra vires. I am accordingly satisfied that the designation orders relating to A, K and M under TO 2006 were void and that the new orders made under TO 2009 must also be void.

[**178**] I turn now to the AQO.

[**179**] The history of the matter has been described by Lord Hope and Lord Mance. In para 4(b) of SCR 1267 (1999) the Security Council decided that all states should—in broad terms—freeze funds and other financial resources owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the committee that was to be established under para 6 of the SCR. This committee, comprising all the members of the Security Council, came to be known as the '1267 Committee'. The following year, in SCR 1333 (2000), the Security Council decided that all states were to freeze without delay, inter alia, funds and other financial assets of 'Usama bin Laden and individuals and entities associated with him as designated by' the 1267 Committee, 'including those in the Al-Qaida organization'. After the 9/11 atrocity, at the instigation of the United States, the committee added a large number of names to its list of groups and individuals associated with Usama bin Laden and Al-Qaida.

[**180**] SCR 1267 (1999) was aimed at the Taliban regime. So the role of the Committee was to designate Taliban funds which states were to freeze. But, from SCR 1333 (2000) onwards, the Security Council has targeted the funds and assets of individuals and entities associated with Usama bin Laden and the Al-Qaida organisation. And the role of the 1267 Committee has, therefore, been to designate those individuals whose funds are then to be frozen. As Lord Mance explains, at [215], this was not a new device: the Security Council had previously adopted resolutions which left it to a committee to designate individuals to whom particular sanctions were to apply. Those resolutions had been directed, however, at individuals associated with a particular régime in a particular country. By contrast, from SCR 1333 (2000) onwards, the 1267 Committee was having to identify individuals and groups associated with a much more amorphous organisation, emanations of which might be operating in countries all over the world.

[**181**] Obviously, preventing terrorists from obtaining funds and other assets is a crucial part of any system for combating terrorism. Equally obviously, if there is to be a successful international effort to combat terrorism all over the world, a central organisation which gathers information and co-ordinates action is going to play a vital role. Assessing the information and deciding whether to act on it involved matters of political judgment. Obviously, again, much of the necessary information will come from the security services of different countries and there may well be problems about revealing it. The 1267 Committee acts as the central co-ordinating body and is not in the habit of revealing much about the basis for its decisions. It would, of course, be absurd to expect the committee to notify individuals of any proposal to list them: any

funds would quickly be disposed of. But, even after the reforms introduced in the last two years, there is little that individuals can do to launch an effective challenge to their listing after it has occurred. The committee is not obliged to publish more than a narrative summary of reasons for their listing. There is no appeal body outside the committee to which they can complain. The individuals themselves cannot apply directly to the committee to have their names removed from the list. Such requests now go to the Ombudsperson. And, if a state applies on their behalf, the name will still not be removed unless all members of the committee agree. There is an obvious danger that states will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaida may be tenuous at best.

[**182**] The Security Council is a political, not a judicial, body—as is the 1267 Committee. And it may be that the committee's procedures are the best that can be devised if it is to be effective in combating terrorism. But, again, the harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right. On one view, they are simply the incidental but inevitable casualties of the measures which the Security Council has judged it proper to adopt in order to counter the threat posed by terrorism to the peace and security of the world. The Council adopts those measures in order to prevent even worse casualties—those who would be killed or wounded in terrorist attacks.

[**183**] On the assumption that the 1998 Act is not in play, Parliament can pass legislation to give effect in our domestic law to the obligations imposed on the United Kingdom by the Security Council resolutions relating to Usama bin Laden, Al-Qaida etc—however grave the interference with rights of property and even though there is no effective remedy against an unjustified listing. In effect, Parliament could enact a statute in similar terms to the AQO. In doing so, Parliament would be consciously deciding that the need to fulfil the Ch VII obligations imposed by the Security Council meant that the basic common law rights of the individuals concerned would have to yield.

[**184**] Can the same be done by Order in Council under s 1(1) of the 1946 Act? In other words, does s 1(1) authorise Her Majesty in Council to make legislation which encroaches to such an extent on individuals' basic common law rights of property and access to the courts?

[**185**] Undoubtedly, given the terms of art 41 of the Charter which envisages interruption of economic relations, Parliament must have envisaged that, for example, an Order in Council giving effect to a ban on trade with a particular country would interfere significantly with the rights of individuals or companies to export their goods or to use their funds to make payments to individuals or companies in the country concerned. But, having regard to the principle stated by Lord Browne-Wilkinson in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577 at 592; sub nom *R v Secretary of State for the Home Dept, ex p Pierson* [1998] AC 539 at 575, I have come to the conclusion that, by enacting the general words of s 1(1) of the 1946 Act, Parliament could not have intended to authorise the making of the AQO which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts.

[**186**] Lord Brown rejects that conclusion because, he says, there could surely be no political cost in doing what, unless we were flagrantly to violate our

United Nations Charter obligations, the United Kingdom had no alternative but to do. I accept that there might be no real political cost in enacting the measure. But the essential point is that these matters should not pass unnoticed in the democratic process and that the democratically elected Parliament, rather than the executive, should make the final decision that this system, with its inherent problems, should indeed be introduced into our law. The need for parliamentary endorsement is all the more important if the ordinary human rights restraints do not apply.

[**187**] I would accordingly hold that art 3(1)(b) of the AQO is ultra vires and void.

[**188**] For these reasons I agree that the appeals of A, K, M and G should be allowed and the appeal by the Treasury should be dismissed.

LORD BROWN SCJ.

[**189**] The principal question for the court's decision on these appeals is whether the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (the Terrorism Order) or the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 (the Al-Qaida Order) or both fall to be quashed as having been made ultra vires the enabling power—s 1(1) of the United Nations Act 1946. Section 1(1) is central to the appeals:

> 'If, under Article forty-one of the Charter of the United Nations … (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.'

[**190**] The appellants (together with JUSTICE who intervene in these proceedings in support of their case) submit (and I simplify) that the Terrorism Order and the Al-Qaida Order are ultra vires the 1946 Act, first, because they offend the common law principle of legality and, secondly, because they necessarily involve violations of convention rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Essentially what are challenged here are not the designations of the individual appellants and the directions made against them by the Treasury as such, but rather the orders themselves.

[**191**] I gratefully adopt without repetition Lord Hope's detailed recitation of the facts of these appeals and the relevant provisions of all the main instruments under consideration: the United Nations Charter, the various United Nations Security Council resolutions, the impugned orders and, indeed, a number of other relevant Orders in Council made under the 1946 Act. This enables me to proceed at once to what I regard as the core issues.

[**192**] Although, as I shall come to explain, my final conclusion on these appeals is that the Terrorism Order should be struck down but the Al-Qaida Order should stand, let me first make one or two brief introductory observations applicable to both. The draconian nature of the regime imposed

under these asset-freezing orders can hardly be overstated. Construe and apply them how one will—and to my mind they should have been construed and applied altogether more benevolently than they appear to have been—they are scarcely less restrictive of the day-to-day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these orders provide for a regime which considerably interferes with the art 8 and art 1 of the First Protocol rights of those designated. Similarly, it is indisputable that serious questions arise as to the sufficiency of protection of the art 6 rights of those designated. This is so, moreover, even if one superimposes upon the regime (as the Court of Appeal thought permissible ([2008] EWCA Civ 1187, [2009] 2 All ER 747, [2009] 3 WLR 25) the services of a special advocate when required and the means of overcoming the potentially unfair effect of s 17 of the Regulation of Investigatory Powers Act 2000 with regard to the use of intercept evidence.

[**193**] These, then, are powerful reasons for questioning the legitimacy of introducing such restrictive measures by executive order instead of by primary legislation. As Lord Hoffmann famously said in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

I shall call this for simplicity's sake the *Ex p Simms* principle.

[**194**] There is, however, an important countervailing principle also in play here. Chapter VII of the United Nations Charter concerns action to be taken with regard to threats to international peace and security and by art 41 authorises the Security Council to decide on measures to be taken short of armed force to maintain peace and security and to call upon member states to apply such measures. When one considers the ravages of terrorism and war and the gross invasions of human rights which they inevitably entail, it is difficult to think of any greater imperative than that member states should fully honour their international law obligation to implement Security Council decisions under art 41. The existence of such an obligation could not be plainer. Article 25 of the Charter mandates it and art 103 expressly dictates that it is to prevail over any conflicting international law obligation.

[**195**] It follows that these appeals involve the clash of conflicting principles, each of profound importance.

[**196**] As it seems to me, almost any order made under s 1(1) of the 1946 Act is likely to interfere with somebody's fundamental rights. Take a United Nations resolution imposing trading actions against some state. Any domestic measure giving effect to such a decision is bound to interfere with someone's contractual dealings and impinge on their art 1 of the First Protocol rights and quite likely their art 8 rights too. Obviously the *Ex p Simms* principle cannot

operate to emasculate the s 1(1) power entirely. What, then, are the touchstones by which to decide whether a particular executive order falls within the scope of the power? As it seems to me, two paramount considerations will always arise: first, the degree of specificity of the United Nations decision which the United Kingdom is called upon to implement; second, the extent to which the implementing measure will interfere with fundamental human rights. Of course, the legislation affords the minister some margin of appreciation as to just what is 'necessary or expedient' for enabling the effective implementation of the United Nations resolution. But, the more invasive of human rights of those affected the proposed provision is, the narrower that margin will be—until, indeed, the point is reached where, unless the United Kingdom could not consistently with its obligations under the Charter introduce provisions any less invasive of human rights than those proposed, they could not properly be introduced by Order in Council at all but only by primary legislation. Where, as here, those to be designated under the proposed measure will suffer very considerable restrictions under the regime, I would hold that it can only properly be introduced by executive Order in Council if the measure is in all important respects clearly and categorically mandated by the United Nations resolution which it is purporting to implement. If the implementing measure is to go beyond this, then, consistently with the *Ex p Simms* principle, it can only properly be introduced by primary legislation.

[**197**] Turning to the impugned orders, there seems to me a crucially important distinction between them. The fundamental reason why I for my part would strike down the Terrorism Order but not the Al-Qaida Order as ultra vires the 1946 Act is that whereas I cannot regard the former as sufficiently mandated by United Nations Security Council Resolution (SCR) 1373 (2001) to which it purports to give effect, the Al-Qaida Order to my mind *does* faithfully implement SCRs 1267 (1999), 1333 (2000) and 1390 (2002). Let me explain. First, the Terrorism Order. SCR 1373 (2001), by para 1(c), decided that all states shall '[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'. The Terrorism Order, however, provides for designation by HM Treasury on the basis merely that it has 'reasonable grounds for suspecting' that the person 'is' (I omit the words 'or may be', struck out by the Court of Appeal) 'a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism'. This goes well beyond the strict requirements of SCR 1373 (2001). To my mind, it was not open to the minister to introduce such a provision by Order in Council under the 1946 Act.

[**198**] By contrast, para 2 of SCR 1390 (2002) required that all states '[f]reeze without delay the funds and other financial assets or economic resources' of Usama bin Laden, members of the Al-Qaida organisation and the Taliban and others associated with them as referred to in the Sanctions Committee list. And that, as it seems to me, is precisely what the implementing Al-Qaida Order sets out to achieve, no more and no less. What essentially it provides for is the designation of all those designated by the United Nations Sanctions Committee. I cannot see why the *Ex p Simms* principle should apply to limit the power of the executive to accomplish this.

[**199**] I have found it instructive in this regard to see how certain other Commonwealth countries have given effect to these same United Nations SCRs. Australia, New Zealand and Canada all have legislation akin to our

1946 Act. All three countries initially implemented both SCR 1267 (1999) and SCR 1373 (2001) by regulations made under that legislation but in 2002 Australia and New Zealand (although not Canada) replaced these by primary legislation. As I understand it, both the regulations and the legislation have directly implemented the Sanctions Committee designations under SCR 1267 (1999) ie they automatically freeze the listed person's assets in just the same way as our Al-Qaida Order. On the other hand, the provisions implementing SCR 1373 (2001) are altogether more tightly drawn than our Terrorism Order. Unless designated by the Sanctions Committee, people cannot be subjected to executive designation and asset freezing unless the following conditions are met: in Australia only when the minister is satisfied that the person 'is' involved in terrorism; in Canada only when the Governor General is satisfied that there are reasonable grounds to believe this; in New Zealand only if the Prime Minister believes this on reasonable grounds (except that he can make an interim designation for 30 days if he has good cause to suspect it). Contrast all this with the position under the Terrorism Order where HM Treasury can designate—on a long-term basis—merely on 'reasonable grounds for suspecting' the person to be involved in terrorism. As I pointed out in a very different context in *R v Saik* [2006] UKHL 18 at [120], [2006] 4 All ER 866 at [120], [2007] 1 AC 18: 'To suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so'.

[**200**] The way Australia, New Zealand and Canada have dealt with these United Nations SCRs to my mind tends to support the conclusions I have reached about the impugned orders. It suggests that whilst SCR 1267 (1999) is regarded as mandating the automatic asset-freezing of those designated by the Sanctions Committee, SCR 1373 (2001) certainly cannot be regarded as mandating the long-term asset-freezing of people not designated by the Sanctions Committee merely on the ground of reasonable suspicion.

[**201**] With regard to the Terrorism Order I add only this. The logic of the Treasury's argument is that not only is that order sufficiently mandated by the terms of SCR 1373 (2001) but so too would have been Orders in Council introducing the various other regimes aimed at combating terrorism in fact introduced over recent years by primary legislation. Consider for example para 2(b) of SCR 1373 (2001) deciding that all states should '[t]ake the necessary steps to prevent the commission of terrorist acts'. Why should not the control order regime or, indeed, the earlier regime involving the executive detention of suspected terrorists unable to be deported have been the subject of Orders in Council under s 1(1) of the 1946 Act? The answer to my mind is plain. Both regimes were hugely invasive of human rights. Plainly they would have had to be mandated in the clearest and most categoric terms by a Ch VII resolution before they could properly have been introduced by Orders in Council. Equally clearly they were not. But by the same token that the control order regime—itself similarly triggered by the minister merely having reasonable grounds for suspecting someone of terrorist activity—was lawfully introduced by legislation, so too, provided always, of course, that Parliament was persuaded to enact it, could the asset-freezing regime have been. I am unimpressed by the alternative grounds on which the order is challenged, those of certainty and proportionality. Primary legislation introducing this same asset-freezing regime could not have been declared incompatible on those grounds. It is only because the order was plainly insufficiently mandated by the SCR 1373 (2001) that I would hold it invalid.

[**202**] I return to the Al-Qaida Order which, as I have suggested, does precisely what SCR 1267 (1999) (and subsequent resolutions) expressly required the United Kingdom to do. I recognise, of course, that the United Kingdom's international law obligations give rise to no domestic law rights or obligations unless and until they are given effect in domestic law. But here the resolution *was* given domestic law effect. The only question is whether that could properly be done by Order in Council under the 1946 Act.

[**203**] Inevitably in considering this question one is struck by the traumatic consequences of implementing SCR 1267 (1999): the long-term radical restrictions upon the lives of those designated by the Sanctions Committee without there being afforded any judicial means of challenging that designation. (I cannot accept the Court of Appeal's suggestion that a merits-based review can somehow be achieved within the scope of this regime.) In these circumstances it is perhaps unsurprising that the European Court of Justice in *Kadi v EU Council* Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872 struck down an implementing EC regulation for want of any procedure for telling those designated of the evidence against them or for a hearing on the merits of the case for (and against) their inclusion in the Sanction Committee's list. But, of course, the European Community is not a member state of the United Nations: unlike the United Kingdom, it is not under an international law obligation to implement Security Council decisions under art 41 of Ch VII of the Charter and, more particularly, to do so in the light of art 103 of the Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' The United Kingdom's position as a member state is quite different. Not merely was the United Kingdom entitled to introduce this asset-freezing scheme in respect of those designated by the Sanctions Committee; it was (under international law) bound to do so. And given that it was bound to do so, I can see no good reason why that should not have been achieved under the 1946 Act. I accept, of course, that the regime introduced by the Al-Qaida Order is 'contrary to fundamental principles of human rights' (to use Lord Hoffmann's phrase in *Ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115). But that was the inevitable consequence of implementing SCR 1267 (1999). Obviously, as it seems to me, it could have been implemented by primary legislation. Certainly, whilst *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 1 AC 332 stands, such legislation could not be declared incompatible with convention rights. What purpose then, one asks, would be served by adopting this course rather than making use of the 1946 Act?

[**204**] The *Ex p Simms* principle is intended to ensure that human rights are not interfered with to a greater extent than Parliament has already unambiguously sanctioned. The loss of such rights is not to be allowed to '[pass] unnoticed in the democratic process'. 'Parliament must squarely confront what it is doing and accept the political cost.' But in this case the Security Council by SCR 1267 (1999) unambiguously stated what was required of the United Kingdom and the 1946 Act equally unambiguously provided that that measure could be implemented by Order in Council. There could surely be no political cost in doing what, unless we were flagrantly to violate our United Nations Charter obligations, the United Kingdom had no alternative but to do.

[**205**] I do not accept that such an approach carries with it the implication that the 1946 Act could similarly be used to introduce by Order in Council the sort of internment regime mandated by the Security Council resolution under consideration in *R (on the application of Al-Jedda) v Secretary of State for Defence*. Given the obvious extent to which internment interferes with fundamental human rights, such a resolution would need a degree of specificity at least as great as that characterising SCR 1267 (1999) to satisfy my suggested criteria (see [196], above) for the proper use of the 1946 Act power. 'Internment where this is necessary for imperative reasons of security' (the terms of the resolution providing for internment in post-war Iraq with which the House was concerned in *R (on the application of Al-Jedda) v Secretary of State for Defence*), understandable as that was in its particular context, would not sufficiently clearly mandate a comprehensive internment regime in the United Kingdom pursuant to Executive Order; internment of named individuals in certain circumstances might.

[**206**] Since, however, it now appears that the approach I favour is not one which commends itself to the majority of the court, it would be unhelpful to pursue the matter further. I content myself with the hope that the view of the majority will not be thought to indicate any weakening in this country's commitment to the United Nations Charter.

LORD MANCE SCJ.

INTRODUCTION

[**207**] These appeals concern the validity of (i) the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 and (ii) the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952. I shall refer to these as the Terrorism Order 2006 and the Al-Qaida Order. Both were made in reliance on the power contained in s 1(1) of the United Nations Act 1946, providing:

> '**1.** *Measures under article 41.*—(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order …'

[**208**] Article 41 appears in Ch VII of the Charter of the United Nations which is headed 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' and provides:

> 'Article 39
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make

recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security …

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

[**209**] In the cases of *A v HM Treasury* [2008] EWCA Civ 1187, [2009] 2 All ER 747, [2009] 3 WLR 25, the Court of Appeal, overruling Collins J [2008] EWHC 869 (Admin), [2008] 3 All ER 361, held by a majority (Sir Anthony Clarke MR and Wilson LJ) that both orders were valid, subject only to the excision from the former order of the words 'or may be'. Sedley LJ dissented on the issue of the validity of the Terrorism Order. The majority reasoning was that the orders fell, subject to the excision, within the scope of s 1(1), that they were certain and proportionate and that their operation could be accompanied by sufficient procedural safeguards to preclude any objection to their validity at common law or under the Human Rights Act 1998. Against those conclusions, appeals have been brought with leave by A, K, M and G (who, in the light of our ruling on the first day of the appeal, can be given his full name, Mohammed al Ghabra). In the case of *R* (*on the application of HAY*) *v HM Treasury* [2009] EWHC 1677 (Admin), Owen J held, in the light of the Court of Appeal's reasoning in *A v HM Treasury*, that, on the particular facts in *R* (*on the application of HAY*) *v HM Treasury*, sufficient procedural safeguards could not be provided by the court, and that the Al-Qaida Order should be 'quashed in so far as it applies to the claimant'. On this appeal, the Treasury seeks to uphold the validity of the order in relation to HAY, while HAY cross-appeals on the ground that the judge ought to have quashed the order generally.

[**210**] Lord Hope has set out the background to and salient terms of the Terrorism Order 2006 and the Al-Qaida Order in paras [21] to [27], and the circumstances and effect of application of these orders to A, K, M, G and HAY in paras [1] to [4] of his judgment. A, K, M and G were each made the subject of a direction by the Treasury under art 4 of the Terrorism Order 2006. They were entitled to challenge the Treasury's direction under art 5(4)(a) of that order. In late October 2009 (subsequent to the hearing of these appeals), their designations under the Terrorism Order 2006 were revoked and replaced, as Lord Hope recounts in para [27], by designations under the Terrorism (United Nations Measures) Order 2009, SI 2009/1747, which was itself framed to replace the Terrorism Order 2006. For the reasons which Lord Hope gives in para [28] and without pre-judging any contrary argument which may be raised, this redesignation does not appear to make the central issues argued before us under the Terrorism Order 2006 either academic or of past interest only. G and

HAY were persons designated by the Sanctions Committee and were accordingly covered without more by art 3(1)(b) of the Al-Qaida Order. They were not entitled to bring any challenge under art 5(4)(a) of the Al-Qaida Order, since that applies only to persons covered by virtue of a Treasury direction. G's application to the court under art 5(4)(a) of the Al-Qaida Order was thus treated by Collins J as an application for judicial review. HAY's application was brought from the outset as an application for judicial review.

SECTION 1(1) OF THE 1946 ACT

[**211**] The primary argument of the appellants A, K, M and G, supported by the interveners JUSTICE, is that, notwithstanding the wide wording of s 1(1), the Terrorism Order 2006 was by its nature a measure falling outside the scope of s 1(1). Section 1(1) was, they submit, conceived with measures in mind arising from disputes between states, while the Terrorism Order 2006 was an executive order directed in the first place to individuals and interfering with their fundamental rights in a manner which could not, as a matter of constitutional propriety, have been contemplated without legislation in Parliament. A similar argument is mounted in respect of the Al-Qaida Order, reinforced by the consideration that, in that case, the order purports to introduce into domestic law asset freezing provisions which apply automatically to persons designated by an international committee (the Sanctions Committee) whose designations are not subject to any direct challenge in domestic law.

[**212**] Section 1(1) of the 1946 Act was introduced to provide a quick and simple means by which the United Kingdom could honour its international obligations and impose upon its citizens the duty to comply with decisions of the Security Council under art 41 of the United Nations Charter. In these circumstances, I agree with views expressed in the Court of Appeal in *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337, [2006] 2 WLR 294. The court there said that the power under the European Communities Act 1972 to give effect to this country's international (Community) obligations was a power sui generis and should not be construed narrowly. The same applies to the power conferred by s 1(1) to give effect to Security Council resolutions under art 41. In considering whether the general language of s 1(1) extends to the implementation of any such resolution, however radical its effect on individual rights, it is none the less of some relevance that s 1(1) involves purely executive action, to implement inter-governmental decisions taken in the Security Council, free in each case of any procedure for direct Parliamentary scrutiny.

[**213**] Not surprisingly, art 41 itself illustrates its application in its second sentence by reference to the interruption of economic relations or communications and the severance of diplomatic relations—familiar measures directed against states. In the debates in Parliament, these examples were cited by the Lord Chancellor (139 HL Official Report (5th series) col 375, 12 February 1946) and by the Minister of State in the Commons (421 HC Official Report (5th series) col 1516, 5 April 1946). But s 1(1) of the 1946 Act expressly contemplates that sanctions against another state may, in order to be effective, require to be supported at the domestic level by criminal prohibitions addressed directly to and enforceable against persons (individual or corporate). The present appeal concerns measures taken at the international level, but addressed to and enforceable against non-state actors and individuals, and the issue is how far s 1(1) enables effect to be given to such measures.

[**214**] That the line between measures against state and non-state actors is not as great as might appear is demonstrated by the history of Security Council resolutions leading to the Terrorism and Al-Qaida Orders. Initially, the focus was on the control by the Taliban (described in Resolution 1267 (1999) as 'the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan') of part of Afghanistan, accompanied by pretensions to control the whole country, and its making available the areas that it controlled to Al-Qaida for the purposes of international terrorism against other states. Subsequently, in the aftermath of the New York attacks, attention was widened in Resolution 1373 (2001) to the threat to international peace caused by terrorist activity generally. This led in the United Kingdom on 9 October 2001 to the making under s 1(1) of the 1946 Act of the Terrorism (United Nations Measures) Order 2001, SI 2001/3365 (the Terrorism Order 2001) and on 14 December 2001 to the Anti-terrorism, Crime and Security Act 2001. The Terrorism Order 2001 was the more limited predecessor of, and was revoked by, the Terrorism Order 2006. Later, by Resolution 1390 (2002), recalling previous Resolutions 1267 (1999), 1333 (2000) and 1363 (2001), the Security Council condemned both the attacks of 11 September 2001 and the Taliban ('for allowing Afghanistan to be used as a base for terrorists training and activities, including the export of terrorism by the Al-Qaida network and other terrorist groups as well as for using foreign mercenaries in hostile actions in the territory of Afghanistan') and the Al-Qaida network and other associated groups (for multiple terrorist acts). Resolution 1390 (2002) and the later Resolution 1455 (2003) refer to the list drawn up by the Sanctions Committee as covering 'Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them'. Resolution 1390 led on 23 January 2002 to the Al-Qa'ida and Taliban (United Nations Measures) Order 2002, SI 2002/111, prohibiting the supply or delivery, agreement to supply or deliver and any act calculated to promote supply or delivery of restricted goods to Usama bin Laden, any person designated by the United Nations Sanctions Committee or to any member of, or group, undertaking or entity associated with, Al-Qaida or the Taliban and was later amended and supplemented by the Al-Qaida Order 2006. (The Terrorism Order 2006 and the Al-Qaida Order 2006 also reflect the passing on 20 December 2002 of Security Council Resolution 1452, deciding that Resolutions 1267 and 1390 do not apply to funds and other financial assets or economic resources determined by the relevant state to be necessary for basic or, in particular circumstances, extraordinary expenses.)

[**215**] No doubt the threat to international peace by rogue states or states under rogue leadership was in the forefront of everyone's mind in 1945–46. But a threat to peace by an organisation which has succeeded in taking over a significant part of a state cannot sensibly be distinguished. Nor indeed can a threat posed by an international organisation which establishes itself outside the jurisdiction, or without taking over any particular part, of any state and presents a threat to international peace. Under art 39 of the United Nations Charter, it is the Security Council's role to identify the existence of a threat to international peace from any such organisation, not just from states. What matters is such a threat, not whether it originates in a traditional subject of international law. Earlier instances exist of Security Council resolutions under Ch VII directing states to take measures against non-state actors: for example, measures under Resolution 841 (1993) to freeze within their territories funds of the de facto authorities in Haiti, as well as funds of the legitimate, though

ousted government of President Aristide; measures under Resolution 864 (1993) against the UNITA movement in Angola; measures under Resolution 1127 (1997) to restrict entry into or transit through their territories by 'senior officials of UNITA and … adult members of their immediate families' and providing that a Security Council committee should 'draw up guidelines … for the[ir] implementation … including the designation of officials and of adult members of their immediate families' to be affected; and measures under Resolution 1171 (1998) requiring states to prevent all arms sales to Sierra Leone, other than to the government, and to prevent entry into or transit through their territories of 'leading members of the former military junta'. The extension of such measures to 'senior' or 'leading' officials or adult members of their families is understandable. These are persons who can be identified with the relevant state or non-state actor, rather than mere agents. Had the United Nations existed during the Second World War, Ch VII measures could have been directed to Hitler and his entourage.

[**216**] Where the present resolutions can be said to go further is that they are directed in the case of Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) not only at particular non-state actors, the Al-Qaida organisation and the Taliban and at Usama bin Laden, but at all 'members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them', and in the case of Resolution 1373 (2001) at individuals engaging in terrorism. In the case of the latter, the means of identifying such individuals were to be established in domestic law, but in the case of the former the resolutions provided for identification of the 'associated' individuals, groups, undertakings and entities at the international level by the committee consisting of all Security Council members.

[**217**] The appellants did not challenge—indeed they said expressly that they accepted—the legitimacy of Resolution 1373 (2001) under art 41 of the United Nations Charter. In any event, the legitimacy of such measures is not as such justiciable at a domestic level. It is all the same worth noting the opinion expressed by Sir Michael Wood in his first Hersch Lauterpacht lecture (delivered 7 November 2006) on *The Legal Framework of the Security Council* that:

> 'Depending on the nature of the threat, such measures may be specific, addressed, for example, to the threat emanating from North Korea, or they may be general, addressed, for example, to the global threat from terrorist groups. I do not see any great principle involved here, though the circumstances in which general measures are considered necessary and appropriate may prove to be rare.'

[**218**] At a domestic level, the question does, however, arise as to how far all such measures are capable of being reflected by Orders in Council made under s 1(1) of the 1946 Act. Essentially, the question is whether the power in s 1(1) is subject to implicit limitations, arising from the background against which it was passed and the need for express language to override what would otherwise be regarded as basic rights. A similar issue was raised by Hazel Fox (Lady Fox) in 1997 in relation to an order implementing the Resolution 827 (1993), whereby the Security Council established the International Tribunal for the former Yugoslavia. The United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, made in reliance on s 1(1), providing for, inter alia, the arrest and transfer out of the jurisdiction of individuals for trial to and sentence by the tribunal. Hazel Fox

described the Security Council's resolution as 'a wholly novel exercise of power' and questioned the legitimacy of the use of s 1(1) for the purpose of its implementation: *The objections to transfer of criminal jurisdiction to the UN Tribunal* (1997) 46 ICLQ 434. Professor Christopher Greenwood, as he then was, later responded, arguing that the wording of s 1(1) is unconfined: see V Gowlland-Debbas (ed) *National Implementation of United Nations Sanctions: a Comparative Study* (2004, Martinus Nijhoff) 581, esp pp 601–603.

THE TERRORISM ORDER 2006—GENERAL

[**219**] The aim of s 1(1) was to enable the United Kingdom government to respond, with despatch, to any call by the Security Council 'to apply any measures to give effect to any decision of that Council'. Section 1(1) is in my view apt to cover Security Council decisions under art 41 requiring every state to take domestic measures against persons who that state identified as involved in terrorist activities. Section 1(1) expressly envisages that Security Council decisions under art 41 will, in order to be effective, require to be accompanied by prohibitions and sanctions addressed to domestic individuals or entities, and impacting, therefore, on rights or freedoms that they would otherwise have—particularly to make contracts and deal with or dispose of property. This might be the case either because the Security Council resolution expressly so required, or because its effective domestic application appeared to the executive to make it necessary or expedient. On the face of it, therefore, it was open to the executive government to react by Order in Council to Security Council Resolutions 1267 (1999) and 1373 (2001) and their successive resolutions in the same series, by introducing provisions freezing the assets of persons who were identified at the domestic level as terrorists, and thereby enabling measures required by art 4(2) of Resolution 1267 (1999) and art 1 of Resolution 1373 (2001) to be effectively applied in the United Kingdom.

THE TERRORISM ORDER 2006—NECESSARY OR EXPEDIENT

[**220**] The essential question is whether the Terrorism Order 2006 was in terms which can be regarded as making 'such provision as appears to [Her Majesty in Council] necessary or expedient for enabling those measures to be effectively applied'. Before the Supreme Court, though it appears to a lesser extent below, considerable emphasis was placed upon the extent to which Parliament had been asked to enact and had enacted anti-terrorist measures by primary legislation (in particular the Terrorism Act 2000, passed on 20 July 2000, and the 2001 Act, passed on 14 December 2001) and the suggested 'constitutional impropriety of the government by-passing Parliament and deciding what powers to accord itself' through the Terrorism Orders 2001 and later 2006 and 2009. One can certainly feel concern about the development and continuation over the years of a patchwork of overlapping anti-terrorism measures, some receiving Parliamentary scrutiny, others simply the result of executive action. However, the primary legislation does not implement all measures required by the United Nations resolutions and the primary and secondary legislation are not actually inconsistent.

[**221**] More particularly, Pt III of the 2000 Act introduced a series of offences relating to 'terrorist property', defined to include money or other property likely to be used for the purposes of terrorism, as well as the proceeds of, or of acts carried out for the purposes of, terrorism. But these offences are all defined in terms which require mens rea such as an intention, knowledge or

reasonable suspicion that money or other property will be used for terrorist purposes. In contrast, the Terrorism Orders 2001 and 2006 both included absolute prohibitions on certain dealings with designated persons. The 2001 Order included a precursor (art 3) to art 8 of the 2006 Order (art 3 was confined to making available 'any funds or financial (or related services)'), as well as a precursor (art 4) to arts 4 and 7(1) of the 2006 Order (art 4 only gave power to the Treasury to direct that funds be not made available to any person by a person by, for or on behalf of whom such funds were held where the Treasury had reasonable grounds for suspecting that the latter person 'is or may be' within one of the three categories matching art 4(2)(a), (b) and (d) of the 2006 Order).

[**222**] As to the 2001 Act, this was passed over two months after the Terrorism Order 2001. In theory at least, Parliament had the opportunity, when enacting the 2001 Act to consider whether the Terrorism Order 2001 should be allowed to continue in force. The same may be said in relation to the enactment of the Terrorism Act 2006. However there is little, if anything, to suggest that Parliamentary attention was ever focused on or drawn to this opportunity. The explanatory notes to the 2001 and 2006 Acts make no reference to the Terrorism Order 2001 or the Al-Qa'ida Order 2002. The notes to the 2001 Act refer only to the previous power to freeze assets under the Emergency Laws (Re-Enactments and Repeals) Act 1964, and debate in the House of Lords on 28 November 2001 took place on the scope of the power to freeze without reference to the existence of the Terrorism Order 2001 (629 HL Official Report (5th series) cols 351–353). (The possibility that financial sanctions agreed by the United Nations or European Union would be implemented in some way other than under the 2001 Act was briefly mentioned at one point.) The notes to the 2006 Act describe 'previous counter-terrorism legislation' solely by reference to the previous statutes.

[**223**] The extensive power to make freezing orders under Pt 2 of the 2001 Act is limited by pre-conditions, the first that the Treasury should reasonably believe that action to the detriment of the United Kingdom economy or constituting a threat to the life or property of one or more United Kingdom nationals has been or is likely, but the second, critically, that the person taking or likely to take such action is a foreign government or overseas resident. The Terrorism Orders 2001 and 2006 extend, and have regularly been used, in relation to purely domestic threats. It may well be thought desirable that such measures should be debated in Parliament alongside the primary legislation which Parliament did enact, and correspondingly undesirable that there should be developed and continued, as a result of executive orders, a patchwork of measures that have and have not been debated in Parliament. But I cannot view the making of the orders under s 1(1), or their continuation in force, as constitutionally improper merely because of these considerations. This however leaves open whether the measures introduced by executive order were of a nature falling within the scope of s 1(1) of the 1946 Act.

[**224**] The argument in the courts below focused on the prescribed pre-conditions to the making of any direction under art 4, and, in particular, on the words 'that the Treasury have reasonable grounds for suspecting that the person is or may be'. While Collins J and the Court of Appeal considered that the words 'or may be' lowered the threshold too far, the majority in the Court of Appeal accepted that the executive 'could properly conclude that it was expedient to provide that reasonable grounds for suspicion was an appropriate test' (paras [42] and [155]–[157]). The Master of the Rolls (Sir Anthony Clarke)

observed that Resolution 1373 (2001) was 'silent on the standard of proof to be satisfied on the question whether a particular person "commits, or attempts to commit, terrorist acts" before a state must freeze his assets within para 1(c) or prohibit certain activities within para 1(d)' (para [42]).

[**225**] In this context, because of the nexus with domestic law arising from the language of s 1(1) itself, it is necessary to form a view about the scope of Security Council Resolution 1373 (2001). I see its scope differently to the Master of the Rolls. The relevant wording of art 1(c) and (d) of Security Council Resolution 1373 (2001) is directed at the prevention and suppression and the criminalisation and prosecution of actual terrorist acts; at the freezing of funds or other financial assets or economic resources of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts' and of entities owned or controlled, or acting on behalf of or at the direction of such persons and entities; and at prohibiting nationals or persons and entities within their territories from making any funds, financial assets or economic resources or financial or related services available for the benefit of any such persons. This wording does not suggest that the Security Council had in mind 'reasonable suspicion' as a sufficient basis for an indefinite freeze.

[**226**] When, following the terrorist bombing on 14 February 2005 which killed former Lebanese Prime Minister Rafiq Hariri, the Security Council adopted Resolution 1636 (2005) under Ch VII, it decided, 'as a step to assist in the investigation of this crime and without prejudice to the ultimate judicial determination of the guilt or innocence of any individual', that 'all individuals designated by the [international investigation] Commission [S/2005/662] or the Government of Lebanon as suspected of involvement in … this terrorist act, upon notification of such designation to and agreement of the Committee [established by the Security Council for the purpose]' should be prohibited entry to or transit through states other than their own, and that all states should freeze all such individuals' funds, financial assets and economic resources. The absence of any similar reference to 'persons suspected' in Resolution 1373 (2001) is notable.

[**227**] Further, the freezing measures prescribed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) (which in turn led to the Al-Qaida Order 2006) have been explained as 'preventative in nature and … not reliant upon criminal standards set out under national law': see recitals to Resolutions 1735 (2006), 1822 (2008) and 1904 (2009). Resolutions 1735 (2006) and 1822 (2008) themselves called on states not merely to freeze the assets of individuals on the Sanctions Committee list, but also to prevent the supply, sale or transfer to such individuals of arms and related material. The latter would have to be proscribed at the domestic level, at which level issues would arise as to the standard of proof contemplated. The wording of the recitals to Resolutions 1735 (2006) and 1822 (2008), post-dating that of Resolution 1636 (2005), does not suggest that reasonable suspicion was contemplated as the appropriate test, but rather an ordinary civil standard of proof of relevant allegations.

[**228**] In so far as the Court of Appeal justified its decision on the basis that the Security Council Resolutions contemplate indefinite freezing orders based not on proof but on reasonable suspicion, I therefore disagree. That is not the end of the matter, because of the power to make such provision as appears to Her Majesty in Council necessary or expedient for enabling the relevant Security Council resolutions to be effectively applied. That undoubtedly justifies provisions going beyond those of the resolutions, and expediency goes

wider than necessity. To that extent, I cannot accept the description of s 1(1) given by Mr Fordham QC as a mere 'transposition power'. An example of such a provision under s 1(1) itself is found in *R v HM Treasury, ex p Centro-Com* [1994] CLC 628. The Order in Council there went beyond Security Council Resolution 757 (1992) relating to the conflict in the former Yugoslavia, in so far as it enabled the Treasury to prohibit the making of payments from funds held in the United Kingdom even of medical supplies and foodstuffs, and the Treasury determined that it would refuse permission for payment of all supplies (even supplies already made), other than medical supplies and foodstuffs supplied from the United Kingdom. The reason was the risk that payments were being made from funds held in the United Kingdom, for supplies from other countries which were ostensibly but were not in fact medical supplies or foodstuffs, and the impracticality of eliminating this risk in relation to goods supplied from abroad. The Court of Appeal (unanimous on this point) upheld the validity of the Treasury's determination in principle, with Glidewell LJ dissenting only in relation to its retrospective application to past supplies. The court mentioned that its decision did not prevent the supply of medical supplies or foodstuffs from any country. It merely imposed a limitation on the origin of the funds which the purchasers could use to pay for such supplies.

[**229**] In the present case, the order as worded imposes an indefinite freeze on the use of funds or economic resources by any person designated by the Treasury for the purposes of the order on the basis that the Treasury have reasonable grounds for suspecting that he is or may be (a) a terrorist or (b) a person identified in Council Decision (EC) 2006/379 (OJ L144 p 21) or (c)/(d) a person owned or controlled or acting on behalf or at the direction of any person so designated. Only on the basis that the Treasury did not have reasonable grounds for suspecting this, could a person seek under art 5(4) to set aside a Treasury direction made under art 4. The courts below held that the phrase 'or may be' was outside the scope of the power in s 1(1), as lowering the threshold too far. Mr Swift for the Treasury does not concede that this conclusion was correct (though there has been no cross-appeal against it), but said frankly that the reason there was no cross-appeal in respect of the deletion of the words 'or may be' was because the Treasury did not really need to, if it had the words 'have reasonable grounds for suspecting'.

[**230**] In my opinion, there is an objective limit to the extent to which s 1(1) permits the executive by Order in Council to enact any measure that appears to it expedient to enable the effective application of the core prohibition mandated by Resolution 1373 (2001) and summarised in para [225], above. A measure cannot be regarded as effectively applying that core prohibition, if it substitutes another, essentially different prohibition freezing the assets of a different and much wider group of persons on an indefinite basis. I accept that it could have been regarded as necessary or expedient to freeze the funds and economic resources of suspects on a temporary basis, in order to ensure the effectiveness of any permanent freezing order, once their terrorist activity had been shown or they had had, at the least, the opportunity of disproving it to a civil standard. I also accept that the indefinite freezing of funds and economic resources of suspects may make it probable that the group of persons whose funds, etc are frozen will include more actual terrorists, etc. But it does so by changing the essential nature and target of the freezing order. That being the case, it is no longer possible to say that the order is either necessary or expedient 'for enabling those measures [those decided by Resolution 1373] to

be effectively applied'. It is enabling or applying different measures. Further and in any event, since the Treasury's case involves interpreting the words 'necessary or expedient' in s 1(1) of the 1946 Act as authorising a major inroad, on the basis of reasonable suspicion alone, into the rights of individuals to dispose of their assets and live their lives free of executive interference, the principle of legality, which I discuss in more detail below in relation to the Al-Qaida Order, argues for the more limited interpretation.

[231] For these reasons, I consider that the Terrorism Order 2006 was outside the power conferred upon the Treasury under s 1(1). It was not submitted that, in these circumstances, not only the words 'or may be' but also the words 'that the Treasury have reasonable grounds for suspecting' in art 4(2) could be blue-pencilled, so as to leave the order valid on that changed basis. But, in any event, such a suggestion would, even if accepted, have made no difference to the appeals of A, K, M and G in respect of the Terrorism Order 2006, since their designation was based on too relaxed a test. In these circumstances, I consider that we should allow the appeal in respect of this order, declare that the order was ultra vires and quash it. Since A, K, M and G are all now subject to designation under the Terrorism Order 2009, which could only be quashed in separate proceedings, there is no point in staying the operation of our order quashing the Terrorism Order 2006 for any period.

THE ALTERNATIVE GROUNDS OF CHALLENGE TO THE TERRORISM ORDER

[232] I add some words on the alternative grounds on which the appellants sought to challenge the Terrorism Order 2006. They were presented under the heads of certainty and proportionality, in each case in reliance on the Human Rights Convention. The prohibitions in arts 7(1) and 8(1) of the order were said to amount to an unlawful interference with convention rights, particularly the right to peaceful protection of possessions protected by art 1 of the First Protocol and the right to respect for private and family life protected by art 8. The same prohibitions, in combination with the criminal sanctions provided by arts 7(3) and 8(2), are said to have been insufficiently certain to comply with art 7 of the convention. Three particular aspects of alleged uncertainty are identified: the first, the scope of the prohibition in art 7(2)(d) in respect of 'any person acting on behalf or at the direction of a person referred to in sub-paragraph (a) or (b)'; the second, the scope of the words 'make … economic resources … available, directly or indirectly' in art 8(1); and the third, the scope of the further words in that article 'to or for the benefit of a person referred to in article 7(2).'

[233] The requisite standard governing certainty under art 7 was summarised by the European Court of Human Rights in *Kafkaris v Cyprus* (2008) 25 BHRC 591 as follows:

> '140. Furthermore, the term "law" implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, *Cantoni v France* [1996] ECHR 17862/91 at para 29; *Coëme v Belgium* [2000] ECHR 32492/96 at para 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see [*Achour v France* (2006) 45 EHRR 9, [2006] ECHR 67335/01 (para 41)]). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be

imposed for the act committed and/or omission (see, among other authorities, *Cantoni v France* [1996] ECHR 17862/91 at para 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, *Cantoni v France* [1996] ECHR 17862/91 at para 35; and [*Achour v France* (2006) 45 EHRR 9, [2006] ECHR 67335/01 (para 54)]).

141. The court has acknowledged in its case law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, mutatis mutandis, [*Sunday Times v UK* (1979) 2 EHRR 245, [1979] ECHR 6538/74 (para 49), and *Kokkinakis v Greece* (1993) 17 EHRR 397, [1993] ECHR 14307/88 (para 40)]). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, mutatis mutandis, *Cantoni v France* [1996] ECHR 17862/ 91). Article 7 of the convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see [*SW v UK* (1995) 21 EHRR 363, [1995] ECHR 20166/92 (para 36), and *Streletz v Germany* (2001) 33 EHRR 751, [2001] ECHR 34044/96 (para 50)]).'

[**234**] Judged by these standards, I agree with the Court of Appeal's reasoning and conclusion that the relevant provisions of arts 7 and 8 were and are sufficiently certain to be valid. That difficult cases may arise is not the point. Further, both under domestic law and under the jurisprudence of the European Court of Human Rights, criminal law provisions will, in case of real doubt, be construed restrictively, in the accused's favour: see *Kafkaris v Cyprus* (para 138). Among other points, it is relevant to note that art 7(1) read with 7(2)(d) is addressing a situation where a person (*A*) deals with funds or economic resources belonging to, owned or held by a person (*B*) acting on behalf or at the direction of a terrorist or designated person (usually *C*, though it could be *A*) rather than with funds owned or held by *A*. In relation to 'make … economic resources … available' in art 8(1), it is relevant to note that 'economic resources' are defined to mean 'assets … which are not funds but can be used to obtain funds, goods or services'. This would be unlikely to be the case in respect of a number of the examples canvassed in argument (supply of a cooked meal or a bed for the night, for example). The appellants were able to point to the stringent interpretation of the words 'for the benefit of', for which the Treasury has argued under Council Regulation (EC) 881/2002 (OJ 2002 L139 p 9) in *R (on the application of M) v HM Treasury* [2008] UKHL 26, [2008] 2 All ER 1097n. The interpretation advanced there by the Treasury would, if correct, preclude the payment (without Treasury licence) to the wife of a designated person of social security benefits, enabling her to expend money on domestic expenses such as buying household food, from which the

designated person would derive a benefit in kind. The House of Lords, in referring that issue to the European Court of Justice, expressed its own clear view that the Treasury's interpretation should be rejected as unnecessarily and overly wide.

[**235**] I am at present also unpersuaded that the content of the orders could be challenged on grounds of lack of proportionality, although I need express no final view about this. Combating terrorism, and the freezing of funds or resources which can be used for terrorist purposes, are undoubtedly matters of first importance. Those introducing legislative measures in this area have to make a judgment as to the nature and stringency of the measures required. The severity of impact of the freezing order provisions in the Terrorism Orders 2001 and 2006 on designated individuals in respect of whom there is only a 'reasonable suspicion' of terrorism and on others such as members of their families is relevant when considering whether such measures could be introduced as delegated legislation under s 1(1) of the 1946 Act. But, assuming this otherwise to be permissible, designation was not automatic and the Treasury was under the Terrorism Order 2006 empowered to grant licences to make available or deal with funds or economic resources in a manner which would otherwise be prohibited. The appellants complained about the stringency with which and way in which the Treasury has in fact operated its licensing system, but this does not appear as a complaint which can affect the validity of the orders themselves, as opposed to the propriety of the Treasury's interpretation or use of its powers under the orders. The latter aspect is not in issue before us.

[**236**] The appellants in their printed case also sought in relation to the Terrorism Order 2006 to rely upon the absence of any statutory provisions for the use of closed material by way of the special advocate procedure, and for the disapplication of the statutory prohibition under s 17 of the Regulation of Investigatory Powers Act 2000. The 2008 Act now makes express provision covering both points (ss 67–69). The original designations under the Terrorism Order 2006 were quashed, as a result of the conclusion in the courts below that the words 'or may be' were inadmissibly included in the order. Fresh designations were made after the Court of Appeal's decision, and have in turn been replaced by those now in existence under the Terrorism Order 2009. The procedures in the 2008 Act would apply to any challenges to these fresh designations. The points raised below regarding the absence of an express special advocate procedure and the disapplication of s 17 of the Regulation of Investigatory Powers Act 2000 are therefore academic under the Terrorism Order 2006, and I need say no more about them in that connection.

THE AL-QAIDA ORDER

[**237**] I turn to the Al-Qaida Order, relevant to both G and HAY. G and HAY are persons designated by the Sanctions Committee within art 3(1)(b), and subject accordingly to the prohibitions in arts 7 and 8, of the order. It is at the heart of both the Treasury's and G's and HAY's cases that the application to them of such prohibitions was required by the Security Council resolutions to which the order was intended to give effect, and that, once their designation by the Sanctions Committee was accepted, the merits of their designation were and are a matter external to and incapable of challenge in any domestic court. The Treasury derives from this the conclusion that the making of the order incorporating art 3(1)(b) was authorised and valid under s 1(1). G and HAY

submit that, precisely because domestic law can in these circumstances offer them no effective recourse, the making of the order was invalid. In the case of G, where the United Kingdom had sought and obtained G's listing, it was held (at least by Wilson LJ: para [157]) that effective recourse consisted in no more than 'a merits-based judicial review of the executive's response to [G's] application to it that it should request, or support his own request, for de-listing by the Sanctions Committee'. In the case of HAY, Owen J held, after reviewing the Court of Appeal's reasoning, that no effective recourse existed in respect of HAY, because of the lack of any certainty that he would be delisted, despite the United Kingdom's support, in circumstances where another unidentified state had sought his listing.

[238] The appellants put their case on two distinct bases, one common law, the other based on the 1998 Act. At common law, the submission is that s 1(1) cannot be taken to have contemplated or permitted orders which would interfere with, or at all events violate, fundamental rights. Under the 1998 Act, they recognise an obstacle in the reasoning in *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 3 All ER 111, [2006] 1 AC 529, particularly at [25] and [88] per Lord Bingham of Cornhill and Lord Hope of Craighead, and in the decision in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28, [2008] 1 AC 332. In *R (on the application of Al-Jedda) v Secretary of State for Defence* the House of Lords held, in the light of art 103 of the Charter, that a power to detain authorised by Security Council Resolution 1546 and successive further resolutions under Ch VII prevailed over the limitations on the power to detain otherwise contained in art 5 of the convention (although a detainee's rights under art 5 were not to be infringed to any greater extent than was inherent in such detention: para [39] per Lord Bingham). G and HAY invite the Supreme Court to reconsider both these cases and to depart from them so far as necessary.

[239] As noted above (para [218]), s 1(1) of the 1946 Act contemplates that Orders in Council implementing Security Council resolutions under Ch VII may interfere with individual persons' rights to enter into contracts or to deal with or dispose of their business. The limitations imposed by the Al-Qaida Order on G's and HAY's rights to use their property and on their privacy or family life were not, as such, of a character falling outside the scope of the s 1(1) power to give effect to Security Council resolutions. The real issue is whether s 1(1) permits the making of an order which interferes with such rights on a basis which is immune from any right of challenge on the merits before a court or other judicial tribunal. G and HAY submit that s 1(1) does not embrace the making of an Order in Council which deprived them of any effective right of access to a court or judicial tribunal to challenge the basis upon which they had been categorised as associates of Al-Qaida or the Taliban, with the limitations on their rights to use their property and on their privacy and family life that followed from that categorisation. It is not suggested that the Sanctions Committee equates with a court or judicial tribunal, though steps have been taken to respond to the General Assembly's call in September 2005 on the Security Council 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions' (United Nation General Assembly Resolution 60/1 of 16 September 2005, para 109). The Committee's procedures are set out in guidelines first adopted on 7 November 2002 and now current in a version adopted on 9 December 2008. The Committee usually meets in

closed session, and it determines what information about its proceedings or considered by it should be made public or otherwise disclosed. Its decisions are usually taken by consensus, but if none is achieved the matter may be submitted to the Security Council itself, which decides by majority. The Committee receives applications for removal of a name from the list either by states, or, through the 'Focal Point' procedure established by Resolution 1730 (2006), from any person or entity on the list. But there is no judicial procedure enabling a person or entity affected to know and respond to the full case regarding it. The identity of the member state seeking a listing or seeking to uphold a listing may not even be known or disclosed to that person or entity. Under Resolution 1822 (2008), para 12, the member state proposing inclusion on the list identifies those parts of the detailed statement of case that may be publicly released, and about which the person affected should under para 17 be notified. The most recent Resolution 1904 (2009) adopted on 17 December 2009 reflects in a number of respects concerns expressed about the effects of the United Nations resolutions and the Committee's procedures; it reverses the onus by deciding that 'the statement of case shall be releasable, upon request, except for the parts a Member State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing' to be published on the Committee's website (para 11); and it provides for an Ombudsperson ('an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions') to assist the Committee in de-listing requests. But nothing in it affects the basic problems that there exists no judicial procedure for review and no guarantee that individuals affected will know sufficient about the case against them (or even know the identify of the member state which sought their designation) in order to be able to respond to it.

[240] G and HAY invoke under English law the statement of principle in Lord Browne-Wilkinson's speech in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577 at 592; sub nom *R v Secretary of State for the Home Dept, ex p Pierson* [1998] AC 539 at 575 to the effect that:

> 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'

Lord Browne-Wilkinson dissented in that case only as to whether the principle applied on its particular facts. In *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131, Lord Hoffmann developed the principle of legality in these terms:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed

> unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1 at 6, [1960] AC 260 at 286, Viscount Simonds referred to the principle 'that the subject's recourse to Her Majesty's courts for the determination of his rights' as a 'fundamental rule' and as 'not by any means to be whittled down'. In *Ex p Pierson* Lord Browne-Wilkinson referred with approval to *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, [1998] QB 575, where the right of access to the courts was treated as 'a basic "constitutional right" ', the abrogation of which was not to be taken as authorised by the general words of a statutory provision, so that the setting of court fees at a level precluding access to the court by some litigants was not authorised by a general power to prescribe fees.

[241] Applying the principles recognised in these cases, I put aside, as circular in this context, the submission made by Mr Swift for the Treasury that G's and HAY's right of access to a court is unaffected since the only right they have under the Al-Qaida Order is to challenge the fact of their listing or their identity with any listed person. That is a relevant submission once the court's adjudicative power is shown to be excluded or limited by some valid and applicable legislative provision or common law principle: *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573 provides an example. But here the question is whether the Al-Qaida Order (or more particularly art 3(1)(b) of that Order) is valid. That depends upon whether s 1(1) of the 1946 Act enables the executive not merely to legislate in a manner which interferes with individual property rights—that is as such clearly contemplated by s 1(1)—but to restrict them so directly and radically as severely to curtail personal and family life on an indefinite basis, without affording any means of judicial recourse (domestic or international) to test the underlying premise of the restriction, namely 'association' with an organisation identified by the Security Council as a threat to international peace.

[242] In arguing for a negative answer to this question, G and HAY suggest as an analogy the reasoning and decision of the European Court of Justice in *Kadi v EU Council* Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872. That case concerned Council Regulation (EC) 881/2002, the aim of which, since the Community is not as such a member of the United Nations, was to ensure a uniform application of the United Nations Resolutions 1267 (1999) and 1390 (2002) within the member states of the Community. The regulation set out in Annex I the names of persons designated by the United Nations Sanctions Committee as associated with Al-Qaida and the Taliban and contained provisions mirroring those of the Security Council resolutions freezing their assets.

[243] The court held that the European Community was an autonomous legal system, based on the rule of law and in which fundamental rights formed an integral part of the general principles of law which Community legislation had to observe if they were to be lawful (paras 282–284). One of the principles

that formed 'part of the very foundations of the Community' was 'the protection of human rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights' (para 304); and this 'principle of effective judicial protection' meant that 'it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested Regulation' (para 336). This in turn meant that 'the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action' (paras 336–338). The court annulled the regulation as far as it concerned Mr Kadi and his co-appellants in the absence of any procedure for communicating (or any communication) to them of the evidence against them and in the absence of any procedure for hearing them, before or after the decision on the merits of their inclusion in the list (paras 344–352 and 368–369).

[244] Mr Swift points out that the decision in *Kadi v EU Council* turned on the court's view of the Community as an autonomous legal order (and not itself a member of the United Nations, although this factor does not appear explicitly in the court's reasoning). The United Kingdom is, in contrast, a member of the United Nations, bound by its Charter, and committed in international law to giving effect to Security Council resolutions under Ch VII. Counsel for G and HAY, supported by Mr Fordham for Justice, point out in response that the United Kingdom takes a dualist view of international law, and that international law has no domestic effect unless and until implemented at a domestic level: *Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523; sub nom *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418. The force of this submission is weakened by the consideration that the whole purpose of s 1(1) is to address the consequences of the dualist view by facilitating the implementation at domestic level of the United Kingdom's international legal obligations under Ch VII. Nevertheless, the issue remains, whether s 1(1) covers any and every Security Council resolution that might be passed, including even a resolution directed at what would otherwise be regarded as basic constitutional rights under domestic law.

[245] In considering this issue, it is relevant background that the United Nations is itself an institution committed to the promotion of human rights. The preamble to the Charter reaffirms 'faith in fundamental human rights' and art 1 includes among its purposes, in addition to maintaining international peace and security and developing friendly relations among nations:

> '3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction …
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.'

It is also of note that the Security Council by Resolution 1456 (2003) on 20 January 2003 adopted the following 'declaration on the issue of combating terrorism':

> '1. All States must take urgent action to prevent and suppress all active and passive support to terrorism, and in particular comply fully with all relevant resolutions of the Security Council, in particular resolutions 1373 (2001), 1390 (2002) and 1455 (2003) …
>
> 6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law …'

In its second report (S/2005/83) to the United Nations Sanctions Committee, the Analytical Support and Sanctions Monitoring Team established pursuant to Resolution 1526 (2004) identified the challenges made to European Community and national measures implementing Security Council Resolution 1267 (1999) and acknowledged, as the High Level Panel before it had, that at that date:

> 'The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly conflict with fundamental rights, norms and conventions' (para 54).

More recently, Resolution 1822 (2008) reaffirms 'the need to combat by all means, in accordance with the Charter … and international law, including applicable international human rights, refugee, and humanitarian law'. Against this background, it is open to question at an international level how far the United Nations Security Council resolutions can have been intended either to require member states to enact domestic legislation that would violate fundamental principles of human rights under their domestic constitutions or laws or to exclude domestic review of the compatibility of such legislation with such rights. Be that as it may, the relevant question at the domestic level is how far the United Kingdom Parliament in enacting s 1(1) of the 1946 Act can have envisaged that a Security Council resolution could or would be used as the basis for introducing a domestic measure that would conflict with such rights.

[**246**] The basic common law right at issue on these appeals is G's and HAY's right to access to a domestic court or tribunal to challenge the basis for including their names in the list of persons associated with Al-Qaida or the Taliban and so freezing their property with the severe personal consequences already indicated. This was also the limit of the equivalent right identified under European Community law by the Court of Justice in *Kadi v EU Council*. There was no suggestion in *Kadi v EU Council* that Mr Kadi was entitled to an opportunity to challenge the basic premise of Security Council Resolution 1267 and of Regulation (EC) 881/2002, viz that the Taliban (or Al-Qaida) was and is a terrorist organisation. In the traditional sphere of decision-making under art 41 (that is action, in the form of, say, sanctions, against a member state of the United Nations or against a non-state actor, such as the Taliban or Al-Qaida), a person affected by a domestic prohibition aimed at giving effect to such sanctions could not sensibly suggest that he had a fundamental right to access to a domestic court to challenge the premise of that prohibition. He could not demand access to a domestic court to challenge the proposition that the member state or non-state actor was in some way a threat to international peace meriting the imposition of sanctions.

[**247**] Equally, a head of a state or senior minister or other person closely identifiable with (an alter ego of) a state or non-state actor could, I think, find it hard to suggest that he had any basic right to challenge the legitimacy of a Security Council resolution requiring the sanctions to extend to his movements or his dealings with property. He could of course be expected to have a right of access to a domestic court to challenge any suggestion that the prohibition applied to him (e g that he was the head of state) or his activities or that he had infringed it. But, if one takes Usama bin Laden himself, who is identified in Resolution 1267 read with 1333 as an individual whose assets are required to be frozen and appears on this basis in the United Nations list and in art 3(1)(a) of the Terrorism Order 2006, as well as in Annex I to Regulation (EC) 881/2002, it must be very doubtful whether the European Court of Justice would have held in *Kadi v EU Council* that he should have a right to challenge his listing. Several points can be made about this. First, the listing of Usama bin Laden was directly determined by the Security Council's legally binding decision, rather than by any listing decision of the Sanctions Committee. Second, the position of Usama bin Laden, in relation to a non-state actor like Al-Qaida, parallels that of a head of state in relation to sanctions against a state; while, third, the origins and history of the Second World War are a sufficient demonstration of the potential threat to world peace which a single individual heading a state may pose. On this basis, if the question ever arose, s 1(1) of the 1946 Act could be seen as authorising the making of art 3(1)(a) of the Terrorism Order 2006 directed expressly at Usama bin Laden. But the present appeal does not require us to determine very remote and, as yet, entirely hypothetical situations.

[**248**] The Security Council and Sanctions Committee are closely related. To describe the former as legislating and the latter as executing or adjudicating upon the implementation of measures determined by the former is hardly realistic. The former was delegating listing to the latter, composed of representatives of all states sitting on the former. In these circumstances, I do not think that the Al-Qaida Order was outside the scope of s 1(1) merely because it gave effect to a determination made by the Sanctions Committee, rather than the Security Council. But I do consider that there is a relevant distinction between, on the one hand, measures directed at states or non-state actors such as Al-Qaida identified by the Security Council as threats to international peace, or at their acknowledged heads or alter egos, and, on the other hand, measures directed in entirely general terms at anyone associated with such non-state actors. In the case of the Terrorism Order, it was left to domestic legal systems to determine the identity of persons active as terrorists on whom the sanctions should bite. In the case of the Al-Qaida Order, the determination was undertaken by non-judicial process at the international level, by which member states were to be bound without more.

[**249**] The words of s 1(1) are general, but for that very reason susceptible to the presumption, in the absence of express language or necessary implication to the contrary, that they were intended to be subject to the basic rights of the individual: see *Ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115 per Lord Hoffmann (above). In the event of the Security Council establishing under Ch VII a régime requiring the internment of individuals (as was held to be the case in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2008] 3 All ER 28, [2008] 1 AC 332), s 1(1) could hardly enable the executive by Order in Council to introduce provisions for such internment within the United Kingdom. As an extreme form of restriction of individual liberty, internment without the right to challenge its basis before any court or judicial tribunal

would, if it were to be possible at all, at the least require primary legislation. Designation as an 'associate' of a rogue state or non-state organisation under Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), and the consequential freezing of assets, also has radical consequences for personal and family life. It is a matter which one would expect to be subject to judicial control, before or after the designation. So here, in my view, s 1(1) was and is an inappropriate basis for the Al-Qaida Order, freezing indefinitely the ordinary rights of individuals to deal with or dispose of property on the basis that they were associated with Al-Qaida or the Taliban, without providing any means by which they could challenge the justification for treating them as so associated before any judicial tribunal or court, at a domestic or international level. On this basis, I would hold that s 1(1) did not extend to authorise the making of art 3(1)(b) of that order. I would allow the appeal of G and dismiss the Treasury's appeal in the case of HAY accordingly. Owen J in the case of HAY quashed the Al-Qaida Order only 'in so far as it applies to' HAY. HAY cross-appeals against that conclusion, in my opinion with justification. The conclusion I have reached means necessarily that art 3(1)(b) of the order is invalid generally and it should be so declared, subject to a stay of one month on the operation of this order in respect of HAY. There would appear to be no point in such a stay in respect of G's designation under the Al-Qaida Order, in view of his concurrent designation under the Terrorism Act 2009.

[250] This makes it unnecessary to consider the alternative submissions developed under art 5 of the European Convention on Human Rights. The House's previous decision in *R (on the application of Al-Jedda) v Secretary of State for Defence* is about to be reviewed in proceedings brought by Mr Al-Jedda before the European Court of Human Rights. I would in these circumstances decline the invitation to re-consider that decision at this stage. It is also unnecessary to express any views on the fairness of the procedure available (particularly in the absence of any special provision for the use of special advocates), had it been the position that G and HAY were entitled under English law to challenge domestically the basis for their listing as associates of Al-Qaida or the Taliban.

CONCLUSION

[251] I would therefore dispose of the appeals and make orders in respect of the Terrorism Order 2006 as indicated in para [231] and the Al-Qaida Order as indicated in para [249], above.

Appeals allowed.

Vanessa Higgins Barrister.

Ahmed and others v HM Treasury

al-Ghabra v HM Treasury

R (on the application of Youssef) v HM Treasury

(No 2)

Note

[2010] UKSC 5

SUPREME COURT

LORD PHILLIPS P, LORD HOPE DP, LORD RODGER, LORD WALKER, LADY HALE, LORD BROWN AND LORD MANCE SCJJ

28 JANUARY, 4 FEBRUARY 2010

Terrorism – Sanctions – Freezing of funds and economic resources – United Nations Resolutions requiring freezing of funds and economic resources of terrorists – Resolutions given effect by Orders in Council – Orders unlawful – Whether order of court to be suspended.

Cases referred to in judgments

Kadi v EU Council Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872, [2008] ECR I-6351, ECJ.

Koo Sze Yiu v Chief Executive of the HKSAR [2006] HKCU 1152, HK CFA.

Lake v Lake [1955] 2 All ER 538, [1955] P 336, [1955] 3 WLR 145, CA.

Mathew, Re [2001] BPIR 531.

Spectrum Plus Ltd, Re, National Westminster Bank plc v Spectrum Plus Ltd [2005] UKHL 41, [2005] 4 All ER 209, [2005] 2 AC 680, [2005] 3 WLR 58.

Further judgment

Following judgment on 27 January 2010 in *Ahmed and others v HM Treasury, al-Ghabra v HM Treasury* and *R (on the application of Youssef) v HM Treasury* ([2010] UKSC 2, [2010] 4 All ER 745) the Treasury submitted that the Supreme Court should suspend the operation of the orders it proposed to make declaring the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 and art 3(1)(b) of the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 ultra vires and quashing them, in the case of the former for a period of eight weeks to 25 March 2010 and in the case of the latter for a period of six weeks to 11 March 2010. The court heard further argument.

Raza Husain (instructed by *Birnberg Pierce and Partners*) for A, K, M and HAY.

Alex Bailin (instructed by *Tuckers*) for G.

Jonathan Swift and *Andrew O'Connor* (instructed by the *Treasury Solicitor*) for the Treasury.

Judgment was reserved.

4 February 2010. The following judgments were delivered.

LORD PHILLIPS P (with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance SCJJ agree).

[**1**] When judgment was given on 27 January 2010 ([2010] UKSC 2, [2010] 4 All ER 745, [2010] 2 WLR 378) an issue arose in respect of the order that the court proposed to make. The court has held that the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (the TO) and art 3(1)(b) of the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 (the AQO) were ultra vires. This means that the restrictions imposed on individuals pursuant to these orders have been imposed without authority and are of no effect in law. Because this has not been appreciated there has been compliance with these restrictions, not least by third parties, including banks holding funds of those purportedly affected by the orders. Thus the orders have, in practice, achieved the effect that the Treasury intended when making them.

[**2**] The Treasury is anxious that this state of affairs should persist until the invalid restrictions can be replaced by restrictions that have the force of law. To this end Mr Swift has submitted that the court should suspend the operation of the orders that it proposes to make declaring the TO and art 3(1)(b) of the AQO ultra vires and quashing them, in the case of the former for a period of eight weeks to 25 March 2010 and in the case of the latter for a period of six weeks to 11 March 2010.

[**3**] This submission is a variation and extension of a limited suspension to the operation of its orders that Lord Hope had proposed that the court should make in para [84] of his judgment. I had concurred in this proposal, but having considered the matter further I have concluded that it would not be appropriate to suspend any part of the court's order.

[**4**] Mr Swift submitted that this court has power to suspend the effect of any order that it makes. Counsel for the appellants conceded that this was correct and that concession was rightly made. The problem with a suspension in this case is, however, that the court's order, whenever it is made, will not alter the position in law. It will declare what that position is. It is true that it will also quash the TO and part of the AQO, but these are provisions that are ultra vires and of no effect in law. The object of quashing them is to make it quite plain that this is the case.

[**5**] The effect of suspending the operation of the order of the court would be, or might be, to give the opposite impression. It would suggest that, during the period of suspension of the quashing orders, the provisions to be quashed would remain in force. Mr Swift acknowledged that it might give this impression. Indeed, he made it plain that this was the object of seeking the suspension.

[**6**] Mr Swift's submissions are described in the dissenting judgment of Lord Hope. He did not suggest that the court could or should give temporary validity to the unlawful provisions. He did not suggest that the court could or should purport prospectively to overrule them. He did not suggest that suspension was necessary in order to permit action by the executive which might otherwise appear to be flouting the decision of the court, as it was in *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] HKCU 1152. He did not suggest that the suspension would have any effect in law.

[**7**] Mr Swift urged the court to suspend the operation of its judgment because of the effect that the suspension would have on the conduct of third parties. He submitted that the banks, in particular, would be unlikely to release

frozen funds while the court's orders remained suspended. I comment that if suspension were to have this effect this would only be because the third parties wrongly believed that it affected their legal rights and obligations.

[8] The ends sought by Mr Swift might well be thought desirable, but I do not consider that they justify the means that he proposes. This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment. Accordingly, I would not suspend the operation of any part of the court's order. That order should provide as follows:

THE COURT ORDERS that

(1) the appeals of Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen and of Mohammed al-Ghabra as regards the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 be allowed

(2) it be declared that the Terrorism (United Nations Measures) Order 2006 is ultra vires and the order quashed

(3) the appeal of Mohammed al-Ghabra as regards the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 be allowed to the extent that it be declared that art 3(1)(b) of the order is ultra vires and the order quashed

(4) the appeal of HM Treasury be allowed to the extent only of setting aside the declaration made by Owen J on 10 July 2009 in the Administrative Court of the Queen's Bench Division of the High Court ([2009] EWHC 1677 (Admin))

(5) the respondent pay, or cause to be paid, to the appellants, Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen, their costs in the House of Lords, the Supreme Court, the Court of Appeal and the Administrative Court, to be subject to detailed assessment if not agreed

(6) the parties in the appeal of *R (on the application of Youssef) v HM Treasury* and in the appeal of *al-Ghabra v HM Treasury* make written submissions on costs in the House of Lords, the Supreme Court, the Court of Appeal and the Administrative Court by 18 February 2010

(7) there be a detailed assessment of the publicly funded costs in all three appeals.

LORD HOPE DP (dissenting).

[9] I have the greatest possible respect for the views of my colleagues and for the reasons which Lord Phillips has set out so carefully in his judgment. I regret however that I am unable to agree with what he proposes. As the issue is important, was not the subject of any decision by the House of Lords and has not previously been considered by this court, I should like to explain in my own words why I am of that opinion.

[10] In para [84] of my judgment which was given on 27 January 2010 ([2010] UKSC 2, [2010] 4 All ER 745, [2010] 2 WLR 378) I said that I would suspend the operation of the orders that I would make as regards art 3(1)(b) of the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952 (the AQO) in the case of Hani El Sayed Sabaei Youssef (referred to previously as HAY in these proceedings) for a period of one month. This was to enable the Treasury, if so minded, to take the steps that were needed to give effect to the obligation by which the United Kingdom is bound by art 25 of the Charter of the United Nations pending the proceedings that are currently being taken by the United Kingdom for him to be de-listed by the United Nations Security Council 1267 Committee. Lord Phillips said in para [156] that, for the reasons that I gave, he agreed that the operation of the order in HAY's case should be suspended for one month from the date of judgment. Lord Mance said in

para [249] that the declaration that he would make that art 3(1)(b) of the AQO was invalid generally should be subject to a stay of one month on its operation on respect of HAY. There was no dissent from this proposal, although Lord Brown did not agree with the view of the majority that art 3(1)(b) of the AQO was ultra vires.

[**11**] In accordance with Supreme Court Practice Direction 6.8.3 the parties were provided in advance with a copy of the court's judgment and a draft of the orders that the court proposed to make. Written submissions on behalf of the Treasury, Mohammed al-Ghabra (referred to previously as G) and HAY were shown to the court before it sat to deliver the judgment. Counsel for HAY did not object to the proposal that the operation of the court's order in his case should be suspended for a period of one month. Mr Husain adhered to this position on HAY's behalf when the proposed orders were discussed in more detail the day after judgment was given. He informed the court that his position was one of neutrality. He then said that, on instructions, he agreed with Mr Swift for the Treasury that the judgment was not self-executing and that the court had power to suspend the operation of the orders that it proposed to make in his case. He said that HAY welcomed the opportunity that the court's judgment gave for the orders that the Treasury proposed to make to receive proper parliamentary scrutiny, and that he would prefer a stay to a resort to emergency legislation without such scrutiny to cover the period until the steps that were necessary to achieve this could be taken. His attitude may well be: better the devil you know than the devil you don't. But, whatever his reasons, it is clear that HAY's position is that he does not oppose the order that I was proposing. Had the matter rested there, I would have been satisfied that the order that I was proposing should be made.

[**12**] But the matter does not rest there. Mr Swift for the Treasury asks the court to suspend the operation of the order for the quashing of the Terrorism (United Nations Measures) Order 2006, SI 2006/2657 (the TO 2006) for a period of eight weeks to 25 March 2010 to enable the Treasury to address the effects of the court's judgment in relation to that order by introducing primary legislation for consideration by Parliament. He also asks the court to suspend the operation of the orders that it proposes to make in relation to the AQO for a period of six weeks to 11 March 2010, not the four weeks that I had suggested, and that it should extend this suspension to the order that quashed the AQO generally, not just in the case of HAY as I had suggested. This was to enable the Treasury to made an order under s 2 of the European Communities Act 1972 containing enforcement measures in support of Council Regulation (EC) 881/2002 (OJ 2002 L139 p 9) implementing United Nations resolutions under Ch VII of the Charter of the United Nations for the freezing of the funds and economic resources of persons associated with Osama bin Laden, Al-Qaida or the Taliban. In each case the suspension is sought for the purpose of enabling steps to be taken to ensure that the United Kingdom remains in compliance with its international obligations under the UN Charter. These applications have made it necessary for the court to look more closely at the question whether it has power to make orders of that kind and, if so, whether it should do so in this case.

[**13**] Before considering these issues I should mention some other matters by way of background. The court was told that at present 13 persons remain designated under the TO 2006. There are also 25 persons or entities who remain designated under the Terrorism (United Nations Measures) Order 2001, SI 2001/3365 and 21 persons who have been designated under the Terrorism

(United Nations Measures) Order 2009, SI 2009/1747. As I indicated in para [84] of my judgment, I had assumed that the existence of the 2009 Order under which A, K, M and G were re-designated had removed the need for a short period to be given for the Treasury to address the consequences of the court's judgment in regard to the TO 2006. On the facts that are now before the court the web created by these orders is more far-reaching than I had imagined. As for the AQO, the court was told that 18 persons including G and HAY, and four other entities present in the United Kingdom who are named on the consolidated list, have been designated by the 1267 Committee. The United Kingdom will be in breach of its obligations under United Nations Security Council Resolution 1904 (2009), which replaced Resolution 1822 (2008) with effect from 17 December 2009, and under Regulation 881/2002 if effect is not given to these designations in domestic law.

[14] Having regard to these obligations, in a letter dated 9 October 2009 copies of which were sent to the other parties' solicitors, the Treasury sought a widening of the opportunity that is provided by Practice Direction 6.8.3, which enables judgments to be released to counsel, solicitors and in-house legal advisers six days before the delivery of the judgment. Permission was sought for the judgment in this case to be released also to 38 named individuals in relevant government departments and an unspecified number in the Security Service, to allow for contingency planning to safeguard national security should the Treasury be unsuccessful in the appeals. As this was an open letter, the reasons for this request were not fully explained. But the point was made that operational concerns might arise in the form of an increased risk of previously frozen funds being withdrawn from unfrozen bank accounts and diverted for terrorist purposes or being used as a conduit to this end. It was made clear at the same time that the Treasury would, for operational reasons, strongly oppose provision of the embargoed judgment to A, K, M, G and HAY for any period additional to the 24 hours provided for in the Practice Direction. The court was not willing to accede to this request. But the reasons why it was made have not gone away.

[15] I was aware of the Treasury's request when I proposed in my judgment that the order quashing art 3(1)(b) of the AQO should be suspended for one month in HAY's case. It is worth noting also that in *Kadi v EU Council* Joined cases C-402/05P and C-415/05P [2009] AC 1225, [2009] 3 WLR 872 (para 373), the European Court of Justice recognised that the immediate effect of its decision would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by Council Regulation (EC) 881/2002 which the Community was required to implement because, for example, steps might be taken to prevent any further measures freezing funds from being applied to them. So it delayed effect being given to its judgment by three months. The risk of serious and perhaps irreversible damage to efforts to defeat international terrorism in our case too must weigh heavily with this court in deciding what it should do to meet the concerns that have been expressed by the Treasury. This is not simply a matter of meeting international obligations. The national interest in resisting threats to our own security is just as important.

THE POWER TO SUSPEND

[16] Mr Swift submitted that it was clear, as a matter of simple vires, that the court had power to make the orders he seeks. Rule 29 of the Supreme Court Rules 2009, SI 2009/1603 states that the court has all the powers of the court

below, and s 40(5) of the Constitutional Reform Act 2005 gives the court power to determine any question necessary to be determined for the purposes of doing justice in an appeal. CPR 40.7(1) provides: 'A judgment or order takes effect from the day when it is given or made, or such later date as the court may specify.' This rule reflects the well-established principle that it is the order that the court makes that disposes of the proceedings and provides the basis for an appeal, not the issuing of the reasons for it in the form of the court's judgment: *Lake v Lake* [1955] 2 All ER 538, [1955] P 336; *Re Mathew* [2001] BPIR 531 at 532 per Lawrence Collins J. Examples of the application of that principle can be found in this case, as Mr Swift pointed out. They can be seen in the orders that Collins J made suspending the effect of his judgment pending appeal to the Court of Appeal and in the orders made by the Court of Appeal pending applications for leave to appeal to the House of Lords. The situation in which the Supreme Court finds itself is different, as there is no further right of appeal. This has a bearing on the question whether the orders that it proposes to make should be suspended. But I do not think that the court lacks the power to specify a later date for the taking effect of the orders it proposes to make should it consider that it should do so.

[**17**] There was some discussion in the course of the hearing of the question whether the court should declare that the orders that it proposed to make should have effect prospectively only. The usual rule, of course, is that an order quashing an order or other measure as ultra vires operates retrospectively as well as prospectively. The question whether there was power to place temporal limitations on the effect of its judgments was considered by the House of Lords in *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 4 All ER 209, [2005] 2 AC 680. The focus in that case was on the prospective overruling of decisions on points of law. The House held that it had jurisdiction to make such an order, although it declined to do so on the facts of that case. In *A Time for Everything under the Law: Some Reflections on Retrospectivity* (2005) 121 LQR 57 at 77 Lord Rodger of Earlsferry acknowledged that prospective overruling might be particularly useful in cases involving the application of convention rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)).

[**18**] The situation in this case is quite different. For the reasons that the court has given, the TO 2006 and art 3(1)(b) of the AQO were ultra vires and void from the moment that the orders were made. It would be entirely contrary to the reasoning on which that conclusion is based for the ruling to be applied only to the future and not to the past. But I do not think that it is necessary to explore the point further because Mr Swift, very properly, made it clear that the Treasury were not seeking prospective overruling in this case. He accepted that the court's orders, when made, will apply retroactively as usual. What he is seeking is simply a delay in the date as from which that consequence will take effect. That being so, I would hold that the court has power to make the orders that he seeks. I do not think that there is any difference of view between us on that point. The more difficult question is whether it should do so. The view of the majority, as Lord Phillips has explained, is that this would not be appropriate.

SHOULD THE POWER BE EXERCISED?

[**19**] The first question that needs to be considered is the effect, if any, that suspension would have in practice. It would be wrong to regard the suspension

as giving any kind of temporary validity to the provisions that are to be quashed. As Bokhary PJ said in *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] HKCU 1152, para 63, there is no shield from legal liability for functioning pursuant to what has been declared to be ultra vires during the period of the suspension. Mr Swift did not seek to argue the contrary. He made it clear that the Treasury accepted that suspension would do no more than delay the taking effect of the court's orders, which would then operate retrospectively as from the specified date. It would have no effect whatever on remedies for what had happened in the past or during the period of the suspension.

[**20**] It was suggested in the course of the hearing that this was an absurd result. After all, now that the court's judgment has been made public everyone knows what the court proposes to do. The prohibitions that the orders have imposed will remain in place, but to use them as a fetter on the designated person's access to funds would be contrary to what is now known to be the law. Any person who contravenes the prohibition in art 7(1) of the TO 2006 in the meantime would on paper be committing a criminal offence. But that would be a pointless restriction. Mr Swift's answer was that, while technically that was so, it would be obvious by the time any prosecutions were brought that the order was ultra vires. So any prosecutions that might be brought for what was done during this period would not be proceeded with. I agree that to prosecute would plainly be a waste of time and public money. So, to the extent that it may be thought to prolong the effect of the criminal sanctions, it can be seen that nothing would be gained by a suspension.

[**21**] Mr Swift insisted that a suspension would nevertheless have practical effect. This was because it would not be ignored by the banks and other institutions, which would continue to give effect to the prohibitions and obligations in the TO and the AQO until they were directed otherwise by an order of the court. That, he indicated, is how these institutions conduct their affairs in practice and what they could be expected to do in this case. Judging by the grounds that the Treasury gave for seeking a relaxation on the embargo under the Practice Direction, this is a matter of far greater significance to combating international terrorism than breaches of the prohibitions by individuals such as the friends and family members of those who have been designated. For obvious reasons the court has not been given any detailed information about the whereabouts or amounts of the funds that may be in the hands of the financial institutions, of the damage that would be caused to the national interest if the institutions were to feel able to release them or disregard the conditions that may have been attached to any licences that may have been issued to them without notifying the Treasury or whether or not that damage would be irreparable. Nor has it been given any indication by the financial institutions themselves, who have not been named, that they would not release any funds during the period of the suspension. But I think that it would be wrong for the court not to accept Mr Swift's assurance that in this respect suspension would achieve something that would be of real practical value.

[**22**] Although the situation now is different from that which the courts below faced when they suspended the effect of their orders, it is comparable in this respect. We have recognised that the breaches of fundamental law which render the orders in question ultra vires are capable of being remedied. In their case there was the possibility of their decisions being reversed on appeal. In our case there is the possibility—indeed more than that, the likelihood—that the remedial measures will be approved by Parliament. If that were not so, there would be no grounds for any delay in making the orders that are needed to

give effect to the court's judgment. As it is, it would seem that there is everything to be said for not letting the cat—whose dimensions and capacity to inflict damage we can only guess at—out of the bag in the meantime. I think that the national interest, as well as respect for our international obligations, requires the court to do what it can to see that this does not happen.

[**23**] There was also some discussion at the hearing of measures that the Treasury might itself take to achieve the same result. In para [176] of the judgment Lord Rodger said that in his opinion s 1(1) of the United Nations Act 1946 would authorise Her Majesty to make an Order in Council, even with the far-reaching effects that are to be seen in the current orders, provided it only had a limited life-span and was replaced as soon as practically possible by equivalent legislation passed by Parliament. Mr Swift said that the Treasury had given some thought to this suggestion but had concluded, after studying the judgment as a whole, that it would not be appropriate for it to adopt it. Emergency legislation by Parliament is also in theory not impossible. But that would mean achieving the desired result by two Acts of Parliament in quick succession, not one.

CONCLUSION

[**24**] There is an obvious attraction in putting the orders that the court proposes to make into effect as soon as possible. There is perhaps a risk, as Lord Phillips has said, that suspension would tend to obfuscate the effect of the court's judgment. But I would not myself regard that as a decisive factor in deciding where the balance of advantage lies. The judgment itself has been promulgated, and the Treasury accepts that suspension would have no effect whatever on its effect once the period of suspension has been lifted. Furthermore, the steps that the Treasury proposes to take to comply with the international obligations are now known. So it is possible to assess the advantages of a suspension as against the disadvantages. The periods proposed are short—indeed they have been shortening by the day as time has gone by since the judgment was issued. In view of the way the financial institutions can be expected to respond to a suspension, it cannot be said that this would be of no practical value. On the contrary, not to suspend could result in damage to the effectiveness of the measures that the international obligations require which might well be, as the European Court of Justice indicated in *Kadi v EU Council*, serious and irreversible. Bearing in mind too, as Mr Swift concedes, that suspension would have no effect whatsoever on remedies for what had happened in the past or during the period of the suspension, I consider that the balance lies in favour of suspension in the terms requested by the Treasury.

[**25**] I would therefore have directed that the order quashing the TO 2006 should not take effect until 25 March 2010 and that the orders quashing art 3(1)(b) of the AQO should not take effect until 11 March 2010.

Order accordingly.

Vanessa Higgins Barrister.

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Références

Cour de cassation
chambre sociale
Audience publique du Tuesday 25 January 2005
N° de pourvoi: 04-41012
Publié au bulletin **Rejet.**

M. Sargos., président
M. Chagny., conseiller rapporteur
M. Maynial., avocat général
la SCP Defrenois et Levis, Me Haas., avocat(s)

Texte intégral

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, CHAMBRE SOCIALE, a rendu l'arrêt suivant :

Sur le moyen unique :

Attendu que, selon l'arrêt attaqué (Paris, 7 octobre 2003), M. X..., engagé en 1992 par la Banque africaine de développement, a été démis de ses fonctions par une lettre du 20 novembre 1995 du président de cette organisation internationale ;

Attendu qu'il est fait grief à l'arrêt d'avoir déclaré recevable l'action en paiement d'indemnités et de primes exercée par un ancien fonctionnaire international (M. X...) contre son ancien employeur, une organisation internationale, la Banque africaine de développement ayant son siège en Côte-d'Ivoire, alors que la cour d'appel a constaté que le demandeur avait été employé par une organisation internationale exerçant son activité en Afrique, ce dont il résultait qu'il ne relevait pas, au moment des faits, de la juridiction d'une partie contractante à la Convention européenne des droits de l'homme et ne pouvait donc se prévaloir des droits et libertés définis par cette Convention ; qu'en se fondant néanmoins sur une supposée atteinte à la substance du droit à un tribunal pour refuser de faire jouer l'immunité de juridiction, la cour d'appel a excédé ses pouvoirs au regard de l'article 52 de l'accord du 4 août 1963 instituant la Banque africaine de développement, ensemble l'article 1er de la Convention européenne des droits de l'homme ;

Mais attendu que la Banque africaine de développement ne peut se prévaloir de l'immunité de juridiction dans le litige l'opposant au salarié qu'elle a licencié dès lors qu'à l'époque des faits elle n'avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges de cette nature, l'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France ;

Et attendu que la cour d'appel, d'une part, a retenu à juste titre qu'en l'absence de toute juridiction du travail instituée au sein de la Banque africaine de développement, l'immunité de juridiction édictée au bénéfice de ladite banque par l'article 52 de l'accord signé à Khartoum le 4 août 1963, publié en vertu du décret n° 86-1039 du 12 septembre 1986, mettait le salarié dans l'impossibilité d'exercer son droit à un tribunal pour connaître de sa cause ; que, d'autre part, elle a fait ressortir que le lien avec la France était la nationalité française de l'intéressé ; que c'est donc sans excéder son pouvoir que la cour d'appel a décidé que la juridiction française était compétente pour connaître du litige ;

D'où il suit que le moyen ne peut être accueilli ;

PAR CES MOTIFS :

REJETTE le pourvoi ;

Condamne la Banque africaine de développement aux dépens ;

Vu les articles 37, alinéa 2, de la loi du 10 juillet 1991 et 700 du nouveau Code de procédure civile, condamne la Banque africaine de développement à payer à Me Haas la somme de 2 000 euros ;

Ainsi fait et jugé par la Cour de Cassation, Chambre sociale, et prononcé par le président en son audience publique du vingt-cinq janvier deux mille cinq.

Analyse

Publication : Bulletin 2005 V N° 16 p. 13

Décision attaquée : Cour d'appel de Paris , du 7 octobre 2003

Titrages et résumés : CONFLIT DE JURIDICTIONS - Compétence internationale - Immunité de juridiction - Effets - Limites.
L'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constitue un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France. Dès lors, n'excède pas son pouvoir la cour d'appel qui, pour décider que la juridiction française est compétente pour connaître du litige, d'une part, a retenu à juste titre qu'en l'absence de toute juridiction du travail instituée au sein de la Banque africaine de développement l'immunité de juridiction édictée au bénéfice de ladite banque par l'article 52 de l'Accord signé à Khartoum le 4 août 1963, publié en vertu du décret n° 86-1039 du 12 septembre 1986, mettait le salarié qu'elle avait licencié dans l'impossibilité d'exercer son droit à un tribunal pour connaître de sa cause, de sorte qu'elle ne pouvait se prévaloir de l'immunité de juridiction, et qui, d'autre part, a fait ressortir que le lien avec la France était la nationalité française de l'intéressé.

ORGANISMES INTERNATIONAUX - Banque africaine de développement - Immunité - Limites CONFLIT DE JURIDICTIONS - Compétence internationale - Immunité de juridiction - Organisme international - Banque africaine de développement CONVENTIONS INTERNATIONALES - Accords et conventions divers - Accord de Khartoum du 4 août 1963 - Article 52 - Immunité de juridiction - Bénéfice - Limites - Portée POUVOIRS DES JUGES - Excès de pouvoir - Définition - Déni de justice - Applications diverses - Impossibilité pour une partie d'accéder à un juge

Textes appliqués :

- Accord international de Khartoum 1963-08-04 art. 52
- Décret 86-1039 1986-09-12

Oxford Public International Law

African Development Bank v X, Appeal judgment, 04-41012, ILDC 778 (FR 2005), 25th January 2005, Court of Cassation [Cass]

Date: 25 January 2005
Content type: Domestic Court Decisions
Jurisdiction: Court of Cassation [Cass]

Citation(s): 04-41012 (Official Case No) ILDC 778 (FR 2005) (OUP reference)
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]

Parties: African Development Bank
Mr X (France [fr])

Judges/Arbitrators: Sargos (President)

Procedural Stage: Appeal judgment

Previous Procedural Stage(s):
Decision of the Industrial Tribunal (*Tribunal des Prud'homme*); *African Development Bank v X*, 2000 (unreported)
Decision of the Court of Appeal of Orléans; *African Development Bank v X*, (2005) Revue critique de droit international privé 405, 7 October 2003

Subject(s):

Privileges — Right to a judge — Immunity from jurisdiction, international organizations

Core Issue(s):

Whether the human right to a judge justified an exception to jurisdictional immunities of international organizations in actions brought before French courts.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper and Professor Erika de Wet, University of Amsterdam Center for International Law.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2015. All Rights Reserved. Subscriber: Monash University; date: 03 June 2015

Facts

F1 Mr X, a French citizen, was appointed in 1993 as a civil servant in Ivory Coast by the African Development Bank, an international organization created by the Agreement Establishing the African Development Bank, Khartoum, 4 August 1963 ('Khartoum Agreement'). Two years later, the Bank decided to dismiss him. Contesting the redundancy payment he obtained, he decided to sue the Bank before a French court in order to obtain damages.

F2 The case was first brought before the Paris Industrial Tribunal (*Tribunal des Prud'homme*), which in 2000 ordered the Bank to pay its former employee damages in relation to termination. The judgment of the Tribunal was challenged on appeal by the Bank, on the grounds that the French courts had no jurisdiction over the case since the organization was protected by its jurisdictional immunity as provided for by Article 52 of the Khartoum Agreement. This provision specified that 'the Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers'. The Khartoum Agreement was ratified by France and incorporated into French law in accordance with Article 55 of the Constitution, (France).

F3 The Court of Appeal of Orleans upheld the judgment of first instance; it also denied immunity to the Bank on the main grounds that no administrative tribunal had been established by the international organization to decide cases such as the one at hand. In a situation where there were no other legal proceedings available to the claimant to contest the organization's decision than the referral of the case to the domestic courts, allowing the Bank to enjoy jurisdictional immunities would have resulted in a breach of the 'substance' of the individual right to a tribunal, set out in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953 ('European Convention on Human Rights', 'ECHR').

F4 The Bank appealed to the Court of Cassation, arguing that the ECHR was inapplicable to the matter, since X was not within the jurisdiction of a contracting state as provided by Article 1 of the ECHR, and requesting the application of Article 52 of the Khartoum Agreement.

Held

H1 The Appeal was dismissed. The jurisdictional immunity of an international organization could not be relied upon in relation to proceedings brought by an employee when no international administrative tribunal had been instituted by that organization with jurisdiction to hear complaints brought by its employees. It would otherwise be a denial of justice, in violation of the right to a court which, in France, was part of the 'international public order'. (paragraph 3)

H2 French courts had jurisdiction only in so far as the matter had a connection with France. In the case at hand, the relevant link was provided by the French nationality of X. (paragraph 4)

Date of Report: 01 September 2008

Reporter(s): Yann Kerbrat

Analysis

A1 The decision was a leading one in that it recognized for the first time in French case law that the fundamental individual right to a court prevailed over jurisdictional immunities of international organizations. It constituted a reversal of the opinion of the court expressed in its previous decision *Hintermann*, (1997) Journal du droit international 141, 14 November 1995 (reproduced in French in 1997).

A2 This opinion of the Court of Cassation was in line with the judgment of the European Court of Human Rights ('ECtHR') in *Waite and Kennedy v Germany*, Case No 26083/94, (1999) 1 EHRR 393, 18 February 1999 although that case was not cited expressly in the present decision. The ECtHR

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held that the limitations applied to the right of access to the courts (secured by Article 6(1) of the ECHR) justified by the protection of the immunities of international organizations must not 'restrict or reduce the access left to individuals in such a way or to such an extent that the very essence of the right is impaired'. Furthermore, a limitation must pursue a 'legitimate aim' and be proportionate to the objective in view (*Waite and Kennedy*, [59]).

A3 Unlike the decision of the Court of Appeal of Orleans, the Court of Cassation decision did not refer to the ECHR; the decision was grounded on the notion of 'international public order' which forbids the denial of justice. The concept of 'international public order' was traditionally used in French law, as well as in other states, to exclude the application of a foreign law designated by general rules of conflict of laws. Its content was quite vague; it was established by case law. It globally included values which were either regarded as fundamental by judges, or secured by international instruments (first the ECHR) as general domestic principles. In the present decision, the reference to the 'international public order' had another purpose: it was used to justify the non-application of a treaty (the Khartoum Agreement), nevertheless incorporated in the French legal order. To that effect, there was no need for the court either to examine the jurisdictional scope of the ECHR as in its Article 1 or to apply the rules on conflicts of treaties as codified in the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980.

Date of Analysis: 01 September 2008
Analysis by: Yann Kerbrat

Further analysis:

N Haupais, (2006) 110 Revue générale **de** droit international 217
L Corbion, (2005) Journal du droit international 1142
V Moissignac Massirat, 'Immunité **de** juridiction et droit à un tribunal' (2005) La semaine juridique —édition générale, Pt II No 10185
I Pingel, (2005) Revue critique **de** droit international privé 477
F Viangalli, 'Immunité **de** juridiction et déni **de** justice' (2005) Recueil Dalloz Sirey 1540
M Audit, Revue critique **de** droit international privé, (2004), 405

Instruments cited in the full text of this decision:

International

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Article 1

Agreement Establishing the African Development Bank, 4 August 1963 (Khartoum), Article 52

To access full citation information for this document, see the Oxford Law Citator record

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Decision - English translation

The Court of Cassation, Social Division, handed down the following judgment:

On the sole ground for appeal:

1 According to the judgment under appeal (Paris, 7 October 2003), Mr. X, employed in 1992 by the African Development Bank was dismissed by a letter dated 20 November 1995 from the chairman of this international organisation;

2 It is claimed that the judgment wrongly declared admissible the action for payment of compensation and bonuses, brought by a former international employee (Mr X) against his former employer, an international organisation, the African Development Bank, whose headquarters are in the Ivory Coast, whereas the court of appeal held that the claimant was employed by an international organisation conducting its business in Africa, as a result of which, at the time of the events, this did not fall within the jurisdiction of a contracting party to the European Convention on Human Rights. He could therefore not have recourse to the rights and freedoms provided in that Convention. In proceeding, nonetheless, on an alleged infringement of the substance of the right of a court to refuse to apply immunity from jurisdiction, the court of appeal acted *ultra vires* with regard to Article 52 of the Agreement of 4 August 1963 establishing the African Development Bank, together with Article 1 of the European Convention on Human Rights;

3 However, the African Development Bank cannot invoke immunity from jurisdiction in a lawsuit from an employee who it dismissed, as at the time of the events it had not set up within the organisation a court competent to consider disputes of this kind, making it impossible for a party to approach a court eligible to find on his claim and to exercise a right that falls within international public policy, constituting a denial of justice, which establishes jurisdiction for the French courts if a link with France exists;

4 The court of appeal, on the one hand, correctly held that in the absence of any industrial tribunals set up within the African Development Bank, the immunity from jurisdiction established for the benefit of this bank in Article 52 of the Agreement signed in Khartoum on 4 August 1963, published in decree No. 86-1039 of 12 September 1986, makes it impossible for the employee to exercise his right to have a court consider his case. On the other hand, it found that the link with France was the French nationality of the person concerned, thus the court of appeal did not act *ultra vires* in holding that the French court was competent to consider the dispute;

5 The appeal therefore cannot be upheld;

For These Reasons:

6 REJECTS the appeal;

7 With costs against the African Development Bank;

8 With regard to Articles 37(2) of the Act of 10 July 1991 and Article 700 of the New Civil Procedure Code, orders the African Development Bank to pay Mr. Haas the sum of 2,000 Euros;

9 Thus held and considered by the Court of Cassation, Social Division, and delivered by the Presiding Judge at the public hearing on the twenty-fifth of January two thousand and five.

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Decision - full text

Paragraph numbers have been added to this decision by OUP

La Cour de Cassation, Chambre Sociale, a rendu l'arrêt suivant :

Sur le moyen unique :

1 Attendu que, selon l'arrêt attaqué (Paris, 7 octobre 2003), M. X..., engagé en 1992 par la **Banque africaine de développement**, a été démis **de** ses fonctions par une lettre du 20 novembre 1995 du président **de** cette organisation internationale ;

2 Attendu qu'il est fait grief à l'arrêt d'avoir déclaré recevable l'action en paiement d'indemnités et **de** primes exercée par un ancien fonctionnaire international (M. X...) contre son ancien employeur, une organisation internationale, la **Banque africaine de développement** ayant son siège en Côte-d'Ivoire, alors que la cour d'appel a constaté que le demandeur avait été employé par une organisation internationale exerçant son activité en Afrique, ce dont il résultait qu'il ne relevait pas, au moment des faits, **de** la juridiction d'une partie contractante à la Convention européenne des droits **de** l'homme et ne pouvait donc se prévaloir des droits et libertés définis par cette Convention ; qu'en se fondant néanmoins sur une supposée atteinte à la substance du droit à un tribunal pour refuser **de** faire jouer l'immunité **de** juridiction, la cour d'appel a excédé ses pouvoirs au regard **de** l'article 52 **de** l'accord du 4 août 1963 instituant la **Banque africaine de développement**, ensemble l'article 1er **de** la Convention européenne des droits **de** l'homme ;

3 Mais attendu que la **Banque africaine de développement** ne peut se prévaloir **de** l'immunité **de** juridiction dans le litige l'opposant au salarié qu'elle a licencié dès lors qu'à l'époque des faits elle n'avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges **de** cette nature, l'impossibilité pour une partie d'accéder au juge chargé **de** se prononcer sur sa prétention et d'exercer un droit qui relève **de** l'ordre public international constituant un déni **de** justice fondant la compétence **de** la juridiction française lorsqu'il existe un rattachement avec la France ;

4 Et attendu que la cour d'appel, d'une part, a retenu à juste titre qu'en l'absence **de** toute juridiction du travail instituée au sein **de** la **Banque africaine de développement**, l'immunité **de** juridiction édictée au bénéfice **de** ladite **banque** par l'article 52 **de** l'accord signé à Khartoum le 4 août 1963, publié en vertu du décret nº 86–1039 du 12 septembre 1986, mettait le salarié dans l'impossibilité d'exercer son droit à un tribunal pour connaître **de** sa cause ; que, d'autre part, elle a fait ressortir que le lien avec la France était la nationalité française **de** l'intéressé ; que c'est donc sans excéder son pouvoir que la cour d'appel a décidé que la juridiction française était compétente pour connaître du litige ;

5 D' où il suit que le moyen ne peut être accueilli ;

Par Ces Motifs :

6 REJETTE le pourvoi ;

7 Condamne la **Banque africaine de développement** aux dépens ;

8 Vu les articles 37, alinéa 2, **de** la loi du 10 juillet 1991 et 700 du nouveau Code **de** procédure civile, condamne la **Banque africaine de développement** à payer à Me Haas la somme **de** 2 000 euros ;

9 Ainsi fait et jugé par la Cour **de** Cassation, Chambre sociale, et prononcé par le président en

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son audience publique du vingt-cinq janvier deux mille cinq.

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OXFORD PUBLIC INTERNATIONAL LAW
Oxford Reports on International Law

Drago v International Plant Genetic Resources Institute (IPGRI), Final Appeal Judgment, Case No 3718, Giustizia Civile Massimario, 2007, 2, ILDC 827 (IT 2007), 19th February 2007, Supreme Court of Cassation

Date: 19 February 2007
Content type: Domestic Court Decisions
Jurisdiction: Supreme Court of Cassation

Citation(s): Case No 3718 (Official Case No)
Giustizia Civile Massimario, 2007, 2 (Other Reference)
ILDC 827 (IT 2007) (OUP reference)
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]

Parties: Drago Alberto
International Plant Genetic Resources Institute (IPGRI)

Judges/Arbitrators: Carbone Vincenzo (President); Corona Rafaele; Senese Salvatore; Altieri Enrico; Miani Canevari Fabrizio; Di Nanni Luigi Francesco; Vitrone Ugo; Morelli Mario Rosario; Graziadei Giulio

Procedural Stage: Final appeal judgment

Previous Procedural Stage(s):
Appeal judgment; *Drago v International Plant Genetic Resources Institute (IPGRI)* , n 3516 (Rome Court of Appeal); unreported, 30 August 2004
Trial judgment; *Drago v International Plant Genetic Resources Institute (IPGRI)* , Diritto del lavoro, 2002, II, 501 (Rome Tribunal), 12 December 2001

Subject(s):

Privileges — Right to a judge — Immunity from jurisdiction, absolute — Immunity from jurisdiction, international organizations — Immunity from jurisdiction, ratione materiae — Immunity from jurisdiction, relative — Immunity from jurisdiction, states — Treaties, interpretation — Consistent interpretation — Incorporation — Customary international law — Jurisdiction of states, domestic

Core Issue(s):

Whether IPGRI enjoyed immunity from jurisdiction with regard to employment disputes.

Whether the treaty provisions conferring jurisdictional immunity to international organizations prevailed over the fundamental principles contained in the Italian Constitution, 1948.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper and Professor Erika de Wet, University of Amsterdam Center for International Law.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: New York University; date: 31 March 2014

Facts

F1 Mr Drago was a former employee of the International Plant Genetic Resources Institute (IPGRI) with a temporary employment contract. After termination of the working relationship, on 30 April 2000, Mr Drago launched an action with the Rome Tribunal claiming unfair dismissal and requesting reinstatement in service, and reparation.

F2 The Rome Tribunal declined jurisdiction over the employment dispute on the basis of the immunity granted to IPGRI by Article 5 of the Agreement between the Italian Republic and the IPGRI relating to its Headquarters in Rome (10 October 1991) ('Headquarters Agreement') and ratified with Law n 67, 15 January 1994 (Italy). The decision was upheld by a judgment of the Rome Court of Appeal on 30 August 2004, which affirmed that the customary international rule on the immunity of foreign states was also applicable to international organizations.

F3 Mr Drago challenged the judgment of the Rome Court of Appeal before the Court of Cassation on a number of grounds. First, he alleged violation and erroneous application of Articles 10 and 24 of the Italian Constitution and of the customary international rule on the jurisdictional immunity of states on the grounds that: (a) IPGRI enjoyed immunity from the jurisdiction of the host state pursuant to Article 5 of the Headquarters Agreement and not on the basis of customary international law; (b) the decision delivered by the Court of Appeal did not take account of the fact that IPGRI, contrary to the obligation enshrined in the Headquarters Agreement, did not make available or set up any judicial remedy for the resolution of employment disputes before January 2001, that is, when IPGRI recognized the jurisdiction of the Administrative Tribunal of the International Labour Organization; and (c) the customary international rule on the immunity of states was not applicable to international organizations with regard to employment disputes if the employee did not perform institutional functions.

F4 Second, Mr Drago called for an evolutive interpretation of Law n 67 in order to exclude the jurisdictional immunity of IPGRI as a consequence of its failure to make available or set up an alternative independent and impartial remedy. For the same reason, that is, the lack of judicial protection against violations of employees' rights, Mr Drago alleged that Law n 67 was incompatible with Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222, entered into force 3 September 1953 ('ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union, OJ 200/C 364/01, European Union, 7 December 2000, which guarantee the right to a judge.

Held

H1 IPGRI was not entitled to immunity in this instance because of its failure to provide an independent and impartial judicial remedy alternative to court proceedings in the host state for the resolution of employment disputes. Therefore, Italian jurisdiction was affirmed and the case was referred back to the Rome Tribunal for adjudication on the merits. (paragraphs 6.8, 7)

H2 Under the well-established rule of customary international law *par in parem non habet jurisdictionem,* which was part of Italian law by virtue of Article 10 of the Italian Constitution, foreign states were entitled to immunity from court proceedings. Such immunity, however, was to be denied whenever foreign states engaged in acts having a purely private nature (*acta iure gestionis*) and not carried out in their capacity of sovereign entities (*acta iure imperii*).

H3 The distinction between *acta iure gestionis* and *acta iure imperii* also applied to labour relationships. In various decisions, in fact, the Court of Cassation had clarified that Italian jurisdiction should be affirmed in relation to employment-related disputes which had no bearing on the organization and public functions of a foreign state. Instead, in the cases of disputes related to working relationships taking part in the sovereign functions of the state, jurisdiction should be declined. (paragraphs 6, 6.1, 6.2)

H4 However, although international legal personality may have been attributed to international organizations by virtue of their constitutive treaties, it was not certain that the customary rule *par in parem non habet jurisdictionem* also applied to international organizations. Thus, the existence

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of privileges and immunities to which an international organization might have been entitled before domestic courts could only be inferred from conventional instruments, such as the headquarters agreements signed by the organization and the host state. However, these treaties and the pertinent national measures of implementation must be in conformity with and, thus, should not prevail over, the principles of the constitutional legal order of the host state. (paragraphs 6.3, 6.5)

H5 In the case at hand, the relevant conventional rules conferring immunity from Italian jurisdiction to IPGRI were to be found in Article 5 of the Headquarters Agreement. This provision, as well as Law n 67, was not compatible with the fundamental right contained in Article 24 of the Italian Constitution (which established that everybody has the right to institute proceedings to protect his or her rights) because IPGRI did not fulfil its obligation, contained in Article 17 of the Headquarters Agreement, to provide an independent and impartial judicial remedy for the resolution of employment-related disputes. In the period prior to January 2001 (ie the period relevant on the facts of the case), when IPGRI accepted the jurisdiction of the Administrative Tribunal of the International Labour Organization, its employees, such as Mr Drago, could avail themselves only of an internal remedy that did not satisfy the fundamental requirements of independence and impartiality. (paragraphs 6.4–6.7)

Date of Report: 20 December 2007

Reporter(s): Alessandro Chechi

Analysis

A1 With this decision the Court of Cassation focused on the compatibility of the treaty provisions granting immunity from jurisdiction to international organizations with Article 24 of the Italian Constitution.

A2 The court affirmed Italian jurisdiction on the basis of an evolutive and articulated reasoning. First, it verified that, in the period under consideration, the members of IPGRI's staff did not have any effective remedies as an alternative to court proceedings in the host state for the protection of their rights. This meant, in the court's perspective, that the individual's right of access to a court conferred by the Italian Constitution was infringed. Second, the court used the result of its inquiry to interpret in an evolutive manner the law implementing the Headquarters Agreement: it affirmed that the fulfillment of the obligation to provide an alternative independent and impartial remedy was the *conditio sine qua non* for the application of the jurisdictional immunity. (paragraph 6.7)

A3 The Court of Cassation attempted to reconcile the fundamental principle of the protection of the rights and interests of individuals with the rule of immunity for international organizations. In doing so, it not only strengthened the existing jurisprudence, but it also increased dramatically the role of national judges. As a result, national judges were empowered to exclude on their own motion the application of the immunity rule whenever international organizations did not provide an independent and impartial remedy for the resolution of employment-related disputes, with no need to raise the matter before the Constitutional Court. Therefore, the organizations having their seats in Italy were now aware that their immunity from jurisdiction was subject to strict requirements and, if they wanted to benefit from it, they must comply with the conditions dictated by this judgment.

A4 Despite its merits, this decision lends itself to some criticisms. First, the application of this evolutive approach depends on the accuracy with which judges assess the existence, nature and effectiveness of the remedies set up by an organization for the resolution of labour disputes. Second, the court omitted to clarify whether the customary international rule on foreign state immunity could be applied in favour of the international organizations whose immunity was established in a multilateral treaty concluded by sovereign states and not by the organization itself. Third, the alleged violation of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights of the European Union were not discussed, demonstrating that the Court preferred to resolve the questions at hand solely on the basis of the Italian Constitution.

Date of Analysis: 20 December 2007

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Analysis by: Alessandro Chechi

Instruments cited in the full text of this decision:

International

Charter of Fundamental Rights of the European Union, OJ 200/C 364/01, European Union, 7 December 2000, p 1, Article 47

Agreement between the Italian Republic and the IPGRI relating to its Headquarters in Rome (10 October 1991), Articles 5, 17

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Articles 6, 13

Constitutions

Constitution, 1948 (Italy), Articles 3, 10, 11, 24, 25, 36

Cases cited in the full text of this decision:

Italian domestic courts

Case concerning the constitutionality of Article 698, para 2, cod. proc. pen., and of Law n 225 of 26 May 1984, on extradition and protection of human rights, n 223 (Constitutional Court); RIDPP, 1996, 1119, 27 June 1996

Food and Agriculture Organization of the United Nations v Colagrossi , n 5942 (Court of Cassation, All Civil Sections); RDI, 1992, 407, 18 May 1992

French Academy at Rome v Perrini , n 5126 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 1994, 719; Foro it, 1994, I, 2074, 26 May 1994

Secretariat to the Presidency of the Republic v Ruggi and anor , n 12614 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 1998, 2592, 17 December 1998

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Kuna Kuwait Agency v Gitan Musa , n 331 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 1999, 1342, 12 June 1999

Centre International des Hautes Études Agronomiques Méditerranéennes (CIHEAM) v Anelli , n 1150 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 2000, 2216, 7 November 2000

Carretti v Food and Agriculture Organization of the United Nations, n 1237 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 2004, 1, 23 January 2004

Opera Romana Pellegrinaggi v De Orsi, n 7791 (Court of Cassation, All Civil Sections); Giustizia Civile Massimario, 2005, 4, 15 April 2005

Pistelli v European University Institute , n. 20995 (Court of Cassation, All Civil Sections); ILDC 297 IT (2005); IYIL, 2005, 319, 28 October 2005

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Decision - full text

Fatto

Drago Alberto ha convenuto in giudizio l'IPGRI (Ente internazionale per le Risorse Fitogenetiche) esponendo di aver lavorato alle dipendenze di tale organismo internazionale con mansioni di segreteria, in base ad un contratto di lavoro che prevedeva la scadenza del rapporto al 30 aprile 1997, poi prorogata al 30 aprile 2000; con lettera del direttore generale dell'ente in data 28 gennaio 2000 gli era stata comunicata la cessazione del rapporto stesso alla suddetta scadenza. Il Drago ha chiesto al giudice adito di accertare, previa declaratoria dell'esistenza tra le parti di un rapporto di lavoro subordinato a tempo indeterminato, l'illegittimità del licenziamento così intimatogli, e di condannare l'IPGRI alla reintegrazione dell'attore nel posto di lavoro e al risarcimento del danno; in via subordinata, per l'ipotesi di difetto di giurisdizione del giudice italiano correlato alla domanda di reintegra, ha limitato la propria richiesta alla pretesa risarcitoria. Il Tribunale adito ha dichiarato il difetto di giurisdizione del giudice italiano, sul rilievo dell'immunità riconosciuta all'Istituto in base all'accordo ratificato con L. 15 gennaio 1994, n. 67; tale decisione è stata confermata dalla Corte di Appello di Roma con la sentenza oggi impugnata, motivata con il richiamo alla regola consuetudinaria che assimila le organizzazioni internazionali agli Stati esteri per l'immunità dalla giurisdizione, e quindi con l'affermazione del difetto di giurisdizione del giudice italiano in ordine alla controversia avente ad oggetto l'accertamento della illegittimità del licenziamento ai fini del ripristino del rapporto, anche se con domande di contenuto meramente patrimoniale, consequenziali all'accertamento dell'illegittimità del recesso. Avverso tale sentenza il Drago propone ricorso per cassazione con cinque motivi, al quale l'IPGRI resiste con controricorso. Le parti hanno depositato memorie.

Diritto

1. Con il primo motivo, mediante la denuncia di violazione e falsa applicazione degli artt. 10 e 24 Cost. e della norma di diritto consuetudinario sulla giurisdizione, si critica la decisione della Corte d'Appello, che ha erroneamente ravvisato la fonte della immunità dell'IPGRI in una norma consuetudinaria sorta precedentemente all'entrata in vigore della Costituzione Italiana (così da escludere ogni problema di compatibilità con i precetti costituzionali). Si osserva che la regola della immunità è invece posta da una norma pattizia, in relazione all'accordo di sede stipulato con l'organizzazione internazionale e ratificato con L. 15 gennaio 1994, n. 67. Contestata la prevalenza quale diritto speciale della pretesa norma consuetudinaria previgente alla Costituzione italiana, si ripropone, quindi, la questione di legittimità costituzionale della Legge citata, per contrasto con gli artt. 3, 11, 24, 25 e 36 Cost., in relazione alla impossibilità per l'attuale ricorrente di adire qualsiasi giudice diverso da quello italiano. Infatti per tutto il periodo di svolgimento del rapporto di lavoro e all'epoca della sua cessazione l'IPGRI non ha aderito ad alcun organismo internazionale di composizione delle controversie di lavoro con i propri dipendenti, nè ha costituito in seno alla propria organizzazione idonee forme di impugnazione dei provvedimenti adottati dal Direttore generale (essendo normativamente esclusa la possibilità di adire il Collegio arbitrale interno per questioni attinenti al rinnovo del rapporto di lavoro e ai provvedimenti disciplinari).

2. Con il secondo motivo, con cui si denuncia la violazione e falsa applicazione della L. 15 gennaio 1994, n. 67, si prospetta una interpretazione adeguatrice di tale normativa in relazione alla garanzia di valori costituzionalmente protetti, che condiziona l'immunità giurisdizionale riconosciuta all'IPGRI, da ritenersi pertanto inoperante per il periodo in questione a causa della inosservanza dell'obbligo dell'ente di individuare adeguate forme di tutela dei diritti dei propri dipendenti.

3. Con il terzo motivo, denunciandosi la violazione degli artt. 6 e 13 della Convenzione Europea dei diritti dell'uomo e dell'art. 47 della Carta dei diritti fondamentali dell'Unione Europea, si sostiene l'incompatibilità della L. n. 67 del 1994 con il diritto comunitario.

4. Con il quarto motivo viene denunciata la violazione e falsa applicazione della norma consuetudinaria relativa alla immunità giurisdizionale “ristretta”, sostenendosi che nella specie sussiste comunque la giurisdizione del giudice italiano, avuto riguardo alla natura delle mansioni

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svolte dal Drago che non comportavano alcuna partecipazione funzionale all'attività pubblicistica dell'ente– e alla limitazione dell'oggetto della domanda dell'attore.

5. Con l'ultimo motivo di ricorso si denuncia la contraddittorietà della motivazione della sentenza impugnata, che fa riferimento alla norma consuetudinaria generale relativa all'immunità degli stati esteri, mentre d'altro canto risolve la questione posta all'esame del giudice dell'appello in applicazione della norma pattizia.

6. I motivi, che vanno esaminati congiuntamente perchè attinenti all'unica questione della giurisdizione, meritano accoglimento per le seguenti considerazioni.

6.1. A norma dell'art. 10 Cost., comma 1, l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute e da questa norma la giurisprudenza fa derivare l'immunità degli Stati esteri dalla giurisdizione italiana, in base ad una consuetudine internazionale intesa al rispetto dell'altrui sovranità. Tale immunità riguarda i rapporti giuridici estranei all'ordinamento italiano, o perchè gli Stati stranieri agiscono come soggetti di diritto internazionale o perchè agiscono come titolari di una potestà di imperio nell'ordinamento proprio ossia come enti sovrani. L'immunità consuetudinaria si estende agli altri soggetti che rivestono, in senso ampio, la qualità di organi dello Stato estero (enti pubblici, comunque denominati: vedi Cass. Sez. Un. 18 marzo 1999, n. 150; 12 giugno 1999, n. 331), compresi, in particolare, gli enti e istituti di carattere culturale (vedi Cass. Sez. Un. 26 maggio 1994, n. 5126 – Accademie de France a Rome – 9 settembre 1997, n. 8768; 12 marzo 1999, n. 120 – Ecole francaise de Rome – 9 ottobre 1998, n. 9995 – The British Institute of Florence).

6.2. I confini dell'area dell'immunità sono segnati dalla non riconducibilità degli atti ai poteri sovrani, compiuti cioè non iure imperii ma iure gestionis. Con riguardo a questa distinzione e con specifico riferimento ai rapporti di lavoro, dopo alcune incertezze, la giurisprudenza di queste Sezioni unite si è orientata nel senso che, nei confronti degli enti estranei all'ordinamento italiano perchè enti di diritto internazionale e immuni dalla giurisdizione, il giudice italiano è titolare della potestà giurisdizionale per tutte le controversie inerenti a rapporti di lavoro che risultino del tutto esterni alle funzioni istituzionali e all'organizzazione dell'ente, costituiti, cioè, nell'esercizio di capacità di diritto privato (vedi Cass. Sez. Un. 7 novembre 2000, n. 1150); per gli altri rapporti, il medesimo giudice è carente della potestà giurisdizionale atta ad interferire nell'assetto organizzativo e nelle funzioni proprie degli enti, mentre può emettere provvedimenti di contenuto esclusivamente patrimoniale. Ed ha precisato ulteriormente che, tra i provvedimenti di natura esclusivamente patrimoniale, non può comprendersi la sentenza di condanna ad un pagamento che debba essere logicamente preceduta da un accertamento del danno da interruzione di un rapporto di lavoro a tempo indeterminato, con prestazioni lavorative attinenti ai fini istituzionali dell'ente datore di lavoro: infatti tale sentenza, una volta passata in giudicato, farebbe stato sia sull'obbligo di pagare, sia (questione pregiudiziale logica) sull'obbligo di ricevere a tempo indeterminato le prestazioni lavorative (Cass., Sez. Un. 15 aprile 2005, n. 7791).

6.3. Considerazioni diverse valgono per lo status giuridico di organizzazioni internazionali costituite dagli Stati, alle quali sia riconosciuta personalità di diritto internazionale e la conseguente capacità di instaurare rapporti giuridici anche con gli Stati. In difetto di esplicite definizioni pattizie, i caratteri distintivi della personalità vengono sovente individuati proprio nelle immunità e privilegi conferiti; si ritiene, tuttavia, che la capacità di partecipare a certe relazioni e di essere centro di imputazione di effetti nell'ordinamento internazionale, sulla base delle previsioni delle convenzioni istitutive, non comporta in tutti i casi l'equiparazione agli Stati, potendo anche accadere che all'organizzazione non sia garantita l'immunità dalla giurisdizione nazionale. Fondamento di tale convincimento è che, per le organizzazioni internazionali sicuramente in possesso della personalità di diritto internazionale, non è sicura la formazione di una consuetudine che permetta di estendere a tutte il principio par in parem non habet iurisdictionem, operante tra gli Stati e implicitamente richiamato nell'art. 10 Cost., comma 1. Nell'impossibilità di porre su un piano di parità assoluta Stati ed organizzazioni internazionali, privilegi ed immunità spettanti a queste possono derivare così solo da specifiche fonti scritte e per il tramite dell'art. 11 Cost. (v. in questo senso Cass. Sez. Un. 18 marzo 1999 n. 149, 28 ottobre 2005 n. 20995). Queste fonti sogliono consistere non soltanto in accordi tra Stati, ossia tra i soggetti che costituiscono l'organizzazione e

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che vengono chiamati Stati contraenti, ma anche come nel caso di specie nei cosiddetti “accordi di sede”, stipulati fra l'organizzazione, priva di un proprio territorio, e lo Stato in cui essa stabilisce la sua sede, principale o secondaria.

6.4. Con L. 15 gennaio 1994, n. 67 è stato ratificato l'accordo tra la Repubblica Italiana e l'Istituto internazionale per le risorse fitogenetiche (IPGRI) relativo alla sede centrale dell'IPGRI, fatto a Roma il 10 ottobre 1991, nonchè lo scambio di note effettuato tra le stesse parti l'8/9 febbraio 1993. L'art. 5 dell'accordo stabilisce che “l'Istituto godrà dell'immunità giurisdizionale di qualsiasi genere, con riferimento a qualsiasi atto sia di natura pubblica che privata, tranne in quei casi particolari in cui il Direttore Generale vi abbia rinunciato espressamente”.

6.5. Occorre verificare la conformità di questa disposizione che riconosce univocamente l'immunità dell'ente dalla giurisdizione italiana estesa anche alle controversie relative ai rapporti di lavoro con i suoi dipendenti alla garanzia costituzionale della tutela giudiziaria, di cui all'art. 24 Cost., che rappresenta un principio cardine dell'ordinamento (cfr. Cass. Sez. Un. 17 dicembre 1998 n. 12614, n. 149/1999 cit.). Ora, tale principio cardine cede di fronte al principio consuetudinario par in parem non habet iurisdictionem, riferito agli Stati, in quanto il principio riflette l'eguale sovranità delle organizzazioni statuali che costituisce fondamento universalmente accettato dalla comunità internazionale, al quale la nostra Costituzione dichiara di sottomettersi (art. 10). Ma una tale prevalenza non ha più giustificazione quando il sacrificio del “principio cardine” della Costituzione discende, non già dal fondamento dello stesso ordine internazionale, ma da un impegno liberamente assunto dalla nostra Repubblica attraverso la sottoscrizione di una convenzione. In questo caso, proprio la necessità che l'impegno assunto si traduca in una legge di ratifica per essere vincolante per i giudici, porta in primo piano i principi fondamentali dell'ordinamento costituzionale, con i quali l'impegno deve essere compatibile, pena l'invalidità della legge di ratifica (vedi Corte cost. n. 223 del 1996). Di conseguenza, l'esclusione in radice del diritto degli interessati alla tutela giurisdizionale dinanzi ad un organo indipendente delle situazioni giuridiche nascenti in un certo ambito dei rapporti, deve indurre a dubitare della legittimità costituzionale della legge di ratifica di convenzioni recanti simili previsioni, ovvero, ove sia possibile, a pervenire a risultati interpretativi costituzionalmente orientati. Alla stregua di tali criteri, la giurisprudenza di questa Corte ha ritenuto che l'immunità riconosciuta ad un ente internazionale non ponga dubbi di legittimità costituzionale quando la convenzione che sottrae quelle situazioni alla cognizione del giudice italiano assicuri tuttavia la tutela giurisdizionale delle stesse dinanzi ad un giudice imparziale e indipendente, sia pure scelto con procedure e criteri diversi da quelli vigenti nell'ordinamento nazionale: cfr. Cass. Sez. Un. 18 maggio 1992 n. 5942, 23 gennaio 2004 n. 1237, in relazione all'attribuzione alla cognizione del Tribunale amministrativo dell'OIL delle controversie promosse dai dipendenti della FAO nei confronti del datore di lavoro per la tutela dei loro diritti; Cass. Sez. Un. 20995/2005 cit., con riguardo all'attuazione della convenzione istitutiva dell'Istituto Universitario Europeo mediante la previsione di uno strumento di composizione delle controversie dinanzi ad un'apposita Commissione (che non costituisce un mero rimedio interno, anche perchè la competenza di tale commissione può essere sostituita da quella della Corte di Giustizia delle Comunità Europee).

6.6. Nel caso in esame non si ravvisano, con riguardo al rapporto di lavoro di cui è causa, i presupposti di tale garanzia. E' pacifico, infatti, che solo nel gennaio 2001 l'IPGRI ha aderito all'OIL e al sistema giurisdizionale del Tribunale Amministrativo del Lavoro, al quale non potrebbe essere dunque sottoposto l'esame della controversia, posto che il regolamento di tale organismo prevede la irricevibilità dei ricorsi aventi ad oggetto diritti i cui fatti costitutivi siano anteriori alla adesione dell'ente. Un regolamento interno dell'ente (denominato in inglese Personnel Policy Manual, corrispondente a “regolamento del personale”) prevede per il riesame dei provvedimenti disciplinari un organo, denominato Appeals Committee (in italiano “commissione per i reclami”) al quale possono essere sottoposti anche reclami per questioni non disciplinari. Si tratta di un mero rimedio interno, mancando per tale strumento i caratteri propri di una tutela giurisdizionale nel senso sopra indicato. Va comunque rilevato che lo stesso manuale (par. 114.02) esclude espressamente la possibilità di affidare a questa istanza l'esame di reclami relativi alla scadenza del contratto di lavoro del dipendente (“action based on expiration of an appointment by its own terms is not disciplinary in character, nor may such action form the basis of grievance”: tradotto in

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italiano, “l'azione basata sulla scadenza dell'incarico secondo le condizioni dello stesso non ha carattere disciplinare, nè tale azione può costituire la base di un reclamo).

6.7. L'incompatibilità della disciplina in esame con il principio costituzionale sopra richiamato, per l'esclusione del diritto dei dipendenti dell'ente alla tutela giurisdizionale dinanzi ad un organo indipendente, richiede di verificare se di tale normativa sia possibile un'interpretazione adeguatrice, secondo il canone ermeneutico preminente che prescrive al giudice, di optare, fra più soluzioni astrattamente possibili, per quella che rende la disposizione conforme a Costituzione (v. Corte Cost. nn. 113/2000, 277/2000, 316/2001, 198/2003). Tale interpretazione può essere raggiunta, in ossequio al principio di supremazia costituzionale, sulla base del dato normativo fornito dall'art. 17 dell'accordo ratificato con la L. n. 67/1994, che contiene la seguente previsione: “L'Istituto stabilirà procedure idonee per la soluzione delle controversie con il suo personale”. E' dunque previsto uno specifico obbligo dell'Istituto stipulante l'accordo, obbligo da riferire necessariamente, per il rispetto della fondamentale garanzia costituzionale, alla realizzazione di strumenti di tutela giurisdizionale dinanzi ad un organo imparziale e indipendente; in base al medesimo principio si deve ritenere che l'osservanza di tale obbligo condizioni lo stesso riconoscimento dell'immunità ai sensi dell'art. 5 dell'accordo.

6.8. Conseguentemente, si deve affermare che la mancata attuazione dell'obbligo in questione nel periodo considerato (precludendo il ricorso a qualsiasi forma di tutela giurisdizionale di situazioni soggettive dei dipendenti dell'Istituto, come si è rilevato sub 6.6.), ha impedito l'operatività della previsione dell'immunità, sicchè la cognizione delle relative controversie tra le quali rientra quella promossa dal Drago resta attribuita al giudice italiano.

7. Va dunque dichiarata la giurisdizione del giudice italiano, restando assorbiti gli altri profili di censura. La sentenza impugnata deve essere cassata, con rinvio della causa al primo giudice, che dovrà provvedere anche sulle spese dell'intero giudizio.

P.Q.M.

La Corte accoglie il ricorso. Dichiara la giurisdizione del giudice italiano. Cassa la sentenza impugnata e rinvia anche per le spese dell'intero giudizio al Tribunale di Roma. Così deciso in Roma, il 11 gennaio 2007. Depositato in Cancelleria il 19 febbraio 2007

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International organizations — Immunity — Jurisdictional immunity — Food and Agriculture Organization of the United Nations ("FAO") — Lease — Action to secure rent increase — Whether FAO entitled to jurisdictional immunity — Constitution of FAO 1945, Article XV — FAO-Italy Headquarters Agreement, 1950, Article VIII, Section 16 — Scope of immunity of FAO from legal process — Whether application of general rules of customary international law on immunity of international organizations excluded by specific treaty provisions on immunity of FAO

International organizations — Immunity — Waiver — Conclusion of tenancy agreement by international organization — Whether constitutes waiver — Application to municipal courts by lessor for rent increase — Arbitration clause in tenancy agreement — Whether a bar to jurisdiction of municipal courts

International organizations — Legal status — Constitution of FAO, 1945, Article XV — The law of Italy

FOOD AND AGRICULTURE ORGANIZATION *v.* INPDAI

(Case No 5399)

Italy, Court of Cassation (plenary session). 18 *October* 1982

(Tamburrino, *President*)

SUMMARY: *The facts*:—In 1969 the Food and Agriculture Organization ("the FAO"), whose headquarters were in Rome, leased premises in Rome for use as additional offices for its organization and related bodies. The lease contained various typical provisions concerning the requisite period of notice, discharge, the state of the building and responsibility for repairs and alterations. It was also stated in the lease that none of its provisions were to be interpreted as a waiver of the privileges and immunities enjoyed by the FAO and that any dispute arising would be settled by arbitration in accordance with the International Chamber of Commerce Rules. In 1978 the lessor, INPDAI, instituted proceedings before the Examining Magistrate (*Pretore*) of Rome, claiming that a clause in the lease allowed the rent payable to be increased. The FAO entered an appearance and a plea of lack of jurisdiction. At the same time the FAO lodged a request for a preliminary ruling on the Jurisdictional issue before the Court of Cassation.

Held:—The Italian courts had jurisdiction over the claim.

(1) Article XV of the Constitution of the FAO, which defined the legal status of the Organization, could not be relied upon as conferring a general immunity upon the FAO. Member States only undertook to grant to the

Organization the same immunities which they granted to diplomatic missions and only in so far as their constitutional procedures allowed. Such immunity only extended to diplomatic premises and personnel and was not the same as State immunity. Furthermore, the Italian Constitution incorporated the generally recognized rules of customary international law into municipal law (Article 10(1)), which included rules on the immunity of international organizations, and required that any immunity granted to international organizations should not infringe the guarantee of effective judicial protection to which nationals were entitled in the exercise of their rights (Article 24) (p. 5).

(2) Neither could Article VIII (Section 16) of the FAO-Italy Headquarters Agreement be relied upon as conferring general immunity upon the FAO. This provision stated that the FAO and its property, wherever located and by whomsoever held, enjoyed immunity from every form of legal process except in so far as in any particular case the FAO expressly waived its immunity. But the scope of the immunity granted by this provision could not be wider than the scope of diplomatic immunity. This view was confirmed by Article VII, Section 14, of the Agreement, which recognized the capacity of the FAO to contract, to acquire and dispose of property and to institute legal proceedings. This clearly assumed that the FAO was in principle subject to Italian jurisdiction (pp. 5–6).

(3) The scope and extent of the entitlement of the FAO to jurisdictional immunity was therefore to be decided in accordance with the rules of customary international law. The immunity of international organizations was based on the duty of member States not to interfere in the fulfilment of the institutional aims of those organizations, wherever they acted in the exercise of their sovereign powers. But it was necessary to establish a close and direct connection between the activities at issue and the aims of the organization. Such a connection was not automatically present in all cases. Activities related to the internal structure and organization of an international body were clearly sufficiently closely connected with its institutional aims to be covered by immunity. But the conclusion of a lease of premises for use as offices by an international organization did not affect its internal structure since the choice of the location of its offices was a matter which was extraneous to the primary functions which it pursued (pp. 6–9).

(4) Equally those clauses in the lease, stating that none of its provisions were to be construed as a waiver of the immunities of the FAO and that disputes were to be settled by arbitration, did not grant general and unlimited immunity to the FAO but merely confirmed those immunities to which it was entitled. In particular the parties could not extend by contractual means the scope of the jurisdictional immunity to which the FAO was entitled and thereby derogate from the principles of international law (pp. 9–10).

The following is the text of the relevant part of the judgment of the Court:

Course of the Proceedings—By a contract entered into on 14 February 1969, the United Nations Organization for Food and Agriculture

("FAO"), which has its headquarters in Rome …, rented from INPDAI a property situated in Rome at 402 via Cristoforo Colombo, with a view to putting it to use as offices for its organization and related bodies. In addition, the FAO intended to designate the building for the use of its own auxiliary services.

The contract of tenancy laid down a number of clauses governing the obligations of the lessor and the lessee on the following points: period of notice required to terminate the tenancy; discharge and terms of lease; acceptance by the tenant of the actual state of the building; liability, in accordance with the law presently in force, for alteration work which might involve structural modifications; maintenance and cost-sharing. Furthermore it was agreed that under no circumstances was the content of the contract to be interpreted in the sense of waiving privileges and immunities enjoyed by the FAO. Equally the contract would confer no privilege or immunity on the lessor. Finally it was agreed to submit possible disputes arising from the contract to arbitration, in compliance with the rules of the Court of Arbitration of the International Chamber of Commerce (ICC).

On 18 July 1978 the lessor, INPDAI, instituted proceedings against the FAO before the Examining Magistrate (*Pretore*) of Rome, in his function as a judge responsible for regulated tenancies and rent limits, claiming that a clause in the lease allowed the rent payable to be lawfully increased.

The FAO entered an appearance and counter-application, arguing that the Italian judge lacked jurisdiction. At the same time the FAO lodged a request for a preliminary ruling on jurisdiction. INPDAI has submitted a written statement in support of its position and both parties have made written submissions on general points.

Reasons for the Decision—Firstly the FAO, in its request for a preliminary ruling on the jurisdictional issue, declares that it is an international organization entitled to its own distinct legal personality and endowed with a legal framework which is separate from both municipal law and international law.

Secondly the FAO contends that, pursuant to Article XV of its Constitution signed at Quebec on 16 October 1945 (ratified in Italy by Law No 546 of 16 May 1947):

> 1. The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution.
>
> 2. Each Member nation undertakes, in so far as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemption from taxation.

By virtue of Article VIII (Section 16) of the Headquarters Agreement signed in Washington on 31 October 1950 (ratified in Italy by Law No 11 of 9 January 1951):

> FAO and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case FAO shall have expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Moreover, the parties have agreed by contract to submit to arbitration, in order to conform with the provisions of Article IX (Section 31) of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, signed by Italy, which provides:

> Each specialized agency shall make provision for appropriate modes of settlement of:
> (a) Disputes arising out of contracts or other disputes of a private character to which the specialized agency is a party …

The FAO points out that INPDAI has never disputed the last-mentioned provision and agreed, on the basis of its terms, to refer any dispute arising from the tenancy agreement at issue to the Court of Arbitration of the International Chamber of Commerce.

Accordingly the FAO invokes the settled principle of international law, according to which jurisdictional immunity is granted only to activities carried out by an international body in fulfilment of its institutional purposes and to tasks performed in order to create an administrative structure aimed at pursuing those functions. It follows that the initiatives undertaken by the FAO, with a view to finding appropriate premises for its offices designated to provide specific public services, form part of the public tasks pursued by the organization and, as such, are immune from the jurisdiction of the Italian judge. The proceedings instituted by INPDAI against the FAO before the Examining Magistrate of Rome concern a contract entered into by the FAO for the furtherance of its own institutional purposes, which is covered by immunity for the reasons mentioned above.

This Court dismisses the preliminary objection to the exercise of jurisdiction, which is unfounded. If it is necessary to establish whether or not the pending action at first instance before the Examining Magistrate of Rome, brought by INPDAI against the FAO, is subject to Italian jurisdiction, then Article XV of the Quebec Convention (which contains the Constitution of the FAO) is irrelevant, as it fails to offer any decisive criterion. This Article

defines the FAO as a body endowed with its own distinct legal personality and capacity to perform any legal act, appropriate to its purpose, which is not beyond the powers granted to it by its Constitution. In relation to this legal status, Article XV binds the Member States to accord to the Organization (in so far as their constitutional procedures allow) the same immunities which are ordinarily granted to diplomatic missions, including inviolability of premises and archives, jurisdictional immunity and exemption from taxation. It is to be observed that this Article delineates a status but does not confer immediate and general immunity to the FAO with respect to each Member State.

Firstly Article XV simply grants the same immunity recognized to diplomatic missions, that is to say a type of immunity which is invested in diplomatic premises and individuals, but not in the State itself. In this context it is to be noted that Decision No 48 of 18 June 1979, handed down by the Constitutional Court and invoked by the claimant in support of its contentions, declared groundless the argument of lack of conformity to the Constitution raised against Article 2 of Law No 804 of 9 August 1967 in so far as it enacted the provisions of Article 31(1) and (3) of the Vienna Convention on Diplomatic Immunity, concerning immunity from the civil jurisdiction of the receiving State. Indeed this judgment merely refers to the immunity enjoyed by diplomatic envoys.

Secondly Article XV explicitly limits the commitment of the Member nations to the extent allowed by their constitutions. In the case of Italy, the State accepts the generally recognized rules of customary international law which are incorporated under Article 10(1) of the Italian Constitution, but requires that the immunity accorded to States or international organizations must not infringe the basic tenor of the guarantee of effective judicial protection to which nationals are entitled with regard to their rights and legitimate interests (Article 24 of the Italian Constitution).

Neither can absolute immunity from jurisdiction be given effect, on the basis of Article VIII of the Headquarters Agreement between the Government of the Italian Republic and the FAO, signed in Washington on 31 October 1950 and ratified by Law No 11 of 9 January 1951, if the Court takes into account the subject-matter of the case at issue, that is to say the seat of the FAO. Even considering this Agreement, there is no doubt that the scope of the immunity which it grants from Italian jurisdiction cannot be wider than the scope of diplomatic immunity. The concept of diplomatic immunity is applicable to the seat and to individuals carrying out their diplomatic and consular functions, as Article VIII clearly points out in mentioning the FAO and its assets, wherever their location and by whomsoever held.

Article VII (Section 14) of the same Agreement confirms this line of reasoning by stating that:

> The Government recognizes the juridical personality of FAO and, in particular, its capacity:
> (a) to contract;
> (b) to acquire and dispose of movable and immovable property;
> (c) to institute legal proceedings.

This last rule clearly assumes that the FAO is subject to Italian jurisdiction and implicitly denies its supposed entitlement to absolute and general immunity.

This view is not contradicted by the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations (which requires each specialized agency to make provision for appropriate modes of settlement of civil law disputes), as is proved by the circumstance that the FAO sought to have its capacity to sue and be sued recognized and accepted by the Italian State.

The problematic issue of the extent to which the FAO is entitled to jurisdictional immunity needs to be tackled and solved on the basis of the same principles of international law (which were not derogated from by the Conventions mentioned above, and which Italian law is bound to respect, pursuant to Article 10 of the Constitution). Such rules on immunity have been developed in favour of both States and international organizations. In addition the Court observes that the FAO, in its capacity as a specialized body endowed with its own separate legal personality in international law, enjoys autonomous sovereign powers and, whilst acting in the exercise of those powers, is not subject to the sovereignty of Member States, including Italy as the receiving State.

A settled orientation in earlier case-law has established that this Court upholds the competence of the Italian judge over claims where one of the parties is either a public or private foreign entity, wherever that organization enters a contract acting as a private individual and implicitly waiving its sovereign powers (Court of Cassation, Cases Nos 1996/54, 1178/63[1] and 2830/66[2]). On other occasions immunity claimed by a foreign State (and its public bodies) is granted in relation to activities intended to achieve their public functions. On the other hand, the same immunity is denied with respect to merely private activities (Court of Cassation, Case No 1653/74[3]). In these judgments the purpose for which the activity was performed was emphasized, and not the private or public nature of the activity itself.

[1. 65 *ILR* 262.]
[2. 65 *ILR* 265.]
[3. 65 *ILR* 308.]

What mattered was whether or not that purpose was directly connected with the institutional aims normally pursued by the entity at issue, although the established principle *par in parem non habet jurisdictionem* was also referred to.

As far as employment relationships are concerned (with the exception of NATO employees, who are treated differently according to their categorization as laid down by the London Convention of 19 June 1951 ratified by Law No 1335 of 30 November 1955), it has been pointed out that, in relations of employment established with an international organization, those relationships which form part of the basic internal structure of the entity and are performed in furtherance of institutional or sovereign functions must be distinguished from relationships whereby only manual tasks are carried out by auxiliary personnel in order to permit the normal daily functioning of offices overseas.

The latter relationships are not exempt from jurisdiction, whilst the former relationships are exempt.

In particular, the nature of the tenancy agreement must be ascertained, that is to say the purpose pursued by the organization in entering into such agreements (Court of Cassation, Case No 4502/77[4]). Accordingly, as far as non-liability to taxation is concerned, it has been stated that the exercise of activities *jure gestionis* is irrelevant. On the contrary, what matters is the fact that the acts at issue were either closely connected with the exercise of sovereign functions or carried out with a view to accomplishing the institutional purposes of the entity, rather than merely to achieve private aims (Case No 2051/78[5]). A subsequent decision (Case No 979/79[6]) referred to the exercise of "sovereign functions" and held that so-called "functional activities", whose performance arose from normal contracts, were exempt when they were performed to achieve the institutional aims of a foreign organization endowed with legal personality.

From the findings summarized above different conclusions may be drawn. Doctrine and jurisprudence are mostly oriented towards a concept of restrictive immunity, connected with the dichotomy between "acts *jure imperii* and *jure gestionis*", and do not grant immunity where the foreign body enters into a contract of private law with an Italian national. Another view expressed is that sovereignty is not related to the nature of the legal instruments which are executed, but to the purpose they are designated for, on the basis of a concept of so-called functional immunity. Regardless of the conclusion which may be reached on the views outlined above there is no doubt in the present case that the Italian judge has jurisdiction

[4. 77 *ILR* 602.]
[5. 65 *ILR* 320.]
[6. 65 *ILR* 325.]

over the dispute between the parties. Whichever of the two concepts of international law should prevail, either restrictive or functional immunity, is irrelevant since both views lead to identical solutions.

It is sufficient to contemplate the circumstance that the FAO, whose main seat is established in via Terme di Caracalla [in Rome], rented the premises situated in via Cristoforo Colombo [in Rome] for the relocation of some of its auxiliary offices and entered into a tenancy agreement with INPDAI, negotiating with the lessor the inclusion of various clauses which are typical of leases concluded between private parties. The lessor INPDAI brought an action against the lessee, the FAO, before the Examining Magistrate of Rome in his function as judge responsible for regulated tenancies and rent limits, with a view to obtaining a specific increase in rent, provided for by one of the aforementioned clauses. This is a claim which lies entirely within the domain of private law.

It is not disputed that, according to the traditional approach which distinguishes between acts *jure imperii* and acts *jure gestionis*, the Italian courts have jurisdiction, and an identical conclusion is reached taking into account the purpose, i.e. the relocation of offices, which the FAO intended to pursue by concluding the tenancy agreement.

The *ratio* of immunity lies in the assumption that the Italian State shall not interfere in the fulfilment of institutional purposes carried out by the FAO, whenever this international organization acts in the exercise of its sovereign powers. On the other hand, in order to grant immunity to activities performed by the FAO in furtherance of its institutional aims, the existence of a close, direct and necessary connection between those activities and its purposes must first be ascertained and proved. The claimant's contention, however, is based on the *a priori* affirmation of the absolute existence, under all circumstances, of an instrumental relationship between activities and purposes, irrespective of the type of activity which is performed and of the objective which is pursued, on the ground that any activity is *lato sensu* carried out by an international organization to achieve its sovereign functions. If ever such a contention were to be accepted, a concept of absolute immunity would thereby implicitly be acknowledged, whereas such an approach seemingly conflicts with the very provisions enshrined in the international conventions which govern the FAO. The rule of international law which was previously mentioned in the claimant's application would inevitably assume a character which was not originally intended nor provided for, and the natural evolution of doctrine and jurisprudence would be utterly disregarded.

The only activity whose performance qualifies for immunity from jurisdiction is an activity closely affecting the institutional purposes of the organization. In other words, immunity is granted only to those

activities which, were they to be carried out differently or employing other methods, would compromise the accomplishment of the organization's aims or would achieve them in a less appropriate manner.

In accordance with the above considerations there is no doubt that activities relating to the internal organization of offices and the definition of responsibilities with regard to tasks and services are closely and necessarily connected with the institutional purposes and sovereign powers of the entity at issue, and therefore fall within its organizational autonomy. The same reasoning cannot apply, however, to an activity such as the one performed by entering into a contract of tenancy, whose aim is solely logistic and pertains to the external arrangement and management of offices, not to their inner functioning and structure. It is evident that the choice of location of an office is a factor which is extraneous to the primary functions pursued by the international organization and which does not affect the autonomy and the structural planning of the entity under consideration. It follows logically that the Italian State is entitled, in this case, to exercise its sovereignty and jurisdiction.

This holding of the Court is unaffected by the presence of certain special contractual clauses. Careful examination of these clauses does not reveal the assertion or existence of any general and unlimited jurisdictional immunity supposedly enjoyed by the FAO.

The claimant appears to attribute such a meaning to Clauses 13 and 11 of the contract.

Clause 13 establishes that nothing formulated in the contract (or related to it) shall ever lead to the waiver of privileges and immunities enjoyed by the FAO, nor can it confer privileges or immunities upon the lessor and its personnel. Such a clause has a general content and is somewhat misleading to the extent that it denies “immunity” to the lessor and its employees. As a whole, the clause under review reveals merely the FAO's intention not to waive any privilege or immunity to which the Organization might be entitled, but certainly does not acknowledge any general and unlimited jurisdictional immunity enjoyed by the FAO. Such immunity in principle does not exist, at least not to that extent.

Similar considerations apply in relation to Clause 11, by which the parties agreed to submit possible disputes arising from the interpretation and application of the contract at issue to arbitration, in compliance with the rules of the International Chamber of Commerce. This specific clause is not invoked by the FAO … as a basis for its preliminary objection to jurisdiction (the Italian judge's lack of jurisdiction is deduced by the FAO from the absolute immunity to which it claims to be entitled). On the contrary, this clause is adduced with the purpose of deducing a form of immunity

which the parties were meant to have recognized expressly at the moment they entered into the contract.

This Court considers that Clause 11 does not possess the value alleged by the FAO, since the parties were not empowered to extend by contractual means the limitations to jurisdictional immunity to which the FAO was subject. Such limitations arise from precise rules of international law which may not be derogated from, and are derived from applying principles established by municipal constitutions, which the criteria for granting immunity must abide by in accordance with a binding procedure of integration and coordination.

Furthermore, pursuant to Article 2 of the Code of Civil Procedure, Clause 11 cannot have the effect of derogating from the jurisdiction of the Italian judge. Although the first requirement for derogation laid down by Article 2 is met (there is an action concerning undertakings or the performance of obligations entered into by the parties), the second requirement is lacking (the dispute at issue must be between non-nationals, or alternatively between a non-national and a national who is neither resident nor domiciled in Italy).

In conclusion, the Italian courts must be held to have jurisdiction in this case whereby an action, brought by INPDAI against the FAO and regarding a claim for a rent increase under a contract of lease, is presently pending before the Tribunal of Rome (first instance) awaiting a decision by the judge responsible for regulated tenancies and rent limits.

[Report: RDI 1983, p. 187 (in Italian)]

NOTE.—This judgment may be compared with an earlier decision of a lower Italian court of 25 June 1969, *Porru v. Food and Agriculture Organization*, printed in 71 *ILR* 240.

Le : 03/06/2015

Cour de cassation

chambre civile 1

Audience publique du 14 octobre 2009

N° de pourvoi: 08-14978

Publié au bulletin

Rejet

M. Bargue, président

Mme Pascal, conseiller apporteur

M. Chevalier, avocat général

SCP Masse-Dessen et Thouvenin, SCP Waquet, Farge et Hazan, avocat(s)

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, a rendu l'arrêt suivant :

Attendu que par acte du 18 janvier 2007, la société de Construction de systèmes de réfrigération (CSR) et la Société tunisienne de réfrigération électrique (SATRE) ont fait pratiquer une saisie attribution au préjudice de la Ligue des Etats arabes sur un compte ouvert à son nom à la Société Générale, en vertu de deux jugements déclarant exécutoires en France deux jugements du Tribunal de première instance de Tunis des 18 novembre 1993 et 16 février 1994 qui condamnaient celle-ci à leur payer diverses sommes sur le fondement d'un contrat de bail portant sur un immeuble situé à Tunis ; que la Ligue des Etats arabes – Bureau de Paris a fait assigner les sociétés CSR et SATRE devant le juge de l'exécution en mainlevée de la saisie, au motif qu'en raison de son statut d'organisation internationale jouissant d'une immunité d'exécution consacrée par un accord d'établissement conclu avec le gouvernement français le 26 novembre 1997, entré en vigueur le 1er juillet 2000, ces deux décisions ne pouvaient être exécutées ;
Sur le premier moyen, pris en ses deux branches :
Attendu que les sociétés SATRE et CSR font grief à l'arrêt attaqué (Paris, 10 janvier 2008) d'avoir ordonné la mainlevée de la saisie attribution et de la saisie de valeurs mobilières pratiquées le 18 janvier 2007 au préjudice de la Ligue des Etats arabes – Bureau de Paris, alors, selon le moyen que :

1°/ le jugement ordonnant l'exequatur sert, indissociablement avec la décision étrangère objet de l'exequatur, de fondement aux poursuites ; que le juge de l'exécution ne peut modifier ni le dispositif du jugement objet de l'exequatur, ni celui du jugement ordonnant l'exequatur ; qu'il ne peut suspendre et a fortiori arrêter l'exécution de ces deux jugements ; qu'ainsi, la cour d'appel a violé les articles 8 du décret du 31 juillet 1992 et L. 213-6 du code de l'organisation judiciaire ;
2°/ en statuant comme elle l'a fait, la cour d'appel a méconnu l'autorité de la chose jugée par les jugements des 26 avril 2006 et 5 juillet 2006 qui, en ordonnant l'exequatur des décisions tunisiennes qui condamnaient la Ligue des Etats arabes à payer diverses sommes aux sociétés SATRE et CSR et ce, après avoir écarté le moyen tiré de l'immunité d'exécution, les rendaient exécutoires sur les biens de la Ligue des Etats arabes en France ; que la cour d'appel a ainsi violé l'article 1351 du code civil.

Mais attendu que l'exequatur n'est pas, en lui-même, un acte d'exécution pouvant exclure l'immunité d'exécution d'une organisation internationale ; que c'est donc à bon droit, et sans modifier les termes du jugement d'exequatur, que la cour d'appel a jugé qu'il ne s'était pas prononcé sur la possibilité de saisir tous les biens de la Ligue des Etats arabes en France ; que le moyen n'est pas fondé ;
Sur les deuxième et troisième moyens réunis, pris en leurs diverses branches :
Attendu que les sociétés SATRE et CSR font encore grief à l'arrêt d'avoir ordonné la mainlevée des saisies pratiquées le 18 janvier 2007, alors que, selon les moyens, que :
1°/ il résulte de l'accord du 26 novembre 1997 signé entre le gouvernement de la République française et la Ligue des Etats arabes publié par décret du 18 septembre 2000, que l'immunité d'exécution n'a pas lieu en cas d'action civile fondée sur une obligation de la Ligue des Etats arabes résultant d'un contrat ; que l'accord ne distingue pas selon que l'obligation en cause est la conséquence de l'activité de la Ligue des Etats arabes en France et des conventions passées pour cette activité ou selon qu'elle aurait une autre cause, comme celle d'une condamnation pécuniaire par une juridiction hors de France, provenant d'une obligation contractuelle étrangère à l'activité du Bureau lui-même, qui n'a pas de personnalité juridique distincte de celle de la Ligue des Etats arabes ; qu'en décidant le contraire, l'arrêt attaqué a violé les articles 1, 4, 6 de l'accord du 26 novembre 1997 et 1er alinéa 3 de la loi du 9 juillet 1991.
2°/ les Etats étrangers et les organismes qui en constituent l'émanation ne bénéficient de l'immunité de juridiction ou d'exécution qu'autant que l'acte qui donne lieu au litige participe, par sa nature et par sa finalité, à l'exercice de la souveraineté et n'est pas un acte de gestion ; que le contrat de bail conclu entre les sociétés SATRE et CSR bailleresses et la Ligue des Etats arabes locataire qui donne lieu au litige ne constitue pas un acte de souveraineté, mais une opération de gestion relevant du droit privé, et ne pouvant par conséquent bénéficier de l'immunité d'exécution ; qu'en décidant le contraire, la cour d'appel a violé les principes relatifs à l'immunité d'exécution et l'accord du 26 novembre 1997 ;
3°/ en faisant application d'une immunité d'exécution qui au regard des circonstances de l'espèce, ne répond pas à un but légitime, est disproportionnée par rapport au but poursuivi, et porte atteinte au droit d'accès aux tribunaux en sa substance même, la cour d'appel a violé l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme.
Mais attendu qu'ayant relevé que les cas dans lesquels les biens de la Ligue des Etats arabes, mis à la disposition du bureau, pouvaient être saisis, étaient expressément limités par les dispositions de l'accord du 26 novembre 1997 aux conséquences des conventions passées pour l'activité du bureau et à celles des accidents causés par un véhicule du bureau, c'est sans violer l'article 6.1 de la Convention européenne des droits de l'homme, que la cour d'appel a pu en déduire que ces biens étaient protégés par une immunité d'exécution, l'obligation de la Ligue ayant une autre cause, dès lors d'une part, que la condamnation prononcée sanctionnait une obligation contractuelle étrangère à l'activité du bureau lui même et d'autre part, que les demanderesses, qui disposaient d'autres voies pour faire exécuter cette condamnation, n'étaient pas privées d'un accès au juge ; que les moyens ne sont pas fondés ;
PAR CES MOTIFS :
REJETTE le pourvoi ;
Condamne les Sociétés tunisienne de réfrigération électrique SATRE et de Construction de systèmes de réfrigération (CSR) aux dépens ;
Vu l'article 700 du code de procédure civile, rejette les demandes ;
Ainsi fait et jugé par la Cour de cassation, première chambre civile, et prononcé par le président en son audience publique du quatorze octobre deux mille neuf.

MOYENS ANNEXES au présent arrêt
Moyens produits par la SCP Waquet, Farge et Hazan, avocat aux Conseils, pour les sociétés SATRE et CSR
PREMIER MOYEN DE CASSATION
Il est fait grief à l'arrêt infirmatif attaqué d'avoir ordonné la mainlevée de la saisie attribution et de la saisie de valeurs mobilières pratiquée le 18 janvier 2007 par les sociétés SATRE et CSR au préjudice de la Ligue des Etats Arabes – Bureau de Paris ;
Aux motifs qu'il ne peut être soutenu que retenir l'immunité d'exécution reviendrait à modifier les termes du jugement ayant ordonné l'exequatur des jugements des juridictions tunisiennes en France, ce qui est interdit au juge de l'exécution ; que d'une part, cette interdiction ne vaut que pour le jugement servant de fondement aux poursuites, ce que n'est pas le jugement déclarant les

jugements des juridictions tunisiennes exécutoires en France, seuls ces derniers étant les titres exécutoires dont l'exécution est poursuivie par les sociétés SATRE et CSR ; que d'autre part, les jugements ordonnant l'exequatur ne se sont prononcés que sur la recevabilité de la demande à l'encontre du Bureau de Paris et sur les conditions de l'exequatur, qu'ils ont estimé remplies ; que ces décisions du Tribunal de grande instance de Paris, exécutoires par provision mais dont il est fait appel, ne se sont pas prononcées en donnant l'exequatur, sur la possibilité de saisir tous les biens de la Ligue des Etats Arabes en France ;
Alors d'une part, que le jugement ordonnant l'exequatur sert indissociablement avec la décision étrangère objet de l'exequatur, de fondement aux poursuites ; que le juge de l'exécution ne peut modifier ni le dispositif du jugement objet de l'exequatur, ni celui du jugement ordonnant l'exequatur ; qu'il ne peut suspendre et a fortiori arrêter l'exécution de ces deux jugements ; qu'ainsi, la Cour d'appel a violé les articles 8 du décret du 31 juillet 1992 et L 213-6 du Code de l'organisation judiciaire ;
Alors d'autre part qu'en statuant comme elle l'a fait, la Cour d'appel a méconnu l'autorité de la chose jugée par les jugements des 26 avril 2006 et 5 juillet 2006 qui, en ordonnant l'exequatur des décisions tunisiennes qui condamnaient la Ligue des Etats Arabes à payer diverses sommes aux sociétés SATRE et CSR et ce après avoir écarté le moyen tiré de l'immunité d'exécution, les rendaient exécutoires sur les biens de la Ligue des Etats Arabes en France ; que la Cour d'appel a ainsi violé l'article 1351 du Code civil.
DEUXIEME MOYEN DE CASSATION
Il est fait grief à l'arrêt infirmatif attaqué d'avoir ordonné la mainlevée de la saisie attribution et de la saisie de valeurs mobilières pratiquée le 18 janvier 2007 par les sociétés SATRE et CSR au préjudice de la Ligue des Etats Arabes – Bureau de Paris ;
Aux motifs que l'accord du 26 novembre 1997 concerne l'établissement à Paris d'un bureau que la Ligue des Etats Arabes est autorisée à ouvrir, qui a pour activité officielle la fourniture dans un but non lucratif d'informations et de documentations sur cette organisation internationale et sur les Etats qui en sont membres ; qu'il prévoit que le bureau n'a pas de personnalité juridique distincte de celle de la Ligue des Etats Arabes, que celle-ci jouit, pour ce qui concerne l'activité officielle de son Bureau sur le territoire français, de l'immunité d'exécution et de juridiction, sauf dans le cas d'une action civile fondée sur une obligation de la Ligue résultant d'un contrat ou d'un accident causé par un véhicule à moteur, que les biens et avoirs mis par la Ligue à la disposition du Bureau pour l'exécution de son activité officielle sont exempts de saisie, de confiscation, de toute forme de contrainte administrative ou judiciaire ; qu'il résulte de cet accord et de sa finalité que les biens dont est titulaire le Bureau en France, sont mis à sa disposition pour sa mission par la Ligue des Etats Arabes – Bureau de Paris et dans cette mesure sont protégés de toute contrainte sauf au cas où la Ligue des Etats Arabes se trouverait redevable d'une somme en raison d'un contrat, comme un contrat de travail passé par son Bureau ou d'un accident de la circulation dans lequel un véhicule appartenant au Bureau serait appliqué ; que ces cas dans lesquels les biens de la Ligue des Etats Arabes mis à la disposition du Bureau peuvent être saisis sont limités aux conséquences de l'activité de celui-ci en France, des conventions passées pour cette activité ou d'un accident causé par un véhicule du Bureau ; qu'ils sont protégés par une immunité d'exécution pour toute obligation de la Ligue des Etats Arabes ayant une autre cause, comme celle d'une condamnation pécuniaire par une juridiction hors de France, provenant d'une obligation contractuelle étrangère à l'activité du Bureau lui-même ; que ces biens ressortissent à l'activité même de la Ligue et des Etats qui en sont membres et à leur souveraineté ; que l'accord conclu en 1997, quoique postérieurement aux décisions tunisiennes mises à exécution, s'applique immédiatement et à l'évidence les exceptions qu'ils comportent ne peuvent trouver application qu'après son entrée en vigueur, mais pour l'activité du Bureau en France ; que les saisies pratiquées se heurtent à l'immunité d'exécution dont jouissent les Etats étrangers affirmée par l'accord du 26 novembre 1997 ;

Alors qu'il résulte de l'accord du 26 novembre 1997 signé entre le gouvernement de la République française et la Ligue des Etats Arabes publié par décret du 18 septembre 2000, que l'immunité d'exécution n'a pas lieu en cas d'action civile fondée sur une obligation de la Ligue des Etats Arabes résultant d'un contrat ; que l'accord ne distingue pas selon que l'obligation en cause est la conséquence de l'activité de la Ligue des Etats Arabes en France et des conventions passées pour cette activité ou selon qu'elle aurait une autre cause, comme celle d'une condamnation pécuniaire par une juridiction hors de France, provenant d'une obligation contractuelle étrangère à l'activité du Bureau lui-même, qui n'a pas de personnalité juridique distincte de celle de la Ligue des Etats Arabes ; qu'en décidant le contraire, l'arrêt attaqué a violé les articles 1, 4, 6 de l'accord du 26

novembre 1997 et 1er alinéa 3 de la loi du 9 juillet 1991.
TROISIEME MOYEN DE CASSATION
Il est fait grief à l'arrêt infirmatif attaqué d'avoir ordonné la mainlevée de la saisie attribution et de la saisie de valeurs mobilières pratiquée le 18 janvier 2007 par les sociétés SATRE et CSR au préjudice de la Ligue des Etats Arabes – Bureau de Paris ;
Aux motifs que l'accord du 26 novembre 1997 concerne l'établissement à Paris d'un bureau que la Ligue des Etats Arabes est autorisée à ouvrir, qui a pour activité officielle la fourniture dans un but non lucratif d'informations et de documentations sur cette organisation internationale et sur les Etats qui en sont membres ; qu'il prévoit que le bureau n'a pas de personnalité juridique distincte de celle de la Ligue des Etats Arabes, que celle-ci jouit, pour ce qui concerne l'activité officielle de son Bureau sur le territoire français, de l'immunité d'exécution et de juridiction, sauf dans le cas d'une action civile fondée sur une obligation de la Ligue résultant d'un contrat ou d'un accident causé par un véhicule à moteur, que les biens et avoirs mis par la Ligue à la disposition du Bureau pour l'exécution de son activité officielle sont exempts de saisie, de confiscation, de toute forme de contrainte administrative ou judiciaire ; qu'il résulte de cet accord et de sa finalité que les biens dont est titulaire le Bureau en France, sont mis à sa disposition pour sa mission par la Ligue des Etats Arabes – Bureau de Paris et dans cette mesure sont protégés de toute contrainte sauf au cas où la Ligue des Etats Arabes se trouverait redevable d'une somme en raison d'un contrat, comme un contrat de travail passé par son Bureau ou d'un accident de la circulation dans lequel un dans lequel un véhicule appartenant au Bureau serait appliqué ; que ces cas dans lesquels les biens de la Ligue des Etats Arabes mis à la disposition du Bureau peuvent être saisis sont limités aux conséquences de l'activité de celui-ci en France, des conventions passées pour cette activité ou d'un accident causé par un véhicule du Bureau ; qu'ils sont protégés par une immunité d'exécution pour toute obligation de la Ligue des Etats Arabes ayant une autre cause, comme celle d'une condamnation pécuniaire par une juridiction hors de France, provenant d'une obligation contractuelle étrangère à l'activité du Bureau lui-même ; que ces biens ressortissent à l'activité même de la Ligue et des Etats qui en sont membres et à leur souveraineté ; que l'accord conclu en 1997, quoique postérieurement aux décisions tunisiennes mises à exécution, s'applique immédiatement et à l'évidence les exceptions qu'ils comportent ne peuvent trouver application qu'après son entrée en vigueur, mais pour l'activité du Bureau en France ; que les saisies pratiquées se heurtent à l'immunité d'exécution dont jouissent les Etats étrangers affirmée par l'accord du 26 novembre 1997 ;
Alors d'une part, que les Etats étrangers et les organismes qui en constituent l'émanation ne bénéficient de l'immunité de juridiction ou d'exécution qu'autant que l'acte qui donne lieu au litige participe, par sa nature et par sa finalité, à l'exercice de la souveraineté et n'est pas un acte de gestion ; que le contrat de bail conclu entre les société SATRE et CSR bailleresses et la Ligue des Etats Arabes locataire qui donne lieu au litige ne constitue pas un acte de souveraineté, mais une opération de gestion relevant du droit privé, et ne pouvant par conséquent bénéficier de l'immunité d'exécution ; qu'en décidant le contraire, la Cour d'appel a violé les principes relatifs à l'immunité d'exécution et l'accord du 26 novembre 1997 ;
Alors d'autre part, qu'en faisant application d'une immunité d'exécution qui au regard des circonstances de l'espèce, ne répond pas à un but légitime, est disproportionnée par rapport au but poursuivi, et porte atteinte au droit d'accès aux tribunaux en sa substance même, la Cour d'appel a violé l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme.
Publication : Bulletin 2009, I, n° 206

Décision attaquée : Cour d'appel de Paris , du 10 janvier 2008

Titrages et résumés : CONFLIT DE JURIDICTIONS - Effets internationaux des jugements - Exequatur - Effets - Détermination - Portée

L'exequatur d'un jugement étranger n'est pas, en lui-même, un acte d'exécution pouvant exclure l'immunité d'exécution d'une organisation internationale

CONFLIT DE JURIDICTIONS - Compétence internationale - Immunité d'exécution - Exclusion - Cas - Exequatur (non)

ORGANISMES INTERNATIONAUX - Ligue des Etats arabes - Immunité d'exécution - Etendue - Détermination - Portée

Une cour d'appel qui constate qu'un accord signé entre le gouvernement de la République française et une organisation internationale limite expressément les cas dans lesquels les biens de cette organisation peuvent être saisis aux conséquences des conventions passées pour l'activité de son bureau, a pu en déduire que les biens de l'organisation étaient protégés par une immunité d'exécution lorsque l'obligation de l'organisation avait une autre cause, telle une condamnation pécuniaire sanctionnant une obligation contractuelle étrangère à l'activité du bureau lui-même et dès lors que les créanciers de l'organisation, qui disposaient d'autres voies pour faire exécuter la condamnation, n'étaient pas privées d'un accès au juge

CONFLIT DE JURIDICTIONS - Compétence internationale - Immunité d'exécution - Organisme international - Ligue des Etats arabes - Etendue

Précédents jurisprudentiels :

Sur le n° 1 : Sur une autre application du même principe, à rapprocher :1re Civ., 11 juin 1991, pourvoi n° 90-11.282, Bull. 1991, I, n° 193 (cassation sans renvoi)

Sur le n° 2 : Sur d'autres applications du même principe, à rapprocher :1re Civ., 14 mars 1984, pourvoi n° 82-12.462, Bull. 1984, I, n° 98 (cassation), et les arrêts cités ;1re Civ., 1er octobre 1985, pourvoi n° 84-13.605, Bull. 1985, I, n° 236 (rejet), et les arrêts cités ;1re Civ., 8 novembre 1988, pourvoi n° 84-41.462, Bull. 1988, I, n° 309 (cassation) ;1re Civ., 28 octobre 2003, pourvoi n° 01-16.927, Bull. 2003, I, n° 212 (cassation partielle sans renvoi), et l'arrêt cité ;1re Civ., 25 janvier 2005, pourvoi n° 03-18.176, Bull. 2005, I, n° 39 (rejet) ;1re Civ., 19 novembre 2008, pourvoi n° 07-10.570, Bull. 2008, I, n° 266 (cassation partielle), et les arrêts cités

Textes appliqués :
Cour d'appel de Paris, 10 janvier 2008, 07/8578

G I U R I S P R U D E N Z A

GIURISPRUDENZA ITALIANA

Organizzazione internazionale per i rifugiati - Personalità internazionale - Rapporto d'impiego - Controversie - Competenza dell'autorità giudiziaria ordinaria italiana.

Le controversie relative a rapporti d'impiego tra un ente fornito di personalità internazionale ed i propri dipendenti, anche se italiani ed operanti in Italia, sono, in linea di principio, sottratte alla giurisdizione italiana.

Tuttavia, avendo l'Organizzazione internazionale per i rifugiati predisposto, per la risoluzione di tali controversie, un arbitrato che contrasta con i requisiti essenziali per la costituzione di un qualsiasi procedimento arbitrale, deve ritenersi competente il giudice ordinario italiano, atteso il carattere universale della sua giurisdizione, ed in base al disposto del decr. legisl. 6 marzo 1948; nè può ritenersi competente il giudice amministrativo, per la specialità della sua giurisdizione, che non è suscettibile di estensione analogica.

CASSAZIONE (Sez. un.), 27 maggio 1955 - Pres. ACAMPORA - Est. LORIZIO - P.M. DE MARTINI (concl. diff.) - *Maida* c. *Amministrazione per gli aiuti internazionali.*

(Omissis) Concordando le due parti, il dott. Maida e l'Amministrazione aiuti internazionali (A.A.I.), la seconda quale sostituto processuale dello IRO, nell'escludere, contrariamente alla statuizione del Tribunale, che per il rapporto d'impiego di che trattasi l'IRO possa ritenersi soggetta alla giurisdizione amministrativa italiana. Discordando invece sulla determinazione del giudice, chè, mentre dal Maida si afferma la giurisdizione del tribunale ordinario, sezinoe lavoro, la A.A.I. deduce il difetto assoluto di giurisdizione di qualsiasi giudice dello Stato italiano. Il Maida potrebbe unicamente, si sostiene dall'A.A.I., sottoporre le sue richieste a quella forma speciale di arbitrato costituito con l'art. 9 del regolamento del personale dell'IRO e demandato all'organo Avvocatura dello Stato italiano.

Osserva essere consolidata, e ribadita anche in recenti pronunzie del Supremo Collegio, la distinzione secondo che un soggetto di diritto internazionale agisca come tale, mantenendosi sul piano dei rapporti internazionali ed esplicando sovranamente l'attività pubblicistica incidente solo sui detti rapporti, ovvero ponga in essere, nell'ambito dell'ordinamento giuridico dell'altro Stato in cui agisca, atti e rapporti di natura privata o patrimoniale. Nel primo caso deve essere ammesso a godere della c.d. immunità dalla giurisdizione; nel secondo, agendo *jure privatorum*, è soggetto alla giurisdizione dell'altro Stato nel quale ha spiegato attività negoziale. Principio che va, nell'un caso e nel-

l'altro, interpretato, precisandosi che l'esenzione dalla giurisdizione vien meno quando il soggetto di diritto internazionale vi abbia rinunciato; e, all'opposto, si avvera allorchè il negozio, il cui carattere ordinario è di diritto privato o patrimoniale, sia regolato pubblicisticamente con convenzione od accordo di carattere internazionale.

Sulla base del detto principio, nulla essendo da aggiungere alla dimostrazione, data dal Tribunale, della qualità di soggetto di diritto internazionale dell'IRO, non può non ritenersi che il rapporto di impiego intercorso tra l'IRO e il dott. Maida ineriva allo svolgimento delle mansioni costituenti attuazione dell'attività pubblicistica dell'Ente e rientranti nei fini istituzionali dello stesso. Fini consistenti in un programma organico di assistenza, mantenimento, risistemazione e rimpatrio di certe categorie di profughi dei vari paesi immigrati in Italia (e in altri Stati) a seguito delle vicende dell'ultima guerra, e a favore dei quali fu costituita una apposita organizzazione internazionale riconosciuta dai vari Stati, e, tra essi, dall'Italia, che si impegnò a collaborare per l'attuazione dei fini medesimi, assumendo all'uopo compiti specifici ed accordando sul proprio territorio facilitazioni e vantaggi di vario genere (d. legis. 6 marzo 1948 n. 468). Per l'assistenza materiale dei profughi venne assunto in Italia un personale medico (medici ed infermieri) col compito di prestare servizio negli uffici medici dell'organizzazione nelle zone in cui questa svolgesse la sua attività. Onde il rapporto d'impiego dei detti medici si ricollegava direttamente ai fini istituzionali dell'IRO essendo il medico assunto per lo svolgimento di mansioni (assistenza sanitaria) rientranti negli scopi specifici per i quali l'Ente era stato creato.

Negozio pertanto (il rapporto d'impiego Maida-IRO) nel quale il rapporto di prestazione d'opera intellettuale (di comune carattere patrimoniale) è, per così dire, assorbito dall'incidenza dell'opera nella finalità eminentemente pubblica dell'ente internazionale, onde dovrebbe ricevere approvazione il principio dell'esenzione giurisdizionale, ove a tale esenzione l'IRO non avesse rinunziato. Che, in proposito, l'IRO si spogliasse della immunità giurisdizionale è affermato dal ricorrente dott. Maida e, al contrario, tenacemente contestato dalla resistente A.A.I. la quale aggiunge che la stessa accettazione, da parte dell'IRO, della giurisdizione italiana, non renderebbe proponibile la domanda del Maida.

Considera il Supremo Collegio che tutto nel caso in esame lascia ritenere che siasi in presenza di speciale regolamento di soggetto di diritto internazionale, ben distinto dalla disciplina generale riguardante gli Stati sovrani e gli altri soggetti di diritto internazionale che abbiano, almeno in principio, serbato integra la propria autonomia nello svolgimento della loro attività pubblicistica nel territorio di altro Stato. Tale particolare regolamento inerisce alla peculiarità dello scopo perseguito dall'IRO, del quale il Governo italiano, in fattiva solidarietà con gli altri Stati aderenti, intese agevolare il conseguimento sul suo territorio. Col citato d. legis. 6 marzo 1948 n. 468, il Governo italiano riconobbe legislativamente il carattere internazionale dell'IRO e concesse al Direttore di tale ente ed ai principali funzionari dirigenti di nazionalità non italiana e non residenti stabilmente in Italia, le immunità, facilitazioni, privilegi ed esenzioni normalmente attribuiti alle rappresentanze diplomatiche. Nell'intento poi di « cooperare al programma dell'IRO entro i limiti della propria giurisdizione », detto Governo concesse agevolazioni della natura più varia: uso gratuito di immobili e mobili con assunzione delle relative spese,

esenzioni tributarie e doganali, facilitazioni ferroviarie ed altri e diversi servizi: il tutto inerente all'attuazione dei fini della detta organizzazione internazionale. E, sempre per favorire il conseguimento dei fini dell'IRO, il Governo italiano assunse altresì la difesa di tale ente in giudizio, sia come attore sia come convenuto, in tutte le azioni interessanti l'Ente o il suo personale in Italia e relative alle funzioni ufficiali dell'Ente.

Ma nel dare all'IRO ogni fattivo aiuto, nel menzionato accordo 6 marzo 1948 fu peraltro stabilito che le funzioni e le attività dell'IRO dovessero svolgersi in conformità delle leggi italiane e degli impegni internazionali assunti o da assumere dall'Italia; che l'IRO avrebbe assunto la responsabilità per i danni dovuti, ai sensi della legge italiana, a dolo o colpa lata del proprio personale o dei profughi. E servendosi l'IRO per l'attuazione di suoi fini, di numeroso e vario personale (impiegati e lavoratori manuali), ed impegnandosi il Governo italiano a fornire all'IRO ogni possibile assistenza nella selezione ed assunzione di cittadini italiani qualificati, fu dichiarato che a questi sarebbero state applicate tutte le assicurazioni sociali previste dalla legge italiana per impiegati di ditte private italiane. L'IRO poi, disciplinando, nel suo già ricordato regolamento interno del personale 13 aprile 1951, con minute norme il rapporto d'impiego e di lavoro dei propri dipendenti, dispose che per quanto non fosse contemplato in detto regolamento, l'Amministrazione (di esso Ente) o l'impiegato dovessero riferirsi alla vigente legislazione italiana sull'impiego privato.

Risulta pertanto che l'IRO, pur essendo soggetto di diritto internazionale, si rimise per più rapporti alla legge italiana, richiamata a volte in modo indiretto e sussidiario. Il che deve servire di orientamento nel caso in esame, per determinare l'organo competente a statuire sulla controversia di impiego tra l'IRO e il dott. Maida. Dispone in proposito l'art. 9 del citato regolamento interno che, nel caso di controversia tra l'impiegato e l'Ente, l'impiegato può far presente il proprio caso all'ufficio del personale dell'Ente, e, dove non accetti la decisione, « può (in termine indicato) inoltrare richiesta di arbitrato all'Avvocatura dello Stato (italiano) ».

E il dissenso tra le parti, grave ed inconciliabile, verte appunto sulla natura ed obbligatorietà di tale arbitrato, che, secondo la tesi della resistente A.A.I., escluderebbe di per sè la giurisdizione italiana, e l'IRO si sarebbe creata nell'ambito della propria organizzazione pubblica e per la decisione delle controversie con il suo personale, una propria giurisdizione speciale. E, al contrario, il ricorrente nega ogni valore a quanto è come dinanzi disposto dal regolamento interno dell'IRO che, disposto unilateralmente dall'Ente, non vincolerebbe lo Stato italiano, e l'ordinamento italiano non potrebbe riconoscere, siccome in contrasto con gli artt. 24 e 25 della Cost., per i quali tutti possono agire in giudizio per la tutela dei loro diritti e nessuno può essere distolto dal giudice naturale precostituito dalla legge; perchè detto arbitrato sarebbe solo facoltativo (l'impiegato « può »); perchè in particolare, l'arbitrato è perentoriamente vietato nelle controversie relative a rapporti di lavoro e d'impiego (art. 806 c.p.c.).

Osserva il Supremo Collegio che le obiezioni del Maida perdono valore quando siasi in presenza, come nella specie non è a dubitare, di prestazione di lavori inerenti all'attuazione dei fini pubblicistici di ente internazionale, il quale abbia provveduto, nell'ambito della propria organizzazione pubblica, al modo di risolverne le controversie. Nè può trarsi argomento, per rilevare il

carattere meramente facoltativo dell'arbitrato in oggetto, dalla dizione l'impiegato « può », in quanto, una volta riconosciuta una volontà sovrana dell'IRO nei rapporti interni col proprio personale, la procedura istituita dall'IRO costituirebbe l'unica via aperta all'impiegato per far valere le sue ragioni. Infine, l'esclusione della facoltà di compromettere in arbitri le controversie di lavoro regolate o regolabili da contratti collettivi, se imperativa in diritto interno, non può esserlo anche in ogni caso nei rapporti internazionali, la legislazione italiana sull'impiego privato essendo poi richiamata per quanto non sia contemplato dal regolamento interno dell'Ente internazionale.

Senonchè, pare al Supremo Collegio decisivo, contro la legittimità dell'arbitrato di che trattasi, che esso, come istituito dal citato art. 9 del Regolamento interno dell'IRO, contravviene ad esigenze basilari per la costituzione di un qualsiasi arbitrato. Infatti l'arbitrato è nella specie demandato (così il regolamento dispone) « all'Avvocatura dello Stato italiano », senza altra menzione o specificazione ed in particolare senza che sia stabilito se l'arbitro debba essere unico o debba costituire un collegio arbitrale (e nel secondo caso sarebbesi dovuto indicare il numero degli arbitri), e senza che sia precisato da chi gli arbitri debbano essere nominati. Indicazioni queste, indispensabili, in quanto l'Avvocatura dello Stato italiano è costituita da un corpo selezionato di patroni numeroso e distinto in più gradi gerarchici. E se pure, mancando una particolare designazione, potesse ritenersi che la nomina spetta al capo dell'organizzazione gerarchica dell'Avvocatura (l'Avvocato generale dello Stato), farebbe in ogni caso difetto la determinazione del numero degli arbitri (se uno o più) che mai può essere omessa nè demandata al libero indiscriminato criterio di persona singola o capo di collegio, siano pure autorevoli. Si è poi fuori del caso di corpi e collegi (società e associazioni di carattere civile e commerciale) che abbiano determinato nei loro regolamenti interni debitamente approvati la composizione e il funzionamento di collegi arbitrali per la definizione di controversie.

Ed eguale rilievo varrebbe ove, come sostiene la resistente A.A.I., dovesse scorgersi nell'arbitrato in discorso una giurisdizione speciale che richiede in ogni caso pure essa la preventiva determinazione, nella legge od altro atto normativo che la istituisce, nel numero dei giudici (singolo o collegiale). La resistente parla altresì di arbitraggio, ma tale particolare figura non appare appropriata, non trattandosi altro che di lasciare all'equo arbitrio di terzi elementi di obbligazione non determinati dalle parti. E non può essere materia di dubbio che, se oggi è anche legislativamente riconosciuta la validità dei c.d. arbitrati liberi, in cui si prescinde dall'osservanza di norme del codice di proc. civ. disciplinanti il compromesso, mai, in caso pure di arbitrato libero, può essere lasciata all'illimitato criterio del terzo la determinazione del numero degli arbitri o arbitratori.

Consegue da quanto rilevato che l'arbitrato di cui al discusso art. 9 del regolamento interno del personale dell'IRO non avrebbe possibilità di giuridica applicazione. E non potendo un tale arbitrato costituirsi, e dovendo la controversia sorta fra l'IRO ed il suo impiegato, per necessità non sopprimibile, avere un giudice ed essere risolta, soccorrono, ad avviso del Supremo Collegio, la citata disposizione del decr. legis. 6 marzo 1948, per cui le funzioni e le attività dell'IRO saranno svolte in conformità delle leggi italiane ed il pur ricordato disposto del regolamento interno del personale dell'Ente medesimo, che richiama, come fonte sussidiaria di diritto, la legislazione italiana sul contratto d'impiego.

Al riguardo il Tribunale, che stimò facoltativo per l'impiegato il ricorso all'arbitrato (non scorgendo che tale organo non potesse, per quanto rilevato, legittimamente costituirsi), giudicò che la cognizione della controversia tra il Maida e l'IRO spettasse, attese le finalità pubblicistiche dell'Ente, alla giurisdizione amministrativa italiana, esclusiva, nel vigente ordinamento italiano, per la risoluzione delle controversie riguardanti il contratto di pubblico impiego.

Ma ove si consideri che la giurisdizione esclusiva che il vigente regolamento attribuisce, nelle controversie oradette, al Consiglio di Stato e alla G.P.A. ha, com'è pacifico, carattere speciale, in quanto costituisce eccezione alla fondamentale distinzione fra la cognizione dei diritti propria del giudice, e quella degli interessi, specifica della giurisdizione amministrativa, questo Supremo Collegio stima più consono ai principî che, riservate alla giurisdizione amministrativa le controversie sul rapporto d'impiego concernenti l'impiegato dello Stato italiano, la controversia di cui trattasi, nella quale è parte un soggetto di diritto internazionale, estraneo all'organizzazione amministrativa dello Stato italiano, vada deferita alla cognizione del giudice ordinario in considerazione del carattere universale della guirisdizione dello stesso, che soffre limitazioni unicamente in quanto determinati rapporti o categorie siano dalla legge espressamente sottratti alla sua giurisdizione.

Ed in tale modo va definita la questione di giurisdizione, modificandosi la declaratoria di carenza di giurisdizione emessa dal Tribunale del lavoro di Napoli. *(Omissis)*

NOTA

Le controversie in materia d'impiego presso enti internazionali e la giurisdizione italiana.

1. Il tema della natura giuridica del rapporto d'impiego presso enti internazionali e della sottoponibilità delle relative controversie alla giurisdizione italiana, affrontato dall'annotata sentenza, richiede, per il suo esame, lo svolgimento di alcune sia pur brevi considerazioni di carattere generale. Il problema, infatti, si inquadra in quello dell'esenzione degli Stati — vedremo poi in che senso si possa fare applicazione agli enti internazionali dei risultati raggiunti — dalla giurisdizione civile di altri Stati.

La dottrina e la giurisprudenza in materia vengono tradizionalmente ripartite in due correnti. Secondo la prima, gli Stati sarebbero in principio esenti dalla giurisdizione di altri Stati, come conseguenza necessaria degli stessi concetti di indipendenza e di sovranità, da cui si fa discendere il principio *par in parem non habet auctoritatem* (1). I

(1) Fra i sostenitori della teoria in questione si possono ricordare: TRIEPEL, *Gerichtsbarkeit über fremde Staaten*, in *Archiv für öffentliches Recht*, XXVIII, 1911-12, p. 212 ss., in particolare p. 218 ss.; PROVINCIALI, *L'immunità giurisdizionale degli Stati stranieri*, Padova, 1933; FITZMAURICE, *State immunity from proceedings in foreign courts*, in *British Yearbook*, 1933, p. 101 ss.; VAN PRAAG, *La question de l'immunité de juridiction des Etats étrangers et*

ECLI:NL:PHR:2012:BX8351

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Formele relaties	Arrest gerechtshof: ECLI:NL:GHSGR:2011:BQ4781 Arrest Hoge Raad: ECLI:NL:HR:2012:BX8351
Rechtsgebieden	Civiel recht
Bijzondere kenmerken	-
Inhoudsindicatie	Internationaal recht. Verbindendheid (gewijzigde) Sanctieregeling Iran 2007 die dient ter uitvoering van Resolutie 1737 van de VN Veiligheidsraad ten aanzien van kennisembargo. Verenigbaarheid met andere internationale verplichtingen; verboden onderscheid naar nationaliteit? Toetsingskader. Voorrangsregel art. 103 Handvest VN; art. 31 Weens Verdragenverdrag; Verordening (EG) Nr. 423/2007 (Pb L 103/1). Uitvoeringsvrijheid Staat.
Vindplaatsen	Rechtspraak.nl NJB 2013/64 RvdW 2013/38

Conclusie

Zaak 11/03521

Mr P. Vlas

Zitting, 21 september 2012

Conclusie inzake

De Staat der Nederlanden,

eiser tot cassatie,

tegen

1. [Verweerder 1],

2. [Verweerder 2],

3. [Verweerder 3],

verweerders in cassatie

In deze zaak gaat het om de Nederlandse implementatieregeling van Resolutie 1737 van de VN Veiligheidsraad ten aanzien van het 'kennisembargo' tegen Iran. Het betreft de vraag of de Sanctieregeling Iran 2010 (zoals nadien vervangen door de Sanctieregeling Iran 2012) in strijd is met het beginsel van gelijke behandeling, zoals is verankerd in verschillende verdragen en in art. 1 van de Grondwet.

1. Feiten en procesverloop

1.1 In cassatie kan van de volgende feiten worden uitgegaan.(1) [Verweerder 1] is student bachelor scheikunde aan de Technische Universiteit Delft. [Verweerder 2] is promovendus techniekfilosofie aan diezelfde universiteit. [Verweerder 3] is hoogleraar experimentele kernfysica aan de Rijksuniversiteit Groningen. Zij hebben allen naast de Nederlandse ook de Iraanse nationaliteit.

1.2 Op 23 december 2006 heeft de Veiligheidsraad van de Verenigde Naties Resolutie 1737 aanvaard.(2) Voor zover thans van belang luidt paragraaf 17 van de Resolutie 1737:

'[The Security Council] Calls upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems'.

1.3 Ter uitvoering van Resolutie 1737 heeft de Raad van de Europese Unie op 27 februari 2007 Gemeenschappelijk Standpunt 2007/140/GBVB betreffende beperkende maatregelen tegen Iran (hierna: het Gemeenschappelijk Standpunt)(3) uitgebracht, waarvan artikel 6 luidt:

'De lidstaten nemen overeenkomstig hun nationale wetgeving de nodige maatregelen om te verhinderen dat, op hun grondgebied of door hun onderdanen, gespecialiseerde vorming of opleiding aan Iraanse onderdanen wordt verstrekt, die bijdraagt aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens'.

1.4 Op 23 juni 2008 hebben de ministers van Buitenlandse Zaken en van Onderwijs, Cultuur en Wetenschap de Wijziging Sanctieregeling 2007 (hierna: de Sanctieregeling of ontheffingsregeling) vastgesteld, waardoor de reeds geldende, op artikel 2 lid 2 van de Sanctiewet 1977 gebaseerde, Sanctieregeling Iran 2007 werd aangepast ter uitvoering van paragraaf 17 van Resolutie 1737 en van artikel 6 van het Gemeenschappelijk Standpunt. De leden 1 en 2 van het nieuw ingevoegde artikel 2a luidden oorspronkelijk:

'1. Het is verboden om Iraanse onderdanen toegang te verlenen tot de in de bijlage bij deze regeling genoemde locaties en gegevensbestanden.

2. Het is verboden om zonder of in afwijking van een ontheffing van de Minister van Onderwijs, Cultuur en Wetenschap gespecialiseerde vorming of opleiding aan Iraanse onderdanen te verstrekken, die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek'.

1.5 Nadat het vonnis van de rechtbank in deze zaak was gewezen, is de Sanctieregeling Iran 2007 opnieuw gewijzigd zodanig dat met ingang van 14 juli 2010 de leden 1 en 2 van artikel 2a als volgt zijn komen te luiden:

'1. Het is verboden om gespecialiseerde vorming of opleiding die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens te verstrekken aan Iraanse onderdanen, die niet beschikken over een met het oog op deze verstrekking door de Minister van Onderwijs, Cultuur en Wetenschap verleende ontheffing of in afwijking van deze ontheffing verleende beperkingen. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot

bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek.

2. Een ontheffing wordt geweigerd, indien de Minister van Onderwijs, Cultuur en Wetenschap het risico dat het aanbieden van de bedoelde vorming of opleiding aan de Iraanse onderdaan voor wie de ontheffing is bestemd, zal bijdragen aan proliferatiegevoelige activiteiten van Iran of aan de ontwikkeling van systemen voor de overbrenging van kernwapens in Iran, onaanvaardbaar groot acht'.(4)

1.6 De wijzigingen ten opzichte van de vorige versie van de Sanctieregeling komen erop neer dat het toegangsverbod tot bepaalde locaties en gegevensbestanden (hierna: het locatieverbod) is komen te vervallen. Daarnaast is beoogd duidelijker tot uitdrukking te laten komen dat het in lid 2 van de vorige versie vervatte verbod niet is gericht op Iraniërs als groep, maar op bepaalde individuele Iraniërs die een risico op kennisoverdracht aan Iran meebrengen. In verband daarmee is thans opgenomen op welke grond een aangevraagde ontheffing moet worden geweigerd.

1.7 Op 26 april 2012 is de Nederlandse Sanctieregeling Iran 2012 in werking getreden.(5) Het in nr. 1.5 geciteerde kennisembargo is thans ongewijzigd opgenomen in art. 5 van de Sanctieregeling 2012. De Sanctieregeling Iran 2010 is op grond van art. 6 van de Sanctieregeling Iran 2012 ingetrokken. Deze intrekking heeft echter geen gevolgen voor de onderhavige procedure.

1.8 Bij inleidende dagvaarding van 27 maart 2009 hebben verweerders in cassatie (hierna: [verweerder] c.s.) eiser tot cassatie (hierna: de Staat) gedaagd voor de rechtbank te 's-Gravenhage en gevorderd (i) primair dat de Staat wordt opgedragen de Sanctieregeling in te trekken, (ii) subsidiair dat aan de Staat een bevel wordt geven om de uitsluiting van mensen met een Iraans paspoort zoals opgenomen in de Sanctieregeling ongedaan te maken, en (iii) meer subsidiair dat voor recht wordt verklaard dat de Sanctieregeling jegens [verweerder] c.s. onrechtmatig is.

1.9 [Verweerder] c.s. hebben aan hun vordering ten grondslag gelegd dat de Sanctieregeling wegens discriminatie op grond van nationaliteit, ras en etniciteit in strijd is met het gelijkheidsbeginsel zoals neergelegd in art. 1 van de Grondwet, art. 18 van het Verdrag betreffende de Werking van de Europese Unie (VWEU), art. 26 van het Internationaal Verdrag inzake burgerlijke en politieke rechten (IVBPR) en art. 1 van het Twaalfde Protocol bij het EVRM. Daarnaast zou sprake zijn van schending van het gelijkheidsbeginsel van art. 14 EVRM in combinatie met art. 2 van het Eerste Protocol bij het EVRM (recht op onderwijs).

1.10 Volgens [verweerder] c.s. wordt in de Sanctieregeling een categoraal onderscheid gemaakt tussen Iraniërs en niet-Iraniërs, hetgeen niet alleen discriminerend maar ook stigmatiserend is. Dit heeft nadelig effect op hun sociaal-economische ontplooiing als volwaardige Nederlandse burgers van Iraanse afkomst. [Verweerder] c.s. hebben geen ontheffing op grond van de Sanctieregeling aangevraagd. Evenmin is door een onderwijsinstelling een ontheffing voor hen aangevraagd. Van een weigering van de Minister van Onderwijs, Cultuur en Wetenschap een ontheffing te verlenen aan [verweerder] c.s. is dus geen sprake. In feitelijke instanties is echter vastgesteld dat [verweerder] c.s. wel degelijk belang overeenkomstig art. 3:303 BW hebben en daarom ontvankelijk zijn in hun vordering. In cassatie is dit niet meer in geschil.(6)

1.11 Bij vonnis van 3 februari 2010 (LJN: BL1862) heeft de rechtbank de primaire en de subsidiaire vordering verstaan als een vordering de Sanctieregeling onverbindend te verklaren en in deze zin toegewezen. Zij is van mening dat Resolutie 1737 (evenals het Gemeenschappelijk Standpunt) lidstaten van de VN (en de EU) de vrije keuze laat op welke wijze zij Resolutie 1737 zullen uitvoeren, alsmede dat die resolutie hen niet verplicht een onderscheid te maken naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is (rov. 4.6). Het doel van het maken van onderscheid naar nationaliteit in de Sanctieregeling, te weten het voorkomen dat Iran door tussenkomst van zijn onderdanen in het buitenland proliferatiegevoelige kennis verwerft, acht de rechtbank op zichzelf genomen legitiem (rov. 4.8 en 4.9).(7) Met betrekking tot de vraag of het onderscheid noodzakelijk en gerechtvaardigd is, is de rechtbank van oordeel dat de Sanctieregeling niet geschikt is om haar doel te bereiken, omdat die regeling niet verhindert dat personen met een andere nationaliteit dan de Iraanse proliferatiegevoelige kennis

doorspelen aan Iran (rov. 4.10).

1.12 De rechtbank overweegt in het slot van rov. 4.10 dat de Sanctieregeling zélf (dus niet: het daarin gemaakte onderscheid naar nationaliteit) disproportioneel is. De Staat had ook kunnen overgaan tot het nemen van minder ingrijpende alternatieven zoals het aanscherpen van al bestaande beveiligings- en controlemaatregelen door (bijvoorbeeld) strengere individuele screening dan wel het stellen van dezelfde (minder ingrijpende) maatregelen die door andere lidstaten ter uitvoering van Resolutie 1737 en art. 6 van het Gemeenschappelijk Standpunt zijn ingevoerd, zoals het stellen van beperkingen bij het verlenen van visa aan Iraniërs.

1.13 De Staat heeft tegen het vonnis van de rechtbank hoger beroep ingesteld. Bij arrest van 26 april 2011 (LJN: BQ4781) heeft het hof 's-Gravenhage het vonnis van de rechtbank bekrachtigd. Het hof heeft zich aangesloten bij het oordeel van de rechtbank omtrent de noodzaak en de gerechtvaardigdheid van de Sanctieregeling. Wat betreft de vraag naar de proportionaliteit heeft het hof in rov. 6.2 het oordeel van de rechtbank over de proportionaliteit aldus uitgelegd, dat het gaat om de vraag of het in de Sanctieregeling gemaakte onderscheid naar nationaliteit proportioneel is (en dus niet de Sanctieregeling zélf). Volgens het hof is het in de Sanctieregeling gemaakte onderscheid naar nationaliteit ongeschikt om het doel dat daarmee wordt nagestreefd te bereiken, zodat niet aan het proportionaliteitsvereiste is voldaan (rov. 6.4 in fine).

1.14 De Staat heeft (tijdig) cassatieberoep ingesteld tegen het arrest van het hof. Partijen hebben hun standpunten schriftelijk toegelicht, gevolgd door repliek zijdens de Staat en dupliek zijdens [verweerder] c.s.

1.15 Ten overvloede wijs ik nog op het feit dat [verweerder] c.s., alsmede een student lucht- en ruimtevaart aan de TU Delft (een Iraans politiek vluchteling die sinds 1993 in Nederland verblijft), naar aanleiding van het arrest van het hof van 26 april 2011 de Staat bij dagvaarding van 7 juli 2011 opnieuw hebben gedaagd voor de rechtbank te 's-Gravenhage. In die zaak hebben zij gevorderd dat de rechtbank de gewijzigde Sanctieregeling 2010 onverbindend verklaart, aangezien het hof het vonnis van de rechtbank van 3 februari 2010 heeft bekrachtigd en in dat vonnis niet de Sanctieregeling 2010 maar die van 2007 onverbindend werd verklaard. Daarbij heeft de advocaat van eisers er tevens op gewezen dat de Sanctieregeling slechts jegens [verweerder] c.s. onverbindend is verklaard en niet tegen de desbetreffende Iraanse student lucht- en ruimtevaart (in die procedure 'eiser sub 4'). Daarnaast is immateriële schade gevorderd wegens onrechtmatige regelgeving.

1.16 Bij vonnis van 28 maart 2012 (LJN: BW3098) heeft de rechtbank de Staat veroordeeld art. 2a van de Wijziging Sanctieregeling 2007, laatstelijk gewijzigd met ingang van 14 juli 2010, ten opzichte van 'eiser sub 4' buiten toepassing te laten. Voor het overige heeft de rechtbank geoordeeld dat 's hofs bekrachtiging van het vonnis van de rechtbank van 3 februari 2010 in redelijkheid niet anders kan worden verstaan dan dat het hof de Sanctieregeling 2010 jegens [verweerder] c.s. evenzeer discriminatoir heeft bevonden (rov. 5.1). Ook de vordering tot vergoeding van immateriële schade heeft de rechtbank afgewezen.

2. Bespreking van het cassatieberoep

2.1 Het door de Staat aangevoerde middel van cassatie bestaat uit zeven onderdelen, waarvan het laatste onderdeel een veegklacht bevat. De meeste onderdelen zijn opgebouwd uit subonderdelen, waarin met rechts- en motiveringsklachten wordt opgekomen tegen rov. 5.2 t/m 7.2 van het bestreden arrest.

2.2 In deze zaak gaat het in het bijzonder om de toetsing van de Sanctieregeling aan art. 1 van het Twaalfde Protocol bij het EVRM en art. 26 IVBPR. Daarbij komt het aan op de vraag of met het in de Sanctieregeling gemaakte onderscheid tussen Iraanse en niet-Iraanse onderdanen een legitiem doel wordt nagestreefd (legitimiteit), of dit onderscheid voor het bereiken van dit doel passend is (doelmatigheid) en of dit onderscheid geboden is (proportionaliteit).(8) Bij die vraag komt de wetgever een zekere beoordelingsruimte toe.(9)

2.3 Alvorens het cassatiemiddel te bespreken, besteed ik enige aandacht aan de onderlinge hiërarchie van met elkaar conflicterende volkenrechtelijke verplichtingen, in het bijzonder toegespitst op de onderhavige Sanctieregeling.

2.4 Volgens art. 94 Grondwet vinden binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en besluiten van volkenrechtelijke organisaties. Deze bepaling heeft betrekking op het toetsingsvraagstuk.(10) Hiervan moet worden onderscheiden de meer algemene verplichting van de Nederlandse rechter, als orgaan van de Staat, zich rekenschap te geven van de verplichtingen die door het volkenrecht aan de Staat worden opgelegd. De onderhavige Sanctieregeling is een implementatie of uitvoering van een op Hoofdstuk VII van het Handvest van de Verenigde Naties gebaseerde(11) en daarom internationaal dwingende resolutie.(12) De Nederlandse rechter dient bij het uitvoeren en uitleggen van een op een resolutie gebaseerde regeling een compromis te vinden tussen eventueel haaks op elkaar staande volkenrechtelijke verplichtingen van de Nederlandse Staat: enerzijds de verplichting een dwingende Veiligheidsraadresolutie na te komen, anderzijds de verplichting te voldoen aan met andere Staten gesloten verdragen op het gebied van mensenrechten, zoals het EVRM en het IVBPR.

2.5 Dit conflict zou kunnen worden opgelost aan de hand van art. 103 van het Handvest van de Verenigde Naties (Handvest VN), waarin is bepaald dat in geval van strijdigheid tussen de verplichtingen van de Leden van de Verenigde Naties krachtens dit Handvest en hun verplichtingen krachtens andere internationale overeenkomsten, de verplichtingen krachtens dit Handvest voorrang hebben. Deze regel is ook als uitgangspunt genomen in art. 30 van het Weens Verdragenverdrag van 23 mei 1969 (WVV). De handhaving van de internationale vrede en veiligheid wordt als hoogste goed gezien, waarvoor andere - daarmee conflicterende - internationale overeenkomsten dienen te wijken.(13) Over het conflict tussen internationale bepalingen met nationale constitutionele regels en beginselen heeft de Staatscommissie Grondwet 2010 het volgende opgemerkt:

'In geval van een conflict tussen een internationale bepaling enerzijds en een nationale fundamentele constitutionele norm anderzijds, is er daarom vaak tegelijk sprake van een conflict tussen die internationale bepaling en een andere internationale norm, die een gelijkwaardige inhoud heeft als de nationale constitutionele norm. In geval van een beweerdelijk conflict tussen de verschillende normen van internationale oorsprong tracht de rechter de verschillende bepalingen zo uit te leggen dat zij met elkaar verenigbaar zijn. Indien dit niet mogelijk is en een conflict tussen internationale bepalingen onderling onontkoombaar is, is de Nederlandse rechter bevoegd het conflict op te lossen'.(14)

De rechter zal aan de hand van internationale regels over samenloop moeten bepalen welke regel voorgaat en daarbij toepassing moeten geven aan de internationale voorrangsregel van art. 30 WVV en art. 103 Handvest VN.(15) Daarbij verdient aantekening dat waar het gaat om in internationale mensenrechtenverdragen neergelegde constitutionele regels en fundamentele beginselen, zoals in casu het gelijkheidsbeginsel van art. 1 Grondwet, de rechter zal moeten overgaan tot een belangenafweging. In die belangenafweging is de Nederlandse rechtspraktijk erop gericht bijzonder belang te hechten aan de bescherming van de grondrechten van de burger.(16)

2.6 In deze zaak kan als uitgangspunt worden genomen dat Resolutie 1737 het invoeren van een ontheffingsregeling als zodanig expliciet noch impliciet voorschrijft. Hetzelfde geldt voor art. 6 van het Gemeenschappelijk Standpunt. Paragraaf 17 van Resolutie 1737 roept Staten slechts in algemene bewoordingen op om waakzaamheid te betrachten en te voorkomen dat personen met de Iraanse nationaliteit specialistische kennis en training verwerven die kunnen bijdragen aan proliferatiegevoelige activiteiten van Iran.(17) Dit kan op allerlei manieren, bijvoorbeeld ook door middel van het aanscherpen van bestaande veiligheidsmaatregelen ten aanzien van zeer specialistische kennis en gevoelige informatie en/of het stellen van beperkingen bij het verlenen van visa aan personen met de Iraanse nationaliteit. Dit laatste is gangbaar in Europees verband en wordt ook als zodanig door de lidstaten van de EU uitgevoerd.(18)

2.7 In Nederland heeft de materiële wetgever echter gekozen voor een ontheffingsregeling en daarin bovendien expliciet onderscheid gemaakt tussen Iraanse en niet-Iraanse onderdanen. Voor zover bekend, is Nederland het enige land dat paragraaf 17 van Resolutie 1737 en art. 6 van het Gemeenschappelijk Standpunt heeft geïmplementeerd of uitgevoerd door middel van een ontheffingsregeling.(19) Voor deze Nederlandse uitvoering zou men begrip kunnen opbrengen, niet alleen vanuit het verantwoordelijkheidsbesef voor de internationale vrede en veiligheid, maar ook vanuit het besef dat het 'gevaar' immers niet alleen van buitenaf kan komen, maar ook van binnenuit, namelijk van personen die zich reeds in Nederland bevinden. De Europese implementatie of uitvoering is vooralsnog primair gericht op beperkingen bij het verlenen van visa aan personen met de Iraanse nationaliteit, een beleid gericht op het uitsluiten van Iraniërs die van buiten komen.(20)

2.8 In de literatuur is ook geopperd dat het doel van de Sanctieregeling waarschijnlijk is ingegeven door de angst dat proliferatiegevoelige kennis in verkeerde handen valt, waarbij wat Nederland betreft gedacht kan worden aan de zaak van dr. A.Q. Khan, de Pakistaanse atoomgeleerde die in de jaren zeventig van de vorige eeuw in Nederland werkzaam is geweest bij Urenco, een Brits-Duits-Nederlands samenwerkingsverband op het gebied van uraniumverrijking en ultra centrifuge.(21) Dr. Khan speelde cruciale kennis en techniek toe aan Pakistan, en waarschijnlijk ook aan Noord-Korea, Iran, Libië en Syrië.(22)

2.9 Wat hiervan ook verder zij, het moge duidelijk zijn dat de onderhavige Sanctieregeling uiterst gevoelige vragen van politieke aard oproept. Rechtbank en hof zagen zich in het onderhavige geschil genoodzaakt te beoordelen of voor de verwezenlijking van het doel van de Sanctieregeling, namelijk het voorkomen dat personen met de Iraanse nationaliteit specialistische kennis en training verwerven die kunnen bijdragen aan proliferatiegevoelige activiteiten van Iran, noodzakelijk is dat voorwaarden moeten worden gesteld aan de vrije toegang tot onderwijs en promotieonderzoek van alle Iraniërs in Nederland (waardoor een categoraal onderscheid tussen hen en andere bevolkingsgroepen wordt gemaakt).

2.10 Na deze inleidende opmerkingen ga ik over tot de bespreking van het middel.

2.11 Het eerste onderdeel is opgebouwd uit vijf subonderdelen (a t/m e) en is gericht tegen rov. 5.2 t/m 5.4 van het bestreden arrest. Hierin heeft het hof, kort gezegd, overwogen dat het Handvest VN niet voorschrijft op welke wijze een krachtens hoofdstuk VII van het Handvest vastgestelde resolutie van de Veiligheidsraad moet worden uitgevoerd. Volgens het hof laat het Handvest VN de leden van de VN in beginsel de vrije keuze tussen de verschillende mogelijkheden voor de omzetting van deze resoluties in hun nationale rechtsorde. Het hof is van oordeel dat in de opvatting van de materiële wetgever Resolutie 1737 geen absoluut verbod op onderwijs aan alle personen van Iraanse nationaliteit inhoudt maar een verbod om dergelijk onderwijs te geven aan personen van Iraanse nationaliteit waarvan gevreesd moet worden dat zij de in Nederland opgedane kennis doorgeven aan Iran. Volgens het hof heeft de rechtbank terecht overwogen dat de resolutie de lidstaten in ieder geval niet verplicht tot het maken van onderscheid naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is.

2.12 Volgens subonderdeel a van het eerste onderdeel heeft het hof miskend dat het doel van de Sanctieregeling is het voorkomen dat Iran zijn nucleaire activiteiten en wapens door tussenkomst van zijn onderdanen ontplooit respectievelijk uitbreidt. Reeds om die reden zou de Staat verplicht zijn om in de ontheffingsregeling onderscheid naar nationaliteit te maken en kan geen toetsing plaatsvinden aan het gelijkheidsbeginsel.

2.13 Het subonderdeel faalt, omdat het hof de verschillende internationale verplichtingen zo heeft uitgelegd dat zij met elkaar verenigbaar zijn (zie ook hetgeen ik hierover heb opgemerkt onder nr. 2.4 en 2.5). Deze uitleg is juist en begrijpelijk. Het hof heeft aansluiting gezocht bij de bewoordingen van de resolutie en heeft deze bezien in hun context en in het licht van het voorwerp en het doel van de resolutie (overeenkomstig de maatstaf van art. 31 WVV).(23) Het middelonderdeel heeft in wezen de manoeuvreerruimte van de Staat op het oog ten aanzien van de inhoud (in casu het maken van onderscheid naar nationaliteit) van het gekozen instrument of model van implementatie (in casu de

ontheffingsregeling). Vrijheid van keuze van lidstaten wat betreft het implementatiemodel betekent niet dat lidstaten ook de vrijheid hebben dat model naar believen in te richten.(24) In rov. 5.3 en 5.4 heeft het hof de manoeuvreerruimte geduid door te overwegen dat de Veiligheidsraad met Resolutie 1737 een zeker resultaat wil bereiken, namelijk dat Iran via Iraanse onderdanen niet over proliferatiegevoelige kennis en techniek komt te beschikken waarvan gevreesd moet worden dat zij die toespelen aan Iran. De resolutie beoogt dus niet een categoraal onderscheid door te voeren in de lidstaten van de VN.(25) Een Sanctieregeling die dat onderscheid niet maakt en iedereen, ongeacht nationaliteit, onderwerpt aan een ontheffingsregeling voldoet nog veel meer aan het preventieve oogmerk van de resolutie.

2.14 Overigens meen ik dat de uitleg van het hof tot hetzelfde resultaat leidt wanneer aansluiting wordt gezocht bij de letterlijke bewoordingen van paragraaf 17 van Resolutie 1737. Het is immers nog maar de vraag of de betekenis van de woorden 'Iranian nationals', in de context van het volkenrecht, wel zo eenduidig is als op het eerste gezicht lijkt. In dit verband is van belang de beslissing van het Internationaal Gerechtshof (IGH) van 6 april 1955 inzake Nottebohm (Liechtenstein v. Guatemala), een mijlpaal op het gebied van diplomatieke bescherming en nationaliteit.(26) Daarin is beslist dat Liechtenstein zich jegens Guatemala niet kon beroepen op de diplomatieke bescherming voor Nottebohm, een in 1939 tot Liechtensteiner genaturaliseerde Duitser van geboorte, die sinds 1905 zijn gewone verblijfplaats in Guatemala had. Nottebohm had geen enkele reële band met Liechtenstein, zodat hij werd geacht niet de effectieve Liechtensteinse nationaliteit te bezitten ('no genuine connection').(27)

2.15 Hetzelfde zou kunnen worden gezegd voor [verweerder] c.s. met betrekking tot hun Iraanse nationaliteit. Zij behoren tot de groep van 85 % van de in totaal 19.000 Iraniërs in Nederland die (ook) de Nederlandse nationaliteit bezitten.(28) Door alle Iraanse onderdanen te onderwerpen aan een ontheffingsregeling hebben de verantwoordelijke ministers, namens de Staat, een categoraal onderscheid gemaakt dat geen recht doet aan de feitelijke situatie en in wezen neerkomt op onderscheid naar etniciteit (waarvoor strengere criteria gelden).(29) Voor [verweerder] c.s. is de enkele omstandigheid dat zij een ontheffing moeten verzoeken al discriminerend en stigmatiserend.(30) Dit categorale aspect is door [verweerder] c.s. in feitelijke instanties gesteld en is kennelijk door het hof zo begrepen.(31) Dit klemt temeer daar [verweerder] c.s. over de Nederlandse nationaliteit beschikken en geen reële banden (meer) hebben met Iran, laat staan met het huidige Iraanse regime. Bovendien blijkt het in de praktijk onmogelijk te zijn om afstand te doen van de Iraanse nationaliteit.(32)

2.16 Nu de resolutie wel degelijk voor meerdere uitleg vatbaar is, moet de meest 'mensenrechtenconforme' uitleg worden gekozen, zoals het Europese Hof van de Rechten van de Mens (EHRM) in zijn uitspraak Al-Jedda doet.(33) Het hof heeft in het thans bestreden arrest kennelijk aansluiting willen zoeken bij het EHRM en geoordeeld dat paragraaf 17 van Resolutie 1737 geen verplichting bevat categoraal onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen in een Nederlandse sanctieregeling en daarom van strijd tussen die resolutie en artikel 1 van het Twaalfde Protocol en/of art. 14 van het EVRM geen sprake is.(34) De Sanctieregeling gaat volgens het hof dus verder dan de Veiligheidsraad met Resolutie 1737 heeft bedoeld, zodat aan de vraag of VN-recht van 'hogere' orde is (art. 103 Handvest VN) niet behoeft te worden toegekomen.

2.17 Blijkens zijn schriftelijke toelichting op het middel (nr. 3.2.14 en 3.2.15) lijkt de Staat ten slotte ook nog te miskennen dat het feit dat Veiligheidsraadresoluties dwingend zijn, slechts wil zeggen dat lidstaten niet vrij zijn te bepalen of zij de desbetreffende resolutie wel of niet implementeren.(35) De vraag naar de manoeuvreerruimte van lidstaten wat betreft het invullen en vormgeven van het gekozen implementatiemodel, hangt af van de bewoordingen van de resolutie, bezien in hun context en in het licht van het voorwerp en het doel van de resolutie (vgl. art. 31 WVV).

2.18 Nu naar mijn mening paragraaf 17 van Resolutie 1737 geen verplichting aan de Staat oplegt tot het maken van (categoraal) onderscheid naar nationaliteit in de Sanctieregeling, falen daarmee ook de in de subonderdelen b, c en d van het eerste onderdeel aangevoerde klachten. In subonderdeel e wordt nog betoogd dat het hof met zijn slotsom in rov. 5.4 dat Resolutie 1737 de lidstaten niet verplicht tot het maken van onderscheid naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is, in wezen toch een

toetsing verricht van de resolutie aan het gelijkheidsbeginsel en/of van het in die resolutie neergelegde - en in de Sanctieregeling overgenomen - onderscheid tussen Iraanse en niet-Iraanse onderdanen. Ook deze klacht kan niet tot cassatie leiden. Het hof heeft namelijk niet Resolutie 1737 maar de Nederlandse Sanctieregeling getoetst aan het gelijkheidsbeginsel zoals neergelegd in mensenrechtenverdragen. Zoals ik in nr. 2.13 heb uiteengezet, zag het hof zich bij het bepalen van de manoeuvreerruimte van de Staat genoodzaakt aansluiting te zoeken bij de bewoordingen en de context van Resolutie 1737, bezien in het licht van het voorwerp en het doel van deze resolutie (art. 31 WVV). Het betreft hier een uitleg van Resolutie 1737 en geen toetsing daarvan door de Nederlandse rechter.

2.19 De verwijzing in subonderdeel e naar art. 25 jo. art. 48 jo. art. 103 Handvest VN gaat niet op, nu het hof Resolutie 1737 'mensenrechtenconform' heeft uitgelegd en heeft geoordeeld dat er geen conflict bestaat tussen die resolutie en het internationale discriminatieverbod. Voorts kan niet worden aangenomen dat, zoals het subonderdeel betoogt, het onderscheid naar nationaliteit 'per definitie' noodzakelijk en gerechtvaardigd is op grond van de bindende kracht van de Veiligheidsraadresolutie. Het gaat er nu juist om wat de manoeuvreerruimte van de lidstaten is bij de uitvoering van een dergelijke resolutie. Hierboven heb ik uiteengezet dat de Staat die manoeuvreerruimte met betrekking tot het maken van onderscheid tussen Iraanse en niet-Iraanse onderdanen in de ontheffingsregeling wel degelijk had.

2.20 Het tweede middelonderdeel bestaat uit vier subonderdelen (a t/m d) en is gericht tegen rov. 5.5 van het bestreden arrest. Daarin heeft het hof, kort gezegd, overwogen dat de omstandigheid dat de Sanctieregeling strekt ter uitvoering van een resolutie van de Veiligheidsraad respectievelijk een Gemeenschappelijk Standpunt, niet betekent dat niet kan worden getoetst aan de grondrechten die zijn verankerd in het EVRM en het gemeenschapsrecht(36), waaronder het gelijkheidsbeginsel en het verbod op discriminatie wegens nationaliteit. Het hof heeft hierbij gewezen op het arrest van het HvJEG van 3 september 2008 inzake Kadi en El Barakaat, waarin is beslist dat de gemeenschapswetgever de wettigheid van alle gemeenschapshandelingen, daaronder begrepen de gemeenschapshandelingen die beogen uitvoering te geven aan krachtens hoofdstuk VII van het Handvest VN vastgestelde resoluties van de Veiligheidsraad, in beginsel volledig dient te toetsen aan de grondrechten die behoren tot de algemene beginselen van gemeenschapsrecht. Volgens het hof stond het 'a fortiori' vrij de Sanctieregeling aan deze grondrechten te toetsen.

2.21 Volgens subonderdeel a van dit tweede onderdeel heeft het hof ten onrechte uit het arrest van het HvJ EG van 3 september 2008 'a fortiori' afgeleid dat het ook de nationale rechter vrij staat om een nationale sanctieregeling die uitvoering geeft aan een Veiligheidsraadresolutie te toetsen aan grondrechten zoals vervat in het gemeenschapsrecht.(37) Voor de nationale rechter die een nationale regeling toetst, zou onverkort de regel van art. 103 Handvest VN gelden.

2.22 Het subonderdeel faalt. Het genoemde arrest van het HvJ EG ziet op de toetsing van een Europese verordening en laat onverlet dat de Nederlandse rechter zijn of haar eigen wet- en regelgeving kan toetsen aan fundamentele beginselen in het geval uitvoering wordt gegeven aan een Veiligheidsraadresolutie.(38) Het hof heeft slechts naar het arrest van het HvJEG verwezen als handvat om aan te geven dat het het hof vrij staat de Sanctieregeling te toetsen aan de grondrechten die behoren tot de algemene beginselen van gemeenschapsrecht. Niet de Veiligheidsraadresolutie zelf wordt getoetst, maar de nationale implementatieregels die door de nationale wetgever zijn uitgevaardigd met inachtneming van het door de Resolutie geschapen kader. Zo kunnen op grond van de Sanctiewet 1977 de verantwoordelijke ministers internationaal dwingende Veiligheidsraadresoluties flexibel uitvoeren via materiële wetgeving.(39) Deze wetgeving kan zonder problemen op haar grondwettigheid worden getoetst door de Nederlandse rechter (vgl. art. 120 Gw.).(40) De internationale voorrangsregel van art. 103 Handvest VN is slechts een integraal deel van dat toetsingsproces. De Staat doet het ten onrechte voorkomen of alleen art. 103 beslissend is voor de onderhavige situatie van normconflicten (zie ook nr. 2.5).

2.23 In subonderdeel b van het tweede onderdeel betoogt de Staat dat nu het HvJ EG in zijn arrest inzake Kadi en El Barakaat uitdrukkelijk heeft overwogen dat de gemeenschapsrechter niet de wettigheid kan

controleren van een resolutie van de Veiligheidsraad, de rechter slechts in de grondwettigheid van een maatregel ter uitvoering van een Veiligheidsraadresolutie kan treden als de resolutie de lidstaten van de VN manoeuvreerruimte biedt voor de verschillende mogelijkheden voor de omzetting ervan. Voor zover dit betoog ziet op de keuzevrijheid van de Staat voor het implementatiemodel, faalt het reeds omdat in casu die keuzevrijheid van de Staat niet in geschil is (zie nr. 2.6). Voor zover het betoog refereert aan de manoeuvreerruimte met betrekking tot het in het gekozen implementatiemodel gemaakte onderscheid naar nationaliteit, bouwt het voort op het vorige onderdeel en deelt het in het lot daarvan.

2.24 Ook de subonderdelen c en d bouwen voort op het vorige onderdeel en moeten daarom falen. Subonderdeel c berust op een verkeerde lezing van het bestreden arrest. Het hof heeft wel degelijk onderkend dat het Gemeenschappelijk Standpunt zelfstandige betekenis mist. Het hof heeft in rov. 5.5 uitdrukkelijk overwogen dat de omstandigheid dat de Sanctieregeling strekt ter uitvoering van een resolutie van de Veiligheidsraad respectievelijk van een Gemeenschappelijk Standpunt, niet betekent dat de Sanctieregeling niet kan worden getoetst aan de grondrechten die in het EVRM en het gemeenschapsrecht verankerd zijn. Het gaat derhalve om toetsing van regels die uitvoering geven aan resoluties en Gemeenschappelijke Standpunten. Subonderdeel d faalt, omdat het hof de Sanctieregeling aan het in de Nederlandse rechtsorde verankerde gelijkheidsbeginsel heeft getoetst. Dat het hof in rov. 6.1 uitdrukkelijk aansluiting zoekt bij het EVRM en het IVBPR valt te verklaren uit het feit dat het daarin neergelegde gelijkheidsbeginsel rechtstreeks doorwerkt in de Nederlandse rechtsorde en dus van 'hogere' orde is krachtens art. 93 Grondwet.

2.25 Het derde middelonderdeel keert zich met zeven subonderdelen (a t/m g) tegen rov. 6.1 t/m 6.5 van het bestreden arrest, waarin het hof inhoudelijk heeft getoetst of het onderscheid naar nationaliteit in de Sanctieregeling geoorloofd is.

2.26 Volgens subonderdeel a van het derde onderdeel heeft het hof in rov. 6.4 het doel van het gemaakte onderscheid miskend door te overwegen dat het doel is 'het voorkomen dat Iran haar nucleaire activiteiten verder uitbreidt met behulp van in Nederland opgedane kennis'. Het hof verwijst in dat kader naar nr. 7.11 van de conclusie van antwoord van de Staat in eerste aanleg. Het door het hof omschreven doel is volgens dit subonderdeel rechtens onjuist, nu het er niet om gaat om in algemene zin te voorkomen dat Iran zijn proliferatiegevoelige activiteiten uitbreidt, doch te voorkomen dat Iran dit doet door tussenkomst van zijn onderdanen.

2.27 De klacht faalt. Zelfs als het er niet om gaat in algemene zin te voorkomen dat Iran gevoelige informatie uit Nederland verwerft, betekent dit nog niet dat het maken van een categoraal onderscheid naar nationaliteit geoorloofd is. Met betrekking tot die laatste vraag acht het hof in rov. 6.4 met name van belang de geschiktheid of doelmatigheid van het zonder uitzondering onderwerpen van alle Iraniërs aan een ontheffingsprocedure.

2.28 Dat het in de Sanctieregeling gemaakte (categorale) onderscheid naar nationaliteit niet geschikt of doelmatig is, blijkt uit de uitlatingen van de verantwoordelijke minister naar aanleiding van vragen uit de Tweede Kamer. Zo heeft de minister van Onderwijs, Cultuur en Wetenschap het volgende geantwoord in het kader van een wetgevingsoverleg:

'Diverse leden hebben het punt van de Iraanse studenten aangesneden. De heer Dibi trekt in twijfel of het een goede manier is om het verspreiden van nucleaire kennis te voorkomen. Ik ben het ermee eens dat als je doelstelling het voorkomen is van de verspreiding van nucleaire kennis, je dit niet moet doen. De doelstelling is echter een sanctie, het buitenlandse woord voor straf. Het is een straf die is ingesteld door de Verenigde Naties'.(41)

Voorts heeft de minister benadrukt dat gezocht was naar een zo beperkt mogelijke implementatie van het kennisembargo van Resolutie 1737. De beperkingen kunnen worden gevonden in het beperkte aantal gesanctioneerde opleidingen, alsmede in het feit dat het geen absolute uitsluiting van Iraniërs betreft maar ontheffing mogelijk is wanneer aan bepaalde voorwaarden is voldaan en er geen enkele zorg is dat

de desbetreffende Iraniër kennis doorspeelt aan Iran. De minister heeft in het reeds genoemde wetgevingsoverleg opgemerkt:

'Als een Iraans burger een stage kernfysica wil doen, kan ook worden besloten om eerst onderzoek te doen naar de achtergrond van de betrokkene. Dat kan heel goed iemand zijn die juist gevlucht is voor het regime in Iran of wiens ouders 20 jaar geleden voor dat regime zijn gevlucht en waarbij geen enkele aanleiding tot zorg is. Ook dat wil ik meewegen in het finale oordeel. Daarmee heb ik het nu zo klein gemaakt dat het totale aantal mensen dat geen toegang tot de studie heeft gekregen op basis van deze resolutie nul is. Ik heb nog niet één student op basis daarvan de poort hoeven wijzen. Het is een theoretische kwestie'. (42)

2.29 Deze passage geeft sterk de indruk dat de verantwoordelijke minister ervan is uitgegaan dat Iraanse onderdanen in Nederland geen enkel nadeel ondervinden van de Sanctieregeling omdat het niet een absoluut verbod tot het volgen van de in die regeling neergelegde studies betreft. De minister, evenals de Staat in de onderhavige procedure, miskent daarmee dat een categoraal onderscheid naar nationaliteit wel degelijk nadelige gevolgen kan hebben voor Iraanse onderdanen in Nederland. Dit is zijdens [verweerder] c.s. ook aangevoerd in beide feitelijke instanties.(43) Het standpunt van [verweerder] c.s. heeft het hof kunnen ondersteunen met rechtssociologisch onderzoek waaruit onder andere blijkt, dat Iraniërs worden geweigerd voor studies die niet onder de Sanctieregeling vallen, ontslagen zijn uit een functie in de oliebranche, of de reactor van de TU Delft niet mochten betreden omdat men meent dat de Sanctieregeling nog steeds het verbod tot het betreden van bepaalde plaatsen bevat.(44) Verder voelen Iraniërs zich blijkens genoemd onderzoek in Nederland gestigmatiseerd en is het contact met Nederlandse vrienden en collega's minder geworden waardoor een algeheel gevoel van afstand met Nederland ontstaat. Dit heeft ook invloed op het vinden van werk.(45) Een en ander klemt temeer nu, zoals in nr. 2.15 is vermeld, 85% van de 19.000 Iraniërs in Nederland ook de Nederlandse nationaliteit heeft (vaak ook omdat zij hier geboren zijn) en zij geen afstand van hun Iraanse nationaliteit kunnen doen.

2.30 Ook van de zijde van de onderwijsinstellingen die bij het overleg in het kader van de invoering van de Sanctieregeling betrokken waren, zijn signalen afgegeven dat aan de geschiktheid of doelmatigheid van de Sanctieregeling kan worden getwijfeld.(46) De TU Delft heeft bij proliferatiegevoelige kennis al controle- en veiligheidsmaatregelen, die voor iedereen gelden, ongeacht de nationaliteit.(47) Volgens de KNAW ontstaat er door de stigmatiserende Sanctieregeling reputatieschade aan Nederlands wetenschappelijk onderzoek en daarmee aan Nederland.(48)

2.31 Het hof heeft op grond van het voorgaande mogen vaststellen dat het maken van categoraal onderscheid tussen Iraanse en niet-Iraanse onderdanen in de Sanctieregeling ongeschikt is om te voorkomen dat Iran over proliferatiegevoelige kennis uit Nederland via Iraanse onderdanen komt te beschikken.

2.32 Om dezelfde reden faalt tevens de in dit subonderdeel aangevoerde klacht dat het hof met zijn vaststelling in rov. 6.4 met betrekking tot het doel van de Sanctieregeling is getreden buiten de grenzen van de rechtsstrijd in hoger beroep en/of - indien het heeft gemeend dat de Staat in hoger beroep die vaststelling wel had bestreden - een onbegrijpelijke uitleg heeft gegeven aan de stellingen van de Staat in hoger beroep. De rechtsstrijd is immers van meet af aan gegaan om de geoorloofdheid van het categorale onderscheid.

2.33 De onderdelen b en c bouwen hierop voort en moeten daarom falen. De Staat stelt zich nog op het standpunt dat zij in feitelijke instanties, anders dan het hof in rov. 6.4 heeft overwogen, wel degelijk heeft aangevoerd waarom het in de Sanctieregeling gemaakte onderscheid naar nationaliteit geschikt is voor het daarmee beoogde doel. Het hof heeft de onderliggende stukken van het geding kennelijk aldus uitgelegd dat de Staat zich in feitelijke instanties slechts op het standpunt heeft gesteld dat Resolutie 1737 geen basis biedt voor het invoeren van nationale sancties die in algemene zin beogen te voorkomen dat Iran zijn proliferatiegevoelige activiteiten door middel van in Nederland opgedane kennis uitbreidt (MvG nr. 4.3.3). Slechts in nr. 21 van de pleitnota van mr. E.J. Daalder heeft de Staat aangevoerd dat een

algemene regeling niet praktisch zou zijn. In plaats van dit nader te onderbouwen is de Staat zich blijven beroepen op de vermeende dwingendheid van Resolutie 1737 als argument voor het (categorale) onderscheid naar nationaliteit in de Sanctieregeling.

2.34 Volgens subonderdeel d is het hof in rov. 6.4 klaarblijkelijk en ten onrechte ervan uitgegaan dat (eerst) sprake is van een onderscheid dat geschikt is voor het daarmee beoogde doel wanneer dat doel volledig kan worden bereikt. Het gaat erom dat het onderscheid naar nationaliteit kan bijdragen aan het bereiken van het daarmee beoogde doel, aldus het subonderdeel. Ook deze klacht faalt. Het hof heeft nu juist geoordeeld dat het categorale onderscheid in het geheel niet bijdraagt aan het oogmerk van de Sanctieregeling. Voor zover het onderscheid wel (enigszins) bijdraagt aan het doel van de regeling, wegen de nadelen voor Iraniërs in Nederland daar niet tegen op. Deze door het hof gemaakte belangenafweging komt mij in het licht van het voorgaande niet onjuist of onbegrijpelijk voor.

2.35 Om dezelfde reden faalt de in subonderdeel e aangevoerde primaire rechtsklacht en de subsidiaire motiveringsklacht dat het hof in rov. 6.4 verwijst naar 'de kennelijk aan de Sanctieregeling ten grondslag liggende veronderstelling dat alleen bij personen met een Iraanse nationaliteit het risico bestaat dat zij gevoelige informatie die zij in Nederland hebben verkregen aan Iran zullen doorgeven'. Volgens dit subonderdeel berust de Sanctieregeling onmiskenbaar niet op een dergelijke veronderstelling, maar op het feit dat het 'kennisembargo' tot oogmerk heeft om te voorkomen dat Iran door tussenkomst van zijn onderdanen in het buitenland proliferatiegevoelige kennis verwerft. Het enkele feit dat alleen Iraniërs om ontheffing moeten verzoeken (het categorale), is volgens het hof een verdacht onderscheid. Dit oordeel is in het licht van zijn beslissing van het IGH inzake Nottebohm en het feit dat [verweerder] c.s. de Nederlandse nationaliteit bezitten en geen 'genuine connection' met Iran hebben, niet onjuist of onbegrijpelijk (zie ook nr. 2.14 en 2.15).

2.36 De motiveringsklacht waarmee subonderdeel f is gericht tegen rov. 6.4 mist feitelijke grondslag, omdat deze berust op een verkeerde lezing van het bestreden arrest. Het hof refereert aan het feit dat de Staat niet heeft betwist dat ook anderen dan Iraniërs proliferatiegevoelige kennis kunnen doorspelen aan Iran en reeds deze omstandigheid de Sanctieregeling, althans het daarin gemaakte categorale onderscheid tussen Iraanse en niet-Iraanse onderdanen, ongeschikt maakt. Zoals ik hiervoor heb uiteengezet, laat eventuele dwingendheid van een Veiligheidsraadresolutie (waar het gaat om het maken van onderscheid naar nationaliteit) onverlet dat de nationale rechter de doorwerking van die resolutie beperkt, indien dat onderscheid feitelijk ongeschikt is om het beoogde doel te bereiken. Bovendien hadden rechtbank en hof reeds geoordeeld dat Resolutie 1737 niet dwingt tot het maken van een categoraal onderscheid. Voor het overige bouwt de klacht voort op eerdere onderdelen en moet de klacht het lot daarvan delen. Hetzelfde geldt voor subonderdeel g, waarin een herhaling van standpunt valt te lezen.

2.37 Het vierde onderdeel van het middel richt zich tegen rov. 6.1 t/m 6.5 van het bestreden arrest met het argument dat het in de eerste plaats aan de wetgever is om de vraag te beantwoorden of voor een onderscheid naar nationaliteit in een wettelijke regeling een objectieve en redelijke rechtvaardiging bestaat. Zowel bij de beoordeling óf sprake is van gelijke gevallen, als bij de beoordeling of voor het maken van onderscheid tussen die gevallen een objectieve en redelijke rechtvaardiging bestaat, komt aan de wetgever een zekere beoordelingsvrijheid toe, aldus het middel.(49)

2.38 Ook dit onderdeel kan niet tot cassatie leiden. Wat er ook zij van bovengenoemde beoordelingsvrijheid van de wetgever, vaststaat dat zijdens de Staat onvoldoende is onderbouwd dat het categorale onderscheid tussen Iraanse en niet-Iraanse onderdanen aan het oogmerk van de Sanctieregeling kan bijdragen. Om de grondwettigheid van de Sanctieregeling te kunnen toetsen, diende het hof toch enig inzicht te hebben in de effectiviteit van die regeling. Het enige dat de Staat in dat kader heeft bijgebracht, is de stelling dat een ontheffingsregeling waar geen (categoraal) onderscheid naar nationaliteit wordt gemaakt, praktisch niet handhaafbaar is.(50) Dit maakt het onderscheid echter nog niet geoorloofd. Bij de vraag of het onderscheid naar nationaliteit geoorloofd is, is volgens de hiervoor in nr. 2.2 aangehaalde jurisprudentie de legitimiteit, de doelmatigheid en de proportionaliteit van het onderscheid van belang. Niet valt in te zien hoe de rechter de geschiktheid of doelmatigheid

'terughoudender' had moeten toetsen bij gebreke van nadere argumenten zijdens de Staat.(51) Vaststaat immers dat ook niet-Iraniërs proliferatiekennis kunnen doorspelen aan Iran. De Staat is zich echter voortdurend blijven beroepen op de vermeende dwingendheid van Resolutie 1737.

2.39 Het vijfde onderdeel van het middel is gericht tegen rov. 5.6 van het bestreden arrest. Dit onderdeel behoeft geen behandeling, omdat het voortbouwt op eerdere onderdelen en daarvan een herhaling vormt. Het hof heeft geen blijk gegeven van een onjuist of onbegrijpelijk oordeel door ervan uit te gaan dat het (categorale) onderscheid naar nationaliteit in de Sanctieregeling ongeoorloofd is.

2.40 Het zesde onderdeel van het middel is gericht tegen rov. 6.6 van het bestreden arrest. Volgens de Staat vormt het sanctiekarakter van de Sanctieregeling wel degelijk een omstandigheid waarmee rekening dient te worden gehouden bij de beoordeling of voor het in de Sanctieregeling gemaakte onderscheid een objectieve en redelijke rechtvaardiging bestaat. Het onderdeel valt ook hier in herhaling en verwijst wederom naar het feit dat de Veiligheidsraad met Resolutie 1737 uitdrukkelijk de keuze heeft gemaakt om van lidstaten van de VN maatregelen met betrekking tot Iraanse onderdanen te verlangen. Voorts verwijst het middelonderdeel naar de onderdelen 3c en 3g.

2.41 Het sanctiekarakter kan inderdaad relevant zijn bij de belangenafweging die de rechter dient te maken. Echter, in de onderhavige zaak hebben rechtbank en hof geoordeeld dat het (categorale) onderscheid naar nationaliteit niet geoorloofd is, in het bijzonder omdat het niet geschikt is om het doel van de Sanctieregeling te bereiken. Het hof heeft hier kennelijk de grondrechten van burgers (Iraniërs in Nederland) zwaarder laten wegen dan het sanctiekarakter. Waar het hof spreekt van 'niet relevant', bedoelt het kennelijk 'niet doorslaggevend'. Het oordeel van het hof moet bovendien worden gelezen tegen de achtergrond van zijn oordeel dat Resolutie 1737 het maken van onderscheid tussen Iraniërs en niet-Iraniërs niet dwingend voorschrijft, zodat het sanctiekarakter reeds om die reden minder zwaarwegend is. Het onderdeel faalt derhalve.

2.42 Het zevende onderdeel van het middel behelst een veegklacht en behoeft geen afzonderlijke behandeling.

3. Conclusie

De conclusie strekt tot verwerping van het cassatieberoep.

De Procureur-Generaal bij de

Hoge Raad der Nederlanden

A-G

1 Zie rov. 2.1 t/m 2.6 van het bestreden arrest van het hof 's-Gravenhage van 26 april 2011 en rov. 2.1 t/m 2.6 van het vonnis van de rechtbank 's-Gravenhage van 3 februari 2010.

2 Resolution 1737 (2006), Adopted by the Security Council at its 5612th meeting, on 23 December 2006, VN Doc. S/RES/1737 (2006).

3 PbEU 2007, L 61/49, gewijzigd bij Gemeenschappelijk Standpunt 2007/246/GBVB van de Raad van 23 april 2007, PbEU 2007, L 106/67.

4 Stcrt. 2010, nr. 10982, 13 juli 2010.

5 Stcrt. 2012, nr. 8001, 25 april 2010.

6 Zie rov. 4.1 t/m 4.5 van het thans in cassatie bestreden arrest van 26 april 2011.

7 Dit is ook het standpunt van [verweerder] c.s. Zie nr. 156 van de inleidende dagvaarding van 27 maart 2009.

8 HR 8 oktober 2004, LJN: AP0424, NJ 2005/117, m.nt. GHvV (rov. 3.4.2) en HR 13 juli 2012 , LJN: BW3367, JAR 2012, 209, m.nt. E.L.J. Bruyninckx (rov. 5.6 en 5.7).

9 Zie rov. 4.4. van het vonnis van de rechtbank d.d. 3 februari 2010, met verwijzing naar HR 15 juli 1998, LJN: AC4289, NJ 2000, 168.

10 Zie T&C Grondwet (Fleuren), Art. 94, aant. 1. De Staatscommissie Grondwet 2010 heeft voorgesteld de begrippen 'een ieder verbindend' in art. 94 te vervangen door 'rechtstreeks werkend' (Rapport Staatscommissie Grondwet 2010, p. 131). Zie over de rechtstreekse werking van het gelijkheidsbeginsel in mensenrechtenverdragen o.a. F.M.C. Vlemminx en M.G. Boekhorst, Artikel 94, in: A.K. Koekkoek (red.), de Grondwet, Een systematisch en artikelsgewijs commentaar, 3e druk, 2000, p. 467.

11 In Resolutie 1737 wordt erop gewezen dat de Veiligheidsraad handelt onder art. 41 Handvest VN.

12 Zie ook Tweede Kamer, vergaderjaar 1999-2000, 26 872, MvT, nr. 3, p. 3 (Wijziging van de Sanctiewet 1977 en van de In- en uitvoerwet tot vereenvoudiging van internationale verplichtingen). Dat de Veiligheidsraadresolutie 1737 ondanks de in paragraaf 17 van die resolutie gebezigde woorden 'Calls upon' dwingend is (en dus niet gekwalificeerd moet worden als 'soft law' zoals resoluties van de Algemene Vergadering van de VN), wordt in cassatie niet betwist. Zie ook de schriftelijke toelichting van de Staat, nr. 3.2.4 t/m 3.2.9, met verwijzing naar art. 25, 41 en 103 Handvest VN. Zie voorts R. Higgins, The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?, 21 ICLQ 1972, p. 275.

13 Art. 103 Handvest VN wordt overigens wel begrensd door de fundamentele beginselen van het Handvest zelf. Zie bijv. A. Orakhelashvili, The Acts of the Security Council: Meaning and Standards of Review, in: A. von Bogdandy, R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 11, 2007, p. 149; R. Bernhardt, Article 103, in: Bruno Simma (ed.), The Charter of the United Nations, A Commentary, Vol. II, 2nd Edition (2002), par. 14, p. 1297.

14 Zie Rapport Staatscommissie Grondwet 2010, p. 127.

15Zie J.W.A. Fleuren, Een ieder verbindende bepalingen van verdragen, 2004, nr. 196, p. 238; J.B. Mus, Verdragsconflicten voor de Nederlandse rechter, 1996, p. 87.

16 Rapport Staatscommissie Grondwet 2010, p. 127; HR 30 maart 1991, LJN: AD7494, NJ 1991/249, m.nt. AHJS.

17 De resolutie specificeert ook niet om welke kennis en training het precies gaat. Ook daarvan is de concrete invulling aan de Staten overgelaten.

18 Vicente Garrido Rebolledo, Intangible transfers of technology and visa screening in the European Union, EU Non-Proliferation Consortium (Non-Proliferation Papers), No. 13, March 2012, p. 1-15. Zie ook A.B. Terlouw, Angst en regelgeving. Onderscheid door de overheid op grond van nationaliteit, afkomst en religie, oratie Nijmegen 2009, p. 42-44.

19 Vgl. Garrido Rebolledo, a.w., p. 14, die erop wijst dat in Europees verband slechts wordt opgeroepen tot 'waakzaamheid' in wetenschappelijke kringen. Op basis daarvan hebben universiteiten in bepaalde Europese lidstaten verlof nodig van het Ministerie van Buitenlandse Zaken voor het aangaan van wetenschappelijke en technische samenwerkingsverbanden met derde landen. In het algemeen gaat het echter om door universiteiten op te stellen lijsten van aangeboden proliferatiegevoelige studies en projecten, welke lijsten door consulaire medewerkers kunnen worden gebruikt bij de beslissing over te hanteren visumvoorwaarden.

20 Vgl. Garrido Rebolledo, a.w., p. 8.

21 Zie Terlouw, oratie 2009, p. 39-40. Zie ook Ashley Terlouw, [verweerder] e.a. tegen de Staat of het einde van de Sanctieregeling Iran (annotatie bij het vonnis van de rechtbank 's-Gravenhage van 3 februari 2010), Journaal Vreemdelingenrecht 2010, nr. 1, p. 36.

22 Zie bijv. C. Clary, A.Q. Khan and the limits of the non-proliferation regime, in: Disarmament Forum, 2004, Issue 4, p. 33-42.

23 De uitlegregels van verdragen gelden ook voor besluiten van internationale organisaties, hoewel het WVV daarop strikt genomen geen betrekking heeft. Art. 31 WVV kan echter worden gezien als een regel van internationaal gewoonterecht, zie Orakhelashvili, supra noot 13, p. 153, 157; M.C. Wood, The

Interpretation of Security Council Resolutions, in: Max Planck Yearbook of United Nations Law, 1998, Vol. 2, p. 73-95.

24 Zie bijv. R. Pavoni, Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC, in: Oxford Yearbook of European Law, 2009, p. 632.

25 In nr. 23 van de Pleitnota van mr. Daalder namens de Staat in hoger beroep ontkent de Staat dat de Sanctieregeling een categorale uitsluiting van Iraanse onderdanen tot bepaalde opleidingen behelst. Hier wordt absolute en categorale uitsluiting met elkaar verward. Zoals het hof terecht in rov. 5.4 van het bestreden arrest overweegt, behelst de Sanctieregeling geen absolute uitsluiting van Iraanse onderdanen, nu ontheffing kan worden verleend. Het feit dat iedere Iraanse onderdaan een ontheffing van de Minister nodig heeft om de desbetreffende opleiding te volgen, is echter wel degelijk categoraal.

26 ICJ Reports 1955, p. 4.

27 ICJ Reports 1955, p. 23-24.

28 Aldus de gegevens vermeld in Terlouw, oratie 2009, p. 36 (deze cijfers hebben betrekking op 2008).

29 Zie Terlouw, Journaal Vreemdelingenrecht, 2010, p. 34. Zie in dit verband over stigmatisering en vooroordelen: J.H. Gerards, Rechterlijke toetsing aan het gelijkheidsbeginsel: een rechtsvergelijkend onderzoek naar een algemeen toetsingsmodel, 2002, p. 87-88; A. Cuyvers, Verboden Voor Iraniërs!, AA 2010, p. 775; I.C. van der Vlies, Discriminatie naar nationaliteit, NJB 2010, p. 333.

30 Zie nr. 18 s.t. en nr. 5 schriftelijk dupliek in cassatie zijdens [verweerder] c.s.

31 Zie met name punt 3 van de pleitaantekeningen van mr. Klaas namens [verweerder] c.s. in appel (p. 4-6).

32 Aldus Terlouw, oratie 2009, p. 36-37, alsmede Terlouw, Journaal Vreemdelingenrecht 2010, p. 34. Ook gesteld door [verweerder] c.s. in nr. 7 van de inleidende dagvaarding van 27 maart 2009.

33 Zie EHRM 7 juli 2011, LJN: BU7944, EHRC 2011, 157, m.nt. M. den Heijer. Dat het hof 's-Gravenhage 'mensenrechtenconform' uitlegt, blijkt ook uit zijn verwijzing in rov. 5.6 naar EHRM 16 september 1996, nr. 17371/90 inzake Gaygusuz/Oostenrijk (LJN: AD2600, NJ 1998/738).

34 Zie ook rov. 109 van het EHRM inzake Al-Jedda. De Nederlandse sanctieregeling lijkt dan ook verder te gaan dan met de resolutie is bedoeld, ook waar het gaat om schending van het recht op onderwijs. Zie F. Coomans, Toegang tot onderwijs ook voor Iraanse studenten, NJCM-Bulletin jrg. 33 (2008), nr. 7, p. 958-960. Zie uitvoerig over artikel 14 EVRM: J.H. Gerards, Gelijke behandeling en het EVRM: Artikel 14 EVRM: van krachteloze waarborg naar 'norm met tanden'?, NJCM-Bulletin jrg. 29 (2004), nr. 2, p. 176 e.v.

35 Larissa van den Herik en Nico Schrijver, Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat, 5 Int'l Org. L. Rev. 329 (2008), p. 335.

36 Na de inwerkingtreding van het Verdrag van Lissabon op 1 december 2009 zou eigenlijk in plaats van de term 'gemeenschapsrecht' de term 'Unierecht' moeten worden gebruikt, maar ik sluit mij in deze conclusie aan bij de door het hof (en ook in het middel) gebruikte (oude) terminologie.

37 HvJEG 3 september 2008, gevoegde zaken C-405/05 P en C-415/05 P, Jur. 2008, p. I-06351 (Kadi en El Barakaat), NJ 2009/38, m.nt. M.R. Mok, EHRC 2008, 128, m.nt. N. Lavranos.

38 Zie rov. 281-285 en rov. 326 van het arrest van het HvJEG 3 september 2008.

39 Zie ook Tweede Kamer, vergaderjaar 1999-2000, 26 872, MvT, nr. 3, p. 2-3.

40 Zie bijv. HR 16 mei 1986, LJN: AC9354, NJ 1987/251, m.nt. MS.

41 Zie Tweede Kamer, vergaderjaar 2008-2009, 31 700 VIII, nr. 138, p. 31 (Verslag van een wetgevingsoverleg), alsmede de brief van minister Plasterk aan de Koninklijke Nederlandse Academie van Wetenschappen (KNAW) van 27 januari 2009 (overgelegd door de Staat als Bijlage 6 bij de conclusie van antwoord van 20 mei 2009).

42 Tweede Kamer, vergaderjaar 2008-2009, 31 700 VIII, nr. 138, p. 31.

43 Inleidende dagvaarding nr. 12-23; Akte inhoudende aanvullende producties eerste aanleg; MvA nr. 2.

Zie in cassatie nr. 6 en 7 van de schriftelijk dupliek zijdens [verweerder] c.s.

44 Dit laatste wordt ook ondersteund door een krantenartikel in de NRC van 11 juni 2012 ('Wetenschappers uit Iran zitten klem in Nederland'). In het slot van dit artikel wordt gesteld dat vier jaar geleden het toenmalige kabinet besloot om bepaalde locaties aan te wijzen als verboden gebieden voor Iraniërs, waaronder de testreactor in Delft. Het artikel verzuimt te vermelden dat het locatieverbod reeds enige tijd geleden is ingetrokken.

45 Zie Terlouw, oratie 2009, p. 55-67. Dit rapport is in eerste aanleg door [verweerder] c.s. ingebracht. Zie nr. 2 MvA.

46 Zie bij Terlouw, oratie 2009, p. 48.

47 Zie bijlage 8 van de inleidende dagvaarding van [verweerder] c.s. (brief TU Delft). Terlouw, oratie 2009, p. 49.

48 Zie ook Terlouw, oratie 2009, p. 52, alsmede de brief van 12 januari 2009 van de KNAW aan de minister (www.knaw.nl).

49 Zie nr. 3.3.25 s.t. zijdens de Staat.

50 Zie ook nr. 3.3.27 van de s.t. van de Staat, met verwijzing naar nr. 7 en 21 van de pleitnota van mr. Daalder in hoger beroep.

51 Het hof heeft in het bestreden arrest dan ook slechts de onverbindendverklaring van de Sanctieregeling door de rechtbank bekrachtigd; het heeft in zijn dictum de Sanctieregeling niet aangepast of ingetrokken. Het Nederlandse staatsrecht zou dat laatste ook niet toelaten, zie HR 21 maart 2003, LJN: AE8462, NJ 2003/691, m.nt. TK en HR 1 oktober 2004, LJN: AO8913, NJ 2004/679, m.nt. TK. Zie ook rov. 5.4 van het vonnis van de rechtbank 's-Gravenhage van 28 maart 2012 (LJN: BW3098), hierboven vermeld in nr. 1.16.

Oxford Public International Law

Netherlands v A and ors, Appeal, Decision No LJN: BX8351, ILDC 1959 (NL 2012), 14th December 2012, Supreme Court [HR]

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Citation(s): Decision No LJN: BX8351 (Decision No)
ILDC 1959 (NL 2012) (OUP reference)
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Parties: **Netherlands** (Ministry of Foreign Affairs and Ministry of Education, Culture and Science)
A (Iran [ir]; Netherlands [nl]), B (Iran [ir]; Netherlands [nl]), C (Iran [ir]; Netherlands [nl])

Judges/Arbitrators: FB Bakels; CA Streefkerk; AHT Heisterkamp; MA Loth; MV Polak; JC van Oven

Procedural Stage: Appeal

Previous Procedural Stage(s):
First instance judgment; *A and ors v* ***Netherlands*** *(Ministry of Foreign Affairs and Ministry of Education, Culture and Science)*, LJN: BL1862/334949; **ILDC** 1463 (NL 2010), 3 February 2010
Appeal; ***Netherlands*** *(Ministry of Foreign Affairs and Ministry of Education, Culture and Science) v A and ors*, LJN: BQ4781, 26 April 2011

Subject(s):

Right to non-discrimination — Non-discrimination — Weapons, nuclear — International organizations, acts — UN Security Council — Incorporation — Judicial review — International peace and security

Core Issue(s):

Whether the Netherlands could rely on a United Nations Security Council Resolution to justify an infringement of the right to non-discrimination.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper and Professor Erika de Wet, University of Amsterdam Center for International Law.

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Facts

F1 On 23 December 2006 the United Nations Security Council ('UNSC') adopted Resolution 1737, UN Doc S/Res/1737, UN Security Council, 23 December 2006 which, in Paragraph 17:

> [c]alls upon all States to exercise extra vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.

F2 The **Netherlands** implemented Resolution 1737 on 23 June 2008 by introducing the Amendment to the Sanctions Regulation Iran 2007, DJZ/BR/0588-08, 23 June 2008 (**Netherlands**) ('Amendment I') which amended the Sanctions Regulation Iran 2007, DJZ/BR/0916-07, 17 October 2007 (**Netherlands**) ('Sanctions Regulation Iran 2007').

F3 A, B, and C—who had Iranian nationality in addition to Dutch nationality—brought a case against the **Netherlands** in relation to the implementation of the sanction measures. They were studying or working, respectively, as a student, a PhD candidate, and a professor, within a security-sensitive field of research.

F4 At first instance, the District Court found in *A and ors v* ***Netherlands*** *(Ministry of Foreign Affairs and Ministry of Education, Culture and Science)*, First instance judgment, LJN, BL1862/334949; **ILDC** 1463 (NL 2010), 3 February 2010 that the distinction between Iranian and non-Iranian nationals made in Amendment I was not required by UNSC Resolution 1737. It found the distinction neither appropriate nor proportional. Therefore, it found a violation of the prohibition on discrimination as laid down in Article 26 of the International Covenant on Civil and Political Rights, (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR'). Pursuant to Article 94 of the Constitution, 1815 (**Netherlands**), this self-executing provision of international law prevailed over diverging domestic law.

F5 After judgment at first instance the government made a further amendment to the Sanctions Regulation Iran 2007 by adopting Amendment to the Sanctions Regulation Iran 2007, DJZ/BR/0473-10, 2 July 2010, **Netherlands** ('Amendment II'). This amendment prohibited providing certain specialized teaching or training to Iranian nationals that could contribute to Iran's proliferation-sensitive activities or the development of nuclear weapon delivery systems, without a license from the Ministry of Education, Culture, and Science.

F6 The decision at first instance was confirmed by the Court of Appeal in ***Netherlands*** *(Ministry of Foreign Affairs and Ministry of Education, Culture and Science) v A and ors*, Appeal, LJN: BQ4781, 26 April 2011. Moreover, the Court of Appeal stated that even if Resolution 1737 required states to make a distinction on the basis of nationality, it would not have prevented the Court from reviewing the domestic implementation of such a provision against the fundamental rights laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953 ('European Convention on Human Rights', 'ECHR') and European Community ('EC') law.

F7 The **Netherlands** appealed to the Supreme Court. It argued that Resolution 1737 did make a distinction with regard to nationality. It argued that it needed to follow this distinction in order to be able to observe the obligation stemming from that Resolution. Further, it contended that to the extent that this obligation was in violation of other international obligations, it took precedence over them pursuant to Article 103 of the Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945 ('UN Charter').

F8 In response, A, B, and C argued that the Sanctions Regulation Iran 2007 was in violation of the prohibition of non-discrimination as laid down in Article 1 of the Constitution, Article 1 of the Twelfth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (4

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November 2000) 213 UNTS 222; 312 ETS 177, entered into force 1 April 2005, Article 26 of the ICCPR, and Article 12 of the Treaty Establishing the European Community (25 March 1957) EU Consolidated Treaties, entered into force 1 January 1958 ('EC Treaty'). In addition, A, B, and C contended that the Sanctions Regulation was not appropriate because it went further than what Resolution 1737 and the Council of the European Union Common Position (27 February 2007), 2007/140/CFSP, OJ [2007], L 61/49 ('EU Common Position') required and was unnecessary to achieve the aims—the prevention of Iran's proliferation—sensitive activities—of the Resolution and Common Position.

Held

H1 The UN Charter left it to states to choose how to implement UNSC Resolutions in the national legal order. The implementation needed to be done in accordance with the rules applicable in the national legal order. The obligation to implement a resolution did not alter the fact that the state, when implementing such a resolution, needed to take account of its other international obligations: especially where it concerned the respect for fundamental rights. Therefore, a judge, in principle, needed to fully review the implementation of Resolution 1737 against the fundamental rights forming a part of the general principles of EC law. (paragraph 3.6.2)

H2 It was not sufficient for the state to contend that the Sanctions Regulation Iran 2007 intended to implement UNSC Resolution 1737. Rather, from the European Court of Human Right's ('ECtHR') ruling in *Nada v Switzerland*, Judgment, (2012) EHRR 1691, 12 September 2012 ('*Nada*'), it followed that the **Netherlands** needed to convincingly argue that it did all it could have done to harmonize the international obligations it regarded as irreconcilable. (paragraph 3.6.3)

H3 There were other possibilities to implement Resolution 1737. Belgium and France had opted for a different implementation, which did not make a distinction on the basis of nationality. In Belgium, access to nuclear facilities was made dependent generally on an individual security clearance, and in France, all applications for following a course of study or training were assessed by security coordinators. Also, Council Regulation, 423/2007, Council of the European Union, 19 April 2007, which sought to implement Resolution 1737 in the European Union, and the EU Common Position, did not make a distinction on the basis of nationality. Instead, it only implemented measures concerning the export of technology and technical assistance. In addition, it froze funds and economic resources of specifically designated individuals and entities. Accordingly, Resolution 1737 did not oblige states to make a distinction between Iranian and non-Iranian nationals. (paragraphs 3.7.4–3.7.6)

H4 The **Netherlands** had not convincingly argued that it had done all it could have done to harmonize the diverging international obligations involved—on the one hand, the obligation to carry out Resolution 1737, and on the other, the obligation not to discriminate. It had insufficiently substantiated its argument that the measures adopted in other countries were inadequate or inappropriate for implementation of the Resolution in the **Netherlands**. Moreover, it had not provided a reasonable explanation for why a prohibition on Iranian nationals to undertake specialized training or education would constitute a necessary and proportional measure to prevent Iran's proliferation-sensitive activities and the development of systems for the transfer of nuclear weapons. (paragraph 3.8.2)

Date of Report: 02 May 2013

Reporter(s): Stephan Hollenberg

Analysis

A1 The UNSC requires states to implement its decisions in order for them to become effective. States are under an obligation pursuant to Article 25 of the UN Charter to carry out the decisions of

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the UNSC. In the case of conflict, this obligation prevails, according to Article 103 of the UN Charter, over all of the states' other obligations under any international agreement.

A2 UNSC resolutions are usually too abstract for state organs to carry them out directly in relation to a particular national situation. Therefore, in most states these resolutions are not considered to be self-executing: V Gowlland-Debbas, 'Implementing Sanctions Resolutions in Domestic Law' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions, A Comparative Study* (Martinus Nijhoff Publishers Leiden 2004) 40 . In addition, it is generally acknowledged that UNSC resolutions are not directly applicable in domestic legal orders, since they have been drafted as obligations for states: H Schermers and N Blokker, *International Institutional Law* (5th edn Martinus Nijhoff Publishers Leiden) [1543] . Hence, in order to apply the measures envisaged in a UNSC resolution, the relevant state organs need to adopt implementing legislation—even in most monist states, such as the **Netherlands**.

A3 In the present instance, both the Court of Appeal and the Supreme Court relied on the decision of the European Court of Justice ('ECJ') in *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment, Case C-402/05P and C-415/05P; [2008] ECR I-06351, 3 September 2008 ('*Kadi and Al Barakaat*'), and effectively separated the domestic implementation from the underlying UNSC resolution. They held that the international obligation created by the UNSC could not prevent them from reviewing domestic regulations seeking to implement that international obligation.

A4 The Court of Appeal asserted that even if Resolution 1737 had obliged states to make a distinction on the basis of nationality, it would not have prohibited the Court from reviewing whether the domestic implementation of that resolution was in accordance with the fundamental rights forming part of the general principles of EC law and the human rights laid down in the ECHR.

A5 The Supreme Court was slightly more careful. It stayed closer than the Court of Appeal to the ECJ's wording in *Kadi and Al Barakaat*. It started by considering that domestic authorities, when implementing UNSC resolutions, had to take into account other international obligations. However, it only added that a review of such implementation could be conducted against fundamental rights forming part of the general principles of EC law. Hence, unlike the Court of Appeal, it did not mention the possibility of a review against the human rights laid down in the ECHR.

A6 Further, the Supreme Court confirmed the lower courts' interpretation that Resolution 1737 did not oblige the **Netherlands** to make a distinction between Iranian and non-Iranian nationals. It added thereto that the **Netherlands**, when implementing that resolution, was under an obligation to do everything it could to avoid making such a distinction. It derived this obligation to harmonize diverging international obligations from the ECtHR's ruling in *Nada*. In the present instance, engaging this obligation appeared slightly redundant, since the Supreme Court had already decided that there was no obligation to make a distinction, and the lower courts indeed arrived at the same result without it.

A7 When invoking the obligation to harmonize, the Supreme Court referred to the *Nada* case, but it did not explicitly mention the ECtHR's application in that case of the presumption of compliance, including the possibility of a rebuttal of that presumption. Rather, the Supreme Court seemed to rely on the obligation to harmonize conflicting international obligations as the ECtHR applied earlier in other cases not concerning a decision of the UNSC.

A8 As regards more specifically the relationship between the ECHR and UNSC resolutions, the ECtHR interpreted the obligation to harmonize in *Nada* to mean that there must be a presumption that the UNSC does not intend to create obligations upon states that are in contravention with their obligations under international human rights law. This presumption could be rebutted by the UNSC if it were to use clear and explicit language to that effect. The Supreme Court did not mention this interpretative technique of presumption of compliance and the option of rebuttal, possibly because

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it was not necessary to solve the present case.

A9 Moreover, the Supreme Court, by asking itself whether the **Netherlands** did everything it could have done to avoid making a distinction on the basis of nationality, appears to have blurred the distinction between the obligation to harmonize conflicting international obligations, as an interpretative technique, with the obligation upon states to do everything they can to take into account the particularities of an individual's situation when implementing a UNSC resolution adversely affecting that individual. On the basis of this latter obligation the ECtHR found in *Nada* a violation by Switzerland of the ECHR rights of Mr Nada. This obligation requires certain conduct from states when implementing UNSC resolutions that unmistakably have an adverse effect upon individuals. Hence, it is applicable in instances where a harmonious interpretation did not (fully) liberate the individual concerned from the application of the impugned resolution.

A10 The decision was not subject to appeal.

Date of Analysis: 11 March 2013
Analysis by: Stephan Hollenberg

Instruments cited in the full text of this decision:

International

Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945, Article 103

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Article 14

Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952) ETS 9, entered into force 18 May 1954, Article 2

Treaty Establishing the European Community (25 March 1957) Official Journal C 325 (24 December 2002), entered into force 1 January 1958, Article 12

International Covenant on Civil and Political Rights, (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 26

Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000) 2465 UNTS, ETS 177, entered into force 1 April 2005, Article 1

Resolution 1737, UN Doc S/Res/1737, UN Security Council, 23 December 2006, Paragraph 17

Common Position, 2007/140/CFSP, Council of the European Union, 27 February 2007, Article 6

Council Regulation, 423/2007, Council of the European Union, 19 April 2007

Constitutions

Constitution, 1815 (**Netherlands**), Article 1

Cases cited in the full text of this decision:

European Court of Justice

Kadi and Al Barakaat International Foundation v Council and Commission, Judgment, Case C-402/05P and C-415/05P; [2008] ECR I-06351, 3 September 2008

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European Court of Human Rights

Nada v Switzerland, Judgment, (2012) EHRR 1691, 12 September 2012

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2 . Het geding in cassatie

Tegen het arrest van het hof heeft de Staat beroep in cassatie ingesteld. De cassatiedagvaarding is aan dit arrest gehecht en maakt daarvan deel uit.

[Verweerder] c.s. hebben geconcludeerd tot verwerping van het beroep.

De zaak is voor partijen toegelicht door hun advocaten.

De conclusie van de Advocaat-Generaal P. Vlas strekt tot verwerping van het cassatieberoep.

De advocaten van de Staat hebben bij brief van 5 oktober 2012 op die conclusie gereageerd; de advocaat van [verweerder] c.s. heeft dat eveneens gedaan bij brief van 5 oktober 2012.

3 . Beoordeling van het middel

3.1 Deze zaak gaat over de vraag naar de verbindendheid van de Sanctieregeling die diende ter uitvoering van Resolutie 1737 van de VN Veiligheidsraad ten aanzien van het zogenoemde kennisembargo tegen Iran. In cassatie kan van het volgende worden uitgegaan:

(i) [Verweerder 1] is student bachelor scheikunde aan de Technische Universiteit Delft. [Verweerder 2] is promovendus techniekfilosofie aan diezelfde universiteit. [Verweerder 3] is hoogleraar experimentele kernfysica aan de Rijksuniversiteit Groningen. Zij hebben allen naast de Nederlandse ook de Iraanse nationaliteit.

(ii) Op 23 december 2006 heeft de Veiligheidsraad van de Verenigde Naties Resolutie 1737 aanvaard. Voor zover thans van belang luidt paragraaf 17 van de Resolutie 1737:

> "[The Security Council] Calls upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems."

(iii) Ter uitvoering van Resolutie 1737 heeft de Raad van de Europese Unie op 27 februari 2007 Gemeenschappelijk Standpunt 2007/140/GBVB betreffende beperkende maatregelen tegen Iran(hierna: het Gemeenschappelijk Standpunt) uitgebracht, waarvan art. 6 luidt:

> "De lidstaten nemen overeenkomstig hun nationale wetgeving de nodige maatregelen om te verhinderen dat, op hun grondgebied of door hun onderdanen, gespecialiseerde vorming of opleiding aan Iraanse onderdanen wordt verstrekt, die bijdraagt aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens."

(iv) Op 23 juni 2008 hebben de ministers van Buitenlandse Zaken en van Onderwijs, Cultuur en Wetenschap de Wijziging Sanctieregeling Iran 2007 (hierna: de Sanctieregeling) vastgesteld, waardoor de reeds geldende, op art. 2 lid 2 van de Sanctiewet 1977 gebaseerde, Sanctieregeling Iran 2007 werd aangepast ter uitvoering van paragraaf 17 van Resolutie 1737 en van art. 6 van het Gemeenschappelijk Standpunt. De leden 1 en 2 van het nieuw ingevoegde art. 2a luidden oorspronkelijk:

> "1 . Het is verboden om Iraanse onderdanen toegang te verlenen tot de in de bijlage bij deze regeling genoemde locaties en gegevensbestanden.
>
> 2 . Het is verboden om zonder of in afwijking van een ontheffing van de Minister van

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Onderwijs, Cultuur en Wetenschap gespecialiseerde vorming of opleiding aan Iraanse onderdanen te verstrekken, die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek."

(v) Nadat het vonnis van de rechtbank in deze zaak was gewezen, is de Sanctieregeling Iran 2007 opnieuw gewijzigd, in die zin dat met ingang van 14 juli 2010 de leden 1 en 2 van art. 2a als volgt zijn komen te luiden:

"1 . Het is verboden om gespecialiseerde vorming of opleiding die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens te verstrekken aan Iraanse onderdanen, die niet beschikken over een met het oog op deze verstrekking door de Minister van Onderwijs, Cultuur en Wetenschap verleende ontheffing of in afwijking van deze ontheffing verleende beperkingen. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek.

2 . Een ontheffing wordt geweigerd, indien de Minister van Onderwijs, Cultuur en Wetenschap het risico dat het aanbieden van de bedoelde vorming of opleiding aan de Iraanse onderdaan voor wie de ontheffing is bestemd, zal bijdragen aan proliferatiegevoelige activiteiten van Iran of aan de ontwikkeling van systemen voor de overbrenging van kernwapens in Iran, onaanvaardbaar groot acht."

(vi) De wijzigingen ten opzichte van de vorige versie van de Sanctieregeling komen erop neer dat het toegangsverbod tot bepaalde locaties en gegevensbestanden (hierna: het locatieverbod) is komen te vervallen. Daarnaast is beoogd duidelijker tot uitdrukking te laten komen dat het in lid 2 van de vorige versie vervatte verbod niet is gericht op Iraniërs als groep, maar op bepaalde individuele Iraniërs die een risico op kennisoverdracht aan Iran meebrengen. In verband daarmee is thans opgenomen op welke grond een aangevraagde ontheffing moet worden geweigerd.

(vii) Op 26 april 2012 is de Nederlandse Sanctieregeling Iran 2012 in werking getreden. De in (v) geciteerde regeling is thans ongewijzigd opgenomen in art. 5 van de Sanctieregeling 2012. De Sanctieregeling Iran 2010 is ingevolge art. 6 van de Sanctieregeling Iran 2012 ingetrokken. Deze intrekking heeft echter geen gevolgen voor de onderhavige procedure.

3.2 [Verweerder] c.s. vorderen in dit geding primair dat de Staat wordt bevolen de Sanctieregeling in te trekken, subsidiair dat aan de Staat een bevel wordt gegeven om de uitsluiting van mensen met een Iraans paspoort zoals opgenomen in de Sanctieregeling ongedaan te maken, en meer subsidiair voor recht te verklaren dat de Sanctieregeling jegens hen onrechtmatig is. Zij leggen aan hun vorderingen ten grondslag dat de Sanctieregeling wegens discriminatie op grond van nationaliteit, ras en etniciteit in strijd is met het gelijkheidsbeginsel zoals neergelegd in art. 1 Grondwet, art. 1 Twaalfde Protocol bij het EVRM, art. 26 van het internationaal verdrag inzake burgerlijke en politieke rechten (IVBPR) en art. 12 EG Verdrag (thans art. 18 VWEU). Daarnaast is volgens [verweerder] c.s. sprake van schending van art. 2 Eerste Protocol bij het EVRM in verbinding met art. 14 EVRM (het recht op onderwijs).

3.3 De rechtbank heeft de primaire en de subsidiaire vordering verstaan als een vordering om de Sanctieregeling onverbindend te verklaren en zij heeft die vordering toegewezen. Daartoe heeft zij overwogen dat Resolutie 1737 van de VN (evenals het Gemeenschappelijk Standpunt van de EU) de lidstaten (van de VN respectievelijk de EU) de vrije keuze heeft gelaten op welke wijze zij deze maatregelen uitwerken in hun nationale wetgeving. Daarbij bestaat voor de lidstaten een zekere

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manoeuvreerruimte. Resolutie 1737 verplicht de lidstaten niet een onderscheid naar nationaliteit te maken dat niet noodzakelijk en gerechtvaardigd is. Voorts heeft de rechtbank de Sanctieregeling getoetst aan art. 26 IVBPR en geoordeeld dat het in de regeling gemaakte onderscheid naar nationaliteit weliswaar een legitiem doel dient (namelijk om te voorkomen dat Iran door de tussenkomst van zijn onderdanen in het buitenland kennis verwerft die bijdraagt aan proliferatiegevoelige activiteiten van dat land en aan de ontwikkeling van systemen voor de overbrenging van kernwapens), maar dat het maken van een zo algemeen onderscheid naar nationaliteit noch een passend noch een proportioneel middel is om dat doel te verwezenlijken, zodat voor het gemaakte onderscheid naar nationaliteit geen objectieve en redelijke rechtvaardigingsgrond bestaat. De rechtbank heeft geoordeeld dat de Sanctieregeling in strijd met het in art. 26 IVBPR neergelegde discriminatieverbod is.

3.4 Het hof heeft het vonnis van de rechtbank bekrachtigd. Het heeft voorop gesteld dat de Sanctieregeling na het vonnis van de rechtbank is gewijzigd als hiervoor in 3.1 onder (v) en (vi) omschreven en dat het over die gewijzigde regeling dient te oordelen. Voorts heeft het hof, voor zover in cassatie van belang, als volgt overwogen.

Het Handvest van de Verenigde Naties (hierna: Handvest VN) schrijft niet voor op welke wijze een krachtens hoofdstuk VII van het Handvest vastgestelde resolutie van de Veiligheidsraad moet worden uitgevoerd en laat de leden van de Verenigde Naties in beginsel de vrije keuze tussen de verschillende mogelijkheden voor de omzetting van deze resoluties in hun nationale rechtsorde. De overwegingen en bepalingen van Resolutie 1737 en het Gemeenschappelijk Standpunt laten geen andere conclusie toe dan dat daarmee beoogd is dat Iraanse onderdanen geen onderwijs of vorming mogen genieten voor zover dat ertoe kan leiden dat Iran de beschikking krijgt over kennis die bijdraagt aan proliferatiegevoelige activiteiten van dat land en aan de ontwikkeling van systemen voor de overbrenging van kernwapens. De Sanctieregeling, die hetzelfde doel dient, gaat er (zoals blijkt uit de ontheffingsmogelijkheid) eveneens vanuit dat Resolutie 1737 niet een absoluut verbod op onderwijs aan alle personen van Iraanse nationaliteit inhoudt, maar een verbod om dergelijk onderwijs te geven aan personen van Iraanse nationaliteit waarvan gevreesd moet worden dat zij de in Nederland opgedane kennis doorgeven aan Iran. De rechtbank heeft dan ook terecht overwogen dat Resolutie 1737 niet verplicht tot het maken van onderscheid naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is. Een regeling waarbij — bijvoorbeeld — personen van om het even welke nationaliteit slechts na verkregen ontheffing een door de Sanctieregeling genoemde studie kunnen volgen, zou immers zonder meer beantwoorden aan het oogmerk van de resolutie. (rov. 5.2 – 5.4)

Ook indien Resolutie 1737 wel zou dwingen tot het maken van onderscheid naar nationaliteit, betekent dat niet dat de Sanctieregeling niet kan worden getoetst aan de grondrechten die zijn verankerd in het EVRM en het gemeenschapsrecht. In de uitspraken van 3 september 2008 in de zaken Kadi en El Barakaat (C-402/05 P en C-415/05 P) heeft het HvJEU beslist dat de gemeenschapswetgever de wettigheid van alle gemeenschapshandelingen, daaronder begrepen de gemeenschapshandelingen die beogen uitvoering te geven aan krachtens hoofdstuk VII van het Handvest VN vastgestelde resoluties van de Veiligheidsraad, in beginsel volledig dient te toetsen aan de grondrechten die behoren tot de algemene beginselen van gemeenschapsrecht. A fortiori staat het het hof vrij de Sanctieregeling aan de grondrechten te toetsen. Het hof verwerpt dan ook het oordeel van de rechtbank dat indien Resolutie 1737 de wijze waarop de Staat de Sanctieregeling heeft ingericht dwingend voorschrijft, toetsing van de Sanctieregeling aan de grondrechten niet mogelijk is omdat uit art. 103 van het Handvest van de Verenigde Naties voortvloeit dat resoluties van de Veiligheidsraad van hogere rangorde zijn dan andere verdragsbepalingen. (rov. 5.5)

Het hof merkt op dat alleen zeer gewichtige redenen tot de conclusie kunnen leiden dat een onderscheid dat uitsluitend is gebaseerd op nationaliteit in overeenstemming is met het EVRM (EHRM 16 september 1996, nr. 17371/90 inzake Gaygusuz/Oostenrijk). Het hof onderzoekt

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vervolgens of het door de Sanctieregeling gemaakte onderscheid tussen personen die (ook) de Iraanse nationaliteit bezitten en personen die die nationaliteit niet bezitten, in overeenstemming is met het discriminatieverbod zoals dat is neergelegd in art. 26 IVBPR en art. 1 Twaalfde Protocol bij het EVRM. Het overweegt dat het erom gaat of het door de Staat in de Sanctieregeling gemaakte onderscheid naar nationaliteit geschikt is om het doel dat met het onderscheid wordt nagestreefd te bereiken. Dat doel is door de Staat zelf omschreven als "[het] voorkomen dat Iran haar nucleaire activiteiten verder uitbreidt met behulp van in Nederland opgedane kennis". Dat het in de Sanctieregeling gemaakte onderscheid daartoe geschikt is heeft de Staat niet gesteld, laat staan onderbouwd. Het hof verenigt zich met het oordeel van de rechtbank op dit punt. Het oordeel dat het gemaakte onderscheid ongeschikt is om het doel dat daarmee wordt nagestreefd te bereiken, impliceert tevens dat niet voldaan is aan het proportionaliteitsvereiste. Dat betekent dat het onderscheid zoals dat in de Sanctieregeling, ook na de laatste wijziging, wordt gemaakt tussen personen met een Iraanse en personen met een andere nationaliteit ongeoorloofd is. (rov. 5.6 –6.5)

3.5 Het middel, dat zeven onderdelen behelst, betoogt in de kern dat de Sanctieregeling onderscheid naar nationaliteit maakt tussen Iraanse en niet-Iraanse onderdanen omdat paragraaf 17 van Resolutie 1737 (evenals art. 6 van het Gemeenschappelijk Standpunt) daartoe verplicht. Aangezien Resolutie 1737 zelf onderscheid maakt tussen Iraanse en niet-Iraanse onderdanen, hebben de lidstaten van de Verenigde Naties niet de vrijheid om daarvan af te wijken. Op die grond moet eveneens worden aangenomen dat de nationale rechter niet de vrijheid heeft om de Sanctieregeling te toetsen aan het gelijkheidsbeginsel. Indien en voor zover Resolutie 1737 in strijd is met andere internationale verplichtingen — zoals het gelijkheidsbeginsel — geldt dat ingevolge art. 103 Handvest VN de verplichting om aan de resolutie uitvoering te geven voorrang heeft boven de verplichting het gelijkheidsbeginsel na te leven. Onder deze omstandigheden is de redelijke en objectieve rechtvaardiging voor het in de Sanctieregeling gemaakte onderscheid tussen Iraanse en niet-Iraanse onderdanen gegeven. Dat het doel dat de resolutie beoogt te dienen ook op andere wijze kan worden gerealiseerd, kan niet meebrengen dat het in de Sanctieregeling gemaakte onderscheid als ongeschikt en disproportioneel moet worden beschouwd. Aan de wetgever komt te dien aanzien een zekere beoordelingsvrijheid toe, in verband waarmee een terughoudende toetsing door de rechter geboden is. De wetgever heeft in redelijkheid tot het oordeel kunnen komen dat voor het in de Sanctieregeling gemaakte onderscheid een redelijke en objectieve rechtvaardiging bestaat. Daaraan doet niet af dat in een aantal andere landen andere stelsels zijn uitgewerkt, aldus nog steeds het middel.

Het beoordelingskader

3.6.1 Het middel stelt de vraag aan de orde wat de verhouding is tussen Resolutie 1737 enerzijds en de Sanctieregeling anderzijds, en meer in het bijzonder welke vrijheid de Resolutie de Staat laat bij de uitvoering daarvan en of hij die vrijheid heeft miskend. Bij de beantwoording van die vraag dient het volgende tot uitgangspunt. Ingevolge art. 94 Grondwet vinden binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en besluiten van volkenrechtelijke organisaties. Resolutie 1737 is gebaseerd op Hoofdstuk VII van het Handvest VN en is daarom bindend voor de Leden van de VN. Art. 103 Handvest VN houdt in dat in geval van strijdigheid van de verplichtingen van de Leden van de VN krachtens het Handvest met verplichtingen krachtens andere internationale overeenkomsten, hun verplichtingen krachtens het Handvest voorrang hebben. Binnen dit kader heeft de wetgever de Sanctieregeling uitgevaardigd ter uitvoering van Resolutie 1737 in de Nederlandse rechtsorde. In een geval als het onderhavige dient de rechter te toetsen of de Sanctieregeling verenigbaar is met een ieder verbindende bepalingen van verdragen en besluiten van volkenrechtelijke organisaties, waaronder de genoemde verplichtingen krachtens het handvest VN, alsook de door [verweerder] c.s. ingeroepen internationale verplichtingen.

3.6.2 Indien de Veiligheidsraad een resolutie aanneemt op grond van Hoofdstuk VII van het Handvest VN waarin de Leden worden opgeroepen tot het nemen van maatregelen, is de Staat

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gehouden om daaraan gevolg te geven. Bij de beantwoording van de vraag welke maatregelen dat moeten zijn, dient tot uitgangspunt dat Resolutie 1737 zelf hiervan geen precisering bevat en dat ook het Handvest VN niet een bepaalde wijze van uitvoering van de krachtens Hoofdstuk VII van dit Handvest vastgestelde resoluties van de Veiligheidsraad voorschrijft. Het Handvest VN laat de leden in beginsel de vrije keuze tussen de verschillende mogelijkheden van omzetting in hun nationale rechtsorde. De uitvoering dient te geschieden volgens de in de nationale rechtsorde toepasselijke regels. De verplichting de resolutie uit te voeren laat dan ook onverlet dat de Staat bij die uitvoering acht dient te slaan op zijn andere internationale verplichtingen, met name waar het de eerbiediging van grondrechten betreft. Daarom dient de rechter de uitvoering die de Staat aan Resolutie 1737 heeft gegeven in beginsel volledig te toetsen aan de grondrechten die behoren tot de algemene beginselen van gemeenschapsrecht (vgl. HvJEG 3 september 2008, zaken Kadi en El Bakaraat, C-402/05 P en 415/05 P, LJN BF7850, NJ 2009/38, rov. 285 – 326).

3.6.3 Daarbij dient voorts tot uitgangspunt te worden genomen dat het niet volstaat dat de Sanctieregeling uitvoering geeft aan Resolutie 1737, maar dat aannemelijk dient te zijn dat de Staat alles in het werk heeft gesteld om de door hem als onverenigbaar beschouwde verplichtingen te harmoniseren (vgl. laatstelijk EHRM 12 september 2012, zaak Nada/Zwitserland, nr. 10583/08, LJN BY2785, rov. 163 – 199).

3.6.4 In het licht van deze uitgangspunten dient te worden onderzocht of de Staat de vrijheid had om Resolutie 1737 anders uit te voeren dan in de Sanctieregeling is gebeurd, namelijk op een zodanige wijze dat daarbij geen onderscheid wordt gemaakt tussen Iraanse en niet-Iraanse onderdanen, en of kan worden gezegd dat de Staat alles in het werk heeft gesteld om door hem als onverenigbaar beschouwde verplichtingen zoveel mogelijk te harmoniseren.

Was de Staat verplicht onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen?

3.7.1 De Staat betoogt dat hij verplicht was om in de Sanctieregeling onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen omdat Resolutie 1737 zelf dat onderscheid maakt. De Staat beroept zich op art. 103 Handvest VN, dat inhoudt dat in geval van strijdigheid tussen de verplichtingen van de Leden van de VN krachtens het Handvest met verplichtingen krachtens andere internationale overeenkomsten, hun verplichtingen krachtens het Handvest voorrang hebben.

3.7.2 Wanneer voor de nationale rechter een beroep wordt gedaan op de toepasselijkheid van deze voorrangsregel, zoals hier door de Staat, dient de rechter te onderzoeken of daadwerkelijk sprake is van een zodanige strijdigheid van internationale verplichtingen. Daarbij komt het aan op de uitleg van de desbetreffende verplichtingen, waarbij de rechter ingevolge art. 31 lid 1 Weens Verdragenverdrag een verdrag — waaronder in dit verband mede is te verstaan een besluit van een volkenrechtelijke organisatie — te goeder trouw dient uit te leggen overeenkomstig de gewone betekenis van de termen van het verdrag in hun context en in het licht van het voorwerp en het doel van het verdrag.

3.7.3 Het hof heeft in rov. 5.3 tot uitgangspunt genomen dat het Handvest VN niet voorschrijft op welke wijze een krachtens hoofdstuk VII van het Handvest vastgestelde resolutie van de Veiligheidsraad moet worden uitgevoerd, zodat het de leden in beginsel de vrije keuze laat met betrekking tot de verschillende mogelijkheden voor de omzetting van deze resolutie in hun nationale rechtsorde. Tegen deze achtergrond heeft het hof paragraaf 17 van Resolutie 1737 aldus uitgelegd, dat daarmee beoogd is te voorkomen dat Iraanse onderdanen onderwijs genieten voor zover dat ertoe kan leiden dat Iran de beschikking krijgt over kennis die bijdraagt aan proliferatiegevoelige activiteiten van dat land en aan de ontwikkeling van systemen voor de overbrenging van kernwapens. Het hof heeft vervolgens in rov. 5.4 geoordeeld dat paragraaf 17 van Resolutie 1737 de lidstaten niet verplicht tot het maken van een onderscheid naar nationaliteit, en dat een regeling waarbij — bijvoorbeeld — personen van om het even welke nationaliteit slechts

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na verkregen ontheffing een door de Sanctieregeling genoemde studie kunnen volgen, ook zou beantwoorden aan het oogmerk van de resolutie. De Staat heeft niet zozeer de — overigens juiste — uitleg die het hof aan paragraaf 17 van Resolutie 1737 geeft als zodanig bestreden, maar heeft betoogd dat — anders dan het hof heeft geoordeeld — daaruit volgt dat de wetgever verplicht was om in de Sanctieregeling onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen.

3.7.4 Partijen zijn het erover eens dat de Staat andere mogelijkheden had om Resolutie 1737 uit te voeren. De Staat zelf heeft erop gewezen dat in diverse andere landen Resolutie 1737 anders is uitgevoerd dan in Nederland. Zo is in België de toegang tot nucleaire activiteiten afhankelijk van een individuele veiligheidsmachtiging, en worden in Frankrijk alle aanvragen van buitenlandse studenten om in Frankrijk een studie te mogen volgen door de ambassade getoetst om te bezien of er toestemming wordt gevraagd voor een studie met proliferatiegevoelige onderdelen. Verder zijn op alle universiteiten en technische instellingen in Frankrijk veiligheidscoördinatoren aangesteld die alle aanvragen voor het volgen van een studie of training beoordelen.

Hieruit volgt derhalve dat de Staat Resolutie 1737 ook op zodanige wijze had kunnen uitvoeren dat daarbij geen onderscheid zou worden gemaakt tussen Iraanse en niet-Iraanse onderdanen. Het oordeel van het hof dat een regeling waarbij — bijvoorbeeld — personen van om het even welke nationaliteit slechts na verkregen ontheffing een door de Sanctieregeling genoemde studie kunnen volgen zonder meer zou beantwoorden aan het oogmerk van de resolutie (rov. 5.4), is in dat licht juist.

3.7.5 Dat Resolutie 1737 op zodanige wijze kan worden uitgevoerd dat geen onderscheid wordt gemaakt tussen Iraanse en niet-Iraanse onderdanen, volgt eveneens uit Verordening (EG) Nr. 423/2007 van de Raad van de Europese Unie van 19 april 2007 (Pb L 103/1). Die verordening dient ter uitvoering van Resolutie 1737 en het Gemeenschappelijk Standpunt en behelst beperkende maatregelen ten aanzien van Iran. Zij heeft betrekking op handelingen — zoals de export van technologie of het verlenen van technische bijstand — ten behoeve van natuurlijke personen of rechtspersonen, entiteiten of lichamen in Iran of bestemd voor gebruik in Iran. Voorts worden tegoeden en economische middelen bevroren van op een lijst met name genoemde personen, entiteiten en lichamen. De Verordening geeft aldus uitvoering aan de Resolutie en het Gemeenschappelijk Standpunt zonder daarbij onderscheid te maken tussen personen met en zonder de Iraanse nationaliteit.

3.7.6 Uit het voorgaande volgt dat de stelling van de Staat dat Resolutie 1737 verplicht tot het maken van onderscheid tussen Iraanse en niet-Iraanse onderdanen, onjuist is.

Heeft de Staat alles gedaan om het maken van dat onderscheid te voorkomen?

3.8.1 Ten slotte moet worden beoordeeld of aannemelijk is dat de Staat alles in het werk heeft gesteld om de met elkaar op gespannen voet staande verplichtingen te harmoniseren, in het bijzonder de verplichting om uitvoering te geven aan Resolutie 1737 enerzijds, en het discriminatieverbod anderzijds (zie hiervoor in 3.6.4 slot).

De Staat betoogt in dit verband dat de verschillende wijzen waarop de verplichtingen in andere lidstaten zijn uitgevoerd, niet zonder meer toepasbaar zijn in Nederland. Bij de uitvoering van een resolutie dient immers rekening te worden gehouden met de bijzonderheden van het nationale recht. Zo staat in Nederland de Wet op het hoger onderwijs — en het daarin verankerde recht op onderwijs — in de weg aan een algemene screening van studenten. Voorts wijst de Staat erop dat de in Nederland gekozen aanpak niet noodzakelijk nadeliger is voor personen met de Iraanse nationaliteit dan die welke in andere landen wordt gevolgd. Ten slotte betoogt de Staat dat een algemene regeling praktisch niet handhaafbaar zou zijn (pleitnota in hoger beroep, nr. 20, 21).

3.8.2 Met dit betoog heeft de Staat niet aannemelijk gemaakt dat alles in het werk is gesteld om de

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op hem rustende internationale verplichtingen te harmoniseren. Ook anderszins is dat niet aannemelijk geworden. Zo bestaat onvoldoende inzicht in de beweegredenen van de Nederlandse wetgever om elders genomen maatregelen die niet berusten op een onderscheid tussen Iraanse en niet-Iraanse onderdanen, voor de uitvoering van Resolutie 1737 in Nederland ontoereikend, dan wel niet passend te achten. De Staat heeft voorts niet aannemelijk gemaakt dat en waarom een verbod op gespecialiseerde vorming of opleiding aan personen met de Iraanse nationaliteit, zoals in de Sanctieregeling neergelegd, een noodzakelijke en proportionele maatregel is om proliferatiegevoelige activiteiten van Iran en de ontwikkeling van systemen voor de overbrenging van kernwapens te voorkomen. Daarbij wordt mede in aanmerking genomen dat dit verbod alle in Nederland woonachtige personen met de Iraanse nationaliteit treft.

Onvoldoende duidelijk is geworden waarom in dit verband niet is gekozen voor de mogelijkheid van een algemene screening van studenten die de desbetreffende opleidingen (willen) volgen. Inzicht in de mogelijkheden en de beperkingen daarvan, en met name in de afwegingen die ten grondslag liggen aan de keuze om af te zien van de mogelijkheid daarvoor een wettelijke grondslag in het leven te roepen, en in de kosten die met de handhaving van een dergelijke screening gemoeid zouden zijn, is niet gegeven. Het door de Staat aangevoerde argument dat de gekozen maatregel niet noodzakelijk nadeliger is dan alternatieven, legt zonder toelichting onvoldoende gewicht in de schaal tegenover het onmiskenbaar stigmatiserende effect van een discriminerende maatregel als de onderhavige.

3.9 De slotsom is dat de Staat door Resolutie 1737 niet werd verplicht om in de Sanctieregeling onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen en dat niet aannemelijk is geworden dat de Staat bij de totstandkoming van die regeling alles in het werk heeft gesteld om het maken van dat onderscheid te voorkomen. De klachten van het middel stuiten daarop af.

4 . Beslissing

De Hoge Raad:

verwerpt het beroep;

veroordeelt de Staat in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van[verweerder] c.s. begroot op € 365,34 aan verschotten en € 2.200,— voor salaris.

Dit arrest is gewezen door de vice-president F.B. Bakels en de raadsheren C.A. Streefkerk, A.H.T. Heisterkamp, M.A. Loth en M.V. Polak, en in het openbaar uitgesproken door de raadsheer J.C. van Oven op 14 december 2012.

Conclusie

Zaak 11/03521

Mr P. Vlas

Zitting, 21 september 2012

Conclusie inzake

De Staat der Nederlanden,

eiser tot cassatie,

tegen

1 . [Verweerder 1],

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2 . [Verweerder 2],

3 . [Verweerder 3],

verweerders in cassatie

In deze zaak gaat het om de Nederlandse implementatieregeling van Resolutie 1737 van de VN Veiligheidsraad ten aanzien van het 'kennisembargo' tegen Iran. Het betreft de vraag of de Sanctieregeling Iran 2010 (zoals nadien vervangen door de Sanctieregeling Iran 2012) in strijd is met het beginsel van gelijke behandeling, zoals is verankerd in verschillende verdragen en in art. 1 van de Grondwet.

1 . Feiten en procesverloop

1.1 In cassatie kan van de volgende feiten worden uitgegaan.(1) [Verweerder 1] is student bachelor scheikunde aan de Technische Universiteit Delft. [Verweerder 2] is promovendus techniekfilosofie aan diezelfde universiteit. [Verweerder 3] is hoogleraar experimentele kernfysica aan de Rijksuniversiteit Groningen. Zij hebben allen naast de Nederlandse ook de Iraanse nationaliteit.

1.2 Op 23 december 2006 heeft de Veiligheidsraad van de Verenigde Naties Resolutie 1737 aanvaard.(2) Voor zover thans van belang luidt paragraaf 17 van de Resolutie 1737:

> '[The Security Council] Calls upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems'.

1.3 Ter uitvoering van Resolutie 1737 heeft de Raad van de Europese Unie op 27 februari 2007 Gemeenschappelijk Standpunt 2007/140/GBVB betreffende beperkende maatregelen tegen Iran (hierna: het Gemeenschappelijk Standpunt)(3) uitgebracht, waarvan artikel 6 luidt:

> 'De lidstaten nemen overeenkomstig hun nationale wetgeving de nodige maatregelen om te verhinderen dat, op hun grondgebied of door hun onderdanen, gespecialiseerde vorming of opleiding aan Iraanse onderdanen wordt verstrekt, die bijdraagt aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens'.

1.4 Op 23 juni 2008 hebben de ministers van Buitenlandse Zaken en van Onderwijs, Cultuur en Wetenschap de Wijziging Sanctieregeling 2007 (hierna: de Sanctieregeling of ontheffingsregeling) vastgesteld, waardoor de reeds geldende, op artikel 2 lid 2 van de Sanctiewet 1977 gebaseerde, Sanctieregeling Iran 2007 werd aangepast ter uitvoering van paragraaf 17 van Resolutie 1737 en van artikel 6 van het Gemeenschappelijk Standpunt. De leden 1 en 2 van het nieuw ingevoegde artikel 2a luidden oorspronkelijk:

> '**1** . Het is verboden om Iraanse onderdanen toegang te verlenen tot de in de bijlage bij deze regeling genoemde locaties en gegevensbestanden.
>
> **2** . Het is verboden om zonder of in afwijking van een ontheffing van de Minister van Onderwijs, Cultuur en Wetenschap gespecialiseerde vorming of opleiding aan Iraanse onderdanen te verstrekken, die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek'.

1.5 Nadat het vonnis van de rechtbank in deze zaak was gewezen, is de Sanctieregeling Iran

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2007 opnieuw gewijzigd zodanig dat met ingang van 14 juli 2010 de leden 1 en 2 van artikel 2a als volgt zijn komen te luiden:

> '**1** . Het is verboden om gespecialiseerde vorming of opleiding die kan bijdragen aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens te verstrekken aan Iraanse onderdanen, die niet beschikken over een met het oog op deze verstrekking door de Minister van Onderwijs, Cultuur en Wetenschap verleende ontheffing of in afwijking van deze ontheffing verleende beperkingen. Het verbod, bedoeld in de eerste volzin, strekt zich niet uit tot bacheloropleidingen, bedoeld in de Wet op het hoger onderwijs en wetenschappelijk onderzoek.
>
> **2** . Een ontheffing wordt geweigerd, indien de Minister van Onderwijs, Cultuur en Wetenschap het risico dat het aanbieden van de bedoelde vorming of opleiding aan de Iraanse onderdaan voor wie de ontheffing is bestemd, zal bijdragen aan proliferatiegevoelige activiteiten van Iran of aan de ontwikkeling van systemen voor de overbrenging van kernwapens in Iran, onaanvaardbaar groot acht'.(4)

1.6 De wijzigingen ten opzichte van de vorige versie van de Sanctieregeling komen erop neer dat het toegangsverbod tot bepaalde locaties en gegevensbestanden (hierna: het locatieverbod) is komen te vervallen. Daarnaast is beoogd duidelijker tot uitdrukking te laten komen dat het in lid 2 van de vorige versie vervatte verbod niet is gericht op Iraniërs als groep, maar op bepaalde individuele Iraniërs die een risico op kennisoverdracht aan Iran meebrengen. In verband daarmee is thans opgenomen op welke grond een aangevraagde ontheffing moet worden geweigerd.

1.7 Op 26 april 2012 is de Nederlandse Sanctieregeling Iran 2012 in werking getreden.(5) Het in nr. 1.5 geciteerde kennisembargo is thans ongewijzigd opgenomen in art. 5 van de Sanctieregeling 2012. De Sanctieregeling Iran 2010 is op grond van art. 6 van de Sanctieregeling Iran 2012 ingetrokken. Deze intrekking heeft echter geen gevolgen voor de onderhavige procedure.

1.8 Bij inleidende dagvaarding van 27 maart 2009 hebben verweerders in cassatie (hierna: [verweerder] c.s.) eiser tot cassatie (hierna: de Staat) gedaagd voor de rechtbank te 's-Gravenhage en gevorderd (i) primair dat de Staat wordt opgedragen de Sanctieregeling in te trekken, (ii) subsidiair dat aan de Staat een bevel wordt geven om de uitsluiting van mensen met een Iraans paspoort zoals opgenomen in de Sanctieregeling ongedaan te maken, en (iii) meer subsidiair dat voor recht wordt verklaard dat de Sanctieregeling jegens [verweerder] c.s. onrechtmatig is.

1.9 [Verweerder] c.s. hebben aan hun vordering ten grondslag gelegd dat de Sanctieregeling wegens discriminatie op grond van nationaliteit, ras en etniciteit in strijd is met het gelijkheidsbeginsel zoals neergelegd in art. 1 van de Grondwet, art. 18 van het Verdrag betreffende de Werking van de Europese Unie (VWEU), art. 26 van het Internationaal Verdrag inzake burgerlijke en politieke rechten (IVBPR) en art. 1 van het Twaalfde Protocol bij het EVRM. Daarnaast zou sprake zijn van schending van het gelijkheidsbeginsel van art. 14 EVRM in combinatie met art. 2 van het Eerste Protocol bij het EVRM (recht op onderwijs).

1.10 Volgens [verweerder] c.s. wordt in de Sanctieregeling een categoraal onderscheid gemaakt tussen Iraniërs en niet-Iraniërs, hetgeen niet alleen discriminerend maar ook stigmatiserend is. Dit heeft nadelig effect op hun sociaal-economische ontplooiing als volwaardige Nederlandse burgers van Iraanse afkomst. [Verweerder] c.s. hebben geen ontheffing op grond van de Sanctieregeling aangevraagd. Evenmin is door een onderwijsinstelling een ontheffing voor hen aangevraagd. Van een weigering van de Minister van Onderwijs, Cultuur en Wetenschap een ontheffing te verlenen aan [verweerder] c.s. is dus geen sprake. In feitelijke instanties is echter vastgesteld dat [verweerder] c.s. wel degelijk belang overeenkomstig art. 3:303 BW hebben en daarom ontvankelijk zijn in hun vordering. In cassatie is dit niet meer in geschil.(6)

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1.11 Bij vonnis van 3 februari 2010 (LJN: BL1862) heeft de rechtbank de primaire en de subsidiaire vordering verstaan als een vordering de Sanctieregeling onverbindend te verklaren en in deze zin toegewezen. Zij is van mening dat Resolutie 1737 (evenals het Gemeenschappelijk Standpunt) lidstaten van de VN (en de EU) de vrije keuze laat op welke wijze zij Resolutie 1737 zullen uitvoeren, alsmede dat die resolutie hen niet verplicht een onderscheid te maken naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is (rov. 4.6). Het doel van het maken van onderscheid naar nationaliteit in de Sanctieregeling, te weten het voorkomen dat Iran door tussenkomst van zijn onderdanen in het buitenland proliferatiegevoelige kennis verwerft, acht de rechtbank op zichzelf genomen legitiem (rov. 4.8 en 4.9).(7) Met betrekking tot de vraag of het onderscheid noodzakelijk en gerechtvaardigd is, is de rechtbank van oordeel dat de Sanctieregeling niet geschikt is om haar doel te bereiken, omdat die regeling niet verhindert dat personen met een andere nationaliteit dan de Iraanse proliferatiegevoelige kennis doorspelen aan Iran (rov. 4.10).

1.12 De rechtbank overweegt in het slot van rov. 4.10 dat de Sanctieregeling zélf (dus niet: het daarin gemaakte onderscheid naar nationaliteit) disproportioneel is. De Staat had ook kunnen overgaan tot het nemen van minder ingrijpende alternatieven zoals het aanscherpen van al bestaande beveiligings-en controlemaatregelen door (bijvoorbeeld) strengere individuele screening dan wel het stellen van dezelfde (minder ingrijpende) maatregelen die door andere lidstaten ter uitvoering van Resolutie 1737 en art. 6 van het Gemeenschappelijk Standpunt zijn ingevoerd, zoals het stellen van beperkingen bij het verlenen van visa aan Iraniërs.

1.13 De Staat heeft tegen het vonnis van de rechtbank hoger beroep ingesteld. Bij arrest van 26 april 2011 (LJN: BQ4781) heeft het hof 's-Gravenhage het vonnis van de rechtbank bekrachtigd. Het hof heeft zich aangesloten bij het oordeel van de rechtbank omtrent de noodzaak en de gerechtvaardigdheid van de Sanctieregeling. Wat betreft de vraag naar de proportionaliteit heeft het hof in rov. 6.2 het oordeel van de rechtbank over de proportionaliteit aldus uitgelegd, dat het gaat om de vraag of het in de Sanctieregeling gemaakte onderscheid naar nationaliteit proportioneel is (en dus niet de Sanctieregeling zélf). Volgens het hof is het in de Sanctieregeling gemaakte onderscheid naar nationaliteit ongeschikt om het doel dat daarmee wordt nagestreefd te bereiken, zodat niet aan het proportionaliteitsvereiste is voldaan (rov. 6.4 in fine).

1.14 De Staat heeft (tijdig) cassatieberoep ingesteld tegen het arrest van het hof. Partijen hebben hun standpunten schriftelijk toegelicht, gevolgd door repliek zijdens de Staat en dupliek zijdens [verweerder] c.s.

1.15 Ten overvloede wijs ik nog op het feit dat [verweerder] c.s., alsmede een student lucht- en ruimtevaart aan de TU Delft (een Iraans politiek vluchteling die sinds 1993 in Nederland verblijft), naar aanleiding van het arrest van het hof van 26 april 2011 de Staat bij dagvaarding van 7 juli 2011 opnieuw hebben gedaagd voor de rechtbank te 's-Gravenhage. In die zaak hebben zij gevorderd dat de rechtbank de gewijzigde Sanctieregeling 2010 onverbindend verklaart, aangezien het hof het vonnis van de rechtbank van 3 februari 2010 heeft bekrachtigd en in dat vonnis niet de Sanctieregeling 2010 maar die van 2007 onverbindend werd verklaard. Daarbij heeft de advocaat van eisers er tevens op gewezen dat de Sanctieregeling slechts jegens [verweerder] c.s. onverbindend is verklaard en niet tegen de desbetreffende Iraanse student lucht- en ruimtevaart (in die procedure 'eiser sub 4'). Daarnaast is immateriële schade gevorderd wegens onrechtmatige regelgeving.

1.16 Bij vonnis van 28 maart 2012 (LJN: BW3098) heeft de rechtbank de Staat veroordeeld art. 2a van de Wijziging Sanctieregeling 2007, laatstelijk gewijzigd met ingang van 14 juli 2010, ten opzichte van 'eiser sub 4' buiten toepassing te laten. Voor het overige heeft de rechtbank geoordeeld dat 's hofs bekrachtiging van het vonnis van de rechtbank van 3 februari 2010 in redelijkheid niet anders kan worden verstaan dan dat het hof de Sanctieregeling 2010 jegens [verweerder] c.s. evenzeer discriminatoir heeft bevonden (rov. 5.1). Ook de vordering tot vergoeding van immateriële schade heeft de rechtbank afgewezen.

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2 . Bespreking van het cassatieberoep

2.1 Het door de Staat aangevoerde middel van cassatie bestaat uit zeven onderdelen, waarvan het laatste onderdeel een veegklacht bevat. De meeste onderdelen zijn opgebouwd uit subonderdelen, waarin met rechts- en motiveringsklachten wordt opgekomen tegen rov. 5.2 t/m 7.2 van het bestreden arrest.

2.2 In deze zaak gaat het in het bijzonder om de toetsing van de Sanctieregeling aan art. 1 van het Twaalfde Protocol bij het EVRM en art. 26 IVBPR. Daarbij komt het aan op de vraag of met het in de Sanctieregeling gemaakte onderscheid tussen Iraanse en niet-Iraanse onderdanen een legitiem doel wordt nagestreefd (legitimiteit), of dit onderscheid voor het bereiken van dit doel passend is (doelmatigheid) en of dit onderscheid geboden is (proportionaliteit).(8) Bij die vraag komt de wetgever een zekere beoordelingsruimte toe.(9)

2.3 Alvorens het cassatiemiddel te bespreken, besteed ik enige aandacht aan de onderlinge hiërarchie van met elkaar conflicterende volkenrechtelijke verplichtingen, in het bijzonder toegespitst op de onderhavige Sanctieregeling.

2.4 Volgens art. 94 Grondwet vinden binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en besluiten van volkenrechtelijke organisaties. Deze bepaling heeft betrekking op het toetsingsvraagstuk.(10) Hiervan moet worden onderscheiden de meer algemene verplichting van de Nederlandse rechter, als orgaan van de Staat, zich rekenschap te geven van de verplichtingen die door het volkenrecht aan de Staat worden opgelegd. De onderhavige Sanctieregeling is een implementatie of uitvoering van een op Hoofdstuk VII van het Handvest van de Verenigde Naties gebaseerde(11) en daarom internationaal dwingende resolutie.(12) De Nederlandse rechter dient bij het uitvoeren en uitleggen van een op een resolutie gebaseerde regeling een compromis te vinden tussen eventueel haaks op elkaar staande volkenrechtelijke verplichtingen van de Nederlandse Staat: enerzijds de verplichting een dwingende Veiligheidsraadresolutie na te komen, anderzijds de verplichting te voldoen aan met andere Staten gesloten verdragen op het gebied van mensenrechten, zoals het EVRM en het IVBPR.

2.5 Dit conflict zou kunnen worden opgelost aan de hand van art. 103 van het Handvest van de Verenigde Naties (Handvest VN), waarin is bepaald dat in geval van strijdigheid tussen de verplichtingen van de Leden van de Verenigde Naties krachtens dit Handvest en hun verplichtingen krachtens andere internationale overeenkomsten, de verplichtingen krachtens dit Handvest voorrang hebben. Deze regel is ook als uitgangspunt genomen in art. 30 van het Weens Verdragenverdrag van 23 mei 1969 (WVV). De handhaving van de internationale vrede en veiligheid wordt als hoogste goed gezien, waarvoor andere — daarmee conflicterende — internationale overeenkomsten dienen te wijken.(13) Over het conflict tussen internationale bepalingen met nationale constitutionele regels en beginselen heeft de Staatscommissie Grondwet 2010 het volgende opgemerkt:

> 'In geval van een conflict tussen een internationale bepaling enerzijds en een nationale fundamentele constitutionele norm anderzijds, is er daarom vaak tegelijk sprake van een conflict tussen die internationale bepaling en een andere internationale norm, die een gelijkwaardige inhoud heeft als de nationale constitutionele norm. In geval van een beweerdelijk conflict tussen de verschillende normen van internationale oorsprong tracht de rechter de verschillende bepalingen zo uit te leggen dat zij met elkaar verenigbaar zijn. Indien dit niet mogelijk is en een conflict tussen internationale bepalingen onderling onontkoombaar is, is de Nederlandse rechter bevoegd het conflict op te lossen'.(14)

De rechter zal aan de hand van internationale regels over samenloop moeten bepalen welke regel voorgaat en daarbij toepassing moeten geven aan de internationale voorrangsregel van art. 30 WVV en art. 103 Handvest VN.(15) Daarbij verdient aantekening dat waar het gaat om in

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internationale mensenrechtenverdragen neergelegde constitutionele regels en fundamentele beginselen, zoals in casu het gelijkheidsbeginsel van art. 1 Grondwet, de rechter zal moeten overgaan tot een belangenafweging. In die belangenafweging is de Nederlandse rechtspraktijk erop gericht bijzonder belang te hechten aan de bescherming van de grondrechten van de burger.(16)

2.6 In deze zaak kan als uitgangspunt worden genomen dat Resolutie 1737 het invoeren van een ontheffingsregeling als zodanig expliciet noch impliciet voorschrijft. Hetzelfde geldt voor art. 6 van het Gemeenschappelijk Standpunt. Paragraaf 17 van Resolutie 1737 roept Staten slechts in algemene bewoordingen op om waakzaamheid te betrachten en te voorkomen dat personen met de Iraanse nationaliteit specialistische kennis en training verwerven die kunnen bijdragen aan proliferatiegevoelige activiteiten van Iran.(17) Dit kan op allerlei manieren, bijvoorbeeld ook door middel van het aanscherpen van bestaande veiligheidsmaatregelen ten aanzien van zeer specialistische kennis en gevoelige informatie en/of het stellen van beperkingen bij het verlenen van visa aan personen met de Iraanse nationaliteit. Dit laatste is gangbaar in Europees verband en wordt ook als zodanig door de lidstaten van de EU uitgevoerd.(18)

2.7 In Nederland heeft de materiële wetgever echter gekozen voor een ontheffingsregeling en daarin bovendien expliciet onderscheid gemaakt tussen Iraanse en niet-Iraanse onderdanen. Voor zover bekend, is Nederland het enige land dat paragraaf 17 van Resolutie 1737 en art. 6 van het Gemeenschappelijk Standpunt heeft geïmplementeerd of uitgevoerd door middel van een ontheffingsregeling.(19) Voor deze Nederlandse uitvoering zou men begrip kunnen opbrengen, niet alleen vanuit het verantwoordelijkheidsbesef voor de internationale vrede en veiligheid, maar ook vanuit het besef dat het 'gevaar' immers niet alleen van buitenaf kan komen, maar ook van binnenuit, namelijk van personen die zich reeds in Nederland bevinden. De Europese implementatie of uitvoering is vooralsnog primair gericht op beperkingen bij het verlenen van visa aan personen met de Iraanse nationaliteit, een beleid gericht op het uitsluiten van Iraniërs die van buiten komen.(20)

2.8 In de literatuur is ook geopperd dat het doel van de Sanctieregeling waarschijnlijk is ingegeven door de angst dat proliferatiegevoelige kennis in verkeerde handen valt, waarbij wat Nederland betreft gedacht kan worden aan de zaak van dr. A.Q. Khan, de Pakistaanse atoomgeleerde die in de jaren zeventig van de vorige eeuw in Nederland werkzaam is geweest bij Urenco, een Brits-Duits-Nederlands samenwerkingsverband op het gebied van uraniumverrijking en ultra centrifuge.(21) Dr. Khan speelde cruciale kennis en techniek toe aan Pakistan, en waarschijnlijk ook aan Noord-Korea, Iran, Libië en Syrië.(22)

2.9 Wat hiervan ook verder zij, het moge duidelijk zijn dat de onderhavige Sanctieregeling uiterst gevoelige vragen van politieke aard oproept. Rechtbank en hof zagen zich in het onderhavige geschil genoodzaakt te beoordelen of voor de verwezenlijking van het doel van de Sanctieregeling, namelijk het voorkomen dat personen met de Iraanse nationaliteit specialistische kennis en training verwerven die kunnen bijdragen aan proliferatiegevoelige activiteiten van Iran, noodzakelijk is dat voorwaarden moeten worden gesteld aan de vrije toegang tot onderwijs en promotieonderzoek van alle Iraniërs in Nederland (waardoor een categoraal onderscheid tussen hen en andere bevolkingsgroepen wordt gemaakt).

2.10 Na deze inleidende opmerkingen ga ik over tot de bespreking van het middel.

2.11 Het eerste onderdeel is opgebouwd uit vijf subonderdelen (a t/m e) en is gericht tegen rov. 5.2 t/m 5.4 van het bestreden arrest. Hierin heeft het hof, kort gezegd, overwogen dat het Handvest VN niet voorschrijft op welke wijze een krachtens hoofdstuk VII van het Handvest vastgestelde resolutie van de Veiligheidsraad moet worden uitgevoerd. Volgens het hof laat het Handvest VN de leden van de VN in beginsel de vrije keuze tussen de verschillende mogelijkheden voor de omzetting van deze resoluties in hun nationale rechtsorde. Het hof is van oordeel dat in de opvatting van de materiële wetgever Resolutie 1737 geen absoluut verbod op onderwijs aan alle

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personen van Iraanse nationaliteit inhoudt maar een verbod om dergelijk onderwijs te geven aan personen van Iraanse nationaliteit waarvan gevreesd moet worden dat zij de in Nederland opgedane kennis doorgeven aan Iran. Volgens het hof heeft de rechtbank terecht overwogen dat de resolutie de lidstaten in ieder geval niet verplicht tot het maken van onderscheid naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is.

2.12 Volgens subonderdeel a van het eerste onderdeel heeft het hof miskend dat het doel van de Sanctieregeling is het voorkomen dat Iran zijn nucleaire activiteiten en wapens door tussenkomst van zijn onderdanen ontplooit respectievelijk uitbreidt. Reeds om die reden zou de Staat verplicht zijn om in de ontheffingsregeling onderscheid naar nationaliteit te maken en kan geen toetsing plaatsvinden aan het gelijkheidsbeginsel.

2.13 Het subonderdeel faalt, omdat het hof de verschillende internationale verplichtingen zo heeft uitgelegd dat zij met elkaar verenigbaar zijn (zie ook hetgeen ik hierover heb opgemerkt onder nr. 2.4 en 2.5). Deze uitleg is juist en begrijpelijk. Het hof heeft aansluiting gezocht bij de bewoordingen van de resolutie en heeft deze bezien in hun context en in het licht van het voorwerp en het doel van de resolutie (overeenkomstig de maatstaf van art. 31 WVV).(23) Het middelonderdeel heeft in wezen de manoeuvreerruimte van de Staat op het oog ten aanzien van de inhoud (in casu het maken van onderscheid naar nationaliteit) van het gekozen instrument of model van implementatie (in casu de ontheffingsregeling). Vrijheid van keuze van lidstaten wat betreft het implementatiemodel betekent niet dat lidstaten ook de vrijheid hebben dat model naar believen in te richten.(24) In rov. 5.3 en 5.4 heeft het hof de manoeuvreerruimte geduid door te overwegen dat de Veiligheidsraad met Resolutie 1737 een zeker resultaat wil bereiken, namelijk dat Iran via Iraanse onderdanen niet over proliferatiegevoelige kennis en techniek komt te beschikken waarvan gevreesd moet worden dat zij die toespelen aan Iran. De resolutie beoogt dus niet een categoraal onderscheid door te voeren in de lidstaten van de VN.(25) Een Sanctieregeling die dat onderscheid niet maakt en iedereen, ongeacht nationaliteit, onderwerpt aan een ontheffingsregeling voldoet nog veel meer aan het preventieve oogmerk van de resolutie.

2.14 Overigens meen ik dat de uitleg van het hof tot hetzelfde resultaat leidt wanneer aansluiting wordt gezocht bij de letterlijke bewoordingen van paragraaf 17 van Resolutie 1737. Het is immers nog maar de vraag of de betekenis van de woorden 'Iranian nationals', in de context van het volkenrecht, wel zo eenduidig is als op het eerste gezicht lijkt. In dit verband is van belang de beslissing van het Internationaal Gerechtshof (IGH) van 6 april 1955 inzake Nottebohm (Liechtenstein v. Guatemala), een mijlpaal op het gebied van diplomatieke bescherming en nationaliteit.(26) Daarin is beslist dat Liechtenstein zich jegens Guatemala niet kon beroepen op de diplomatieke bescherming voor Nottebohm, een in 1939 tot Liechtensteiner genaturaliseerde Duitser van geboorte, die sinds 1905 zijn gewone verblijfplaats in Guatemala had. Nottebohm had geen enkele reële band met Liechtenstein, zodat hij werd geacht niet de effectieve Liechtensteinse nationaliteit te bezitten ('no genuine connection').(27)

2.15 Hetzelfde zou kunnen worden gezegd voor [verweerder] c.s. met betrekking tot hun Iraanse nationaliteit. Zij behoren tot de groep van 85 % van de in totaal 19.000 Iraniërs in Nederland die (ook) de Nederlandse nationaliteit bezitten.(28) Door alle Iraanse onderdanen te onderwerpen aan een ontheffingsregeling hebben de verantwoordelijke ministers, namens de Staat, een categoraal onderscheid gemaakt dat geen recht doet aan de feitelijke situatie en in wezen neerkomt op onderscheid naar etniciteit (waarvoor strengere criteria gelden).(29) Voor [verweerder] c.s. is de enkele omstandigheid dat zij een ontheffing moeten verzoeken al discriminerend en stigmatiserend.(30) Dit categorale aspect is door [verweerder] c.s. in feitelijke instanties gesteld en is kennelijk door het hof zo begrepen.(31) Dit klemt temeer daar [verweerder] c.s. over de Nederlandse nationaliteit beschikken en geen reële banden (meer) hebben met Iran, laat staan met het huidige Iraanse regime. Bovendien blijkt het in de praktijk onmogelijk te zijn om afstand te doen van de Iraanse nationaliteit.(32)

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2.16 Nu de resolutie wel degelijk voor meerdere uitleg vatbaar is, moet de meest 'mensenrechtenconforme' uitleg worden gekozen, zoals het Europese Hof van de Rechten van de Mens (EHRM) in zijn uitspraak Al-Jedda doet.(33) Het hof heeft in het thans bestreden arrest kennelijk aansluiting willen zoeken bij het EHRM en geoordeeld dat paragraaf 17 van Resolutie 1737 geen verplichting bevat categoraal onderscheid te maken tussen Iraanse en niet-Iraanse onderdanen in een Nederlandse sanctieregeling en daarom van strijd tussen die resolutie en artikel 1 van het Twaalfde Protocol en/of art. 14 van het EVRM geen sprake is.(34) De Sanctieregeling gaat volgens het hof dus verder dan de Veiligheidsraad met Resolutie 1737 heeft bedoeld, zodat aan de vraag of VN-recht van 'hogere' orde is (art. 103 Handvest VN) niet behoeft te worden toegekomen.

2.17 Blijkens zijn schriftelijke toelichting op het middel (nr. 3.2.14 en 3.2.15) lijkt de Staat ten slotte ook nog te miskennen dat het feit dat Veiligheidsraadresoluties dwingend zijn, slechts wil zeggen dat lidstaten niet vrij zijn te bepalen of zij de desbetreffende resolutie wel of niet implementeren.(35) De vraag naar de manoeuvreerruimte van lidstaten wat betreft het invullen en vormgeven van het gekozen implementatiemodel, hangt af van de bewoordingen van de resolutie, bezien in hun context en in het licht van het voorwerp en het doel van de resolutie (vgl. art. 31 WVV).

2.18 Nu naar mijn mening paragraaf 17 van Resolutie 1737 geen verplichting aan de Staat oplegt tot het maken van (categoraal) onderscheid naar nationaliteit in de Sanctieregeling, falen daarmee ook de in de subonderdelen b, c en d van het eerste onderdeel aangevoerde klachten. In subonderdeel e wordt nog betoogd dat het hof met zijn slotsom in rov. 5.4 dat Resolutie 1737 de lidstaten niet verplicht tot het maken van onderscheid naar nationaliteit dat niet noodzakelijk en gerechtvaardigd is, in wezen toch een toetsing verricht van de resolutie aan het gelijkheidsbeginsel en/of van het in die resolutie neergelegde — en in de Sanctieregeling overgenomen — onderscheid tussen Iraanse en niet-Iraanse onderdanen. Ook deze klacht kan niet tot cassatie leiden. Het hof heeft namelijk niet Resolutie 1737 maar de Nederlandse Sanctieregeling getoetst aan het gelijkheidsbeginsel zoals neergelegd in mensenrechtenverdragen. Zoals ik in nr. 2.13 heb uiteengezet, zag het hof zich bij het bepalen van de manoeuvreerruimte van de Staat genoodzaakt aansluiting te zoeken bij de bewoordingen en de context van Resolutie 1737, bezien in het licht van het voorwerp en het doel van deze resolutie (art. 31 WVV). Het betreft hier een uitleg van Resolutie 1737 en geen toetsing daarvan door de Nederlandse rechter.

2.19 De verwijzing in subonderdeel e naar art. 25 jo. art. 48 jo. art. 103 Handvest VN gaat niet op, nu het hof Resolutie 1737 'mensenrechtenconform' heeft uitgelegd en heeft geoordeeld dat er geen conflict bestaat tussen die resolutie en het internationale discriminatieverbod. Voorts kan niet worden aangenomen dat, zoals het subonderdeel betoogt, het onderscheid naar nationaliteit 'per definitie' noodzakelijk en gerechtvaardigd is op grond van de bindende kracht van de Veiligheidsraadresolutie. Het gaat er nu juist om wat de manoeuvreerruimte van de lidstaten is bij de uitvoering van een dergelijke resolutie. Hierboven heb ik uiteengezet dat de Staat die manoeuvreerruimte met betrekking tot het maken van onderscheid tussen Iraanse en niet-Iraanse onderdanen in de ontheffingsregeling wel degelijk had.

2.20 Het tweede middelonderdeel bestaat uit vier subonderdelen (a t/m d) en is gericht tegen rov. 5.5 van het bestreden arrest. Daarin heeft het hof, kort gezegd, overwogen dat de omstandigheid dat de Sanctieregeling strekt ter uitvoering van een resolutie van de Veiligheidsraad respectievelijk een Gemeenschappelijk Standpunt, niet betekent dat niet kan worden getoetst aan de grondrechten die zijn verankerd in het EVRM en het gemeenschapsrecht(36), waaronder het gelijkheidsbeginsel en het verbod op discriminatie wegens nationaliteit. Het hof heeft hierbij gewezen op het arrest van het HvJEG van 3 september 2008 inzake Kadi en El Barakaat, waarin is beslist dat de gemeenschapswetgever de wettigheid van alle gemeenschapshandelingen, daaronder begrepen de gemeenschapshandelingen die beogen uitvoering te geven aan krachtens hoofdstuk VII van het Handvest VN vastgestelde resoluties van de Veiligheidsraad, in beginsel volledig dient te toetsen aan de grondrechten die behoren tot de algemene beginselen van

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gemeenschapsrecht. Volgens het hof stond het 'a fortiori' vrij de Sanctieregeling aan deze grondrechten te toetsen.

2.21 Volgens subonderdeel a van dit tweede onderdeel heeft het hof ten onrechte uit het arrest van het HvJ EG van 3 september 2008 'a fortiori' afgeleid dat het ook de nationale rechter vrij staat om een nationale sanctieregeling die uitvoering geeft aan een Veiligheidsraadresolutie te toetsen aan grondrechten zoals vervat in het gemeenschapsrecht.(37) Voor de nationale rechter die een nationale regeling toetst, zou onverkort de regel van art. 103 Handvest VN gelden.

2.22 Het subonderdeel faalt. Het genoemde arrest van het HvJ EG ziet op de toetsing van een Europese verordening en laat onverlet dat de Nederlandse rechter zijn of haar eigen wet- en regelgeving kan toetsen aan fundamentele beginselen in het geval uitvoering wordt gegeven aan een Veiligheidsraadresolutie.(38) Het hof heeft slechts naar het arrest van het HvJEG verwezen als handvat om aan te geven dat het het hof vrij staat de Sanctieregeling te toetsen aan de grondrechten die behoren tot de algemene beginselen van gemeenschapsrecht. Niet de Veiligheidsraadresolutie zelf wordt getoetst, maar de nationale implementatieregels die door de nationale wetgever zijn uitgevaardigd met inachtneming van het door de Resolutie geschapen kader. Zo kunnen op grond van de Sanctiewet 1977 de verantwoordelijke ministers internationaal dwingende Veiligheidsraadresoluties flexibel uitvoeren via materiële wetgeving.(39) Deze wetgeving kan zonder problemen op haar grondwettigheid worden getoetst door de Nederlandse rechter (vgl. art. 120 Gw.).(40) De internationale voorrangsregel van art. 103 Handvest VN is slechts een integraal deel van dat toetsingsproces. De Staat doet het ten onrechte voorkomen of alleen art. 103 beslissend is voor de onderhavige situatie van normconflicten (zie ook nr. 2.5).

2.23 In subonderdeel b van het tweede onderdeel betoogt de Staat dat nu het HvJ EG in zijn arrest inzake Kadi en El Barakaat uitdrukkelijk heeft overwogen dat de gemeenschapsrechter niet de wettigheid kan controleren van een resolutie van de Veiligheidsraad, de rechter slechts in de grondwettigheid van een maatregel ter uitvoering van een Veiligheidsraadresolutie kan treden als de resolutie de lidstaten van de VN manoeuvreerruimte biedt voor de verschillende mogelijkheden voor de omzetting ervan. Voor zover dit betoog ziet op de keuzevrijheid van de Staat voor het implementatiemodel, faalt het reeds omdat in casu die keuzevrijheid van de Staat niet in geschil is (zie nr. 2.6). Voor zover het betoog refereert aan de manoeuvreerruimte met betrekking tot het in het gekozen implementatiemodel gemaakte onderscheid naar nationaliteit, bouwt het voort op het vorige onderdeel en deelt het in het lot daarvan.

2.24 Ook de subonderdelen c en d bouwen voort op het vorige onderdeel en moeten daarom falen. Subonderdeel c berust op een verkeerde lezing van het bestreden arrest. Het hof heeft wel degelijk onderkend dat het Gemeenschappelijk Standpunt zelfstandige betekenis mist. Het hof heeft in rov. 5.5 uitdrukkelijk overwogen dat de omstandigheid dat de Sanctieregeling strekt ter uitvoering van een resolutie van de Veiligheidsraad respectievelijk van een Gemeenschappelijk Standpunt, niet betekent dat de Sanctieregeling niet kan worden getoetst aan de grondrechten die in het EVRM en het gemeenschapsrecht verankerd zijn. Het gaat derhalve om toetsing van regels die uitvoering geven aan resoluties en Gemeenschappelijke Standpunten. Subonderdeel d faalt, omdat het hof de Sanctieregeling aan het in de Nederlandse rechtsorde verankerde gelijkheidsbeginsel heeft getoetst. Dat het hof in rov. 6.1 uitdrukkelijk aansluiting zoekt bij het EVRM en het IVBPR valt te verklaren uit het feit dat het daarin neergelegde gelijkheidsbeginsel rechtstreeks doorwerkt in de Nederlandse rechtsorde en dus van 'hogere' orde is krachtens art. 93 Grondwet.

2.25 Het derde middelonderdeel keert zich met zeven subonderdelen (a t/m g) tegen rov. 6.1 t/m 6.5 van het bestreden arrest, waarin het hof inhoudelijk heeft getoetst of het onderscheid naar nationaliteit in de Sanctieregeling geoorloofd is.

2.26 Volgens subonderdeel a van het derde onderdeel heeft het hof in rov. 6.4 het doel van het gemaakte onderscheid miskend door te overwegen dat het doel is 'het voorkomen dat Iran haar nucleaire activiteiten verder uitbreidt met behulp van in Nederland opgedane kennis'. Het hof

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verwijst in dat kader naar nr. 7.11 van de conclusie van antwoord van de Staat in eerste aanleg. Het door het hof omschreven doel is volgens dit subonderdeel rechtens onjuist, nu het er niet om gaat om in algemene zin te voorkomen dat Iran zijn proliferatiegevoelige activiteiten uitbreidt, doch te voorkomen dat Iran dit doet door tussenkomst van zijn onderdanen.

2.27 De klacht faalt. Zelfs als het er niet om gaat in algemene zin te voorkomen dat Iran gevoelige informatie uit Nederland verwerft, betekent dit nog niet dat het maken van een categoraal onderscheid naar nationaliteit geoorloofd is. Met betrekking tot die laatste vraag acht het hof in rov. 6.4 met name van belang de geschiktheid of doelmatigheid van het zonder uitzondering onderwerpen van alle Iraniërs aan een ontheffingsprocedure.

2.28 Dat het in de Sanctieregeling gemaakte (categorale) onderscheid naar nationaliteit niet geschikt of doelmatig is, blijkt uit de uitlatingen van de verantwoordelijke minister naar aanleiding van vragen uit de Tweede Kamer. Zo heeft de minister van Onderwijs, Cultuur en Wetenschap het volgende geantwoord in het kader van een wetgevingsoverleg:

> 'Diverse leden hebben het punt van de Iraanse studenten aangesneden. De heer Dibi trekt in twijfel of het een goede manier is om het verspreiden van nucleaire kennis te voorkomen. Ik ben het ermee eens dat als je doelstelling het voorkomen is van de verspreiding van nucleaire kennis, je dit niet moet doen. De doelstelling is echter een sanctie, het buitenlandse woord voor straf. Het is een straf die is ingesteld door de Verenigde Naties'.(41)

Voorts heeft de minister benadrukt dat gezocht was naar een zo beperkt mogelijke implementatie van het kennisembargo van Resolutie 1737. De beperkingen kunnen worden gevonden in het beperkte aantal gesanctioneerde opleidingen, alsmede in het feit dat het geen absolute uitsluiting van Iraniërs betreft maar ontheffing mogelijk is wanneer aan bepaalde voorwaarden is voldaan en er geen enkele zorg is dat de desbetreffende Iraniër kennis doorspeelt aan Iran. De minister heeft in het reeds genoemde wetgevingsoverleg opgemerkt:

> 'Als een Iraans burger een stage kernfysica wil doen, kan ook worden besloten om eerst onderzoek te doen naar de achtergrond van de betrokkene. Dat kan heel goed iemand zijn die juist gevlucht is voor het regime in Iran of wiens ouders 20 jaar geleden voor dat regime zijn gevlucht en waarbij geen enkele aanleiding tot zorg is. Ook dat wil ik meewegen in het finale oordeel. Daarmee heb ik het nu zo klein gemaakt dat het totale aantal mensen dat geen toegang tot de studie heeft gekregen op basis van deze resolutie nul is. Ik heb nog niet één student op basis daarvan de poort hoeven wijzen. Het is een theoretische kwestie'.(42)

2.29 Deze passage geeft sterk de indruk dat de verantwoordelijke minister ervan is uitgegaan dat Iraanse onderdanen in Nederland geen enkel nadeel ondervinden van de Sanctieregeling omdat het niet een absoluut verbod tot het volgen van de in die regeling neergelegde studies betreft. De minister, evenals de Staat in de onderhavige procedure, miskent daarmee dat een categoraal onderscheid naar nationaliteit wel degelijk nadelige gevolgen kan hebben voor Iraanse onderdanen in Nederland. Dit is zijdens [verweerder] c.s. ook aangevoerd in beide feitelijke instanties.(43) Het standpunt van [verweerder] c.s. heeft het hof kunnen ondersteunen met rechtssociologisch onderzoek waaruit onder andere blijkt, dat Iraniërs worden geweigerd voor studies die niet onder de Sanctieregeling vallen, ontslagen zijn uit een functie in de oliebranche, of de reactor van de TU Delft niet mochten betreden omdat men meent dat de Sanctieregeling nog steeds het verbod tot het betreden van bepaalde plaatsen bevat.(44) Verder voelen Iraniërs zich blijkens genoemd onderzoek in Nederland gestigmatiseerd en is het contact met Nederlandse vrienden en collega's minder geworden waardoor een algeheel gevoel van afstand met Nederland ontstaat. Dit heeft ook invloed op het vinden van werk.(45) Een en ander klemt temeer nu, zoals in nr. 2.15 is vermeld, 85% van de 19.000 Iraniërs in Nederland ook de Nederlandse nationaliteit heeft (vaak ook omdat zij hier geboren zijn) en zij geen afstand van hun Iraanse nationaliteit kunnen doen.

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2.30 Ook van de zijde van de onderwijsinstellingen die bij het overleg in het kader van de invoering van de Sanctieregeling betrokken waren, zijn signalen afgegeven dat aan de geschiktheid of doelmatigheid van de Sanctieregeling kan worden getwijfeld.(46) De TU Delft heeft bij proliferatiegevoelige kennis al controle- en veiligheidsmaatregelen, die voor iedereen gelden, ongeacht de nationaliteit.(47) Volgens de KNAW ontstaat er door de stigmatiserende Sanctieregeling reputatieschade aan Nederlands wetenschappelijk onderzoek en daarmee aan Nederland.(48)

2.31 Het hof heeft op grond van het voorgaande mogen vaststellen dat het maken van categoraal onderscheid tussen Iraanse en niet-Iraanse onderdanen in de Sanctieregeling ongeschikt is om te voorkomen dat Iran over proliferatiegevoelige kennis uit Nederland via Iraanse onderdanen komt te beschikken.

2.32 Om dezelfde reden faalt tevens de in dit subonderdeel aangevoerde klacht dat het hof met zijn vaststelling in rov. 6.4 met betrekking tot het doel van de Sanctieregeling is getreden buiten de grenzen van de rechtsstrijd in hoger beroep en/of — indien het heeft gemeend dat de Staat in hoger beroep die vaststelling wel had bestreden — een onbegrijpelijke uitleg heeft gegeven aan de stellingen van de Staat in hoger beroep. De rechtsstrijd is immers van meet af aan gegaan om de geoorloofdheid van het categorale onderscheid.

2.33 De onderdelen b en c bouwen hierop voort en moeten daarom falen. De Staat stelt zich nog op het standpunt dat zij in feitelijke instanties, anders dan het hof in rov. 6.4 heeft overwogen, wel degelijk heeft aangevoerd waarom het in de Sanctieregeling gemaakte onderscheid naar nationaliteit geschikt is voor het daarmee beoogde doel. Het hof heeft de onderliggende stukken van het geding kennelijk aldus uitgelegd dat de Staat zich in feitelijke instanties slechts op het standpunt heeft gesteld dat Resolutie 1737 geen basis biedt voor het invoeren van nationale sancties die in algemene zin beogen te voorkomen dat Iran zijn proliferatiegevoelige activiteiten door middel van in Nederland opgedane kennis uitbreidt (MvG nr. 4.3.3). Slechts in nr. 21 van de pleitnota van mr. E.J. Daalder heeft de Staat aangevoerd dat een algemene regeling niet praktisch zou zijn. In plaats van dit nader te onderbouwen is de Staat zich blijven beroepen op de vermeende dwingendheid van Resolutie 1737 als argument voor het (categorale) onderscheid naar nationaliteit in de Sanctieregeling.

2.34 Volgens subonderdeel d is het hof in rov. 6.4 klaarblijkelijk en ten onrechte ervan uitgegaan dat (eerst) sprake is van een onderscheid dat geschikt is voor het daarmee beoogde doel wanneer dat doel volledig kan worden bereikt. Het gaat erom dat het onderscheid naar nationaliteit kan bijdragen aan het bereiken van het daarmee beoogde doel, aldus het subonderdeel. Ook deze klacht faalt. Het hof heeft nu juist geoordeeld dat het categorale onderscheid in het geheel niet bijdraagt aan het oogmerk van de Sanctieregeling. Voor zover het onderscheid wel (enigszins) bijdraagt aan het doel van de regeling, wegen de nadelen voor Iraniërs in Nederland daar niet tegen op. Deze door het hof gemaakte belangenafweging komt mij in het licht van het voorgaande niet onjuist of onbegrijpelijk voor.

2.35 Om dezelfde reden faalt de in subonderdeel e aangevoerde primaire rechtsklacht en de subsidiaire motiveringsklacht dat het hof in rov. 6.4 verwijst naar 'de kennelijk aan de Sanctieregeling ten grondslag liggende veronderstelling dat alleen bij personen met een Iraanse nationaliteit het risico bestaat dat zij gevoelige informatie die zij in Nederland hebben verkregen aan Iran zullen doorgeven'. Volgens dit subonderdeel berust de Sanctieregeling onmiskenbaar niet op een dergelijke veronderstelling, maar op het feit dat het 'kennisembargo' tot oogmerk heeft om te voorkomen dat Iran door tussenkomst van zijn onderdanen in het buitenland proliferatiegevoelige kennis verwerft. Het enkele feit dat alleen Iraniërs om ontheffing moeten verzoeken (het categorale), is volgens het hof een verdacht onderscheid. Dit oordeel is in het licht van zijn beslissing van het IGH inzake Nottebohm en het feit dat [verweerder] c.s. de Nederlandse nationaliteit bezitten en geen 'genuine connection' met Iran hebben, niet onjuist of onbegrijpelijk

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(zie ook nr. 2.14 en 2.15).

2.36 De motiveringsklacht waarmee subonderdeel f is gericht tegen rov. 6.4 mist feitelijke grondslag, omdat deze berust op een verkeerde lezing van het bestreden arrest. Het hof refereert aan het feit dat de Staat niet heeft betwist dat ook anderen dan Iraniërs proliferatiegevoelige kennis kunnen doorspelen aan Iran en reeds deze omstandigheid de Sanctieregeling, althans het daarin gemaakte categorale onderscheid tussen Iraanse en niet-Iraanse onderdanen, ongeschikt maakt. Zoals ik hiervoor heb uiteengezet, laat eventuele dwingendheid van een Veiligheidsraadresolutie (waar het gaat om het maken van onderscheid naar nationaliteit) onverlet dat de nationale rechter de doorwerking van die resolutie beperkt, indien dat onderscheid feitelijk ongeschikt is om het beoogde doel te bereiken. Bovendien hadden rechtbank en hof reeds geoordeeld dat Resolutie 1737 niet dwingt tot het maken van een categoraal onderscheid. Voor het overige bouwt de klacht voort op eerdere onderdelen en moet de klacht het lot daarvan delen. Hetzelfde geldt voor subonderdeel g, waarin een herhaling van standpunt valt te lezen.

2.37 Het vierde onderdeel van het middel richt zich tegen rov. 6.1 t/m 6.5 van het bestreden arrest met het argument dat het in de eerste plaats aan de wetgever is om de vraag te beantwoorden of voor een onderscheid naar nationaliteit in een wettelijke regeling een objectieve en redelijke rechtvaardiging bestaat. Zowel bij de beoordeling óf sprake is van gelijke gevallen, als bij de beoordeling of voor het maken van onderscheid tussen die gevallen een objectieve en redelijke rechtvaardiging bestaat, komt aan de wetgever een zekere beoordelingsvrijheid toe, aldus het middel.(49)

2.38 Ook dit onderdeel kan niet tot cassatie leiden. Wat er ook zij van bovengenoemde beoordelingsvrijheid van de wetgever, vaststaat dat zijdens de Staat onvoldoende is onderbouwd dat het categorale onderscheid tussen Iraanse en niet-Iraanse onderdanen aan het oogmerk van de Sanctieregeling kan bijdragen. Om de grondwettigheid van de Sanctieregeling te kunnen toetsen, diende het hof toch enig inzicht te hebben in de effectiviteit van die regeling. Het enige dat de Staat in dat kader heeft bijgebracht, is de stelling dat een ontheffingsregeling waar geen (categoraal) onderscheid naar nationaliteit wordt gemaakt, praktisch niet handhaafbaar is.(50) Dit maakt het onderscheid echter nog niet geoorloofd. Bij de vraag of het onderscheid naar nationaliteit geoorloofd is, is volgens de hiervoor in nr. 2.2 aangehaalde jurisprudentie de legitimiteit, de doelmatigheid en de proportionaliteit van het onderscheid van belang. Niet valt in te zien hoe de rechter de geschiktheid of doelmatigheid 'terughoudender' had moeten toetsen bij gebreke van nadere argumenten zijdens de Staat.(51) Vaststaat immers dat ook niet-Iraniërs proliferatiekennis kunnen doorspelen aan Iran. De Staat is zich echter voortdurend blijven beroepen op de vermeende dwingendheid van Resolutie 1737.

2.39 Het vijfde onderdeel van het middel is gericht tegen rov. 5.6 van het bestreden arrest. Dit onderdeel behoeft geen behandeling, omdat het voortbouwt op eerdere onderdelen en daarvan een herhaling vormt. Het hof heeft geen blijk gegeven van een onjuist of onbegrijpelijk oordeel door ervan uit te gaan dat het (categorale) onderscheid naar nationaliteit in de Sanctieregeling ongeoorloofd is.

2.40 Het zesde onderdeel van het middel is gericht tegen rov. 6.6 van het bestreden arrest. Volgens de Staat vormt het sanctiekarakter van de Sanctieregeling wel degelijk een omstandigheid waarmee rekening dient te worden gehouden bij de beoordeling of voor het in de Sanctieregeling gemaakte onderscheid een objectieve en redelijke rechtvaardiging bestaat. Het onderdeel valt ook hier in herhaling en verwijst wederom naar het feit dat de Veiligheidsraad met Resolutie 1737 uitdrukkelijk de keuze heeft gemaakt om van lidstaten van de VN maatregelen met betrekking tot Iraanse onderdanen te verlangen. Voorts verwijst het middelonderdeel naar de onderdelen 3c en 3g.

2.41 Het sanctiekarakter kan inderdaad relevant zijn bij de belangenafweging die de rechter dient te maken. Echter, in de onderhavige zaak hebben rechtbank en hof geoordeeld dat het

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(categorale) onderscheid naar nationaliteit niet geoorloofd is, in het bijzonder omdat het niet geschikt is om het doel van de Sanctieregeling te bereiken. Het hof heeft hier kennelijk de grondrechten van burgers (Iraniërs in Nederland) zwaarder laten wegen dan het sanctiekarakter. Waar het hof spreekt van 'niet relevant', bedoelt het kennelijk 'niet doorslaggevend'. Het oordeel van het hof moet bovendien worden gelezen tegen de achtergrond van zijn oordeel dat Resolutie 1737 het maken van onderscheid tussen Iraniërs en niet-Iraniërs niet dwingend voorschrijft, zodat het sanctiekarakter reeds om die reden minder zwaarwegend is. Het onderdeel faalt derhalve.

2.42 Het zevende onderdeel van het middel behelst een veegklacht en behoeft geen afzonderlijke behandeling.

3 . Conclusie

De conclusie strekt tot verwerping van het cassatieberoep.

De Procureur-Generaal bij de

Hoge Raad der Nederlanden

A–G

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Footnotes:

1 Zie rov. 2.1 t/m 2.6 van het bestreden arrest van het hof 's-Gravenhage van 26 april 2011 en rov. 2.1 t/m 2.6 van het vonnis van de rechtbank 's-Gravenhage van 3 februari 2010.

2 Resolution 1737 (2006), Adopted by the Security Council at its 5612th meeting, on 23 December 2006, VN Doc. S/RES/1737 (2006).

3 PbEU 2007, L 61/49, gewijzigd bij Gemeenschappelijk Standpunt 2007/246/GBVB van de Raad van 23 april 2007, PbEU 2007, L 106/67.

4 Stcrt. 2010, nr. 10982, 13 juli 2010.

5 Stcrt. 2012, nr. 8001, 25 april 2010.

6 Zie rov. 4.1 t/m 4.5 van het thans in cassatie bestreden arrest van 26 april 2011.

7 Dit is ook het standpunt van [verweerder] c.s. Zie nr. 156 van de inleidende dagvaarding van 27 maart 2009.

8 HR 8 oktober 2004, LJN: AP0424, NJ 2005/117, m.nt. GHvV (rov. 3.4.2) en HR 13 juli 2012 , LJN: BW3367, JAR 2012, 209, m.nt. E.L.J. Bruyninckx (rov. 5.6 en 5.7).

9 Zie rov. 4.4. van het vonnis van de rechtbank d.d. 3 februari 2010, met verwijzing naar HR 15 juli 1998, LJN: AC4289, NJ 2000, 168.

10 Zie T&C Grondwet (Fleuren), Art. 94, aant. 1. De Staatscommissie Grondwet 2010 heeft voorgesteld de begrippen 'een ieder verbindend' in art. 94 te vervangen door 'rechtstreeks werkend' (Rapport Staatscommissie Grondwet 2010, p. 131). Zie over de rechtstreekse werking van het gelijkheidsbeginsel in mensenrechtenverdragen o.a. F.M.C. Vlemminx en M.G. Boekhorst, Artikel 94, in: A.K. Koekkoek (red.), de Grondwet, Een systematisch en artikelsgewijs commentaar, 3e druk, 2000, p. 467.

11 In Resolutie 1737 wordt erop gewezen dat de Veiligheidsraad handelt onder art. 41 Handvest VN.

12 Zie ook Tweede Kamer, vergaderjaar 1999-2000, 26 872, MvT, nr. 3, p. 3 (Wijziging van de Sanctiewet 1977 en van de In- en uitvoerwet tot vereenvoudiging van internationale verplichtingen). Dat de Veiligheidsraadresolutie 1737 ondanks de in paragraaf 17 van die resolutie gebezigde woorden 'Calls upon' dwingend is (en dus niet gekwalificeerd moet worden als 'soft law' zoals resoluties van de Algemene Vergadering van de VN), wordt in cassatie niet betwist. Zie ook de schriftelijke toelichting van de Staat, nr. 3.2.4 t/m 3.2.9, met verwijzing naar art. 25, 41 en 103 Handvest VN. Zie voorts R. Higgins, The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?, 21 ICLQ 1972, p. 275.

13 Art. 103 Handvest VN wordt overigens wel begrensd door de fundamentele beginselen van het Handvest zelf. Zie bijv. A. Orakhelashvili, The Acts of the Security Council: Meaning and Standards of Review, in: A. von Bogdandy, R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 11, 2007, p. 149; R. Bernhardt, Article 103, in: Bruno Simma (ed.), The Charter of the United Nations, A Commentary, Vol. II, 2nd Edition (2002), par. 14, p. 1297.

14 Zie Rapport Staatscommissie Grondwet 2010, p. 127.

15 Zie J.W.A. Fleuren, Een ieder verbindende bepalingen van verdragen, 2004, nr. 196, p. 238; J.B. Mus, Verdragsconflicten voor de Nederlandse rechter, 1996, p. 87.

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16 Rapport Staatscommissie Grondwet 2010, p. 127; HR 30 maart 1991, LJN: AD7494, NJ 1991/249, m.nt. AHJS.

17 De resolutie specificeert ook niet om welke kennis en training het precies gaat. Ook daarvan is de concrete invulling aan de Staten overgelaten.

18 Vicente Garrido Rebolledo, Intangible transfers of technology and visa screening in the European Union, EU Non-Proliferation Consortium (Non-Proliferation Papers), No. 13, March 2012, p. 1–15. Zie ook A.B. Terlouw, Angst en regelgeving. Onderscheid door de overheid op grond van nationaliteit, afkomst en religie, oratie Nijmegen 2009, p. 42–44.

19 Vgl. Garrido Rebolledo, a.w., p. 14, die erop wijst dat in Europees verband slechts wordt opgeroepen tot 'waakzaamheid' in wetenschappelijke kringen. Op basis daarvan hebben universiteiten in bepaalde Europese lidstaten verlof nodig van het Ministerie van Buitenlandse Zaken voor het aangaan van wetenschappelijke en technische samenwerkingsverbanden met derde landen. In het algemeen gaat het echter om door universiteiten op te stellen lijsten van aangeboden proliferatiegevoelige studies en projecten, welke lijsten door consulaire medewerkers kunnen worden gebruikt bij de beslissing over te hanteren visumvoorwaarden.

20 Vgl. Garrido Rebolledo, a.w., p. 8.

21 Zie Terlouw, oratie 2009, p. 39–40. Zie ook Ashley Terlouw, [verweerder] e.a. tegen de Staat of het einde van de Sanctieregeling Iran (annotatie bij het vonnis van de rechtbank 's-Gravenhage van 3 februari 2010), Journaal Vreemdelingenrecht 2010, nr. 1, p. 36.

22 Zie bijv. C. Clary, A.Q. Khan and the limits of the non-proliferation regime, in: Disarmament Forum, 2004, Issue 4, p. 33-42.

23 De uitlegregels van verdragen gelden ook voor besluiten van internationale organisaties, hoewel het WVV daarop strikt genomen geen betrekking heeft. Art. 31 WVV kan echter worden gezien als een regel van internationaal gewoonterecht, zie Orakhelashvili, supra noot 13, p. 153, 157; M.C. Wood, The Interpretation of Security Council Resolutions, in: Max Planck Yearbook of United Nations Law, 1998, Vol. 2, p. 73–95.

24 Zie bijv. R. Pavoni, Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC, in: Oxford Yearbook of European Law, 2009, p. 632.

25 In nr. 23 van de Pleitnota van mr. Daalder namens de Staat in hoger beroep ontkent de Staat dat de Sanctieregeling een categorale uitsluiting van Iraanse onderdanen tot bepaalde opleidingen behelst. Hier wordt absolute en categorale uitsluiting met elkaar verward. Zoals het hof terecht in rov. 5.4 van het bestreden arrest overweegt, behelst de Sanctieregeling geen absolute uitsluiting van Iraanse onderdanen, nu ontheffing kan worden verleend. Het feit dat iedere Iraanse onderdaan een ontheffing van de Minister nodig heeft om de desbetreffende opleiding te volgen, is echter wel degelijk categoraal.

26 ICJ Reports 1955, p. 4.

27 ICJ Reports 1955, p. 23–24.

28 Aldus de gegevens vermeld in Terlouw, oratie 2009, p. 36 (deze cijfers hebben betrekking op 2008).

29 Zie Terlouw, Journaal Vreemdelingenrecht, 2010, p. 34. Zie in dit verband over stigmatisering en vooroordelen: J.H. Gerards, Rechterlijke toetsing aan het gelijkheidsbeginsel: een rechtsvergelijkend onderzoek naar een algemeen toetsingsmodel, 2002, p. 87–88; A. Cuyvers, Verboden Voor Iraniërs!, AA 2010, p. 775; I.C. van der Vlies, Discriminatie naar nationaliteit, NJB

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2010, p. 333.

30 Zie nr. 18 s.t. en nr. 5 schriftelijk dupliek in cassatie zijdens [verweerder] c.s.

31 Zie met name punt 3 van de pleitaantekeningen van mr. Klaas namens [verweerder] c.s. in appel (p. 4–6).

32 Aldus Terlouw, oratie 2009, p. 36-37, alsmede Terlouw, Journaal Vreemdelingenrecht 2010, p. 34. Ook gesteld door [verweerder] c.s. in nr. 7 van de inleidende dagvaarding van 27 maart 2009.

33 Zie EHRM 7 juli 2011, LJN: BU7944, EHRC 2011, 157, m.nt. M. den Heijer. Dat het hof 's-Gravenhage 'mensenrechtenconform' uitlegt, blijkt ook uit zijn verwijzing in rov. 5.6 naar EHRM 16 september 1996, nr. 17371/90 inzake Gaygusuz/Oostenrijk (LJN: AD2600, NJ 1998/738).

34 Zie ook rov. 109 van het EHRM inzake Al-Jedda. De Nederlandse sanctieregeling lijkt dan ook verder te gaan dan met de resolutie is bedoeld, ook waar het gaat om schending van het recht op onderwijs. Zie F. Coomans, Toegang tot onderwijs ook voor Iraanse studenten, NJCM-Bulletin jrg. 33 (2008), nr. 7, p. 958-960. Zie uitvoerig over artikel 14 EVRM: J.H. Gerards, Gelijke behandeling en het EVRM: Artikel 14 EVRM: van krachteloze waarborg naar 'norm met tanden'?, NJCM-Bulletin jrg. 29 (2004), nr. 2, p. 176 e.v.

35 Larissa van den Herik en Nico Schrijver, Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat, 5 Int'l Org. L. Rev. 329 (2008), p. 335.

36 Na de inwerkingtreding van het Verdrag van Lissabon op 1 december 2009 zou eigenlijk in plaats van de term 'gemeenschapsrecht' de term 'Unierecht' moeten worden gebruikt, maar ik sluit mij in deze conclusie aan bij de door het hof (en ook in het middel) gebruikte (oude) terminologie.

37 HvJEG 3 september 2008, gevoegde zaken C-405/05 P en C-415/05 P, Jur. 2008, p. I-06351 (Kadi en El Barakaat), NJ 2009/38, m.nt. M.R. Mok, EHRC 2008, 128, m.nt. N. Lavranos.

38 Zie rov. 281–285 en rov. 326 van het arrest van het HvJEG 3 september 2008.

39 Zie ook Tweede Kamer, vergaderjaar 1999–2000, 26 872, MvT, nr. 3, p. 2–3.

40 Zie bijv. HR 16 mei 1986, LJN: AC9354, NJ 1987/251, m.nt. MS.

41 Zie Tweede Kamer, vergaderjaar 2008–2009, 31 700 VIII, nr. 138, p. 31 (Verslag van een wetgevingsoverleg), alsmede de brief van minister Plasterk aan de Koninklijke Nederlandse Academie van Wetenschappen (KNAW) van 27 januari 2009 (overgelegd door de Staat als Bijlage 6 bij de conclusie van antwoord van 20 mei 2009).

42 Tweede Kamer, vergaderjaar 2008–2009, 31 700 VIII, nr. 138, p. 31.

43 Inleidende dagvaarding nr. 12–23; Akte inhoudende aanvullende producties eerste aanleg; MvA nr. 2. Zie in cassatie nr. 6 en 7 van de schriftelijk dupliek zijdens [verweerder] c.s.

44 Dit laatste wordt ook ondersteund door een krantenartikel in de NRC van 11 juni 2012 ('Wetenschappers uit Iran zitten klem in Nederland'). In het slot van dit artikel wordt gesteld dat vier jaar geleden het toenmalige kabinet besloot om bepaalde locaties aan te wijzen als verboden gebieden voor Iraniërs, waaronder de testreactor in Delft. Het artikel verzuimt te vermelden dat het locatieverbod reeds enige tijd geleden is ingetrokken.

45 Zie Terlouw, oratie 2009, p. 55–67. Dit rapport is in eerste aanleg door [verweerder] c.s. ingebracht. Zie nr. 2 MvA.

46 Zie bij Terlouw, oratie 2009, p. 48.

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47 Zie bijlage 8 van de inleidende dagvaarding van [verweerder] c.s. (brief TU Delft). Terlouw, oratie 2009, p. 49.

48 Zie ook Terlouw, oratie 2009, p. 52, alsmede de brief van 12 januari 2009 van de KNAW aan de minister (http://www.knaw.nl).

49 Zie nr. 3.3.25 s.t. zijdens de Staat.

50 Zie ook nr. 3.3.27 van de s.t. van de Staat, met verwijzing naar nr. 7 en 21 van de pleitnota van mr. Daalder in hoger beroep.

51 Het hof heeft in het bestreden arrest dan ook slechts de onverbindendverklaring van de Sanctieregeling door de rechtbank bekrachtigd; het heeft in zijn dictum de Sanctieregeling niet aangepast of ingetrokken. Het Nederlandse staatsrecht zou dat laatste ook niet toelaten, zie HR 21 maart 2003, LJN: AE8462, NJ 2003/691, m.nt. TK en HR 1 oktober 2004, LJN: AO8913, NJ 2004/679, m.nt. TK. Zie ook rov. 5.4 van het vonnis van de rechtbank 's-Gravenhage van 28 maart 2012 (LJN: BW3098), hierboven vermeld in nr. 1.16.

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Pluris Wolters Kluwer Italia

Cassazione Civile

Cass. civ. Sez. Unite, 28-10-2005, n. 20995

Fatto **Diritto** **P.Q.M.**

COMPETENZA E GIURISDIZIONE CIV.
Giurisdizione
italiana verso lo straniero

LAVORO E PREVIDENZA (CONTROV.)
Competenza
in genere

REPUBBLICA ITALIANA

IN NOME DEL POPOLO ITALIANO

LA CORTE SUPREMA DI CASSAZIONE

SEZIONI UNITE CIVILI

Composta dagli Ill.mi Sigg.ri Magistrati:

Dott. CARBONE Vincenzo - Presidente aggiunto

Dott. PRESTIPINO Giovanni - Presidente di sezione

Dott. SENESE Salvatore - Presidente di sezione

Dott. PAOLINI Giovanni - Consigliere

Dott. ELEFANTE Antonino - Consigliere

Dott. LUCCIOLI Maria Gabriella - Consigliere

Dott. LO PIANO Michele - Consigliere

Dott. EVANGELISTA Stefanomaria - Consigliere

Dott. PICONE Pasquale - rel. Consigliere

ha pronunciato la seguente:

sentenza

sul ricorso proposto da:

PISTELLI Paola, elettivamente domiciliata in Roma, Via Ezio, n. 19 -

studio legale Alliegro - presso l'avv. Pier Francesco Lotito, che, unitamente all'avv. ARAGIUSTO Massimo, la difende con procura speciale apposta in calce al ricorso;

- ricorrente -

contro

ISTITUTO UNIVERSITARIO EUROPEO - I.U.E.-, in persona del presidente in carica, elettivamente domiciliato in Roma, Via XXIV Maggio, n. 43, presso l'avv. GIARDINA Andrea, che, unitamente all'avv.

Paolo Fanfani, lo difende con procura speciale apposta a margine del controricorso;

- resistente -

per la cassazione della sentenza della Corte di appello di Firenze n. 449 in data 4 luglio 2002 (reg. gen. 461/2001);

sentiti, nella pubblica udienza del 23/06/2005: il cons. Dr. Pasquale Picone che ha svolto la relazione della causa;

gli avv. Giardina e Fanfani;

il Pubblico ministero nella persona del sostituto procuratore generale Dr. PALMIERI Raffaele, che ha concluso per il rigetto del ricorso e la dichiarazione del difetto di giurisdizione del giudice italiano.

Svolgimento del processo

1. La Corte di appello di Firenze, con la sentenza sopra specificata, ha rigettato l'impugnazione di Paola Pistelli contro la sentenza del Tribunale della stessa sede (n. 258 del 20 novembre 2000), con la quale era stato dichiarato il difetto di giurisdizione del giudice italiano sulla controversia promossa nei confronti dell'Istituto Universitario Europeo - I.U.E.- per la tutela di diritti derivanti dal rapporto di lavoro di addetta all'amministrazione dell'Ente (accertamento della natura subordinata del rapporto, qualificato come autonomo dal 03/10/1994 al 31/10/1994; dell'illegittimità della trasformazione a tempo parziale dall'01/04/1995; dell'invalida apposizione di termini di durata ai contratti, con conseguente illegittimità della cessazione delle prestazioni disposta dal 06/02/1998; della corrispondenza delle mansioni alla qualifica BIV dall'08/01/1996).

2. La Corte di Firenze ha dichiarato di non condividere le argomentazioni che sostengono la decisione assunta dalla Corte di cassazione, a sezioni unite, con la sentenza 18 marzo 1999, n. 149, dichiarativa della giurisdizione del giudice nazionale in relazione a controversia di lavoro promossa da dipendente dello stesso Istituto.

Secondo il giudizio della Corte territoriale, l'immunità dalla giurisdizione italiana dell'I.U.E. sussisterebbe perchè: la norma consuetudinaria par in parem non habet iurisdictio trova applicazione anche per le organizzazioni internazionali, secondo numerose decisioni delle stesse Sezioni unite della Corte di Cassazione, e, nella specie, veniva in considerazione un rapporto di lavoro costituito nell'ambito delle finalità istituzionali dell'I.U.E. e si domandavano statuizioni incidenti sull'organizzazione dell'ente; la Convenzione istitutiva dell'Istituto e l'allegato protocollo, nonchè il successivo accordo di sede, attribuivano l'immunità dalla giurisdizione dello Stato ospitante, contemplando i privilegi e le immunità necessarie alla missione, attribuendo allo Statuto il potere di definire la disciplina del personale e di prevedere una Commissione dei ricorsi quale unico organo deputato a dirimere le controversie di impiego, con adeguate garanzie di indipendenza;

risultava, soprattutto, sancita l'immunità dalle esecuzioni e l'immunità dalla giurisdizione del Paese ospitante, in generale, degli organi e dei dipendenti disciplinati dallo Statuto (categoria nella quale era compresa la Pistelli).

3. La cassazione della sentenza è domandata da Paola Pistelli con ricorso per tre motivi; resiste con controricorso l'Istituto Universitario Europeo. Sono state depositate dalle due parti memorie ai sensi dell'art. 378 cod. proc. civ..

Motivi della decisione

1. Il ricorso è articolato in tre motivi: con il primo si denuncia che erroneamente è stato dichiarato il difetto di giurisdizione del giudice italiano nell'assunto che fosse garantita all'I.U.E. immunità dalla giurisdizione; con il secondo si deduce che, alla stregua delle mansioni espletate, le domande proposte in giudizio esulavano comunque dall'area della c.d. "immunità ristretta" garantita agli Stati esteri ed enti internazionali, siccome non incidenti sui poteri d'imperio; con il terzo si afferma che non era

garantita la fruizione di istituti di tutela adeguati, alternativi alla giurisdizione dello Stato italiano.

Seguono, poi, numerose considerazioni relative alla fondatezza nel merito delle pretese azionate, evidentemente non esaminabili in sede di impugnazione, mediante ricorso per Cassazione, di una statuizione declinatoria della giurisdizione.

2.1 tre motivi vanno esaminati unitariamente perchè attinenti all'unica questione della giurisdizione.

Nel nucleo essenziale, la ricorrente riprende le argomentazioni che sostengono la decisione con la quale queste Sezioni unite, decidendo in sede di regolamento preventivo, hanno dichiarato sussistere la giurisdizione del giudice nazionale sulle controversie di lavoro tra l'I.U.E. e i suoi dipendenti (Cass. S.u. 18 marzo 1999, n. 149), ribadendo l'orientamento anche nella motivazione della, pressochè coeva, sentenza 15 marzo 1999, n. 138 (relativa alla Scuola europea di Varese - Ispra), e ciò sul rilievo che all'Istituto, sebbene soggetto di diritto internazionale, le fonti scritte non garantivano l'immunità dalla giurisdizione.

Questa precisazione è sufficiente per ritenere destituita di fondamento la richiesta del controricorrente di dichiarare inammissibile il ricorso per difetto di specificità dei motivi, trattandosi di questione la cui soluzione è determinata dall'interpretazione di norme di diritto, perfettamente identificate dal ricorso.

3. Il ricorso va però ritenuto privo di fondamento.

Queste Sezioni unite, infatti, a tanto sollecitate anche dalle articolate difese dell'Istituto resistente e dalle argomentazioni che sostengono le conclusioni del Pubblico ministero, ritengono di dovere sottoporre a revisione la soluzione data in precedenza alla questione di giurisdizione, per ragioni, peraltro, che per larga parte confermano l'elaborazione della sentenza 149/1999 e, di conseguenza, non coincidono interamente con l'apparato motivazionale della sentenza impugnata, sostanzialmente condiviso dal controricorso.

4. A norma dell'art. 10, primo comma, della Costituzione, l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute e da questa norma la giurisprudenza fa derivare l'immunità degli Stati esteri dalla giurisdizione italiana, in base ad una consuetudine internazionale intesa al rispetto dell'altrui sovranità. Tale immunità riguarda i rapporti giuridici estranei all'ordinamento italiano, o perchè gli Stati stranieri agiscono come soggetti di diritto internazionale o perchè agiscono come titolari di una potestà di imperio nell'ordinamento proprio ossia come enti sovrani.

5. L'immunità consuetudinaria si estende agli altri soggetti che rivestono, in senso ampio, la qualità di organi dello Stato estero (enti pubblici, comunque denominati: vedi Cass. S.u. 18 marzo 1999, n. 150; 12 giugno 1999, n. 331), compresi, in particolare, gli enti e istituti di carattere culturale (vedi Cass. S.u. 26 maggio 1994, n. 5126 - Accademie de France a Rome - 9 settembre 1997, n. 8768; 12 marzo 1999, n. 120 - Ecole francaise de Rome - 9 ottobre 1998, n. 9995 - The British institute of Florence).

6. I confini dell'area dell'immunità sono segnati dalla non riconducibilità degli atti ai poteri sovrani, compiuta cioè non iure imperii ma iure gestionis.

Con riguardo a questa distinzione e con specifico riferimento ai rapporti di lavoro, dopo alcune incertezze, la giurisprudenza di queste Sezioni unite si è orientata nel senso che, nei confronti degli enti estranei all'ordinamento italiano perchè enti di diritto internazionale e immuni dalla giurisdizione, il giudice italiano è titolare della potestà giurisdizionale per tutte le controversie inerenti a rapporti di lavoro che risultino del tutto esterni alle funzioni istituzionali e all'organizzazione dell'ente, costituiti, cioè, nell'esercizio di capacità di diritto privato (vedi Cass. S.u. 7 novembre 2000, n. 1150); per gli altri rapporti, il medesimo giudice è carente della potestà giurisdizionale atta ad interferire nell'assetto organizzativo e nelle funzioni proprie degli enti, mentre può emettere provvedimenti di contenuto esclusivamente patrimoniale. Ed ha precisato ulteriormente che, tra i provvedimenti di natura esclusivamente patrimoniale, non può comprendersi la sentenza di condanna ad un pagamento che debba essere logicamente preceduta da un accertamento del danno da interruzione di un rapporto di lavoro a tempo indeterminato, con prestazioni lavorative attinenti ai fini istituzionali dell'ente datore di lavoro: infatti tale sentenza, una volta passata in giudicato, farebbe stato sia sull'obbligo di pagare, sia (questione pregiudiziale logica) sull'obbligo di ricevere a tempo indeterminato le prestazioni lavorative (Cass., S.u. 15 aprile 2005, n. 7791).

7. La norma consuetudinaria, peraltro, può essere derogata per volontà dello stesso soggetto avente

titolo all'immunità, mediante la stipula di convenzioni con le quali si assoggetta senza limiti, generalmente in un ambito determinato, alla giurisdizione italiana, e, per lo più, questo avviene distinguendo, nelle convenzioni, fra dipendenti a statuto internazionale e dipendenti a statuto locale, i primi inseriti nell'organizzazione propriamente pubblicistica dello Stato straniero ed i secondi assunti per i bisogni locali di mano d'opera e per il soddisfacimento di esigenze materiali, perciò non immuni, bensì assoggettati ai giudici dello Status fori (Cass. S.u.

27 gennaio 1977 n. 400,22 maggio 1991 n. 5794,12 gennaio 1996 n. 174).

8. Le problematiche sopra descritte in sintesi sono divenute però più complesse, specialmente in tempo recente, quando con frequenza sempre maggiore sono apparsi sulla scena dell'ordinamento internazionale soggetti diversi dagli Stati ed operanti, rispetto a questi, in posizione di maggiore o minore indipendenza. Si tratta delle organizzazioni internazionali che gli Stati hanno costituito soprattutto dopo la seconda guerra mondiale, onde soddisfare esigenze prima non avvertite, o almeno non abbastanza avvertite, nella comunità delle genti.

Per questi enti si pone, in primo luogo, il problema se debba essere riconosciuta la personalità di diritto internazionale e la conseguente capacità di instaurare rapporti giuridici anche con gli Stati. In difetto di esplicite definizioni pattizie, i caratteri distintivi della personalità vengono sovente individuati proprio nelle immunità e privilegi conferiti; si ritiene, tuttavia, che la capacità di partecipare a certe relazioni e di essere centro di imputazione di effetti nell'ordinamento internazionale, sulla base delle previsioni delle convenzioni istitutive, non comporta in tutti i casi l'equiparazione agli Stati, potendo anche accadere che all'organizzazione non sia garantita l'immunità dalla giurisdizione nazionale (questa evenienza è stata riscontrata per la Scuola europea di Varese - Ispra -, istituita da alcuni degli Stati appartenenti all'Unione Europea: Cass. S.u. 15 marzo 1999, n. 138; 23 gennaio 1990, n. 376).

9. Fondamento di tale convincimento è che, per le organizzazioni internazionali sicuramente in possesso della personalità di diritto internazionale, non è sicura la formazione di una consuetudine che permetta di estendere a tutte il principio par in parerti non habet iurisdictionem, operante tra gli Stati e implicitamente richiamato nell'art. 10, primo comma, Cost.

Nell'impossibilità di porre su un piano di parità assoluta Stati ed organizzazioni internazionali, privilegi ed immunità spettanti a queste possono derivare così solo da specifiche fonti scritte e per il tramite dell'art. 11 Cost.

Queste fonti sogliono consistere non soltanto in accordi tra Stati, ossia tra i soggetti che costituiscono l'organizzazione e che vengono chiamati Stati contraenti, ma anche nei cosiddetti "accordi di sede", stipulati fra l'organizzazione, priva di un proprio territorio, e lo Stato in cui essa stabilisce la sua sede, principale o secondaria.

Tali accordi, oltre a rendere certi i rapporti con lo Stato ospitante, riguardano bensì la complessiva condizione giuridica dell'organizzazione e le garantiscono meglio l'autogoverno, ma a tal fine non stabiliscono necessariamente l'immunità giurisdizionale, oppure la limitano con riferimento alle funzioni istituzionali o ai beni destinati agli usi ufficiali.

10. Sulla base di queste premesse, queste Sezioni unite affermarono, con la sentenza n. 149 del 1999, il principio secondo cui l'attribuzione all'I.U.E., nella convenzione ratificata, della capacità di concludere accordi con governi statali, comporta bensì il riconoscimento di una soggettività giuridica internazionale, che però non basta ad equipararla ad uno Stato estero, tanto da assicurarle l'immunità giurisdizionale alla stregua del principio par in parem non habet iurisdictionem, implicitamente recepito attraverso l'art. 10 Cost. Tale immunità deve necessariamente risultare, espressamente o per implicito, dalle norme pattizie internazionali relative all'organizzazione, oppure da norme della legislazione nazionale compatibili con la Costituzione.

11. A tale principio di diritto va certamente data continuità. E', invece, l'approfondimento della verifica in concreto del se all'Istituto Universitario Europeo sia stata, sulla base delle fonti scritte, garantita l'immunità dalla giurisdizione italiana, con la previsione di adeguati strumenti di tutela per la risoluzione delle controversie, che conduce ad un esito difforme dal precedente indicato.

Il quadro normativo è costituito: a) dalla legge 23 dicembre 1972, n. 920 - Ratifica ed esecuzione della convenzione relativa alla creazione di un Istituto universitario europeo, firmata a Firenze il 19 aprile 1972, con allegato protocollo sui privilegi e sulle immunità - nel testo risultante dalla convenzione ratificata con legge 28 ottobre 1994, n. 637; b) D.P.R. 13 ottobre 1976 n. 990 - Esecuzione

dell'accordo di sede tra il Governo della Repubblica italiana e l'Istituto universitario europeo, con allegati, fumato a Roma il 10 luglio 1975 e del relativo scambio di note, effettuato a Firenze il 25 marzo 1976 -. 12. Le norme della convenzione attribuiscono all'Istituto personalità giuridica (art. 1) e piena capacità giuridica in ciascuno degli stati contraenti (art. 28), ne definiscono i compiti (art. 2), impegnano gli Stati contraenti a prendere tutte le misure atte a facilitare il compimento della missione dell'Istituto, nel rispetto della libertà di ricerca e di insegnamento (art. 3). Ma è solo l'art. 4 ad interessare specificamente il tema dell'immunità:

L'Istituto e il suo personale godono dei privilegi e delle immunità necessari al compimento della loro missione, in conformità del protocollo allegato alla presente Convenzione e che ne costituisce parte integrante. L'Istituto conclude con il governo della Repubblica italiana un accordo sulla sede, approvato all'unanimità dal Consiglio superiore. Assume rilevanza anche l'art. 6, che pone al vertice dell'Istituto il Consiglio superiore, composto di rappresentanti dei Governi degli Stati contraenti, cui conferisce il potere di adottare i regolamenti di organizzazione e, in particolare, lo statuto del personale, atto che deve definire il meccanismo secondo il quale saranno risolte le controversie tra l'Istituto e i beneficiari dello statuto (paragrafo 5, lett. c). E' anche importante sottolineare che i procedimenti volti alla revisione della convenzione possono avviarsi solo su parere conforme del Consiglio superiore (art. 33).

Da considerare pure il disposto dell'art. 29: Le controversie che possono sorgere tra gli Stati contraenti o tra uno o più Stati contraenti e l'Istituto sull'applicazione o sull'interpretazione della Convenzione, e che non hanno potuto essere risolte dal Consiglio superiore vengono, a richiesta di una parte della controversia, sottoposte ad arbitrato. In questo caso il presidente della Corte di giustizia delle Comunità europee designa l'organo arbitrale che dovrà comporre la controversia.

Gli Stati contraenti si impegnano ad eseguire le decisioni dell'organo arbitrale.

13. Le riferite disposizioni della convenzione non sembrano riconoscere all'Istituto soltanto la soggettività internazionale, ma anche l'immunità dalla giurisdizione dello Stato ospitante. Le conferme decisive sono contenute nelle disposizioni, rilevanti nella controversia, dell'allegato protocollo sui privilegi e sulle immunità dell'Istituto Universitario Europeo, idonee a specificare e chiarire la previsione generale del menzionato art. 4 della convenzione.

13.1. Non attengono propriamente al problema della giurisdizione, ma contribuiscono a chiarire il quadro complessivo disegnato dalle norme e lo status riconosciuto all'I.U.E., le disposizioni concernenti le norme sostanziali da applicare al personale dipendente.

Ai sensi dell'art. 11 della convenzione, il regime delle prestazioni di sicurezza sociale è definito dallo statuto; dispone poi Pari 3 dell'accordo di sede: Le leggi della Repubblica italiana sono applicabili all'interno della sede dell'Istituto, fatti salvi la convenzione, il protocollo, il presente accordo, nonchè le norme emanate dal Consiglio superiore ai sensi dell'articolo 6 della convenzione.

13.2. L'art. 1 attribuisce il beneficio dell'immunità di esecuzione nell'ambito delle sue attività ufficiali (definite, dall'art. 17, come comprendenti il funzionamento amministrativo, le attività d'insegnamento e di ricerca), esclusa la materia della circolazione stradale, quanto ai danni (ma solo per le azioni civili) e alle infrazioni, nonchè l'esecuzione di decisioni arbitrali o giurisdizionali contemplate da disposizioni della convenzione o del protocollo e fatto salvo il potere del Consiglio superiore di rinuncia al beneficio in casi particolari, mediante deliberazione assunta all'unanimità.

Va osservato al riguardo che, se è vero che, in linea generale, l'esclusione dalla soggezione ad esecuzione forzata non è immunità dalla giurisdizione, ma questione di merito da far valere nei procedimenti di esecuzione, la formulazione della norma sembra, però, presupporre proprio l'immunità dalla giurisdizione:

convince di ciò il riferimento non ai beni ed averi impiegati, ma alle attività istituzionali; alle azioni civili in materie di danno da circolazione stradale (non all'esecuzione derivante dall'esercizio dell'azione); al riconoscimento degli effetti vincolanti delle pronunce giurisdizionali o arbitrali solo se emanate secondo le previsioni dello statuto internazionale; al potere di rinunciare al "beneficio".

L'interpretazione secondo cui immunità dall'esecuzione per le attività ufficiali esprime il più ampio concetto di esenzione dal vincolo derivante dall'intervento delle giurisdizioni nazionali, trova significativa conferma nella presenza di una disposizione apposita relativamente ai beni ed averi dell'Istituto, che non possono essere oggetto di alcun provvedimento di coercizione amministrativa o preliminare a un giudizio, come requisizione, confisca, espropriazione o sequestro conservativo, eccetto

che nei casi in cui opera l'esclusione del beneficio di cui all'art. 1 (art. 3).

13.3. A parte altre norme (inviolabilità dei locali e degli edifici dell'Istituto: art. 2; immunità e privilegi concessi ai rappresentanti degli Stati contraenti ed ai loro consiglieri che partecipano alle riunioni del Consiglio superiore dell'Istituto, assimilati al personale diplomatico: art. 7; generale rinvio ai trattamenti riservati alle organizzazioni internazionali), rilevo decisivo assumono le previsioni dell'art. 9, da leggere in correlazione sempre con l'art. 4 della convenzione, a termini delle quali il presidente, il segretario generale, i membri del corpo insegnante e i membri del personale dell'Istituto godono, anche dopo aver cessato di essere al servizio dell'Istituto, dell'immunità di giurisdizione per tutti gli atti compiuti nell'esercizio delle loro funzioni ed entro i limiti delle loro attribuzioni (fatta eccezione anche in questo caso della materia della circolazione stradale).

Non sembra possibile leggere in modo riduttivo la disposizione attribuendole il significato che l'immunità dalla giurisdizione concerna organi e personale, ma non l'Istituto, eventualmente per atti che gli sono imputati. Sembra evidente che l'immunità dalla giurisdizione degli organi e del personale rappresenta un'estensione dell'immunità garantita innanzi tutto all'Istituto. Come dimostrano, del resto, le disposizioni che, dopo avere avvertito che le immunità e i privilegi sono concessi alle persone fisiche non nel loro interesse personale, ma dell'Istituto, riconoscono agli organi dell'Istituto medesimo la disponibilità dell'immunità, potendo decidere di toglierla (art. 14). Nello stesso ordine di principi si inserisce il potere (art. 13) di distinguere, nello statuto del personale e con deliberazione assunta all'unanimità, i dipendenti che beneficiano delle immunità e dei privilegi e quelli esclusi, in tutto o in parte, dai benefici (secondo l'accertamento di merito, la disposizione è stata attuata con la distinzione, operata dallo statuto del personale, tra i collaboratori amministrativi "agenti", "agenti temporanei" ed "agenti ausiliari - categoria quest'ultima di appartenenza della Pistelli - tutti "beneficiari dello statuto", e "agenti locali", esclusi dai benefici e assoggettati alla giurisdizione competente in base alla legislazione vigente a Firenze).

L'argomento merita di essere chiuso con l'osservazione che la lettura riduttiva porterebbe all'illogica conseguenza che l'Istituto potrebbe essere convenuto dal dipendente dinanzi alla giurisdizione italiana, ma non potrebbe a sua volta convenirlo dinanzi alla stessa giurisdizione per lo stesso rapporto controverso, in relazione agli atti compiuti nell'esercizio delle attribuzioni e funzioni istituzionali (se non provvedendo a togliere l'immunità).

14. L'indagine, però, non può considerarsi completata se non verificando la conformità dell'immunità dell'I.U.E. dalla giurisdizione italiana al principio costituzionale della tutela giudiziaria (art. 24 Cost.). Ed infatti, Cass. S.u. 149/1999 affermano che "la tutela giurisdizionale costituisce un principio cardine dell'ordinamento" (richiamando Cass. S.u. n. 12614 del 1998).

Ora, tale principio cardine cede di fronte al principio consuetudinario par in parerti non habet iurisdictio, riferito agli Stati, in quanto il principio riflette l'eguale sovranità delle organizzazioni statuali che costituisce fondamento universalmente accettato dalla comunità internazionale, al quale la nostra Costituzione dichiara di sottomettersi (art. 10). Ma una tale prevalenza non ha più giustificazione quando il sacrificio del "principio cardine" della Costituzione discende, non già dal fondamento dello stesso ordine internazionale, ma da un impegno liberamente assunto dalla nostra Repubblica attraverso la sottoscrizione di una convenzione. In questo caso, proprio la necessità che l'impegno assunto si traduca in una legge di ratifica per essere vincolante per i giudici, porta in primo piano i principi fondamentali dell'ordinamento costituzionale, con i quali l'impegno deve essere compatibile, pena l'invalidità della legge di ratifica (vedi Corte cost. n. 223 del 1996).

Di conseguenza, l'esclusione in radice del diritto degli interessati alla tutela giurisdizionale dinanzi ad un organo indipendente delle situazioni giuridiche nascenti in un certo ambito dei rapporti, deve indurre a dubitare della legittimità costituzionale della legge di ratifica di convenzioni recanti simili previsioni, ovvero, ove sia possibile, a pervenire a risultati interpretativi costituzionalmente orientati.

14.1. Ma diverso discorso è a farsi per una convenzione che preveda soltanto la sottrazione della cognizione di quelle situazioni al giudice italiano, tuttavia preoccupandosi di assicurare la tutela giurisdizionale delle stesse situazioni dinanzi a giudice imparziale e indipendente, sia pure scelto con procedure e criteri diversi da quelli vigenti nell'ordinamento nazionale. In tal caso non ricorre alcun vulnus di "principi-cardine" della nostra Costituzionale e non vi è ragione di non applicare la convenzione, id est la legge che la ratifica.

Orbene, dall'esame della convenzione istitutiva dell'U.E. risulta che, accanto all'esplicita affermazione

dell'immunità dalla giurisdizione italiana per quanto attiene ai rapporti di lavoro del personale non locale, sono apprestati strumenti di adeguata tutela giurisdizionale.

14.2, La previsione della convenzione (art. 6, par. 5, lett. c), secondo cui lo statuto deve definire il meccanismo secondo il quale saranno risolte le controversie tra l'Istituto e i beneficiari dello statuto medesimo, è stata attuata nel senso che, esauriti i reclami interni, è concessa all'interessato istanza ad una Commissione, i cui membri sono scelti dal Consiglio superiore da un elenco formato da un organismo giurisdizionale internazionale.

La previsione della Convenzione già appare sufficiente per ritenere che lo strumento di composizione delle controversie sia stato previsto come esclusivo della competenza giurisdizionale nazionale, non certo quale mero rimedio interno. La conferma definitiva, comunque, la si trae dall'allegato n. 2 alla stessa Convenzione, nella parte in cui prevede che le disposizioni dell'articolo 6, paragrafo 5, lettera c), non escludono la possibilità che il Consiglio superiore designi la Corte di giustizia delle Comunità europee - previa consultazione del Presidente di quest'ultima - quale istanza chiamata a dirimere le controversie tra l'Istituto ed il suo personale.

La possibilità di sostituire alla competenza della Commissione, istituita dallo statuto, la Corte di giustizia Cee rivela definitivamente l'intento di attribuite all'istanza non la natura di mero rimedio interno, sperimentato il quale resta aperto l'accesso alla tutela giurisdizionale, ma di mezzo esclusivo, di natura giurisdizionale, della risoluzione delle controversie con i dipendenti.

14.3. I dati richiamati consentono perciò di confutare l'affermazione della sentenza 149/1999, secondo cui sarebbe stato previsto un mero organo di giustizia interna, e un rimedio alternativo rispetto alla giustizia statale, o anche facoltativo, affermazione che, a ben guardare, ha rappresentato il fulcro di quella decisione. L'organo di risoluzione delle controversie, come si è constatato, è una vera e propria istanza giurisdizionale. La scelta dei membri della Commissione all'interno di un elenco formato da organismi giurisdizionali internazionali soddisfa i requisiti di indipendenza e terzietà dell'organo deputato alla risoluzione delle controversie tra il personale e l'Istituto, organo, come si è detto, considerato equivalente alla Corte di giustizia Cee.

L'istituto, del resto, è stato creato da paesi aderenti all'Unione Europea per valorizzare il patrimonio culturale dell'Europa e le sue tradizioni costituzionali, nonchè le sue istituzioni; non poteva, quindi fondarsi su di una convenzione in contrasto con un valore cardine dell'istituzionalità europea e del suo ius cogens, valore consacrato dall'art. 6/2 del trattato sull'Unione (come modificato dal Trattato di Amsterdam: G.u. 6.7.1998, n. 155, suppl. ord.) - letto in connessione con l'art. 6 della CEDU e l'art. 46, lett. d) dello stesso trattato UE (si veda anche l'art. 14, patto sui diritti civili e politici) - e dall'art. 2^-47/2 della carta fondamentale dei diritti dell'Unione.

15. Sulla base delle considerazioni svolte, pertanto, e tenuto conto che nella controversia non è neppure prospettabile il limite dell'immunità ristretta, considerate le mansioni svolte dalla Pistelli e la natura delle domande, tutte non meramente patrimoniali (vedi le considerazioni svolte al n. 6), il ricorso va rigettato e dichiarato il difetto di giurisdizione del giudice italiano.

Sussistono, evidenti, giusti motivi per compensare interamente le spese e gli onorari del giudizio di Cassazione.

P.Q.M.

La Corte, a Sezioni Unite, rigetta il ricorso e dichiara il difetto di giurisdizione del giudice italiano; compensa interamente le spese e gli onorari del giudizio di Cassazione.

Così deciso in Roma, nella Camera di consiglio delle Sezioni Unite civili del 23 giugno 2005.

Depositato in Cancelleria il 28 ottobre 2005

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Oxford Public International Law

Pistelli v European University Institute, Appeal judgment, No 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005), 28th October 2005, Supreme Court of Cassation

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Parties: Paola Pistelli
European University Institute

Judges/Arbitrators: Vincenzo Carbone (President); Giovanni Prestipino; Salvatore Senese; Giovanni Paolini; Antonio Elefante; Maria Gabriella Luccioli; Michele Lo Piano; Stefano Maria Evangelista; Pasquale Picone

Procedural Stage: Appeal judgment

Previous Procedural Stage(s):
Decision of the Florence Tribunal; *Pistelli v European University Institute*, No 258, 20 November 2000
Decision of the Florence Court of Appeal; *Pistelli v European University Institute*, No 449, 4 July 2002

Subject(s):

Privileges — Right to a judge — Economic, social, and cultural rights — Immunity from jurisdiction, international organizations — Customary international law — Statehood, jurisdiction of states, organs of states

Core Issue(s):

Whether the European University Institute of Florence enjoyed immunity from jurisdiction with regard to employment disputes.

Oxford Reports on International Law in Domestic Courts is edited by:

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Facts

F1 On 4 July 2002, the Florence Court of Appeal confirmed (Decision of the Florence Court of Appeal; *Pistelli v European University Institute*, No 449, 4 July 2002) the decision of the Florence Tribunal on 20 November 2000 (Decision of the Florence Tribunal; *Pistelli v European University Institute*, No 258, 20 November 2000), declining jurisdiction in an employment dispute brought by Paola Pistelli against the European University Institute of Florence. Ms Pistelli had been working in the administration of the Institute from 1994 to 1998. She had been recruited as an independent contractor, but in the present proceedings she sought judicial recognition of her status as a permanent employee. She also claimed that the Institute had unlawfully transformed her permanent position into a temporary working relationship by inserting an expiration date into her contract. Consequently, she had addressed the Florence Tribunal invoking unfair dismissal and asked to be reinstated in service. She also claimed that, from 8 January 1998, she had performed higher level functions. Therefore, she wished to be formally assigned to an upper level category in the Institute's bureaucratic hierarchy.

F2 The Florence Court of Appeal decided not to follow the precedent of the Supreme Court's judgment no 149, 18 March 1999, which affirmed Italian jurisdiction over an employment dispute between an Italian citizen and the European University Institute. According to the Court of Appeal, immunity from civil jurisdiction should have been granted to the European University Institute for the following reasons: (a) the customary international rule *par in parem non habet iurisdictionem* was also applicable to international organizations, as affirmed by the Court of Cassation in many rulings; (b) with the regard to employment disputes, an international organization enjoyed immunity from jurisdiction whenever the employee performed institutional functions of the organization in question. This was precisely the case concerning the activities carried out by Ms Pistelli on behalf of the European University Institute; (c) the Convention setting up a European University Institute (1972) OJ C29, 19 April 1972 ('Convention setting up the Institute') and the Protocol on the Privileges and Immunities of the European University Institute (1972) OJ C29, 19 April 1972 ('Protocol on the Privileges and Immunities of the Institute'), as well as the Headquarters Agreement between the Government of Italy and the European University Institute, unpublished, 10 July 1975 ('Heaquarters Agreement'), granted immunity from the jurisdiction of the host state in relation to all activities necessary to accomplish the Institute's mission. On the basis of its statutes, the Institute was entitled to set out the rules governing working relationships with its employees and to set up a claims commission, as the sole organ competent to decide employment disputes. Such a commission would have to offer sufficient safeguards to act as an independent and impartial body; (d) the above-mentioned international instruments also provided for immunity from jurisdiction and execution in relation to all organs and employees whose labour relationship with the Institute was, like Ms Pistelli's, covered by the statutes.

F3 The judgment delivered by the Court of Appeal was challenged before the Supreme Court on three main grounds. First, Ms Pistelli referred to *European University Institute v Piette*, Decision of the Supreme Court, No 149, (1999) 9 Italian Ybk Intl L 155, 18 February 1999, which held that the international agreements establishing the European University Institute did not establish any immunity from jurisdiction on behalf of the Institute itself. Secondly, she alleged that the activities performed by her at the Institute were in any case outside the scope of the customary principle of 'restricted' immunity from jurisdiction because the activities had no connection with the institutional functions of the European University. Thirdly, if the jurisdictional immunity of the Institute were recognized, there would be no alternative independent judicial protection against a violation of her rights.

Held

H1 Foreign states and their public agencies were entitled to immunity from civil jurisdiction before Italian tribunals according to a well-established customary international rule, applicable in the Italian legal order by virtue of Article 10(1) of the Constitution, 1947 (Italy) ('Constitution'). However, only

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acts carried out by foreign states in their capacity as sovereign entities (*acta iure imperii*) were exempt from jurisdiction. Immunity was to be denied whenever foreign states and their agencies engaged in acts and relationships having a purely private nature (*acta iure gestionis*). A foreign state was exempt from jurisdiction if it acted either as 'a subject of international law' (eg in the field of diplomatic or consular relations), or as a 'sovereign power in its own legal order' (eg when exercising its authority over its subjects and organs). (paragraphs 4, 5, 6)

H2 The distinction between *acta iure imperii* and *acta iure gestionis* also applied to labour relationships with foreign states. Over the previous years, the Supreme Court had clarified that Italian jurisdiction should be affirmed whenever the employee performed activities which had no bearing on the self- organization and public functions of a foreign state; whereas jurisdictional immunity should be granted in relation to white-collar employees who took part in the sovereign functions of that state. The court had also added that employment disputes concerning exclusively financial matters should normally have been decided by local tribunals, unless their assessment required a judicial investigation constituting interference with the internal organization of a foreign state's offices and services. (paragraph 6)

H3 The right to jurisdictional immunity could be waived by the foreign state. The waiver was often expressed through the provisions of an international agreement concluded with the forum state. In particular, a waiver to jurisdictional immunity may have been inferred from those treaty provisions where a distinction was made between: (a) personnel enjoying international status engaged in the institutional activities of a foreign state, and (b) locally recruited personnel having the nationality of the host state carrying out day-to-day peripheral activities. Whenever such a distinction was expressly provided for, the foreign State was barred from invoking immunity with regard to the latter category of workers. (paragraph 7)

H4 International organizations were created by states in order to meet general needs of the international community. The fact that rights and obligations may have been directly attributed to international organizations by virtue of their constitutive treaties was not tantamount to recognizing the same legal position enjoyed by states in the international legal order. Although international organizations possessed legal personality, it was not certain that the customary rule *par in parem non habet jurisdictionem* applied to them as well. Thus, the existence and scope of privileges and immunities to which an international organization might have been entitled before domestic courts could only be inferred from conventional instruments, such as the Constitutive Treaty or the Headquarters Agreement in question. (paragraphs 8, 9)

H5 Concerning the European University Institute, the pertinent conventional rules recognizing its immunity from Italian jurisdiction were essentially to be found in the Convention setting up the Institute, and the annexed Protocol on the Privileges and Immunities of the Institute, both signed in Florence on 19 April 1972, and in the Headquarters Agreement. Article 4 of the Convention setting up the Institute affirms that the Institute and its staff enjoy such privileges and immunities as are necessary for the performance of their tasks, while Article 1 of the Protocol on the Privileges and Immunities of the Institute grants the Institute immunity from enforcement in the exercise of its official activities. Although immunity from execution and immunity from jurisdiction are different concepts, the formulation of the above-mentioned Article 1 presupposed that the Institute also enjoyed immunity from jurisdiction whenever its official activities were concerned. (paragraphs 11, 12, 13.2)

H6 The European University Institute's immunity from jurisdiction was confirmed by Article 9 of the Protocol on the Privileges and Immunities of the Institute, stating that the Principal, Secretary, and staff of the Institute were immune from legal proceedings. In fact, the immunity of the organs and of the staff should have been considered as an extension of the immunity enjoyed by the Institute as such in the first place. (paragraph 13.3)

H7 The treaty provisions conferring immunity from jurisdiction to the European University did not

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infringe Article 24 of the Constitution, which granted to everybody the fundamental right to institute proceedings to protect his or her subjective rights and legitimate interests. In fact, as an alternative judicial remedy, a member of the Institute's staff might have addressed his or her claim to the commission established under Article 6(5)(c) of the Convention setting up the Institute. Moreover, Annex 2 to the Convention setting up the Institute contemplated the possibility that the High Council might designate the Court of Justice of the European Communities as competent to resolve disputes between the Institute and members of its staff. (paragraph 14.2)

Date of Report: 31 August 2006

Reporter(s): Massimo Iovane

Analysis

A1 In the present judgment, the Court of Cassation reversed a previous decision delivered on 18 March 1999, in which it had reached a completely opposite conclusion on a similar question. In *European University Institute v Piette*, (1999) 9 Italian Ybk Intl L 156), the Court relied mainly on customary international law to reject the plea of immunity put forward by the European University. It affirmed that international entities other than states were generally entrusted with limited international tasks. They could not claim full international personality equal to that of states. Consequently, international principles tailored to protect interests of states could not automatically be applied to other international entities. According to the 1999 judgment, this held true also for the customary rule on jurisdictional immunity which could not be successfully invoked by entities such as the European University Institute possessing only a limited international capacity.

A2 The 2005 judgment corresponds to the 1999 precedent both with respect to the limited international personality of the European University Institute and the inapplicability to the Institute of the customary rule on immunity from jurisdiction. However, the Court sought to establish the Institute's jurisdictional immunity before Italian courts on dubious conventional norms concerning the creation of the Institute and on the regulation of its functions. Actually, there are no clear indications in the above-cited Convention setting up the Institute and Protocol on the Privileges and Immunities of the Institute of the wide, practically unlimited, immunity from jurisdiction affirmed by the Court in this judgment. The Cassation relied mainly on Article 1 of the Protocol on the Privileges and Immunities of the Institute establishing the Institute's immunity from enforcement, but even that provision set out exceptions to that immunity. In the Court's extensive interpretation of Article 1, practically any labour relationship with the Institute would seem to fall outside Italian jurisdiction. In fact, there is only a slight hint at the end of the judgment about the connection of Ms Pistelli's functions to institutional goals of the European University, and to the ‘non-financial’ nature of her claims. It is worth recalling that in its traditional case law, the Court of Cassation has always relied mostly on these elements in order to affirm or deny Italian jurisdiction. It has done so even when headquarters agreements set out precise criteria, such as the distinction between personnel with international status and locally recruited employees, for distinguishing between immune and non-immune activities.

A3 The weakest part of the judgment is the ruling concerning the availability of alternative remedies for members of the Institute's staff, such as a claims commission. This was a crucial point in the Court's reasoning. In fact, different parts of the decision highlight that the lack of any judicial protection for the Institute's employees might infringe a fundamental principle of the Constitution. However, the Court's inquiry into the existence and effectiveness of the Institute's system for the resolution of labour disputes was totally unsatisfactory. The Court limited itself to quoting a couple of articles where the setting up of this system is envisaged in principle. However, there is no further analysis on the composition of the commission, on its procedural rules, on the substantive norms it applies, or on the possibility of challenging its decisions before an appellate mechanism.

Date of Analysis: 31 August 2006

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Analysis by: Massimo Iovane

Further analysis:

Ronzitti, 'Sull'immunità concessa all'ente nessun contrasto con la Costituzione' (2006) 3 Guida al diritto 45

Instruments cited in the full text of this decision:

International

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Articles 6, 14

Treaty Establishing the European Community (25 March 1957) EU Consolidated Treaties; 298 UNTS 11, entered into force 1 January 1958, as amended by the Treaty of Amsterdam (2 October 1997) OJ C 340; 37 ILM 56, entered into force 1 May 1999, Articles 6(2), 46(d)

Convention setting up a European University Institute (19 April 1972) (1972) OJ C29, Articles 1, 2, 3, 4, 6, 11, 28, 29, 33, Annex 2

Protocol on the Privileges and Immunities of the European University Institute (19 April 1972) (1972) OJ C29, Articles 1, 2, 3, 7, 9, 13, 14, 17

Headquarters Agreement between the Government of Italy and the European University Institute (10 July 1975), unpublished, Article 3

Charter of Fundamental Rights of the European Union, OJ 200/C 364/01, European Union, 7 December 2000, Article II-47

Constitutions

Constitution, 1947 (Italy), Articles 10, 24

Cases cited in the full text of this decision:

Italian domestic courts

European University v Piette, No 149, (1999) 9 Italian Ybk Intl L 155, 18 March 1999

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Decision - full text

Ritenuto in fatto

1. La Corte di appello di Firenze, con la sentenza sopra specificata, ha rigettato l'impugnazione di Paola Pistelli contro la sentenza del Tribunale della stessa sede (n. 258 del 20 novembre 2000), con la quale era stato dichiarato il difetto di giurisdizione del giudice italiano sulla controversia promossa nei confronti dell'Istituto Universitario Europeo -I.U.E.- per la tutela di diritti derivanti dal rapporto di lavoro di addetta all'amministrazione dell'Ente (accertamento della natura subordinata del rapporto, qualificato come autonomo dal 3.10.1994 al 31.10.1994; dell'illegittimità della trasformazione a tempo parziale dall'1.4.1995; dell'invalida apposizione di termini di durata ai contratti, con conseguente illegittimita della cessazione delle prestazioni disposta dal 6.2.1998; della corrispondenza delle mansioni alla qualifica B IV dall'8.1.1996).

2. La Corte di Firenze ha dichiarato di non condividere le argomentazioni che sostengono la decisione assunta dalla Corte di cassazione, a sezioni unite, con la sentenza 18 marzo 1999, n. 149, dichiarativa della giurisdizione del giudice nazionale in relazione a controversia di lavoro promossa da dipendente dello stesso Istituto. Secondo il giudizio della Corte territoriale, l'immunità dalla giurisdizione italiana dell'I.U.E. sussisterebbe perché: la norma consuetudinaria *par in parem non habet iurisdictio* trova applicazione anche per le organizzazioni internazionali, secondo numerose decisioni delle stesse Sezioni unite della Corte di cassazione, e, nella specie, veniva in considerazione un rapporto di lavoro costituito nell'ambito delle finalità istituzionali dell'I.U.E. e si domandavano statuizioni incidenti sull'organizzazione dell'ente; la Convenzione istitutiva dell'Istituto e l'allegato protocollo, nonchè il successivo accordo di sede, attribuivano l'immunità dalla giurisdizione dello Stato ospitante, contemplando privilegi e le immunitè necessarie alla missione, attribuendo allo Statuto il potere di definire la disciplina del personale e di prevedere una Commissione dei ricorsi quale unico organo deputato a dirimere le controversie di impiego, con adeguate garanzie di indipendenza; risultava, soprattutto, sancita l'immunità dalle esecuzioni e l'immunità dalla giurisdizione del Paese ospitante, in generale, degli organi e dei dipendenti disciplinati dallo Statuto (categoria nella quale era compresa la Pistelli).

3. La cassazione della sentenza è domandata da Paola Pistelli con ricorso per tre motivi; resiste con controricorso l'Istituto Universitario Europeo. Sono state depositate dalle due parti memorie ai sensi dell'art. 378 cod. proc. civ.

Considerato in diritto

1. Il ricorso è articolato in tre motivi: con il primo si denuncia che erroneamente è stato dichiarato il difetto di giurisdizione del giudice italiano nell'assunto che fosse garantita all'I.U.E. immunitè dalla giurisdizione; con il seconde si deduce che, alla stregua delle mansioni espletate, le domande proposte in giudizio esulavano comunque dall'area della cd. “immunitè ristretta” garantita agli Stati esteri ed enti internazionali, siccome non incidenti sui poteri d'imperio; con il terzo si afferma che non era garantita la fruizione di istituti di tutela adeguati, alternativi alla giurisdizione dello Stato italiano.

Seguono, poi, numerose considerazioni relative alla fondatezza nel merito delle pretese azionate, evidentemente non esaminabili in sede di impugnazione, mediante ricorso per cassazione, di una statuizione declinatoria della giurisdizione.

2. I tre motivi vanno esaminati unitariamente perche attinenti all'unica questione della giurisdizione.

Nel nucleo essenziale, la ricorrente riprende le argomentazioni che sostengono la decisione con la quale queste Sezioni unite, decidendo in sede di regolamento preventive, hanno dichiarato

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sussistere la giurisdizione del giudice nazionale sulle controversie di lavoro tra l'I.U.E. e i suoi dipendenti (Cass. S.u. 18 marzo 1999, n. 149), ribadendo l'orientamento anche nella motivazione della, pressoché coeva, sentenza 15 marzo 1999, n. 138 (relativa alla Scuola europea di Varese — Ispra), e ciò sul rilievo che all'Istituto, sebbene soggetto di diritto internazionale, le fonti scritte non garantivano l'immunità dalla giurisdizione.

Questa precisazione è sufficiente per ritenere destituita di fondamento la richiesta del controricorrente di dichiarare inammissibile il ricorso per difetto di specificità dei motivi, trattandosi di questione la cui soluzione è determinata dall'interpretazione di norme di diritto, perfettamente identificate dal ricorso.

3. Il ricorso va però ritenuto privo di fondamento.

Queste Sezioni unite, infatti, a tanto sollecitate anche dalle articolate difese dell'Istituto resistente e dalle argomentazioni che sostengono le conclusioni del Pubblico ministero, ritengono di dovere sottoporre a revisione la soluzione data in precedenza alla questione di giurisdizione, per ragioni, peraltro, che per larga parte confermano l'elaborazione della sentenza 149/1999 e, di conseguenza, non coincidono interamente con l'apparato motivazionale della sentenza impugnata, sostanzialmente condiviso dal controricorso.

4. A norma dell'art. 10, primo comma, della Costituzione, l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute e da questa norma la giurisprudenza fa derivare l'immunità degli Stati esteri dalla giurisdizione italiana, in base ad una consuetudine internazionale intesa al rispetto dell'altrui sovranità. Tale immunità riguarda i rapporti giuridici estranei all'ordinamento italiano, o perché gli Stati stranieri agiscono come soggetti di diritto internazionale o perché agiscono come titolari di una potestà di imperio nell'ordinamento proprio ossia come enti sovrani.

4. The Italian legal order conforms to generally accepted rules of international law by virtue of Article 10(1) of the Constitution, and it is on this basis that case law recognises the immunity of foreign States from Italian jurisdiction, based on a customary international rule requiring respect for other countries' sovereignty. This immunity concerns legal relations outside the Italian legal either when foreign States act as a subject of international law or when they act as sovereign powers in their own legal order, namely as sovereign bodies.

5. L'immunità consuetudinaria si estende agli altri soggetti che rivestono, in senso ampio, la qualità di organi dello Stato estero (enti pubblici, comunque denominati: vedi Cass. S.u. 18 marzo 1999, n. 150; 12 giugno 1999, n. 331), compresi, in particolare, gli enti e istituti di carattere culturale (vedi Cass. S.u. 26 maggio 1994, n. 5126 — *Accademie de France a Rome* — 9 settembre 1997, n. 8768; 12 marzo 1999, n. 120 — *Ecole francaise de Rome* — 9 ottobre 1998, n. 9995 — *The British institute of Florence*-).

5. Customary immunity extends to other subjects acting as organs of the foreign State in the broadest sense (public bodies, whatever they are called: see Cassation, All Sections, 18 March 1999, no. 150; 12 June 1999, no. 331), including, in particular, bodies and institutes of a cultural nature (see Cassation, All Sections, 26 May 1994, no. 5126 — *Académie de France a Rome* — 9 September 1997, no. 8768; 12 March 1999, no. 120 — *École française de Rome* — 9 October 1998, no. 9995 — *The British Institute of Florence*).

6. I confini dell'area dell'immunità sono segnati dalla non riconducibilità degli atti ai poteri sovrani, compiuta cioè non *iure imperii* ma *iure gestionis*.

Con riguardo a questa distinzione e con specifico riferimento ai rapporti di lavoro, dopo alcune incertezze, la giurisprudenza di queste Sezioni unite si è orientata nel senso che, nei confronti degli enti estranei all'ordinamento italiano perché enti di diritto internazionale e immuni dalla

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giurisdizione, il giudice italiano è titolare della potestà giurisdizionale per tutte le controversie inerenti a rapporti di lavoro che risultino del tutto esterni alle funzioni istituzionali e all'organizzazione dell'ente, costituiti, cioè, nell'esercizio di capacità di diritto private (vedi Cass. S.u. 7 novembre 2000, n. 1150); per gli altri rapporti, il medesimo giudice è carente della potestà giurisdizionale atta ad interferire nell'assetto organizzativo e nelle funzioni proprie degli enti, mentre può emettere provvedimenti di contenuto esclusivamente patrimoniale. Ed ha precisato ulteriormente che, tra i provvedimenti di natura esclusivamente patrimoniale, non può comprendersi la sentenza di condanna ad un pagamento che debba essere logicamente preceduta da un accertamento del danno da interruzione di un rapporto di lavoro a tempo indeterminate, con prestazioni lavorative attinenti ai fini istituzionali dell'ente datore di lavoro: infatti tale sentenza, una volta passata in giudicato, farebbe stato sia sull'obbligo di pagare, sia (questione pregiudiziale logica) sull'obbligo di ricevere a tempo indeterminato le prestazioni lavorative (Cass., S.u. 15 aprile 2005, n. 7791).

6. States are afforded immunity from jurisdiction for acts carried out *iure imperii* in their capacity as sovereign entities, but not those carried out *iure gestionis*.

Regarding this distinction and with specific reference to labour relations, following some uncertainty, the case law for the Court of Cassation All Sections has taken the view that Italian courts have jurisdictional authority over all labour disputes involving international law entities which enjoy immunity and are therefore outside the Italian legal order when those disputes concern labour relations that are entirely separate from the institutional and organisational functions of the entity, and therefore having a private character (see Cassation, All Sections, 7 November 2000, no. 1150). In relation to other relationships, the court has no jurisdictional authority to intervene in the organisational structure and functioning of the entities, but may issue orders of an exclusively financial nature. It has further specified that such exclusively financial orders may not include orders for payment which must logically be preceded by an evaluation of the damage due to the termination of an employment for an unlimited period which involved activities concerning the employer's institutional functions. Indeed, once this decision became definitive, it would imply both an obligation to pay and (as a logical consequence) an obligation to employ the party for an unlimited period (Cassation, All Sections, 15 April 2005, no. 7791).

7. La norma consuetudinaria, peraltro, può essere derogata per volontà dello stesso soggetto avente titolo all'immunità, mediante la stipula di convenzioni con le quali si assoggetta senza limiti, generalmente in un ambito determinato, alla giurisdizione italiana, e, per lo più, questo avviene distinguendo, nelle convenzioni, fra dipendenti a statuto internazionale e dipendenti a statuto locale, i primi inseriti nell'organizzazione propriamente pubblicistica dello Stato straniero ed i secondi assunti per i bisogni locali di mano d'opera e per il soddisfacimento di esigenze materiali, perciò non immuni, bensi assoggettati ai giudici dello *Status fori* (Cass. S.u. 27 gennaio 1977 n. 400, 22 maggio 1991 n. 5794, 12 gennaio 1996 n. 174).

7. However, an entity which enjoys immunity may decide to waive this right by signing agreements through which it submits to unlimited Italian jurisdiction, normally within a specific sphere. Moreover, such agreements make distinctions between employees enjoying international status and those employed locally, the former included in the foreign State's organisation under public law, and the latter recruited to fulfil requirements for local manpower and to satisfy material requirements, and therefore not immune but subject to the jurisdiction of the forum State (Cassation, All Sections, 27 January 1977 no. 400, 22 May 1991, no. 5794, 12 January 1996, no. 174).

8. Le problematiche sopra descritte in sintesi sono divenute però più complesse, specialmente in tempo recente, quando con frequenza sempre maggiore sono apparsi sulla scena dell'ordinamento internazionale soggetti diversi dagli Stati ed operanti, rispetto a questi, in posizione di maggiore o minore indipendenza. Si tratta delle organizzazioni internazionali che gli Stati hanno costituito soprattutto dopo la seconda guerra mondiale, onde soddisfare esigenze prima non avvertite, o

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almeno non abbastanza avvertite, nella comunità delle genti.

Per questi enti si pone, in primo luogo, il problema se debba essere riconosciuta la personalità di diritto internazionale e la conseguente capacità di instaurare rapporti giuridici anche con gli Stati. In difetto di esplicite definizioni pattizie, i caratteri distintivi della personalità vengono sovente individuati proprio nelle immunità e privilegi conferiti; si ritiene, tuttavia. che la capacità di partecipare a certe relazioni e di essere centro di imputazione di effetti nell'ordinamento internazionale, sulla base delle previsioni delle convenzioni istitutive, non comporta in tutti i casi l'equiparazione agli Stati, potendo anche accadere che all'organizzazione non sia garantita l'immunità dalla giurisdizione nazionale (questa evenienza è stata riscontrata per la Scuola europea di Varese — Ispra -, istituita da alcuni degli Stati appartenenti all'Unione Europea: Cass. S.u. 15 marzo 1999, n. 138; 23 gennaio 1990, n. 376).

8. The problems summarised above have become more complex, especially recently, as an increasing number of subjects operating with varying degrees of independence from States have appeared in the sphere of international law. These international organisations were mainly founded by States after the second world war to satisfy requirements of the international community that had not previously been addressed, or at least not sufficiently addressed.

The first problem associated with these entities is whether they should be granted legal personality under international law and consequently the ability to establish legal relations with States. In the absence of specifically agreed definitions, their legal personality is often characterised by the immunities and privileges conferred on them. However, the capacity to participate in certain relations and to be subject to international law, on the basis of provisions contained in their constitutive treaties does not always make such organisations of equal status to that of States. It may be that such bodies are not necessarily guaranteed immunity from national jurisdiction (this was the case for the European School in Varese — Ispra, formed by certain E.U. member States: Cassation, All Sections, 15 March 1999, no. 138; 23 January 1990; no. 376).

9. Fondamento di tale convincimento è che, per le organizzazioni internazionali sicuramente in possesso della personalità di diritto internazionale, non è sicura la formazione di una consuetudine che permetta di estendere a tutte il principio *par in parem non habet iurisdictionem*, operante tra gli Stati e implicitamente richiamato nell'art. 10, primo comma, Cost.

Nell'impossibilità di porre su un piano di parità assoluta Stati ed organizzazioni internazionali, privilegi ed immunità spettanti a queste possono derivare così solo da specifiche fonti scritte e per il tramite dell'art. 11 Cost.

Queste fonti sogliono consistere non soltanto in accordi tra Stati, ossia tra i soggetti che costituiscono l'organizzazione e che vengono chiamati Stati contraenti, ma anche nei cosiddetti “accordi di sede”, stipulati fra l'organizzazione, priva di un proprio territorio, e lo Stato in cui essa stabilisce la sua sede, principale o secondaria.

Tali accordi, oltre a rendere certi i rapporti con lo Stato ospitante, riguardano bensi la complessiva condizione giuridica dell'organizzazione e le garantiscono meglio l'autogoverno, ma a tal fine non stabiliscono necessariamente l'immunità giurisdizionale, oppure la limitano con riferimento alle funzioni istituzionali o ai beni destinati agli usi ufficiali

9. This view is founded on the fact that it is not clear that the principle *par in parem non habet iurisdictionem*, which operates between States and is implicitly referred to in Article 10(1) of the Constitution, has been extended by customary law to all international organisations with specific legal personality under international law.

As it is impossible to place States and international organisations on the same level, the privileges and immunities the latter enjoy can only arise from specific agreements, through Article 11 of the

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Constitution.

These sources are not only agreements between States, namely between those who establish the organisation, referred to as Contracting States, but also in the so-called “headquarters agreements”, drawn up between an organisation without its own territory and the State in which it establishes its principal or secondary headquarters.

Such agreements concern the overall legal status of the organisation and better guarantee its self-regulation, in addition to giving certainty in its relationships with the host State, but they do not necessarily establish immunity, or else limit such immunity with reference to institutional functions or property destined for official use.

10. Sulla base di queste premesse, queste Sezioni unite affermarono, con la sentenza n. 149 del 1999, il principio seconde cui l'attribuzione all'I.U.E., nella convenzione ratificata, della capacità di concludere accordi con governi statali, comporta bensì il riconoscimento di una soggettività giuridica internazionale, che però non basta ad equipararla ad uno Stato estero, tanto da assicurarle l'immunità giurisdizionale alla stregua del principio *par in parem non habet iurisdictionem*, implicitamente recepito attraverso l'art. 10 Cost. Tale immunità deve necessariamente risultare, espressamente o per implicito, dalle norme pattizie internazionali relative all'organizzazione, oppure da norme della legislazione nazionale compatibili con la Costituzione.

10. On this basis, in decision no. 149 of 1999 the Court of Cassation All Sections confirmed the principle that the ratified treaty which granted EUI the capacity to enter into agreements with state governments granted it international legal personality but was insufficient to give it the status of a foreign State and therefore immunity under the principle *par in parem non habet iurisdictionem* which is implicitly acknowledged by Article 10 of the Constitution. Such immunity must be implicitly or explicitly established in the international agreements governing the organisation, or in national legislation in compliance with the Constitution.

11. A tale principio di diritto va certamente data continuità. E', invece, l'approfondimento della verifica in concrete del se all'Istituto Universitario Europeo sia stata, sulla base delle fonti scritte, garantita l'immunità dalla giurisdizione italiana, con la previsione di adeguati strumenti di tutela per la risoluzione delle controversie, che conduce ad un esito difforme dal precedente indicato.

Il quadro normativo è costituito: a) dalla legge 23 dicembre 1972, n. 920 - Ratifica ed esecuzione della convenzione relativa alla creazione di un Istituto universitario europeo, firmata a Firenze il 19 aprile 1972, con allegato protocollo sui privilegi e sulle immunità - nel testo risultante dalla convenzione ratificata con legge 28 ottobre 1994, n. 637; b) d.P.R. 13 ottobre 1976 n. 990 - Esecuzione dell'accordo di sede tra il Governo della Repubblica italiana e l'Istituto universitario europeo, con allegati, firmato a Roma il 10 luglio 1975 e del relative scambio di note, effettuato a Firenze il 25 marzo 1976 —

11. This legal principle should certainly be continued. However, an examination of whether the European University Institute was guaranteed immunity from Italian jurisdiction on the basis of written agreements with adequate instruments for the resolution of disputes, leads to a different outcome from the precedent above.

The legal framework is composed of: a) Law no. 920 of 23 December 1972 — This ratifies and enacts the convention concerning the creation of a European University Institute, signed in Florence on 19 April 1972, with an attached protocol regarding privileges and immunity — in the text resulting from the convention ratified with Law no. 637 of 12 October 1994; b) Presidential Decree no. 990 of 13 October 1976 — Execution of the Headquarters Agreement between the Italian Government and the European University Institute, with annexes, signed in Rome on 10 July 1975 and the related exchange of notes, made in Florence on 25 March 1976.

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12. Le norme della convenzione attribuiscono all'Istituto personalità giuridica (art. 1) e piena capacità giuridica in ciascuno degli stati contraenti (art. 28), ne definiscono i compiti (art. 2), impegnano gli Stati contraenti a prendere tutte le misure atte a facilitare il compimento della missione dell'Istituto, nel rispetto della libertà di ricerca e di insegnamento (art. 3). Ma è solo l'art. 4 ad interessare specificamente il tema dell'immunità: *L'Istituto e il suo personale godono dei privilegi e delle immunità necessari al compimento della loro missione, in conformità del protocollo allegato alla presente Convenzione e che ne costituisce parte integrante. L'Istituto conclude con il governo della Repubblica italiana un accorda sulla sede, approvato all'unanimità dal Consiglio superiors*.

Assume rilevanza anche l'art. 6, che pone al vertice dell'Istituto il Consiglio superiore, composto di rappresentanti dei Governi degli Stati contraenti, cui conferisce il potere di adottare i regolamenti di organizzazione e, in particolare, lo statuto del personale, atto che *deve definire il meccanismo secondo il quale saranno risolte le controversie tra l'Istituto e i beneficiari dello statuto* (paragrafo 5, lett. c). E' anche importante sottolineare che i procedimenti volti alla revisione della convenzione possono avviarsi solo su parere conforme del Consiglio superiore (art. 33).

Da considerate pure il disposto dell'art. 29: *Le controversie che possono sorgere tra gli Stati contraenti o tra uno o più Stati contraenti e l'Istituto sull'applicazione o sull'interpretazione della Convenzione, e che non hanno potuto essere risolte dal Consiglio superiore vengono, a richiesta di una parte della controversia, sottoposte ad arbitrato. In questo caso il presidente della Corte di giustizia delle Comunità europee designa l'organo arbitrale che dovrà comporre la controversia. Gli Stati contraenti si impegnano ad eseguire le decisioni dell'organo arbitrale*.

12. The rules of the convention grant the Institute legal personality (art 1) and full legal capacity in each of the Contracting States (art 28), define its functions (art 2) and oblige the Contracting States to take all appropriate measures relating to freedom of research and teaching to facilitate the fulfilment of the Institute's mission (art 3). However, the question of immunity is only addressed by Article 4: *The Institute and its staff enjoy such privileges and immunities as are necessary for the performance of their tasks, under the conditions laid down in the Protocol annexed to this Convention, which forms an integral part thereof. The Institute shall conclude a Headquarters Agreement with the Italian Government, to be approved unanimously by the High Council*."

Article 6 is also of importance, as it entrusts control of the Institute to the High Council, composed of representatives of the Governments of the Contracting States, to which it grants the power to adopt the rules governing the activities of the Institute, and in particular the service rules of the staff, *which shall lay down the procedure for settling disputes between the Institute and persons covered by them* (paragraph 5, (c)). It is also important to note that any revisions of the convention require the approval of the High Council (art 33).

Article 29 should also be considered: *Any disputes between Contracting States, or between one or more Contracting States and the Institute, concerning the application or interpretation of the Convention which the High Council has not been able to settle may be submitted to arbitration, on application by one of the parties to the dispute,. In that event, the President of the Court of Justice of the European Communities shall determine the arbitration body to be called upon to settle the dispute. The Contracting States undertake to carry out the decisions of the arbitration body*.

13. Le riferite disposizioni della convenzione non sembrano riconoscere all'Istituto soltanto la soggettività internazionale, ma anche l'immunità dalla giurisdizione dello Stato ospitante. Le conferme decisive sono contenute nelle disposizioni, rilevanti nella controversia, dell'allegato protocollo sui privilegi e sulle immunità dell'Istituto Universitario Europeo, idonee a specificare e chiarire la previsione generale del menzionato art. 4 della convenzione.

13.1 Non attengono propriamente al problema della giurisdizione, ma contribuiscono a chiarire il

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quadro complessivo disegnato dalle norme e lo *status* riconosciuto all'I.U.E., le disposizioni concernenti le norme sostanziali da applicare al personale dipendente.

Ai sensi dell'art. 11 della convenzione, il regime delle prestazioni di sicurezza sociale è definito dallo statuto; dispone poi l'art. 3 dell'accordo di sede: *Le leggi della Repubblica italiana sono applicabili all'interno della sede dell'Istituto, fatti salvi la convenzione, il protocollo, il presente accorda, nonché le norme emanate dal Consiglio superiore ai sensi dell'articolo 6 della convenzione*.

13.2 L'art. 1 attribuisce il benficio dell'immunità di esecuzione *nell'ambito delle sue attività ufficiali* (definite, dall'art. 17, come comprendenti il funzionamento amministrativo, le attività d'insegnamento e di ricerca), esclusa la materia della circolazione stradale, quanto ai danni (ma solo per le azioni civili) e alle infrazioni, nonché l'esecuzione di decisioni arbitrali o giurisdizionali contemplate da disposizioni della convenzione o del protocollo e fatto salvo il potere del Consiglio superiore di rinuncia al beneficio in casi particolari, mediante deliberazione assunta all'unanimità.

Va osservato al riguardo che, se è vero che, in linea generale, l'esclusione dalla soggezione ad esecuzione forzata non è immunità dalla giurisdizione, ma questione di merito da far valere nei procedimenti di esecuzione, la formulazione della norma sembra, però, presupporre proprio l'immunità dalla giurisdizione: convince di ciò il riferimento non ai beni ed averi impiegati, ma alle attività istituzionali; alle azioni civili in materie di danno da circolazione stradale (non all'esecuzione derivante dall'esercizio dell'azione); al riconoscimento degli effetti vincolanti delle pronunce giurisdizionali o arbitrali solo se emanate secondo le previsioni dello statuto internazionale; al potere di rinunciare al “beneficio”.

L'interpretazione secondo cui immunità dall'esecuzione per le attività ufficiali esprime il più ampio concetto di esenzione dal vincolo derivante dall'intervento delle giurisdizioni nazionali, trova significativa conferma nella presenza di una disposizione apposita relativamente ai beni ed averi dell'Istituto, che non possono essere oggetto di alcun provvedimento di coercizione amministrativa o preliminare a un giudizio, come requisizione, confisca, espropriazione o sequestro conservativo, eccetto che nei casi in cui opera l'esclusione del beneficio di cui all'art. 1 (art. 3).

13.3 A parte altre norme (inviolabilità dei locali e degli edifici dell'Istituto: art. 2; immunità e privilegi concessi ai rappresentanti degli Stati contraenti ed ai loro consiglieri che partecipano alle riunioni del Consiglio superiore dell'Istituto, assimilati al personale diplomatico: art. 7; generale rinvio ai trattamenti riservati alle organizzazioni internazionali), rilevo decisivo assumono le previsioni dell'art. 9, da leggere in correlazione sempre con l'art. 4 della convenzione, a termini dellequali il presidente, il segretario generale, i membri del corpo insegnante e i membri del personale dell'Istituto godono, anche dopo aver cessato di essere al servizio dell'Istituto, dell'immunità di giurisdizione per tutti gli atti compiuti nell'esercizio delle loro funzioni ed entro i limiti delle loro attribuzioni (fatta eccezione anche in questo caso della materia della circolazione stradale).

Non sembra possibile leggere in modo riduttivo la disposizione attribuendole il significato che l'immunità dalla giurisdizione concerna organi e personale, ma non l'Istituto, eventualmente per atti che gli sono imputati. Sembra evidente che l'immunità dalla giurisdizione degli organi e del personale rappresenta un'estensione dell'immunità garantita innanzi tutto all'Istituto. Come dimostrano, del resto, le disposizioni che, dopo avere avvertito che le immunità e i privilegi sono concessi alle persone fisiche non nel loro interesse personale, ma dell'Istituto, riconoscono agli organi dell'Istituto medesimo la disponibilità dell'immunità, potendo decidere di toglierla (art. 14). Nello stesso ordine di principi si inserisce il potere (art. 13) di distinguere, nello statuto del personale e con deliberazione assunta all'unammità, i dipendenti che beneficiano delle immunità e dei privilegi e quelli esclusi, in tutto o in parte, dai benefici (secondo l'accertamento di merito, la disposizione è stata attuata con la distinzione, operata dallo statuto del personale, tra i collaboratori amministrativi “agenti”, “agenti temporanei” ed “agenti ausiliari — categoria quest'ultima di appartenenza della Pistelli — tutti “beneficiari dello statuto”, e “agenti locali”, esclusi

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dai benefici e assoggettati alla giurisdizione competente in base alla legislazione vigente a Firenze).

L'argomento merita di essere chiuso con l'osservazione che la lettura riduttiva porterebbe all'illogica conseguenza che l'Istituto potrebbe essere convenuto dal dipendente dinanzi alla giurisdizione italiana, ma non potrebbe a sua volta convenirlo dinanzi alla stessa giurisdizione per lo stesso rapporto controverso, in relazione agli atti compiuti nell'esercizio delle attribuzioni e funzioni istituzionali (se non provvedendo a togliere l'immunità).

13. The provisions of the convention set out above appear not only to grant the Institute international legal personality but also immunity from the jurisdiction of the host State. Decisive confirmation of this is contained in the provisions, of relevance to this dispute, contained in the appended protocol regarding the privileges and immunities of the European University Institute, which specify and clarify the general provision in the aforementioned Article 4 of the convention.

13.1 The provisions concerning the general rules to be applied to personnel do not deal specifically with the question of jurisdiction, but help to clarify the overall framework created by the rules and the status conferred upon the EUI

Under Article 11 of the convention, the system for social security is defined by the statute; Article 3 of the headquarters agreement reads as follows: *The laws of the Italian Republic shall be applicable within the headquarters of the Institute, without prejudice to the convention, the protocol and this agreement, as well as the rules issued by the High Council in accordance with Article 6 of the convention*.

13.2 Article 1 grants immunity from enforcement *in the exercise of its official activities* (defined in Article 17 as including administrative functions and teaching and research activities), but excludes actions for damages (civil suits only) and infractions relating to motor vehicles, the enforcement of arbitration awards or judicial decisions under provisions of the convention or the protocol and gives the High Council's authority to waive such immunity in any particular case by a unanimous resolution.

In this regard it should be noted that, while in general it is true that exclusion from obligatory enforcement is not immunity from jurisdiction but a question of merit to be raised in enforcement proceedings, the formulation of the rule seems to assume immunity from jurisdiction. Evidence of this is provided in the reference not to property and assets but rather to institutional activities; to civil suits concerning damages from the circulation of vehicles (and not enforcement arising from the exercise of the action); to the recognition of the binding effects of jurisdictional or arbitral orders only if issued according to the provisions of the international statute; to the power to waive this “benefit”.

The view that immunity from enforcement for official activities expresses the broadest concept of exemption from national jurisdiction is largely confirmed by the presence of a specific provision concerning the Institute's property and assets, which are immune from any form of administrative or provisional constraining order such as requisition, confiscation, expropriation or attachment, except in the cases under Article 1 (art 3) where this benefit is excluded.

13.3 Aside from other rules (inviolability of the premises and buildings of the Institute: art 2; immunity and privileges granted to representatives of the Contracting States and their advisors participating in meetings of the High Council of the Institute, similar to those for diplomatic personnel: art 7; general reference to treatment reserved for international organisations), of particular importance are the provisions of Article 9, to be considered in conjunction with Article 4 of the Convention, under which the president, the general secretary, the teaching staff and the other members of staff at the Institute enjoy immunity from legal proceedings in respect of their acts in the exercise of their functions and within the limits of their powers (with the exception of motor

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vehicle matters), even after they have left the service of the Institute,.

It would not seem possible to read the provision restrictively, interpreting it to mean that the immunity from legal proceedings applies to organs and personnel, but not the Institute for any actions attributed to it. It seems clear that the immunity from legal proceedings enjoyed by organs and personnel is an extension of the Institute's immunity. This is shown by the provisions which, after stating that the immunities and privileges are accorded to physical persons not in their personal interests but in those of the Institute, then grant to the organs of the Institute the availability of these immunities as they may waive them immunity to the organs of the Institute which may waive that immunity (art 14). Based on the same principles is the power (art 13) to distinguish in the service rules by unanimous resolution, between employees who benefit from the immunities and privileges and those that are wholly or partly excluded from them (, the provision was enacted through a distinction in the service rules between “agent” administrative employees, “temporary agents” and “auxiliary agents” according to the assessment of merit — with Pistelli belonging to the latter category — all were “beneficiaries of the statute”, but “local personnel” were excluded from the benefits and subject to the competent jurisdiction in Florence based on the legislation in force).

It is worth concluding the discussion by observing that the restrictive interpretation would lead to the illogical consequence that proceedings could be brought by an employee against the Institute in Italian jurisdiction, but the Institute could not in turn bring proceedings arising from the same relationship in the same jurisdiction against an employee in relation to activities carried out in the exercise of institutional powers and functions (without deciding to remove immunity).

14. L'indagine, però, non pu&ograve considerarsi completata se non verificando la conformità dell'immunità dell'I.U.E. dalla giurisdizione italiana al principio costituzionale della tutela giudiziaria (art. 24 Cost.) Ed infatti, Cass, S.u. 149/1999 affermano che “la tutela giurisdizionale costituisce un principio cardine dell'ordinamento” (richiamando Cass. S.u. n. 12614 del 1998). Ora, tale principio cardine cede di fronte al principio consuetudinario *par in parem non habet iurisdictio*, riferito agli Stati, in quanto il principio riflette l'eguale sovranità delle organizzazioni statuali che costituisce fondamento universalmente accettato dalla comunità internazionale, al quale la nostra Costituzione dichiara di sottomettersi (art. 10). Ma una tale prevalenza non ha più giustificazione quando il sacrificio del “principio cardine” della Costituzione discende, non già dal fondamento dello stesso ordine internazionale, ma da un impegno liberamente assunto dalla nostra Repubblica attraverso la sottoscrizione di una convenzione. In questo caso, proprio la necessita che l'impegno assunto si traduca in una legge di ratifica per essere vincolante per i giudici, porta in primo piano i principi fondamentali dell'ordinamento costituzionale, con i quali l'impegno deve essere compatibile, pena l'invalidità della legge di ratifica (vedi Corte cost. n. 223 del 1996).

Di conseguenza, l'esclusione *in radice* del diritto degli interessati alla tutela giurisdizionale dinanzi ad un organo indipendente delle situazioni giuridiche nascenti in un certo ambito dei rapporti, deve indurre a dubitare della legittimità costituzionale della legge di ratifica di convenzioni recanti simili previsioni, ovvero, ove sia possibile, a pervenire a risultati interpretativi costituzionalmente orientati.

14.1 Ma diverso discorso è a farsi per una convenzione che preveda soltanto la sottrazione della cognizione di quelle situazioni al giudice italiano, tuttavia preoccupandosi di assicurare la tutela giurisdizionale delle stesse situazioni dinanzi a giudice imparziale e indipendente, sia pure scelto con procedure e criteri diversi da quelli vigenti nell'ordinamento nazionale. In tal caso non ricorre alcun *vulnus* di “principi-cardine” della nostra Costituzionale e non vi è ragione di non applicare la convenzione, *id est* la legge che la ratifica.

Orbene, dall'esame della convenzione istitutiva dell'U.E. risulta che, accanto all'esplicita affermazione dell'immunità dalla giurisdizione italiana per quanto attiene ai rapporti di lavoro del personale non locale, sono apprestati strumenti di adeguata tutela giurisdizionale

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14.2 La previsione della convenzione (art. 6, par. 5, lett. c), secondo cui lo statuto deve definire il meccanismo secondo il quale saranno risolte le controversie tra l'Istituto e i beneficiari dello statuto medesimo, è stata attuata nel senso che, esauriti i reclami interni, è concessa all'interessato istanza ad una Commissione, i cui membri sono scelti dal Consiglio superiore da un elenco formato da un organismo giurisdizionale internazionale.

La previsione della Convenzione già appare sufficiente per ritenere che lo strumento di composizione delle controversie sia stato previsto come esclusivo della competenza giurisdizionale nazionale, non certo quale mero rimedio interno. La conferma definitiva, comunque, la si trae dall'allegato n. 2 alla stessa Convenzione, nella parte in cui prevede che *le disposizioni dell'articolo 6, paragrafo 5, lettera c), non escludono la possibilità che il Consiglio superiore designi la Corte di giustizia delle Comunità europee — previa consultazione del Presidente di quest'ultima — quale istanza chiamata a dirimere le controversie tra l'Istituto ed il suo personale*.

La possibilità di sostituire alla competenza della Commissione, istituita dallo statuto, la Corte di giustizia Cee rivela definitivamente l'intento di attribuite all'istanza non la natura di mero rimedio interno, sperimentato il quale resta aperto l'accesso alla tutela giurisdizionale, ma di mezzo esclusivo, di natura giurisdizionale, della risoluzione delle controversie con i dipendenti.

14.3 I dati richiamati consentono perciò di confutare l'affermazione della sentenza 149/1999, seconde cui sarebbe stato previsto un mero organo di giustizia interna, e un rimedio alternative rispetto alla giustizia statale, o anche facoltativo, affermazione che, a ben guardare, ha rappresentato il fulcro di quella decisione. L'organo di risoluzione delle controversie, come si è constatato, è una vera e propria istanza giurisdizionale. La scelta dei membri della Commissione all'interno di un elenco formato da organismi giurisdizionali internazionali soddisfa i requisiti di indipendenza e terzietà dell'organo deputato alla risoluzione delle controversie tra il personale e l'Istituto, organo, come si è detto, considerato equivalente alla Corte di giustizia Cee.

L'istituto, del resto, è stato creato da paesi aderenti all'Unione Europea per valorizzare il patrimonio culturale dell'Europa e le sue tradizioni costituzionali, nonché le sue istituzioni; non poteva, quindi fondarsi su di una convenzione in contrasto con un valore cardine dell'istituzionalità europea e del suo *ius cogens*, valore consacrato dall'art. 6/2 del trattato sull'Unione (come modificato dal Trattato di Amsterdam: G.u. 6.7.1998, n. 155, suppl. ord.) — letto in connessione con l'art. 6 della CEDU e l'art. 46, lett. d) dello stesso trattato UE (si veda anche l'art. 14,patto sui diritti civili e politici) — e dall'art. II-47/2 della carta fondamentale dei diritti dell'Unione.

14. However, the investigation cannot be considered to be complete without verifying whether the EUI's immunity from Italian jurisdiction complies with the constitutional principle of judicial protection (art 24 of the Constitution). Indeed Cassation All Sections 149/1999 states that “judicial protection constitutes a cardinal principle of the legal order” (referring to Cassation, All Sections no. 12614 of 1998). This cardinal principle submits to the customary principle of *par in parem non habet iurisdictio* in relation to States, as the principle reflects the sovereign equality of state organisations which is a universal rule recognised by the international community to which our Constitution conforms (art 10). But this prevalence is no longer justified when the sacrifice of the cardinal principle of the Constitution arises not from the international system but from a commitment freely undertaken by our Republic through the ratification of a convention. In this case, the requirement that the commitment undertaken be translated into a ratifying law to become binding upon courts brings to the fore the fundamental principles of the Constitution, with which the undertaking must be compatible for the ratifying law to be valid (see Constitutional Court judgement no. 223 of 1996).

Consequently, the complete exclusion of the right to jurisdictional protection before an independent organ for legal disputes arising from specific relationships must raise doubts about the constitutional legitimacy of the law ratifying conventions containing such provisions, or, where possible, encourage interpretations of the provisions in line with the Constitution.

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14.1 However, the situation is different for a convention which only excludes such disputes from Italian courts, while nevertheless ensuring the jurisdictional protection of the same situations before an impartial and independent judge, even if chosen with procedures and criteria other than those in national legislation. In this case there is no violation of the "cardinal principles" of our Constitution and no reason not to apply the convention, in the form of the ratifying law.

From an examination of the constitutive convention of the EUI it appears that there are adequate instruments for jurisdictional protection,, alongside the explicit conformation of immunity from Italian jurisdiction with respect employment relations with non-local personnel,.

14.2 The provision in the convention (art 6(5)(c)) under which the statute must define the mechanism for the resolution of disputes between the Institute and the beneficiaries of the statute, has been enacted as, once internal claims have been exhausted the interested party can take disputes to a Commission, whose members are chosen by the High Council from a list compiled by an international judicial organ.

The provision of the Convention appears sufficient to draw the conclusion that the instrument for settling disputes was envisaged as excluding national jurisdiction, and not as a mere internal remedy. In any event, definitive confirmation is provided by Annex 2 of the same Convention, where it states that *the provisions of Article 6(5)(c) do not prevent the High Council from designating the Court of Justice of the European Communities, after consultation with the President of that Court, as the body appointed to settle disputes between the Institute and its staff*.

The possibility of substituting the competence of the Committee with the Court of Justice of the European Communities definitely reveals the intention for the procedure not to be merely an interim remedy, following which is the possibility of access to jurisdictional protection, but rather the exclusive jurisdictional means of settling disputes with staff.

14.3 These matters therefore makes it possible to refute the statement in decision 149/1999,which formed the basis for that decision, that a merely internal decision-making body had been provided as an alternative or optional remedy to State justice.

As has been noted, the body for settling disputes is a truly jurisdictional body. The selection of the members of the Committee from a list compiled by an international judicial organ of international legal organisations satisfies the requirements of independence and impartiality for the body charged with resolving disputes between staff and the Institute, a body, as has been said, which is considered equivalent to the Court of Justice of the European Communities.

Besides, the Institute was created by member countries of the European Union in order to promote the importance of European cultural heritage and its constitutional traditions, as well as its institutions; it could not therefore be founded on the basis of a convention that contrasted with a cardinal value of European institutionality and its *ius cogens*, a value enshrined by Article 6/2 of the Treaty on the European Union (as amended by the Treaty of Amsterdam: Official Gazette 6.7.1998, no. 155, ordinary supplement) — read in connection with Article 6 of the ECHR and Article 46(d) of the EU treaty (see also Article 14, agreement on civil and political rights) — and by Article II-47/2 of the Charter of Fundamental Rights of the European Union.

15. Sulla base delle considerazioni svolte, pertanto, e tenuto conto che nella controversia non è neppure prospettabile il limite dell'immunità ristretta, considerate le mansioni svolte dalla Pistelli e la natura delle demande, tutte non meramente patrimoniali (vedi le considerazioni svolte al n. 6), il ricorso va rigettato e dichiarato il difetto di giurisdizione del giudice italiano. Sussistono, evidenti, giusti motivi per compensare interamente le spese e gli onorari del giudizio di cassazione.

15. Therefore on the basis of the above considerations, and taking account of the fact that in this

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dispute it is not possible even to contemplate the limit of restricted immunity, considering the tasks conducted by Ms Pistelli and the nature of the applications which do not concern exclusively financial matters (see the point made at no. 6), the appeal must be rejected and Italian jurisdiction must be declined. Clearly there are just reasons to share between the parties the costs and disbursements of the cassation proceeding.

P.Q.M

La Corte, a Sezioni Unite, rigetta il ricorso e dichiara il difetto di giurisdizione del giudice italiano; compensa interamente le spese e gli onorari del giudizio di cassazione.

Cosi deciso, in Roma, nella camera di consiglio delle Sezioni unite civili del 23 giugno 2005.

Il Presidente

Il Consigliere estensore

For this Reason

The All Sections of the Court rejects the appeal and declines Italian jurisdiction; division of the costs and disbursements of the cassation proceeding.

Decided, in Rome, in the closed session of the All Sections on 23 June 2005.

The President

Draftsman

CLERK OF THE COURT

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THE CLERK OF THE COURT

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HOUSE OF LORDS SESSION 2008–09
[2009] UKHL 28
on appeal from: [2008]EWCA Civ 1148

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Respondent) *v* AF (Appellant) (FC) and another (Appellant) and one other action

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

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Appellant (AE):
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Tim Eicke, Cecilia Ivimy
Andrew O'Connor, Kate Grange
(Instructed by Treasury Solicitors)

Interveners (Justice):
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Jemima Stratford, Shaheed Fatima
Tom Richards
(Instructed by Clifford Chance)

Special Advocates:
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Hearing dates:
19 FEBRUARY, 2, 3, 4, 5 AND 9 MARCH 2009

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WEDNESDAY 10 JUNE 2009

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

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[2009] UKHL 28

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Introduction

1. The three appellants, AF, AN and AE, are subject to non-derogating control orders ("control orders") involving significant restriction of liberty. A control order was first made against AF on 24 May 2006, against AN on 4 July 2007 and against AE on 15 May 2006. Each control order was made pursuant to section 2 of the Prevention of Terrorism Act 2005 ("the PTA") on the ground that the Secretary of State had reasonable grounds for suspecting that the appellant was, or had been, involved in terrorism-related activity. The issue raised by their appeals is whether, in each case, the procedure that resulted in the making of the control order satisfied the appellant's right to a fair hearing guaranteed by article 6 of the European Convention on Human Rights ("article 6") in conjunction with the Human Rights Act 1998 ("the HRA"). Each contends that this right was violated by reason of the reliance by the judge making the order upon material received in closed hearing the nature of which was not disclosed to the appellant.

The history of control orders

2. After the tragic events of September 11 2001 the Secretary of State made a Derogation Order under section 14 of the HRA and then enacted the Anti-terrorism, Crime and Security Act 2001 ("the ATCSA"). Section 23 of the ATCSA gave the Secretary of State the power to detain a suspected international terrorist with a view to his

intended deportation. A suspected international terrorist was an alien whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national security and whom he reasonably suspected to be a terrorist. An appeal against certification as a suspected international terrorist lay to the Special Immigration Appeals Commission ("SIAC"). Provision was made for SIAC to receive material in closed hearings at which the suspects would be represented by special advocates, who would not be permitted to consult their clients in order to take instructions in relation to the closed material.

3. In *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 this House quashed the Derogation Order and declared section 23 of the ATCSA incompatible with articles 5 and 14 of the Convention. Parliament's response was to enact the PTA, which made provision for the making of derogating and non-derogating control orders.

The PTA

4. The following are the relevant provisions of the PTA:

Section 2(1) gives the Secretary of State power to make a control order against an individual if he:

> "(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
>
> (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

Section 3 makes provision for the supervision by the court of the making of control orders. Section 3(10) makes provision for a hearing ("the section 3(10) hearing") at which the function of the court is to determine whether the decision of the Secretary of State that the requirements of section 2(1)(a) and (b) were satisfied and that the obligations imposed by the order were necessary was flawed.

5. The rules that govern a section 3(10) hearing were summarised by Lord Bingham of Cornhill in *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] AC 440, to which I shall shortly be referring, and I shall gratefully adopt that summary:

> "26. The Schedule to the 2005 Act provides a rule-making power applicable to both derogating and non-derogating control orders. It requires the rule-making authority (paragraph 2(b)) to have regard in particular to the need to ensure that disclosures of information are not made where they would be contrary to the public interest. Rules so made (paragraph 4(2)(b)) may make provision enabling the relevant court to conduct proceedings in the absence of any person, including a relevant party to the proceedings and his legal representative. Provision may be made for the appointment of a person to represent a relevant party: paragraphs 4(2)(c) and 7. The Secretary of State must be required to disclose all relevant material (paragraph 4(3)(a)), but may apply to the court for permission not to do so: paragraph 4(3)(b). Such application must be heard in the absence of every relevant person and his legal representative (paragraph 4(3)(c)) and the court must give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest: paragraph 4(3)(d). The court must consider requiring the Secretary of State to provide the relevant party and his legal representative with a summary of the material withheld (paragraph 4(3)(e)), but the court must ensure that such summary does not contain information or other material the disclosure of which would be contrary to the public interest: paragraph 4(3)(f). If the Secretary of State elects not to disclose or summarise material which he is required to disclose or summarise, the court may give directions withdrawing from its consideration the matter to which the material is relevant or otherwise ensure that the material is not relied on: paragraph 4(4).
>
> 27. CPR Pt 76 gives effect to the procedural scheme authorised by the Schedule to the 2005 Act. Rule 76.2 modifies the overriding objective of the Rules so as to require a court to ensure that information is not disclosed contrary to the public interest. Rule 76.1(4) stipulates that disclosure is contrary to the public interest if it is made

> contrary to the interests of national security, the international relations of the United Kingdom, the detection or prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. Part III of the Rule applies to non-derogating control orders. It is unnecessary to rehearse its detailed terms. Provision is made for the exclusion of a relevant person and his legal representative from a hearing to secure that information is not disclosed contrary to the public interest: rule 76.22. Provision is made for the appointment of a special advocate whose function is to represent the interests of a relevant party (rules 76.23, 76.24), but who may only communicate with the relevant party before closed material is served upon him, save with permission of the court: rules 76.25, 76.28(2). The ordinary rules governing evidence and inspection of documents are not to apply (rule 76.26): evidence may be given orally or in writing, and in documentary or any other form; it may receive evidence which would not be admissible in a court of law; it is provided by rule 76.26(5) that 'Every party shall be entitled to adduce evidence and to cross-examine witnesses during any part of a hearing from which he and his legal representative are not excluded'."

6. 38 individuals have been subjected to control orders under the PTA. Of these 7 have absconded. Those who did not abscond, or some of them, have generated an extraordinary volume of litigation. The section 3(10) hearings themselves are substantial undertakings, involving as they do open and closed hearings and two sets of advocates representing those who are subject to the orders, whom I shall describe by the inelegant invented noun as "controlees". The care and industry devoted by both judges and advocates to ensuring that the interests of the controlees are properly considered deserves recognition. It exemplifies the respect that is accorded by those involved in the administration of justice in this country both to human rights and to the rule of law.

7. The section 3(10) hearing in many cases proved merely the start of a lengthy saga. The Court of Appeal at paragraphs 9 and 10 describes the series of substantial hearings that have involved AF. This is the second time that his case has been before this House and the eighth substantial hearing that it has received. Nor will this be the last. I propose to pick up the story on the occasion that the case of MB came

before the Court of Appeal, a hearing over which I presided. MB and AF were subsequently co-appellants to this House.

Secretary of State for the Home Department v MB

8. This appeal [2006] EWCA Civ 1140, [2007] QB 415 was brought by the Secretary of State against a decision of Sullivan J holding the PTA incompatible with the Convention. One of the reasons for so holding was that MB had not had a fair hearing in that the court had been constrained by the provisions of the PTA to reach a decision on the basis of closed evidence of which MB was unaware and which he was therefore not in a position to controvert. The Judge had found that the case against MB was wholly contained within the closed material and that, without access to this material, MB could not make an effective challenge to what was, in the open case, no more than a bare assertion.

9. The Court of Appeal accepted that the justification for imposing the control order on MB lay in the closed material. It held, however, that the use of closed material had already been approved in earlier decisions of the Court of Appeal which were binding on the court. It reversed the judge both on this issue and on others raised by the appeal, which was accordingly allowed.

10. MB appealed to this House, together with AF. Once again other issues were raised by that appeal that are not material to the present debate. As in *MB* the Secretary of State's case against AF lay in the closed material. On the section 3(10) hearing [2007] EWHC 651 (Admin) Ouseley J had held at para 61 that it was clear that the essence of the case against AF was in the closed material and that he did not know what that case was. The judge concluded, however, at para 167:

> "I should add that looking at the nature of the issue, namely necessary restrictions on movement in an important interest, and at the way in which the Special Advocates were able to and did deal with the issues on the closed material, I do not regard the process as one in which AF has been without a substantial and sufficient measure of procedural protection."

11. Lord Bingham did not share this view. He quoted a series of judicial dicta from sources of high standing to the effect that a fair hearing requires that a party must be informed of the case against him so that he can respond to it. Commenting on the decision of this House in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, he remarked at para 34:

> "I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him."

12. Lord Bingham expressed the following conclusion at para 41 in respect of MB:

> "This is not a case (like *E*) in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired."

In relation to AF, Lord Bingham said this, as para 43:

> "This would seem to me an even stronger case than *MB*'s. If, as I understand the House to have accepted in *Roberts*, the concept of fairness imports a core, irreducible minimum of procedural protection, I have difficulty, on

> the judge's findings, in concluding that such protection has been afforded to AF. The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB*'s, it seems to me that it was not."

13. Lord Hoffmann took a different view. He considered that the use of closed material, coupled with the protection afforded by special advocates, had been approved by the Strasbourg court:

> "51. Thus a decision that article 6 does not allow the Secretary of State to rely on closed material would create a dilemma: either he must disclose material which the court considers that the public interest requires to be withheld, or he must risk being unable to justify to the court an order which he considers necessary to protect the public against terrorism. It was this dilemma, and the way in which it should be resolved, which the Strasbourg court recognised in *Chahal v United Kingdom* 23 EHRR 413, para 131:
>
> > 'The court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The court attaches significance to the fact that, as the interveners pointed out in connection with article 13 (see para 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.'
>
> 52. The court described the Canadian procedure which they recommended as a model in para 144:

> '[A] Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the state's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.'"

14. Lord Hoffmann commented, at para 54:

> "The Canadian model is precisely what has been adopted in the United Kingdom, first for cases of detention for the purposes of deportation on national security grounds (as in *Chahal*) and then for the judicial supervision of control orders. From the point of view of the individual seeking to challenge the order, it is of course imperfect. But the Strasbourg court has recognised that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest. The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security. There is no Strasbourg or domestic authority which has gone to the lengths of saying that the Secretary of State cannot make a non-derogating control order (or anything of the same kind) without disclosing material which a judge considers it would be contrary to the public interest to disclose. I do not think that we should put the Secretary of State in such an impossible position and I therefore agree with the Court

> of Appeal that in principle the special advocate procedure provides sufficient safeguards to satisfy article 6."

15. The remaining three members of the committee reached conclusions which fell between those of Lord Bingham and Lord Hoffmann. They expressed the view that in some cases it would be possible for the controlee, with the assistance of the special advocate, to have a fair trial notwithstanding the admission of closed material and that in others it would not. The fair trial issue was fact specific and the trial judge was best placed to resolve it.

16. Baroness Hale of Richmond at para 66 expressed the view that one could not be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used would be sufficient to comply with article 6 but that, with strenuous efforts from all, it should usually be possible to accord the controlled person "a substantial measure of procedural justice" – the phrase used by the Strasbourg court in *Chahal.* Significantly, she was also inclined to accept the view of Ouseley J that this test had been satisfied in the case of AF, notwithstanding that the judge had observed that the essence of the case against him lay in the closed material.

17. In expressing her conclusions, Baroness Hale said this at para 74:

> "It follows that I cannot share the view of Lord Hoffmann, that the use of special advocates will always comply with article 6; nor do I have the same difficulty as Lord Bingham, in accepting that the procedure could comply with article 6 in the two cases before us. It is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed."

The last sentence of this passage contains an ambiguity. "Even though the whole evidential basis…is not disclosed" could mean (i) "even though none of the evidential basis is disclosed" or (ii) "even though not all of the evidential basis is disclosed". It seems that some have read it in one way and some in another.

18. If some found Baroness Hale's observations to be to some extent enigmatic, the same was true to a greater degree in respect of a passage in para 90 of the opinion of Lord Brown of Eaton-under-Heywood:

> "I agree further that the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so. There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. *Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded* (a difficult but not, I think, impossible conclusion to arrive at — consider, for example, the judge's remarks in AF's own case, set out by my noble and learned friend Baroness Hale of Richmond at para 67 of her opinion), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect."

19. The portion that I have emphasised has given rise to debate as to whether the House recognised a "makes no difference" principle under which fair process does not require that the nature of the case against the controlee should be disclosed to him if the cogency of the closed material is such as to satisfy the judge that no effective challenge could be made to it.

20. The conclusion of the majority of the House was that there would be cases, albeit rare ones, where the failure to disclose closed material to the controlee would be incompatible with the article 6 requirement of a fair trial. Baroness Hale proposed that in these circumstances it was both possible and desirable to read down the relevant statutory provisions rather than make a declaration of incompatibility. She said, at para 72:

> "In my view, therefore, paragraph 4(3)(d) of the Schedule to the 2005 Act, should be read and given effect 'except

> where to do so would be incompatible with the right of the controlled person to a fair trial'. Paragraph 4(2)(a) and rule 76.29(8) would have to be read in the same way. This would then bring into play rule 76.29(7), made under paragraph 4(4) of the Schedule. Where the court does not give the Secretary of State permission to withhold closed material, she has a choice. She may decide that, after all, it can safely be disclosed (experience elsewhere in the world has been that, if pushed, the authorities discover that more can be disclosed than they first thought possible). But she may decide that it must still be withheld. She cannot then be required to serve it. But if the court considers that the material might be of assistance to the controlled person in relation to a matter under consideration, it may direct that the matter be withdrawn from consideration by the court. In any other case, it may direct that the Secretary of State cannot rely upon the material. If the Secretary of State cannot rely upon it, and it is indeed crucial to the decision, then the decision will be flawed and the order will have to be quashed."

Not only did this proposal find favour with Lord Carswell and Lord Brown; it was accepted, not without reservation, by Lord Bingham. Each case was remitted to the trial judge for further consideration in the light of the observations of the committee.

21. The decision in *MB* was received with some reservations. The House will be aware of expressions of concern in two respects. First it was suggested that, perhaps because the House had deliberately chosen not to view the closed material, it had taken too sanguine a view of the extent to which Special Advocates could respond effectively to material on which they were not able to take instructions from those they represented. Secondly the question of whether the House had approved a "makes no difference" principle was giving rise to uncertainty. Had it done so or, conversely, did it follow from the decision of the House that there was a "core irreducible minimum" of the allegations against a controlee that had to be disclosed? These concerns led the Court of Appeal to take the unusual course of granting permission to appeal in the present case.

The relevant facts in these appeals

22. There is no need to review in any detail the facts relating to each appellant. What is significant is the extent to which the case against each was disclosed to him, and this is in each case sufficiently spelt out by the judge concerned.

AF

23. AF has both United Kingdom and Libyan nationality. He was born in the United Kingdom in 1980 but brought up in Libya. His English mother is divorced from his Libyan father. He came to England with his father in December 2004. The open case against him alleged links with Islamist extremists, some of whom are affiliated to an organisation proscribed under the Terrorism Act 2000. He established that he had innocent links with those who were named. Additional disclosure that was made in relation to a trip by AF to Egypt added nothing significant to the case against him. It is common ground that the open material did not afford the Secretary of State reasonable grounds for suspicion of involvement by AF in terrorism-related activity. The case against him was to be found in the closed material.

24. AF's case following remission came before Stanley Burnton J. In a judgment delivered on 10 March 2008 [2008] EWHC 453 (Admin) he held that although the special advocates had done all that was reasonably possible without instructions from AF, the absence of such instructions had meant that their efforts were ineffective. Subject to one point, the Secretary of State would have to elect between making further disclosure or allowing the control order to be quashed. That point was that there was one aspect of the case against AF on which the judge could be "quite sure that in any event no possible challenge could conceivably have succeeded". If the "makes no difference" principle fell to be applied, then the control order would stand. He held a separate hearing on the issue of whether the "makes no difference" principle had been laid down by the majority of the House in *MB* and concluded that it had not [2008] EWHC 689 (Admin).

AN

25. AN is a British citizen, born in Derby in 1981. In September 2005 he moved with his wife and son to Syria. There he was detained and deported to the United Kingdom in March 2007. The open case against him included alleged connection with extremists and made

general allegations of involvement in attack planning and facilitation of the participation by extremists in terrorism-related activities overseas. In the open judgment after the section 3(10) hearing dated 29 February 2008 [2008] EWHC 372 (Admin) Mitting J held, for reasons set out in the closed judgment, that he was satisfied that AN had not had disclosed to him a substantial part of the grounds for suspecting that he had been involved in terrorism-related activity and that without disclosure he would not be in a position personally to meet those aspects of the case against him.

26. Mitting J summarised his perception of the effect of the decision of this House in *MB* and its consequences as follows:

> "9. The conclusion which I draw from the four speeches of the majority in *MB* is that unless, at a minimum, the special advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them. In practice, this means that he must be told their gist. This means that, if he chooses to do so, he can give and call evidence about the issues himself.
>
> 10. AN does not know the gist of significant grounds of suspicion raised against him. I have already determined, in a closed judgment, that the material which I have considered is capable of founding reasonable grounds to suspect that he has been involved in terrorism related activity. I have identified in a closed disclosure judgment what must be disclosed to him to fulfil his right to a fair hearing in accordance with my understanding of the speeches of the majority in *MB*. I do so with disquiet, because the factors which require further disclosure in this case are likely to arise in many others, with the result that the non-derogating control order procedure may be rendered nugatory in a significant number of cases in which the grounds for suspecting that a controlled person has been involved in terrorism related activities may otherwise be adjudged reasonable."

He put the Secretary of State to her election to disclose the material that he had identified in his closed judgment or to cease to rely on it, but stayed the effect of his order pending her appeal to the Court of Appeal.

AE

27. AE is an Iraqi national. He entered the United Kingdom in January 2002 and claimed political asylum. Relatively lengthy allegations of grounds for suspicion of AE's involvement in terrorism-related activities were made in the open proceedings, but these were almost all in very general terms - too general for any response other than a general denial to be expected. Typical is the first and perhaps the most serious allegation:

> "The security service investigation of AE has revealed he has a considerable jihadi pedigree, and that prior to his arrival in the UK he took part in both terrorist training and activities".

28. It fell to Silber J to apply *MB* to AE's case, and that on two occasions. The first was on a section 3(10) hearing in relation to a second control order made by the Secretary of State in place of an initial order that she had withdrawn. Judgment was given on 1 February 2008 [2008] EWHC 132 (Admin). The second related to the renewal of that order and to issues arising in relation to its variation. Judgment was given on 20 March 2008 [2008] EWHC 585 (Admin).

29. In the first judgment Silber J concluded in para 40 that the effect of *MB* was that he had to ascertain "looking at the process as a whole, whether a process has been used which involved a serious injustice to the controlled person". He held, having particular regard to the role played by the special advocate in the closed hearing, that it had not.

30. Silber J analysed the judgment in *MB* in much greater depth in his second judgment. He accepted in para 43 that the open case for the Secretary of State went "nowhere near setting out the full case against AE", but concluded that it did not follow from this that the procedure was unfair. Earlier he summarised the effect of the decision of this House in *MB* as follows:

> "So my conclusion is that there is no minimum level of information which has *invariably* in every case to be set out in the open material to ensure compliance with the article 6 rights of the controlled person. Indeed the task of the court in deciding if there has been an infringement of the controlled person's article 6 rights is to look with the appropriate intense care described in *MB* at what occurs in the closed proceedings as well as considering the open evidence and the open proceedings."

31. In reaching this conclusion Silber J stated that he had borne in mind that

> "the information disclosed in the open case was very scant and three members of the Appellate Committee concluded that it would be exceptional for there to be a finding of infringement with article 6 rights of a controlled person when the special advocate procedure is adopted. This so that even in cases where the controlled person has not been informed of the essentials of the case against him or her or the evidence relied on by the Secretary of State."

Silber J ordered that the control order should continue in force.

The decision of the Court of Appeal

32. The Secretary of State appealed to the Court of Appeal against the decisions in relation to AF and AN. AE appealed against the decision in his case. These appeals were joined with a further appeal by the Secretary of State against a decision of Sullivan J in favour of a controlee known as AM [2008] EWCA Civ 1148; [2009] 2 WLR 423. In that case Sullivan J delivered a closed judgment only.

33. Sir Anthony Clarke MR and Waller LJ gave a single judgment. Sedley LJ dissented. The majority subjected the decision of this House in *MB* to a detailed and meticulous analysis. They summarised their conclusions in para 64 as follows:

"i) The question is whether the hearing under section 3(10) infringes the controlee's rights under article 6. In this context the question is whether, taken as a whole, the hearing is fundamentally unfair in the sense that there is significant injustice to the controlee or, put another way, that he is not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing is impaired. More broadly, the question is whether the effect of the process is that the controlee is exposed to significant injustice. In what follows 'fair' and 'unfair' are used in this sense.

ii) All proper steps should be made to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting.

iii) Where the full allegations and evidence are not provided for reasons of national security at the outset, the controlee must be provided with a special advocate or advocates. In such a case the following principles apply.

iv) There is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there is, the irreducible minimum can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed.

v) Whether a hearing will be unfair depends upon all the circumstances, including for example the nature of the case, what steps have been taken to explain the detail of the allegations to the controlled person so that he can anticipate what the material in support might be, what steps have been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively the special advocate is able to challenge it on behalf of the controlled person and what difference its disclosure would or might make.

vi) In considering whether open disclosure to the controlee would have made a difference to the answer to the question whether there are reasonable grounds for suspicion that the controlee is or has been involved in terrorist related activity, the court

must have fully in mind the problems for the controlee and the special advocates and take account of all the circumstances of the case, including the question what if any information was openly disclosed and how effective the special advocates were able to be. The correct approach to and the weight to be given to any particular factor will depend upon the particular circumstances.

vii) There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere."

34. There are two points I would make in respect of this summary. The first is that the majority concluded that there was no absolute requirement to disclose the gist or essence of the Secretary of State's case to the controlee. The second is that the summary shows a degree of overlap between the question of whether the procedure has been fair and the question of whether the outcome of the hearing has been fair. This is particularly apparent in paragraph vi) where the test of fairness depends upon whether the procedure adopted can have affected the result. The distinction between procedural fairness and procedure that produces a fair result is one to which I shall revert.

35. The majority endorsed the reasoning of Silber J in *AE* and dismissed AE's appeal. They held that Mitting J had misdirected himself in *AN* in concluding that there was an irreducible minimum of material that had to be disclosed to the controlee and remitted AN's case for further consideration, directing that this should await the present decision of this House. The majority reached a similar decision in relation to Stanley Burnton J's decision that there was no "makes no difference" principle and remitted AF's case for further consideration. It found no error in Sullivan J's closed judgment in *AM* and dismissed the Secretary of State's appeal in that case. I have based this summary on the open judgment delivered by the majority. A closed judgment was also delivered.

36. In his dissent Sedley LJ reached a contrary decision to that of the majority on the critical issue of whether it was fundamental to the fairness of the trial that the controlee should have the case against him disclosed to him and thereby given the opportunity to answer it. He held that this House had not, in fact, determined this in *MB*. His conclusions appear from the following passage of his judgment:

> "112. … The question for this court is whether, in a case such as *AF's*, where the judge took the view that he could be sure that the evidence, albeit wholly undisclosed, was unanswerable, the law regards the requirements of a fair hearing as satisfied. In my judgment, for reasons both principled and pragmatic, Stanley Burnton and Mitting JJ were right to hold that the law did not do so.
>
> 113. Far from being difficult, as Lord Brown tentatively suggested it was, it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know."

37. In a postscript to their judgment the majority explained why the court proposed to take the unusual step of giving permission to AE, AF and AN to appeal to this House. This was that the approach to be adopted to the use of closed material in section 3(10) hearings was a matter of general public importance and there was scope for argument as to whether the majority had correctly interpreted the views of the majority of the House in *MB*.

38. While, for reasons that will become apparent, this question has become of only academic interest, I would wish to record my opinion that the majority of the Court of Appeal, and Silber J, had correctly analysed the effect of the majority opinions in *MB*.

Submissions

39. Lengthy printed cases were submitted that indicated that there was to be a hard fought battle on the appeal to this House. The submissions made in the case on behalf of AF can be summarised as follows:

(i) Contrary to the decision of the Court of Appeal, the majority of the House decided in *MB* that article 6 of the Convention and the common law principle of fairness conferred on a controlee a core, irreducible entitlement to be told sufficient of the case against him to enable him to challenge that case unless, which was not the case so far as AF was concerned, the special advocates were able to defeat those allegations without such disclosure.

(ii) The House did not approve the "makes no difference" principle.

(iii) Alternatively, if the House held that there was no core, irreducible minimum that had to be disclosed, it should depart from that result and affirm the right of a controlee to know and respond to the case against him.

40. The joint case for AN and AE adopted the case for AF. It asserted that the common law right to a fair hearing, and the right to be aware of the case a person has to meet, was "a constitutional protection that is integral to the judicial function itself".

41. The case for the Secretary of State invited the House to depart from the approach of the majority in *MB* and to adopt instead the minority opinion of Lord Hoffmann. Alternatively it was submitted that the majority in *MB* had concluded correctly that article 6(1) did not guarantee a core, irreducible, minimum of disclosure. The relevant principle was whether, having regard to the proceedings as a whole, there had been significant injustice to the controlee or whether the controlee had been afforded "a substantial and sufficient measure of procedural justice". In answering that question it was permissible for the court to consider what difference further open disclosure would have made.

42. JUSTICE was granted permission to intervene and submitted a printed case that supported the appellants' cases. JUSTICE submitted

that there was a "solid bedrock of a core legal principle" that the substance of the case upon which a control order was based should be disclosed to the controlee.

43. A decision was taken that the appeal should be heard by a committee of nine members. Application was made, both by the Secretary of State and by the appellants, with particular support from their special advocates, that the House should give directions for the consideration of the closed judgments below, and possibly other closed material, in closed session. Directions were given that the question of whether to go into closed session would be taken after the parties had presented their cases in the open hearing.

44. On 19 February, a little over a week before the commencement of the appeal in the House, the Grand Chamber of the Strasbourg Court handed down its judgment in *A and others v United Kingdom* (Application No 3455/05). This addressed the extent to which the admission of closed material was compatible with the fair trial requirements of article 5(4). The Secretary of State recognised that the judgment cut the ground from under her feet in so far as she had hoped to persuade the House to adopt the approach of Lord Hoffmann in *MB*. An amended case was filed on her behalf. This contained a lengthy analysis of the decision in *A v United Kingdom*. It submitted that the decision was consistent with the decision of the majority of the House in *MB*, as correctly summarised by the Court of Appeal in the passage that I have set out above at paragraph 33. The Court of Appeal, applying the principles in that passage, had reached the appropriate conclusion in the case of each appellant.

45. The appellants also submitted amended cases that addressed the decision in *A v United Kingdom.* AF's amended case submitted that the Grand Chamber had made it clear that, regardless of the demands of national security, a person will not have a fair hearing for purposes of article 5(4) and article 6 unless they are told sufficient information about the case against them to enable them to give effective instructions to the special advocate who represents their interests. Accordingly, the decision of the majority of the Court of Appeal in relation to AF could not stand. The decision of Stanley Burnton J should be restored.

46. The amended case on behalf of AN and AE was to like effect. The Grand Chamber had established that a minimum requirement of procedural fairness was that a person had to be given the opportunity

effectively to challenge the allegations against him. Where there was a closed hearing the special advocate could not do this on behalf of his client in any useful way unless provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. Mitting J had held that AN could not meet a substantial part of the case against him and did not know the gist of significant grounds of suspicion raised against him. Silber J had wrongly proceeded on the basis that the special advocate procedure could compensate for an absence of any evidence or of a relevant particularised allegation having been provided to AE. The Grand Chamber's decision demonstrated that in neither case were the requirements of article 6 satisfied.

47. In the light of the decision in *A v United Kingdom* counsel for the appellants no longer submitted that it was necessary or desirable for the House to consider closed material, albeit that the special advocates sought, as they candidly admitted, to have their cake and eat it by inviting the House to consider the closed material if otherwise minded to reject their submissions. In these circumstances the House decided that it would not have a closed hearing or look at closed material.

A v United Kingdom

48. There were referred to the Grand Chamber 11 applications. The applicants had been detained pursuant to the provisions of the ATCSA. They complained of violation of a number of their Convention rights, including their right to liberty under article 5(1), relying upon the findings in their favour by this House. The United Kingdom was permitted by the Court to challenge those findings, but did so without success. The relevant complaints were those brought in relation to article 5(4). The Court summarised the respective cases of the parties as follows:

> "The applicants complained about the procedure before SIAC for appeals under section 25 of the 2001 Act (see paragraph 91 above) and in particular the lack of disclosure of material evidence except to special advocates with whom the detained person was not permitted to consult. In their submission, Article 5 § 4 imported the fair trial guarantees of Article 6 § 1 commensurate with the gravity of the issue at stake. While in certain circumstances it might be permissible for a court to

sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond. In all the applicants' appeals, except that of the tenth applicant, SIAC relied on closed material and recognised that the applicants were thereby put at a disadvantage.

On the applicants' second point, the Government submitted that there were valid public interest grounds for withholding the closed material. The right to disclosure of evidence, under Article 6 and also under Article 5 § 4, was not absolute. The Court's case-law from *Chahal* (cited above) onwards had indicated some support for a special advocate procedure in particularly sensitive fields. Moreover, in each applicant's case, the open material gave sufficient notice of the allegations against him to enable him to mount an effective defence."

49. In paragraph 4.54 of its Memorial to the Court the Government submitted that it would be highly desirable for the Grand Chamber to deal with the question of closed evidence in its proper place in the context of article 5(4), so that the law applicable in relation to the applicants should be properly and fully analysed by the Court. The Grand Chamber accepted that invitation.

50. The Government advanced in the Memorial a detailed defence of the use of closed material. At paragraph 4.77 it identified the critical issue in relation to this:

"The Government submit that the result contended for by the applicants is wrong in principle. Their submission wrongly elevates the right of an individual to disclosure of relevant evidence under Article 5(4) (or Article 6) to an absolute right which necessarily overrides the rights of others, including the right to life under Article 2, and overrides the interests of the State in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services.

> Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including Article 5(4) (and Article 6), that the general interests of the community must be balanced against the rights of an individual (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, at para 69; *Soering v United Kingdom* (1989) 11 EHRR 439, at para 89)."

This is the critical issue that arises on the present appeals. For the reasons that follow I consider that the Grand Chamber has provided the definitive resolution of it.

51. The Court cited at length from the decision of this House in *MB* and also quoted the passage in the decision of the majority of the Court of Appeal in *AF* that I have set out at paragraph 33. The conclusions of the Grand Chamber appear in the following section of its unanimous judgment:

> "215. The Court recalls that although the judges sitting as SIAC were able to consider both the "open" and "closed" material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.
>
> 216. The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a 'public emergency threatening the life of the nation'. It must

therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also, in this connection, *Fox, Campbell and Hartley,* cited above, (1990) 13 EHRR 157, para 39).

217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a *sine qua non* (see paragraph 204 above). Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (*Garcia Alva v Germany* (2001) 37 EHRR 335, para 39, and see also *Chahal* (1996) 23 EHRR 413, paras 130 - 131).

218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this

connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the

procedural requirements of Article 5 § 4 would not be satisfied."

52. Mr Eadie QC for the Secretary of State sought valiantly and eloquently to persuade the Committee that this section of the Court's judgment was consistent with the House's decision in *MB*, as interpreted by the Court of Appeal in *AF*. He submitted that the principle to be derived from the judgment was that the controlee must have a reasonable opportunity to make an effective challenge of the case made against him. It was wrong, however, to treat the Court, in the latter part of paragraph 220 as laying down an inflexible principle that there can never be a fair trial if the basis of the Secretary of State's suspicion is to be found solely or to a decisive degree in the closed material. While in some cases this would be true, in others it would not. Each case would depend upon its particular facts.

53. Mr Eadie submitted that the Grand Chamber had not had placed before it a full picture of a section 3(10) hearing. It was not in a position to appreciate the extent to which the court could and did make allowances for the fact that the detainee was unaware of relevant material. Nor did it appreciate the extent to which the special advocate could and did compensate for that fact. The statement that the special advocate could not perform his function "in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" was simply wrong.

54. The committee had the benefit of submissions from the special advocates who had represented the appellants in the closed hearings. Their role was somewhat delicate as each had an obligation to represent to best effect the interests of his client and yet the response to this obligation had to be tempered by the duty to present fairly to the House the extent to which a special advocate could or could not compensate for the non-disclosure of closed material to the controlee. Mr Keith, whose submissions were adopted by the other special advocates, sought to meet this challenge by supporting the observations of Ouseley J in another control order case, *Secretary of State for the Home Department v Abu Rideh* [2008] EWHC 1993 (Admin). Of particular relevance are the following:

"21…In my view, cross-examination by special advocates can usually deal with evidential reliability, possible

> alternative and innocent inferences, internal consistency or contradictions, the significance of pieces of evidence and the strength of the case overall. What they cannot do without instructions or evidence is to provide evidence or explanation which contradicts or explains the closed essential features of the case against him or offer alternative inferences which they are not aware of or lack any support for.
>
> 40…The real value lies in the potential for a controlled person to provide evidence which shows a different picture or an innocent interpretation or explanation which counters the basis for the adverse inferences and does so beyond that which the special advocates may suggest. This would either be because there would now be an evidential basis for those suggestions or because the special advocate may not be able to anticipate or put together what the controlled person's position is. He may also be able to provide the special advocate with information or statements to be deployed as the special advocate sees fit, which the court and SSHD may never know of."

55. Mr Keith's submissions emphasised the practical importance in the interests of fair process of disclosing to the controlee the essential features of the case against him and challenged Mr Eadie's submission that the Grand Chamber had not ruled that such disclosure was essential.

56. Lord Pannick QC for AF pointed out that the Grand Chamber had reached its decision without reference to the closed material. It was thus clear that the test of fair process did not depend upon the strength of the closed case against the controlee. He submitted that whether or not the controlee would be able to provide input that would make any difference to the result was not to the point. What was in issue was not the fairness of the result, but procedural fairness. Procedural fairness required that the controlee should be given sufficient information about the case against him to be able to give effective instructions to the special advocate should he have an answer to that case. The submissions of counsel for the other appellants were to like effect. Counsel for each appellant submitted that the disclosure required by the decision of the Grand Chamber had not been provided in the case of his client.

The effect of the Grand Chamber's decision

57. The requirements of a fair trial depend, to some extent, on what is at stake in the trial. The Grand Chamber was dealing with applicants complaining of detention contrary to article 5(1). The relevant standard of fairness required of their trials was that appropriate to article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that article 5(4) imported the same fair trial rights as article 6(1) in its criminal aspect – see paragraph 217. Mr Eadie submitted that a less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg Court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial. Were this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases. I turn to the effect of the Grand Chamber's decision.

58. Had there been any doubt as to the effect of the passage of the judgment of the Grand Chamber that I have set out in paragraph 51 above it would, as Lord Pannick pointed out, have been dispelled by the approach of the Grand Chamber to some of the individual applications. Thus in the case of the third applicant SIAC had, in reaching its conclusion that the applicant was a terrorist, relied only on closed material "which cannot in our judgment have an innocent explanation", but the Grand Chamber held that his hearing had been unfair for want of adequate disclosure. In the case of the fifth applicant SIAC had stated that they had "no doubt" that he had been engaged in certain terrorism-related activities but the Grand Chamber held that his hearing had been unfair because the case against him had largely been contained in the closed material and the open case was "insubstantial".

59. Contrary to Mr Eadie's submission, I am satisfied that the essence of the Grand Chamber's decision lies in paragraph 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree

on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

Discussion

Procedural fairness and the fair result

60. Counsel for the appellants drew a distinction between a procedure that was fair and a procedure that was likely to produce the right outcome. This case, they submitted, was about the requirements of fair process, not about whether the outcomes of the individual cases were just. I do not believe that it is possible to draw a clear distinction between a fair procedure and a procedure that produces a fair result. The object of the procedure is to ensure, in so far as this is possible, that the outcome of the process is a result that accords with the law. Why then should disclosure to the controlee of the case against him be essential if, on the particular facts, this cannot affect the result?

61. One answer to this question is that one cannot be sure that disclosure will not affect the result. This was the reason advanced by Sedley LJ in the passage that I have cited from his judgment. Its classic exposition is this extract from the judgment of Megarry J in *John v Rees* [1970] Ch 345, at p 402:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against

them has been made without their being afforded any opportunity to influence the course of events."

62. I am not convinced that all of these observations are valid in the present context. What is in issue in control order cases is whether there are reasonable grounds for suspecting involvement on the part of the controlee in terrorism-related activity. This is a low threshold to cross and there are, so it seems to me, bound to be cases where the closed evidence is so cogent that the judge can rightly form the conclusion that there is no possibility that the controlee would be able, if this evidence were disclosed to him, to dispel the reasonable suspicion. Nothing in life is certain, but I believe that with the assistance of the dedicated special advocates that are available and the input of judges with the ability and experience of those who hear these cases, the approach approved by this House in *MB*, including the "makes no difference" principle, could have been applied without significant risk of producing unjust results.

63. There are, however, strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made by Megarry J in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.

64. The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where

the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence. That is why the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals.

65. Before *A v United Kingdom,* Strasbourg had made it plain that the exigencies of national security could justify non-disclosure of relevant material to a party to legal proceedings, provided that counterbalancing procedures ensured that the party was accorded "a substantial measure of procedural justice" – *Chahal v United Kingdom* (1996) 23 EHRR 413, at para 131. Examples were cited by the Grand Chamber in *A v United Kingdom* at paras 205-208, covering the withholding of material evidence and the concealing of the identity of witnesses. The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.

66. In *A v United Kingdom* the Strasbourg court has nonetheless recognised that, where the interests of national security are concerned in the context of combating terrorism, it may be acceptable not to disclose the source of evidence that founds the grounds of suspecting that a person has been involved in terrorism-related activities. In the light of this it should occasion no surprise that no counsel suggested that the decision of this House in *R v Davis* [2008] UKHL 36; [2008] AC 1128 in relation to witness anonymity in criminal trials should be applied in the context of control order proceedings.

Can the PTA still be read down?

67. If the PTA is read down in the way determined by this House in *MB* the departure from the apparently absolute requirements of the

relevant statutory provisions will be more marked. It is perhaps open to question whether the House would have been prepared to read down the statute had this been anticipated. No party has suggested, however, that the reading down should be replaced with a declaration of incompatibility and I believe that there is good reason to let the reading down stand. Accordingly, I would propose this course.

68. The result will be that, in the section 3(10) hearing, the judge will have to consider not merely the allegations that have to be disclosed in order to place in the open sufficient to satisfy the requirements laid down by the Grand Chamber, but whether there is any other matter whose disclosure is essential to the fairness of the trial.

69. For the reasons that I have given I would allow the appeal in each case. In none has the disclosure required by the decision of the Grand Chamber been given. The appropriate course is to remit each case to the judge for further consideration in accordance with the decision of this House.

LORD HOFFMANN

My Lords,

70. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Phillips of Worth Matravers and I agree that the judgment of the European Court of Human Rights ("ECtHR) in *A v United Kingdom* (Application No 3455/05) requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the ECtHR. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when

it acceded to the Convention. I can see no advantage in your Lordships doing so.

71. The difference between the rule laid down by the ECtHR and what I had previously thought to be the law of England is that the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is "based solely or to a decisive degree" on closed material, whereas the view expressed by a majority of your Lordships' House in *Secretary of State for the Home Department v MB* [2008] AC 440 was that even in such a case, substantial justice might still be possible. As I understand the views expressed by judges of the Special Immigration Appeals Commission since *MB's* case, it is not unusual for the Commission to base its decision "to a decisive degree" on closed material and nevertheless to be satisfied, from the nature of that material, that the applicant has had a fair hearing.

72. The particular procedures which have to be followed to make a hearing fair cannot in my opinion be stated in rigid rules. Ordinarily it is true that fairness requires that an accused person should be informed of all the allegations against him and the material tendered to the tribunal in support. The purpose of the rule is not merely to improve the chances of the tribunal reaching the right decision (by giving the accused an opportunity to explain or contradict any such allegations or material) but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told. Seventeenth century lawyers were fond of quoting the example of *Genesis* 3.11, in which God, though omniscient, said to Adam "Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?". In such a case, however, there is no cost in compliance with the general rule. God suffered no disadvantage by revealing to Adam what he knew. The same is true in most cases in which there is a failure to disclose material. But when disclosure is contrary to the public interest, it is necessary to think more carefully and ask whether in all the circumstances it would really be unfair not to tell the applicant or accused. There may well be cases in which, from the point of view of reaching the right decision, it is clear to the Tribunal that it would be highly unlikely to make any difference. If that is the case, the procedure may be fair even though a subjective feeling of injustice is unavoidable.

73. It is true that a case which appears, on the basis of one side's evidence, to be incapable of rebuttal can sometimes be destroyed. The

remarks of Megarry J in *John v Rees* [1970] Ch 345, 402 about "unanswerable charges which, in the event, were completely answered" is often cited. Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted.

74. There are practical limits to the extent to which one can devise a procedure which carries no risk of a wrong decision. It is sometimes said that it is better for ten guilty men to be acquitted than for one innocent man to be convicted. Sometimes it is a hundred guilty men. The figures matter. A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately protect the public. Likewise, the fact in theory there is always some chance that the applicant might have been able to contradict closed evidence is not in my opinion a sufficient reason for saying, in effect, that control orders can never be made against dangerous people if the case against them is based "to a decisive degree" upon material which cannot in the public interest be disclosed. This, however, is what we are now obliged to declare to be the law.

LORD HOPE OF CRAIGHEAD

My Lords,

75. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I agree with it, and I gratefully accept his comprehensive explanation of the background to this case. For the reasons he gives I would allow the appeals and make the orders that he proposes. I wish to add only a few brief remarks of my own.

76. This case brings into sharp focus once again the acute tension that exists between the urgent need to protect the public from attack by terrorists and the fundamental rights of the individual. The country must be entitled to defend itself against those who would destroy its freedoms. The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle. But the court has another duty too. It is to protect

and safeguard the rights of the individual. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 the right that was in issue was the right to liberty. In this case it is a procedural requirement of the controlled person's right to a fair trial. This is a right that belongs to everyone, as the opening words of article 6(1) of the European Convention on Human Rights remind us – even those who are alleged to be the most capable of doing us harm by means of terrorism.

77. The tension is all the more acute in this case because the control order regime was introduced by the Prevention of Terrorism Act 2005 ("PTA 2005") in response to the judgment of this House that the preventive detention regime for aliens suspected of being involved in international terrorism was incompatible with their right to liberty under article 5(1) of the European Convention. Its aim is to protect the public from the risk of terrorist attacks by persons who for reasons of national security cannot, as the law stands at present, either be deported or prosecuted. No-one could reasonably object to this. But when account is taken of their nature, duration, effects and manner of implementation (see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 59), there is no doubt that control orders severely restrict the freedom of movement of those who are subjected to them. They are highly contentious, as Lord Brown of Eaton-under-Heywood observed in *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385, para 86. At one extreme they are not far short of house arrest, which plainly is a form of detention or imprisonment. But they can be designed in such a way that their cumulative effect does not deprive the controlled person of his right to liberty within the meaning of article 5(1): *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440, para 11, per Lord Bingham of Cornhill. Having found an alternative which avoids that objection, is the government's attempt to find a way of protecting the public which is not incompatible with Convention rights to be rendered ineffective because another obstacle derived from the Convention is put in its path?

78. At the heart of the problem is the use of special advocates where the Secretary of State wishes to rely in support of her case on closed material. In *Secretary of State for the Home Department v MB* [2008] AC 440, para 66, Baroness Hale of Richmond said that, with strenuous efforts from all, difficult and time consuming though it would be, it should usually be possible to accord the controlled person a substantial measure of procedural justice. Among the factors that would have a part to play in the assessment would be how effectively the special advocate had been able to challenge the material withheld on behalf of the controlled person and what difference its disclosure would have made.

Lord Brown said in para 92 that the question for the Administrative Court was whether it was possible to confirm the control orders consistently with there having been overall fairness in the appeal process. Lord Bingham too, in para 35, agreeing with Lord Woolf CJ in *R (Roberts) v Parole Board* [2005] 2 AC 738, para 83(vii), said that the task of the court in any given case was to decide, looking at the process as a whole, whether a procedure had been used which involved significant injustice to the controlled person.

79. It has to be said, in retrospect and with all the benefits that this brings, that this was an optimistic assessment. It assumed that the disadvantages that the use of closed material gives rise to could be overcome by looking at the proceedings in the round. As a way of testing whether a substantial measure of procedural justice has been achieved in situations where national security is at risk, this has its attractions. It suggests that no one factor need dominate all the others. It allows for the case where not even the gist can be disclosed to the controlled person by balancing the undoubted protections that are built into the procedure against the disadvantages that non-disclosure gives rise to. For its part the Grand Chamber in *A v United Kingdom*, (Application No 3455/05) (unreported) 19 February 2009, recognised that account can be taken of the fact that the judge who hears the application under section 3(10) of PTA 2005 is a fully independent judge who is best placed to ensure that no material is unnecessarily withheld, and that the special advocate can provide an important additional safeguard by questioning the Secretary of State's witnesses on the need for secrecy, by making submissions to the judge regarding the case for additional disclosure and by testing the evidence and presenting arguments on behalf of the controlled person during the closed hearings: paras 218, 219. It accepted too that the judge is in the best position to form a judgment about the extent to which the controlled person is disadvantaged by the lack of disclosure – or, to put it the other way, the proceedings over which he is presiding afford a sufficient measure of procedural protection.

80. The problem with that approach however has now been exposed by the Grand Chamber in *A v United Kingdom*. It took as its starting point the urgent need at the relevant time to protect the public from terrorist attack: para 216. It recognised that there is a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information. It accepted too that important protections are built into the procedure, and it made allowance for this factor. It acknowledged that the requirement of fairness under article 5(4) does not impose a uniform, unvarying

standard to be applied irrespective of the context, facts and circumstances: para 203. But in two vitally important sentences it made it clear that the procedural protections can never outweigh the controlled person's right to be provided with sufficient information about the allegations against him to give effective instructions to the special advocate.

81. In para 218 the Grand Chamber said that where full disclosure was not possible, article 5(4) required that the difficulties that this causes must be counterbalanced in such a way that the applicant still has the possibility effectively to challenge the allegations against him. In para 220 it said that, where the open material consisted purely of general assertions and the court's decision was based solely or to a decisive degree on closed material, the procedural requirements of article 5(4) would not be satisfied. The controlled person must be given sufficient information about the allegations against him to give effective instructions to the special advocate. This is the bottom line, or the core irreducible minimum as it was put in argument, that cannot be shifted.

82. In that case the judicial control that was in issue was by SIAC over the lawfulness of detention under section 23 of the Anti-terrorism, Crime and Security Act 2001. The Court was presented with a detailed and fully reasoned Memorial by the Government of the United Kingdom in which it was pointed out that the practical effect of the result contended for by the applicants was likely to be that a State might not be able to detain a terrorist suspect at all. Nevertheless it held that the impact of the deprivation of liberty on the applicants' fundamental rights was such as to import the same fair trial guarantees as article 6(1) in its criminal aspect: para 217. Mr Eadie QC for the Secretary of State very properly accepts that the effects of a control order on the controlled person are such that the same fair trial guarantees apply in his case too. He submits that account should be taken of the fact that they are less severe than those imposed by detention, but I do not think that there is room here for such a distinction. To adopt the language of the Strasbourg court in *Garcia Alva v Germany* (2001) 37 EHRR 335, para 39, the proceedings should in principle be conducted so as to meet to the largest extent possible the basic requirements of a fair trial. The difficulties that less than full disclosure gives rise to must be counterbalanced in such a way that the controlled person still has the possibility effectively to challenge the allegations against him. If that cannot be done, the judge must exercise the power that he is given by section 3(12) of PTA 2005 and quash the control order.

83. The approach which the Grand Chamber has adopted is not, as it seems to me, at all surprising. The principle that the accused has a right to know what is being alleged against him has a long pedigree. As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 155, a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him. The domestic and European authorities on which this proposition rests were referred to by Lord Bingham in *R (Roberts) v Parole Board* [2005] 2 AC 738, paras 16 and 17. In *Secretary of State for the Home Department v MB* [2008] AC 440, para 30 he drew attention to McLachlin CJ's observation for the Supreme Court of Canada in *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 SCR 350, para 53, that a person whose liberty is in jeopardy must know the case he has to meet and to *Hamdi v Rumsfeld* (2004) 542 US 507, 533 where it was declared by O'Connor J for the majority in the US Supreme Court that for more than a century it has been clear that parties whose rights are to be affected are entitled to be heard and that in order that they may enjoy that right they must first be notified.

84. I believe that a principled approach to the problem could not do other than the Grand Chamber has done in setting out the basic rule that must be applied. This makes it impossible to support the solution that commended itself to the majority in this House in *Secretary of State for the Home Department v MB* [2008] AC 440. I cannot agree with the way Sedley LJ read that case in his dissenting opinion in the Court of Appeal: *Secretary of State for the Home Department v AF* [2009] 2 WLR 423. In my opinion the majority in the Court of Appeal correctly understood the effect of the opinions of the majority in *MB*. But I think that there is much force in his protest that the answer to the question what difference disclosure might have made is that you can never know, and that for a judge to hold that a hearing in which the party affected has had no opportunity to answer is a fair hearing negates the judicial function which is crucial to the controlled order system: see paras 113, 115. The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

85. The principle is easy to state, but its application in practice is likely to be much more difficult. In *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin), Mitting J referred to the guidance that he found in the speeches in *Secretary of State for the Home Department v MB* [2008] AC 440. In para 9 he said:

> "The conclusion which I draw from the four speeches of the majority in *MB* is that unless, at a minimum, the special advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them. In practice, this means that he must be told their gist."

That analysis, which seeks to combine the approach of Lord Bingham with that of the other three who constituted the majority, must now be read subject to this crucial modification: there is no room for an exception where it is thought that the controlled person has no conceivable case to answer. The judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him. That is the core principle.

86. What will be needed in the application of this principle will, of course, vary from case to case. The judge is entitled to take the view that a person who really does have a case to answer will make every effort to provide his special advocate with the information he needs to make the challenge. He will also note that the Strasbourg court was careful not to insist on disclosure of the evidence. It is a sufficient statement of the allegations against him, not the underlying material or the sources from which it comes, that the controlled person is entitled to ask for. The judge will be in the best position to strike the balance between what is needed to achieve this and what can properly be kept closed.

87. That having been said, there are bound to be cases where, as Mitting J said in para 10 of his judgment in *AN*, the procedure will be rendered nugatory because the details cannot be separated out from the sources or because the judge is satisfied that more needs to be disclosed

than the Secretary of State is prepared to agree to. Lord Bingham used the phrase "effectively to challenge" in *Secretary of State for the Home Department v MB* [2008] AC 440, para 34. It was adopted by the Grand Chamber in *A v United Kingdom*, para 218. It sets a relatively high standard. It suggests that where detail matters, as it often will, detail must be met with detail. In *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin), para 42, Stanley Burton J said that the allegations in the additional disclosure were insufficiently specific to enable AF to give specific instructions beyond a general denial. There may indeed be, as Mitting J suggested in para 10, a significant number of cases of that kind. If that be so, the fact must simply be faced that the system is unsustainable.

88. The House is in no position to say more, as it declined the Secretary of State's invitation to look at the closed material. I believe that it was right to do so. The judge at first instance must have access to it where it is said that disclosure of relevant material will be contrary to the public interest, and the Court of Appeal may perhaps need to too if this is necessary for the exercise of its jurisdiction under section 11(3) of PTA 2005. But the process should stop there. The function of the House, as the final court of appeal, is to give guidance on matters of principle. Its judgments must be open to all, not least to the controlled person. The giving of reasons in a closed judgment, which would be inevitable if it were to be based to any extent on closed material, is inimical to that requirement. It is hard to imagine any circumstances in which scrutiny of such material by the House, or by the Supreme Court when it comes into existence, would be necessary or appropriate.

LORD SCOTT OF FOSCOTE

My Lords,

89. I have had the great advantage of reading in draft the opinion on these appeals of my noble and learned friend Lord Phillips of Worth Matravers and agree that for the reasons he has given each of these appeals should be allowed. I am in general agreement also with the additional comments made by my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I want to add just a few words of my own on some of the constitutional implications that seem to me to emerge from these appeals.

90. The Prevention of Terrorism Act 2005 is expressed in its preamble to be

> "An Act to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity …"

The "obligations" that may be imposed, spelled out in section 1(4), are, if all or many of them are imposed, highly onerous. They do not, or do not necessarily, amount to a deprivation of the liberty of the individual against whom they are made but undeniably are capable of constituting a serious impediment to the ability of that individual to enjoy many of the freedoms and pleasures of an ordinary life in this country.

91. As Lord Hope has observed (para 71 of his opinion) the government has a responsibility for the protection of the lives and well-being of those who live in this country and a duty to promote the enactment of such legislation as it considers necessary for that purpose. It is evident that the government regards the control order provisions contained in the 2005 Act as being necessary for that purpose. The duty of the courts, however, is rather different. It is not, directly at least, a duty to protect the lives of citizens. It is a duty to apply the law. Where the relevant law is, as here, statutory, the courts' duty is to construe the statute and faithfully to apply it so construed. In the process of construction the courts can and should take into account the purposes for which the statute was enacted and, by doing so, endeavour to reach a construction that promotes those purposes. The courts should also take into account treaty obligations by which the United Kingdom is bound under international law and assume, unless the language of the statute compels the contrary conclusion, that the legislature intended the statute to be consistent with those treaty obligations. All this is trite law but needs, I think, to be borne in mind when approaching the construction of the relevant provisions of the 2005 Act.

92. The 2005 Act was enacted in order to protect the citizens of this country from the risk of loss of life or physical injury caused by terrorist activities. But the Human Rights Act 1998 is also part of our law and that Act, too, must be construed and applied by the courts. The 1998 Act incorporated into our domestic law the rights, *inter alia*, set out in

Article 6 of the European Convention on Human Rights. It is worth repeating the first sentence of Article 6(1) :

> "In the determination of his civil rights and obligations …. everyone is entitled to a fair … hearing …"

It is not in dispute that the obligations imposed on each of the appellants by the control order made against him under the 2005 Act constitute civil obligations for the purposes of Article 6(1) and that unless the judicial proceedings conducted pursuant to section 3(10) of the 2005 Act (see paras 4 and 5 of Lord Phillips' opinion) afforded the appellant a "fair hearing" for Article 6(1) purposes, the appellant's Article 6 rights have been breached.

93. It is, of course, open to Parliament to enact legislation that is incompatible with one or more of the Convention rights. The ability to do so is inherent in the constitutional role of a sovereign Parliament. One of the issues which these appeals appeared to me, when I first read the papers, to raise was whether that was what Parliament, in enacting the 2005 Act, had done. In that case, regardless of the question whether the section 3(10) judicial proceedings had afforded the appellants a fair hearing, these appeals would have had to be dismissed on the simple ground that the making of the control orders had complied with the statutory conditions prescribed by the 2005 Act, that the procedures prescribed by the Act for the judicial proceedings had been followed and that that was enough to ensure the validity of the control orders.

94. However, in *Secretary of State for the Home Department v MB and AF* [2008] AC 440, a case which raised the same issues regarding control orders as are raised by these appeals, my noble and learned friend Baroness Hale of Richmond expressed the opinion at p 491, that – "paragraph 4(3)(d) of the Schedule to the 2005 Act should be read and given effect 'except where to do so would be incompatible with the right of the controlled person to a fair trial'." This addition to the statutory language by the reading-in of an express "fair trial" exception bars the withholding from an individual on whom a control order has been, or is proposed to be, imposed of any material on which reliance is placed by the Secretary of State as justifying the imposition of the control order. In effect, the statutory power to impose a control order on an individual cannot be exercised unless the Secretary of State is prepared to disclose to the individual the material proposed to be relied on in the requisite judicial proceedings.

95. My Lords, I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders. It seems to me very well arguable that the detail in which and the precision with which the statutory procedure for the judicial hearings is laid down in the 2005 Act makes it impermissible to argue that compliance with the express statutory requirements is not enough to ensure the validity of control orders and that, in addition, other requirements of a "fair hearing" for Article 6(1) purposes must also be met. This point, however, when put to Mr James Eadie QC, counsel for the Secretary of State, was received with no enthusiasm. The Secretary of State accepts, as I understand it, that unless the judicial procedure prescribed by the 2005 Act, with its involvement of special advocates, closed hearings and the like, results in a "fair hearing" for Article 6(1) purposes, the control orders in question cannot be held to have been validly made, or, as the case may be, validly confirmed. Without the reading-down of the statutory power to make these orders proposed by Baroness Hale in *MB and AF* that addition to the express statutory requirements could not, in my opinion, be accepted. Without that reading-down, the sovereignty of Parliament would, in my opinion, require the conclusion that where the express statutory requirements have been complied with the control orders would have been validly made, or confirmed, whether or not the judicial procedure involved a breach of the controlees' Article 6(1) Convention rights. But the Secretary of State has accepted that the relevant statutory provisions should be construed with the words proposed by my noble and learned friend read into paragraph 4(3)(d) of the Schedule and with the consequence that valid control orders can be made only where they are accompanied by judicial proceedings that constitute a fair hearing for Article 6(1) purposes. So be it.

96. It follows that the only issue on this appeal is the fair hearing issue. Does a judicial process the purpose of which is to impose, or to confirm the imposition of, onerous obligations on individuals on grounds and evidence of which they are not and cannot be informed constitute a fair hearing? The judgment of the Grand Chamber in *A v United Kingdom* has made clear that, for the purpose of Strasbourg jurisprudence and Article 6(1) of the Convention, it does not. I am in respectful agreement with the reasons given by the Grand Chamber for that conclusion but, in my opinion, and in agreement with the observations made by Sedley LJ in paragraphs 113 to 116 of his dissenting judgment in the Court of Appeal, the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion. An essential requirement of a fair hearing is that a party

against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree of detail necessary to be given must, in my opinion, be sufficient to enable the opportunity to be a real one. The disclosure made to each of these appellants was insufficient to afford him a real opportunity for rebuttal. He did not, therefore, have a fair hearing for Article 6(1) purposes and these appeals must be allowed.

97. It does not follow from the result of these appeals that the executive cannot be given by Parliament power to impose control orders on individuals accompanied by judicial procedures that do not comply with Article 6(1), or with common law, fair hearing requirements. The result of these appeals does mean that the executive has not yet been given such powers by Parliament. If the words read by Baroness Hale into the 2005 Act statutory power enabling relevant material to be withheld from the individual on whom a control order is sought to be imposed "except where to do so would be incompatible with the right of the controlled person to a fair trial", a reading-in, as I have said, accepted by the Secretary of State, were to be expressly excluded by Parliament, the legislation would achieve what was, I assume, originally intended. The government would, of course, not propose such an express exclusion unless wholly satisfied that the discharge of its responsibility for the protection of the public from the risk of loss of life or limb from terrorist activity required such a thing. Parliament would not enact such an express exclusion unless so satisfied. Such an exclusion would leave the legislation potentially incompatible with the Convention and, unless the exclusion could be justified under Article 15 of the Convention, would leave this country in breach of its treaty obligations. But the courts would be bound, nonetheless, faithfully to apply the legislation. The underlying problem, as I see it, with the 2005 Act and the government's attitude to it, is that the government, having formed the view that the provisions of the Act were necessary for the safety of the public from terrorism and, accordingly, having promoted and obtained the enactment of the 2005 Act, has been unwilling publicly to accept that the implementation of these provisions may require the curtailment of fair hearing rights, and to face up to whatever may be the political consequences of that acceptance. The function of the courts is to apply the law. It is not the function of the courts to water down the concept and requirements of a fair trial so as to render Convention compatible legislation that may be incompatible. I am in no doubt that for the reasons given by Lord Phillips these appeals should be allowed.

LORD RODGER OF EARLSFERRY

My Lords,

98. I have had the advantage of considering the speech of my noble and learned friend, Lord Phillips of Worth Matravers, in draft. I agree with it and would accordingly allow the appeals. Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.

LORD WALKER OF GESTINGTHORPE

My Lords,

99. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I am in full agreement with it, and for the reasons given by Lord Phillips I would allow these appeals and make the orders which he proposes.

BARONESS HALE OF RICHMOND

My Lords,

100. I agree that these appeals must be allowed, for the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers. I wish to add a few words of my own, out of courtesy to, and sympathy with, those judges who have had to grapple with my "enigmatic" opinion (and those of my colleagues) in *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] AC 440.

101. For what it is worth, which I agree is not much, my opinion now is that the views of Mitting J in *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) and Stanley Burnton J in *Secretary of State for the Home Department v* AF [2008] EWHC 453 (Admin) and [2008] EWHC 689 (Admin) come much closer to the opinions which I was expressing then than do the views of Silber J [2008] EWHC 132 (Admin) and [2008] EWHC 585 (Admin) and the Court of Appeal [2008] EWCA Civ 1148; [2009] 2 WLR 423. The ability to make an effective challenge to the case put against the controlled person is the key. However, I did not say so as clearly as, with hindsight, I should have done. And I was also far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure. There are reasons for this.

102. As to the first, it was not then clear precisely what test Strasbourg would employ in judging whether "any difficulties caused to the defence by a limitation on its rights [are] sufficiently counterbalanced by the procedures followed by the judicial authorities" (the principle which had clearly emerged from the Strasbourg jurisprudence up to that point). My noble and learned friends, Lord Hoffmann and Lord Bingham of Cornhill, took very different views on the point. Hence the main issue for us was whether the special advocate procedure would always be sufficient, or would rarely if ever be sufficient, or might be sufficient depending upon the nature of the case, how much had been disclosed and how effectively the special advocates had been able to challenge what was not disclosed. The majority took the view that it would not always be sufficient but might sometimes be so. Reading down the statute and rules so that the judges were no longer required to make the order, even though the Secretary of State was not willing to make sufficient disclosure to enable the controlled person to have a fair hearing, was the way to reconcile the competing interests. Despite considerable provocation to do so in the course of this hearing, the Secretary of State has not sought to persuade us to depart from that reading down. She has accepted that control orders cannot be confirmed by the court if the controlled person has not had a fair hearing. She and her counsel deserve full credit for taking that principled stance.

103. This is all the more creditable, given that Strasbourg has now, in *A and others v United Kingdom,* Application No 3455/05, Judgment, 19 February 2009, made it entirely clear what the test of a fair hearing is. The test is whether the controlled person has had the possibility effectively to challenge the allegations against him. For this he does not have to be told all the allegations and evidence against him, but he has to have sufficient information about those allegations to be able to give

effective instructions to his special advocate. This is the way in which Mitting J put the principle in para 9 of his open judgment in *AN* and he too deserves credit for his prescience.

104. Since then we have also had the benefit of very full submissions by the special advocates, explaining just what it is that they are and are not able to do in the course of a typical closed control order hearing. In particular, they have set out, probably for the first time in public, the principles which have been generally applied by the courts in relation to the disclosure of closed material. It is not for us, in these proceedings, to decide whether they are correct. For the time being, they represent the law. It is worth setting them out here:

> "(a) Issues of relevance and materiality are irrelevant. There is no balance to be struck between the harm to the public interest if disclosure were to be made and the harm to the interests of justice flowing from non-disclosure: the interests of justice play no part in disclosure decisions on the routine application of CPR Part 76.
>
> (b) The fact that closed material may contain documents that are exculpatory is not relevant in seeking to contend for disclosure to the controlled person.
>
> (c) Any disclosure is assumed to be not just to the controlled person, but to the world at large;
>
> (d) The test is met by mere contemplation by any party of the nature of the primary source of the information, rather than that person's actual identification of that source of information. Therefore disclosure of information is harmful where it may lead to a suspicion in the mind of the controlled person, or a hardening of an existing suspicion, even falling short of actual knowledge or information. Accordingly, for example, the fact the respondent may already suspect that his landline or principal mobile phone has been intercepted would not of itself justify disclosure of that fact.

(e) National security concerns advanced by the Security Service are within its particular expertise and accordingly very convincing material is required before such powerful considerations can be overcome."

105. The result, the special advocates tell us, is that the scope for contesting the Secretary of State's objections to disclosure is very limited and the vast majority of those objections are upheld. It appears that the objections are often in the nature of class claims, relating to the sort of information it is, rather than specific to the particular case. This makes them very different from the other cases mentioned in my opinion, relating to children and mental patients, where non-disclosure may be permissible. These days, a Mental Health Review Tribunal would be unlikely to uphold a non-disclosure claim on the general ground that disclosure would be damaging to the doctor patient relationship. They would want to know precisely what it was in this doctor's evidence that might cause serious harm to this patient or to some other person and to weigh that damage against the interests of fairness (see Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699(L16)), rule 14(2)). It will be an individualised balancing act carried out after discussion with the patient's own advocate and in the light of the opinions of the patient's own independent medical adviser.

106. Under the principles applied to control order cases, that balancing act is largely left to the Secretary of State. So there are bound to be many more cases than I anticipated where the judge is forced to conclude that there cannot be an effective challenge without further disclosure and the Secretary of State is left to decide whether she can agree to it. But the bottom line is that the control order cannot be upheld if the hearing cannot be fair. That seems to me to be an entirely proper and principled conclusion. If the Government adjudges that it is necessary to impose serious restrictions upon an individual's liberty without giving that individual a fair opportunity to challenge the reasons for doing so, as to which it is not for us to express a view, then the Government will have to consider whether or not to derogate from article 6 of the Convention. Until that time, judges will have to grapple with precisely how much disclosure is necessary to enable the controlled person to mount an effective challenge and the Secretary of State will have to grapple with whether to agree to it. The principles are clear, although by no means easy to apply in particular cases, and in common with my noble and learned friend Lord Brown of Eaton-under-Heywood, I hope that they will not have to trouble the appellate courts again.

LORD CARSWELL

My Lords,

107. When the majority of the Appellate Committee in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440, of whom I was one, expressed their conclusions they were of the view that there may be cases in which it is possible to accept that the person subject to a control order ("the controlee") has received a fair trial, even though the material adduced by the Secretary of State in support of the control order may have been based solely or to a decisive degree on closed material. They were of opinion that the fairness of the procedure would depend on all the facts and that in some cases of this nature the special advocate might be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee (see para 85 of my opinion in that appeal). This approach contained a degree of flexibility, which might be said to be in accord with the spirit of the common law.

108. The Grand Chamber in *A v United Kingdom* (Application No 3455/05, judgment 19 February 2009) has expressly opted for an absolute rule, especially in the last sentence of para 220 of the judgment of the Court:

> "Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied."

As your Lordships have pointed out, section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account. Whatever latitude this formulation may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it. Views may differ as to which approach is preferable, and not all may be persuaded that the Grand

Chamber's ruling is the preferable approach. But I am in agreement with your Lordships that we are obliged to accept and apply the Grand Chamber's principles in preference to those espoused by the majority in *MB*.

109. I therefore have to agree that the appeals should be allowed and each case remitted to the judge for further consideration.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

110. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Phillips of Worth Matravers. I gratefully take from it all the relevant facts, statutory materials, and arguments. I agree with it and add a short judgment of my own only because of my earlier close involvement in *Secretary of State for the Home Department v MB* [2008] AC 440 with the issues now arising.

111. The UK's Memorial of February 2008 in *A v United Kingdom* (Application No 3455/05), judgment 19 February 2009, expressly invited the Grand Chamber to deal with the whole question of closed evidence and special advocates in the context of today's terrorist threat. All that the three appellants seek in these appeals to the House is that the Secretary of State should now accept and apply the Strasbourg Court's judgment. True, *A* was directly concerned, not with control orders imposed under the Prevention of Terrorism Act 2005 but with the earlier regime of detention (at Belmarsh Prison) under the Anti-terrorism, Crime and Security Act 2001, and accordingly with article 5(4) of the Convention rather than, as here, article 6. True too, the ECtHR in *A*, holding that article 5(4) "must impose substantially the same fair trial guarantees as article 6(1) in its criminal aspect", took account of "the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants' fundamental rights". Whilst, however, non-derogating control orders, such as those under challenge here, by definition involve no deprivation of liberty, they involve the severest possible restrictions on a number of important Convention rights (and, of course, on freedom of movement albeit the UK have not ratified Protocol 4 so as to confer that particular right); they too (albeit reviewable annually) may appear indefinite, and it

cannot sensibly be supposed that Strasbourg would take a different view about the application of the fair trial guarantees to them.

112. The essential similarities between the two regimes are altogether more striking than their differences. Both involve the making of orders on the basis only of reasonable suspicion of terrorist activity. And, of course, both involve identical schemes for the admission of closed material and the use of special advocates. That detention orders were appealable to SIAC, whereas control orders are subject to review by a single High Court judge, is an immaterial distinction.

113. There is, let me say at this point, all the difference in the world between both these regimes and the appeal jurisdiction exercised by SIAC under the SIAC Act 1997 such as was recently considered by the House in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 WLR 512. Those cases concerned the expulsion of undesirable aliens and the House roundly rejected the attack there on the use of closed material. As was pointed out, the process in those cases was beyond the reach of article 6 and in any event involved no case being made *against* the deportee but rather his case against the state to which it was proposed to deport him.

114. Your Lordships are therefore bound to apply *A* in the determination of these appeals. Section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account and *A* could hardly be more authoritative, contemporary or closer in point than it is. What then follows? Inexorably, as it seems to me, these appeals must be allowed and the Secretary of State be given now the option of disclosing further material as the price of maintaining the control orders, in their present or modified form. (Although by definition the courts have decided that any further disclosure in these cases would be contrary to the public interest, all agree that on their remission to the judges below, the Secretary of State would, in a final assessment of the public interest, have to balance that damage against the damage resulting from the control orders being discharged.)

115. The essence and effect of the Grand Chamber's decision in *A* can be comparatively shortly stated. It comes to this:

> (i) Although in the past—in cases like *Chahal v United Kingdom* (1996) 23 EHRR 413, *Tinnelly & Sons Ltd v United*

Kingdom (1998) 27 EHRR 249 and *Al-Nashif v Bulgaria* (2002) 36 EHRR 655—the Court has contemplated the use of special advocates as a means of counterbalancing procedural unfairness and thereby satisfying the requirements of articles 5(4) and 6, it has never previously actually decided the point—paras 209 and 211.

(ii) Special advocates can provide an important safeguard in ensuring that the fullest possible disclosure is made to the suspect as is consistent with the public interest (para 219). However, the special advocate cannot usefully perform his important role of "testing the evidence and putting arguments on behalf of the [suspect]" unless the suspect is "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" (para 220, second sentence).

(iii) "Where . . . the open material consist[s] purely of general assertions and [the judge's] decision [to confirm the control order is] based solely or to a decisive degree on closed material, the procedural requirements of [article 6 will] not be satisfied." (para 220, last sentence)

(iv) This is so despite the Court's express recognition (a) that there is "a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information" (para 216) and (b) that no excessive or unjustified secrecy is employed; rather there are "compelling reasons for the lack of disclosure" (para 219).

116. In short, Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give "effective instructions" to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk.

117. Was this what the majority of the Committee (Baroness Hale of Richmond, Lord Carswell and myself) held in *Secretary of State for the Home Department v MB* [2008] AC 440? I do not think so. Certainly we recognised that on occasion the special advocate procedure would fail to satisfy the requirements of article 6; but we contemplated that this would be so only in "a few cases" (Lady Hale, para 68), "wholly exceptional[ly]" (my opinion, para 90). More particularly, although I believe we felt the need to disclose to the suspect an irreducible minimum of allegation (to avoid an entirely Kafkaesque situation), we thought that in certain circumstances this might require very little information indeed, the position in AF's case itself (as to that, see para 42 of the opinion of Lord Bingham of Cornhill). Ouseley J, after all, had

expressly regarded the special advocate as providing AF with "a substantial and sufficient measure of procedural protection" and on this account we expressly contemplated that, although the case had to go back to the judge, he might well still conclude that overall the hearing had been fair and in compliance with article 6 (Lady Hale, para 76; Lord Carswell para 87; myself para 92).

118. In my opinion the majority of the Court of Appeal in the present case, in paragraph 64 of its judgment, correctly summarised the decision of the majority of the House in *MB* (save perhaps for the first sentence of para 64(iv) as to the irreducible minimum). Plainly, however, certain aspects of that decision can no longer stand in the face of *A*. In particular *A* is inconsistent with *MB* (as summarised by the Court of Appeal below) at para 64(iv)—that any requirement for an irreducible minimum "can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed"—and para 64(vii): "There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere."

119. Plainly there now *is* a rigid principle. Strasbourg has chosen in para 220 of *A* to stipulate the need in all cases to disclose to the suspect enough about the allegations forming the sole or decisive grounds of suspicion against him to enable him to give effective instructions to the special advocate. In reaching this decision Strasbourg clearly rejected the argument set forth in the Government's Memorial, including, for example, that article 6 confers no "absolute right which necessarily overrides the rights of others, including the right to life under article 2, and overrides the interests of the state in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services. Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including . . . article 6, that the general interests of the community must be balanced against the rights of an individual (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69 [and] *Soering v United Kingdom* (1989) 11 EHRR 439, para 89)."

120. That said, however, Strasbourg's solution to the problem itself plainly represents something of a compromise and gives some weight at least to the demands of national security. Although the Court (at para 217) spoke of importing "substantially the same fair trial guarantees as article 6(1) in its criminal aspect" and (at para 220) used the language—taken from its earlier judgments (in cases such as *Lucà v Italy* (2001) 36 EHRR 807 and *Doorson v The Netherlands* (1996) 22 EHRR 330)

concerning criminal convictions—of decisions "based solely or to a decisive degree" on closed material, the result arrived at is very different from that reached in the strictly criminal context. In criminal cases, Strasbourg has held that a conviction should not be based solely or to a decisive extent on anonymous statements (a principle recently applied by the House in *R v Davis* [2008] AC 1128). If the defendant does not know who his accuser is, he is obviously at a disadvantage in challenging his credibility and reliability. This, however, is not the approach which *A* now dictates in a control order case. Plainly *A* does not require the disclosure of the witness's identity or even their evidence, whatever difficulties that may pose for the suspect. What is required is rather the substance of the essential allegation founding the Secretary of State's reasonable suspicion.

121. Sometimes, of course, it will be impossible to separate out allegations from evidence and, in turn, evidence from its sources (whether these be informants or techniques, neither of which can be disclosed). And in these cases national security may need to give way to the interests of a fair hearing. That is where the ECtHR has chosen to strike the balance between the competing interests. Some of your Lordships may consider that it could and should have been struck differently, perhaps as it was in *MB*. Plainly there is room for at least two views about this, as indeed the differing opinions expressed in *MB* and by the various first instance and Court of Appeal judges in the present cases amply demonstrate. But, as I suggested at the outset, the Grand Chamber has now pronounced its view and we must accept it. Judges exercising this jurisdiction in future will clearly have to follow *A*. Inevitably there will continue to be closed hearings and special advocates. Now, however, that the approach to all this has been declared as definitively as possible, I cannot think that it will ever again be necessary for the Court of Appeal, as opposed to the first instance judges, to consider closed material or hold closed hearings or itself deliver closed judgments. There is a right of appeal only in point of law. The judges who deal with control orders are highly experienced in this work. No one will be better placed than they are to decide what disclosure must be given to meet the requirements of article 6 as now determined by the Grand Chamber and described in para 220 of *A*.

122. This, however, is for the future. For now, the appeals must be allowed and the cases remitted for reconsideration.

Oxford Public International Law

Simoncioni and ors v Germany and President of the Council of Ministers of the Italian Republic (intervening), Constitutional review, No 238, ILDC 2237 (IT 2014), 22nd October 2014, Constitutional Court

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Jurisdiction: Constitutional Court

Citation(s): No 238 (Other Reference)
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Parties: Furio Simoncioni, Marcella Alessi, Luigi Capissi, Gualtiero Alessi, Luigi Capissi, Luigi Bellini, Luigi Capissi, Duilio Bergamini
Germany

Additional parties: (Intervening Party 2) President of the Council of Ministers of the Italian Republic

Judges/Arbitrators: Giuseppe Tesauro (President); Sabino Cassese; Paolo Maria Napolitano; Giuseppe Frigo; Alessandro Criscuolo; Paolo Grossi; Giorgio Lattanzi; Aldo Carosi; Marta Cartabia; Sergio Mattarella; Mario Rosario Morelli; Giancarlo Coraggio; Giuliano Amato

Procedural Stage: Constitutional review

Previous Procedural Stage(s):
Referral to the Constitutional Court by the Tribunal of Florence; *Furio Simoncioni v Germany*, Order no 84, 21 January 2014
Referral to the Constitutional Court by the Tribunal of Florence; *Marcella Alessi and ors (as heirs of Luigi Capissi) v Germany*, Order no 85, ILDC 2725 (IT 2014), 21 January 2014
Referral to the Constitutional Court by the Tribunal of Florence; *Duilio Bergamini v Germany*, Order no 113, 21 January 2014

Related Development(s):
Judgment; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, ICJ GL No 143, ICGJ 434 (ICJ 2012), 3 February 2012 (the International Court of Justice held that the Italian courts' exercise of jurisdiction over Germany in cases concerning crimes against humanity and war crimes committed by the Nazi regime on the Italian territory was contrary to the law of state immunity)

Subject(s):

Right to a judge — Immunity from jurisdiction, absolute — Immunity from jurisdiction, ratione materiae — Immunity from jurisdiction, relative — Immunity from jurisdiction, states — Conflicts between — Judicial review — Customary international law

Core Issue(s):

Whether the customary rule granting immunity to states for acts jure imperii amounting to crimes against humanity and war crimes—as interpreted by the International Court of Justice ('ICJ') in Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)—was consistent with the protection of fundamental human rights as enshrined in the Italian Constitution.

Whether Article 1 of Law no 848 of 17 August 1957 was consistent with the fundamental human rights conferred by the Constitution, insofar as it transposed into Italian law Article 94 of the Charter of the United Nations, and hence compelled Italian courts to abide by Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening).

Whether Article 3 of Law no 5 of 14 January 2013 was compatible with the fundamental human rights as enshrined in the Constitution, insofar as it compelled Italian courts to afford immunity to foreign states when the ICJ had so ruled in proceedings brought against Italy, as well as to revoke prior inconsistent judgments constituting res iudicata.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper and Professor Erika de Wet, University of Amsterdam Center for International Law.

Facts

F1 In 2012, Furio Simoncioni, Duilio Bergamini, and the heirs of Luigi Capissi instituted three distinct civil proceedings against Germany at the Tribunal of Florence. They sought pecuniary compensation for crimes committed in Italy by the Nazi regime following the armistice of 8 September 1943 between Italy and the Allied Powers. From the evidence at trial, Simoncioni, Bergamini, and Capissi were captured in Italy and deported to Germany, where they were subjected to forced labour in three different concentration camps. While Simoncioni and Bergamini were freed by Allied forces at the end of the war, Capissi was killed in the Kahla-Thuringa concentration camp by Nazi officers and buried in a mass grave.

F2 Germany asserted that the jurisdiction of the Florence Tribunal was precluded by the judgment of the International Court of Justice ('ICJ') in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, ICJ GL no 143, ICGJ 434 (ICJ 2012), 3 February 2012 ('*Jurisdictional Immunities of the State (Germany v Italy)*'). With this judgment the ICJ affirmed that there was no exception to the principle that states enjoy immunity from suit before other states' courts for acts *jure imperii* committed by their armed forces. Consequently, the ICJ found that the Italian courts' exercise of jurisdiction over Germany in cases concerning Nazi war crimes committed in Italy was contrary to the law of state immunity. By way of reparation, the ICJ established that Italy was to ensure, by means of its own choosing, 'that all decisions of its courts … infringing Germany's sovereign immunity become unenforceable', and that the 'decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established' (*Jurisdictional Immunities of the State (Germany v Italy)* (pp. 136–37).

F3 Since its delivery, various Italian courts have promptly implemented the ICJ judgment: *Manfredi v Germany*, First instance decision, (2012) 95 Rivista di diritto internazionale 583, 28 March 2012; *Germany v De Guglielmi and De Guglielmi and Italy (joining)*, Appeal decision, No 941/2012; ILDC 1905 (IT 2012), 14 May 2012; *Military Prosecutor v Albers and ors and Germany (joining)*, Final appeal judgment, No 32139/2012; ILDC 1921 (IT 2012), 9 August 2012; and *Frascà v Germany and Giachini (guardian of Priebke) and Italy (joining)*, Preliminary order on jurisdiction, No 4284/2013; ILDC 1998 (IT 2013), 21 February 2013.

F4 As part of the same effort to comply with the ICJ judgment, the Italian Parliament passed Law No 5, 14 January 2013 (Italy) ('Law 5/2013') authorizing the ratification of the United Nations Convention on Jurisdictional Immunities of States and their Property, 16 December 2004, UN Doc A/RES/59/38 (2005) (not yet in force). Article 3 of Law 5/2013 (paragraph 1) stated that where the ICJ, in a judgment settling a dispute in which Italy was a party, excluded the possibility of subjecting specific conduct of another state to civil jurisdiction, the judge hearing the case, *ex officio* and even where a decision having the effect of *res iudicata* with regard to the existence of jurisdiction had already been adopted, had to ascertain the lack of jurisdiction at every stage of the proceedings. Moreover, Article 3 of Law 5/2013 (paragraph 2) provided that a final judgment could be challenged when it clashed with the ICJ judgment, even when that domestic decision preceded the relevant ruling of the ICJ.

F5 Although it was required by law to declare the lack of jurisdiction in the civil proceedings instituted by Simoncioni and ors, the Florence Tribunal raised a question of constitutionality before the Italian Constitutional Court with reference to Article 2 (on the recognition and protection of inviolable human rights) and Article 24 (on the rights of access to a court and to an effective remedy) of the Italian Constitution, 1 January 1948 (Italy) ('the Constitution'). Specifically, the Tribunal challenged the domestic norm transposing into the Italian legal system—pursuant to Article 10 of the Constitution—the customary

rule affording immunity to states for acts *jure imperii* amounting to war crimes and crimes against humanity committed, at least in part, on the forum state's territory (as established by the ICJ judgment *Jurisdictional Immunities of the State (Germany v Italy)*). Furthermore, the Florence Tribunal raised a question of constitutionality with respect to Article 1 of Law No 848 of 17 August 1957 (Italy) ('Law 848/1957'—this Act authorized the implementation within the Italian legal order of the Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945 ('UN Charter')) and Article 3 of Law 5/2013, as these required domestic courts to comply with the ICJ judgment.

F6 Germany did not appear before the Constitutional Court. However, the Italian Government (by means of its Office of State Attorneys, *Avvocatura Generale dello Stato*) intervened in the proceedings in order to argue in favour of Germany's position, namely, that Italian courts were bound to unconditionally comply with the ICJ judgment in *Jurisdictional Immunities of the State (Germany v Italy)*.

Held

H1 The question concerning the constitutionality of the domestic norm transposing into the Italian legal system the customary rule affording immunity from suit to states, as defined by the ICJ with the judgment *Jurisdictional Immunities of the State (Germany v Italy)*, was unfounded. (paragraphs 3, 6) The questions concerning the constitutionality of Article 3 of Law 5/2013 and Article 1 of Law 848/1957 were well-founded to the extent that they compelled domestic courts to abide by the customary rule affording jurisdictional immunity to foreign states for war crimes and crimes against humanity in line with the ICJ's judgment. Consequently, these two provisions were unconstitutional. The underlying cases were to be referred back to the Florence Tribunal for adjudication on the merits. (paragraphs 4.1, 5, 6)

H2 By virtue of Article 134 of the Constitution, the Constitutional Court was the only state organ tasked with the judicial review of the compatibility of any norm with the Constitution, including customary international norms. This constitutional scrutiny concerned every customary rule—incorporated or implemented in the domestic legal order through Article 10 of the Constitution—regardless of whether it had emerged before or after the enactment of the Constitution. (paragraph 2.1)

H3 On the first question of constitutionality, from the perspective of international law, the interpretation by the ICJ of the customary rule on state immunity for acts *iure imperii* was 'particularly qualified' and as such could not be subject to review by domestic courts, including the Constitutional Court, or administrative authorities. (paragraph 3.1)

H4 It was incumbent upon national courts, and particularly and exclusively upon the Constitutional Court, to review the compatibility of the customary immunity rule as interpreted by the ICJ with the constitutional principles underlying the protection of fundamental human rights. (paragraph 3.1)

H5 Article 10 of the Constitution, whereby 'the Italian legal system conforms to the generally recognized norms of international law', provided the mechanism to automatically transpose general principles of law and customary international law into Italian law. However, the penetration of customary international law norms within the Italian legal order under Article 10 was not allowed insofar as such international rules conflicted with the fundamental principles and the inalienable individual rights contained in the Italian Constitution (the 'counter-limits' doctrine). (paragraph 3.2) The right of access to justice set out in Article 24 of the Constitution was one such fundamental principle, especially when it was exercised with a view to protecting fundamental substantive rights. More generally, the right to a court and to effective judicial protection was 'one of the grand principles of legal civilization of any democratic systems of our times'. (paragraph 3.4)

H6 In the field of state immunity, the right of access to justice could be restricted or derogated from if outweighed by a competing public interest. However, the maintenance of peaceful inter-state relations could not be regarded as a public interest that could excuse an absolute sacrifice of the rights that victims of international crimes could enjoy under Articles 2 and 24 of the Constitution. The principle of sovereign immunity from jurisdiction—which protects states against undue interference with the exercise of their governmental functions—could not be invoked to shield acts that carried the stigma of crimes against humanity and war crimes for which no means of redress were available (as accepted by the ICJ itself) because they bore no relation to the typical exercise of governmental powers. (paragraph 3.4)

H7 The Court of Justice of the European Union ('EU'), in its *Kadi* jurisprudence (*Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P; [2008] ECR I-06351), established the principle that all EU acts must be reviewed as far as their compatibility with EU fundamental rights was concerned, even if those acts were implementing resolutions of the UN Security Council. (paragraph 3.4)

H8 The contrast between Articles 2 and 24 of the Constitution and the customary rule on state immunity defined by the ICJ with the judgment *Jurisdictional Immunities of the State (Germany v Italy)* was manifest. However, technically, the constitutional challenge brought on this point by the Florence Tribunal was ill-founded. Indeed, given its violation of the human rights of access to justice and to an effective remedy, the rule that compelled domestic courts to decline jurisdiction in all cases in which damages were sought for international crimes was never incorporated into the Italian legal order and thus produced no legal effects whatsoever in that order. (paragraph 3.5)

H9 On the second question of constitutionality, under Article 1 of Law 848/1957, Italy had accepted to comply with the obligation contained in Article 94 of the UN Charter, namely that '[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'. Without prejudice to all other obligations undertaken by Italy under the UN Charter, Article 1 of Law 848/1957 was unconstitutional insofar as it compelled Italian judges to comply with the ICJ's ruling in *Jurisdictional Immunities of the State (Germany v Italy)*, whereby the ICJ held that the Italian courts' exercise of jurisdiction over Germany in cases concerning crimes against humanity and war crimes committed by the Nazi regime on the Italian territory was contrary to the law of state immunity. Compliance with Article 94 of the UN Charter in this case had to be excluded as it contrasted with basic principles of Italian constitutional law. (paragraph 4.1)

H10 On the third question of constitutionality, Article 3 of Law 5/2013 enjoined Italian courts to comply with the ICJ judgment in *Jurisdictional Immunities of the State (Germany v Italy)*, and hence to decline jurisdiction in all cases in which damages were sought for international crimes committed by a foreign state in the exercise of acts *jure imperii* on Italian territory. This obligation was at variance with Articles 2 and 24 of the Constitution as it deprived the victims of the international crimes at issue of any alternative means of redress. Such an absolute sacrifice of the victims' access to justice and to an effective remedy was indefensible as it would imply shielding from judicial scrutiny an unlawful exercise of governmental power. (paragraph 5)

Date of Report: 05 November 2014

Reporter(s): Alessandro Chechi

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International

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Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Article 6

European Convention for the Peaceful Settlement of Disputes (29 April 1957) 320 UNTS 243, entered into force 30 April 1958, Article 28(2)

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 14

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PL v Senato della Repubblica, Constitutional review, No 120, 5 May 2014

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Decision - full text

Sentenza

nei giudizi di legittimità costituzionale dell'art. 1 della legge 17 agosto 1957, n. 848 (Esecuzione dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945) e degli artt. 1 e 3 della legge 14 gennaio 2013, n. 5 (Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, firmata a New York il 2 dicembre 2004, nonché norme di adeguamento dell'ordinamento interno), promossi dal Tribunale di Firenze con tre ordinanze del 21 gennaio 2014 rispettivamente iscritte ai nn. 84, 85 e 113 del registro ordinanze 2014, e pubblicate nella Gazzetta Ufficiale della Repubblica nn. 23 e 29, prima serie speciale, dell'anno 2014.

Visti gli atti di costituzione di S.F., di A.M. ed altri e di B.D., nonché gli atti di intervento del Presidente del Consiglio dei ministri;

udito nell'udienza pubblica del 23 settembre 2014 il Giudice relatore Giuseppe Tesauro;

uditi l'avvocato Joachim Lau per S.F., per A.M. ed altri e per B.D. e l'avvocato dello Stato Diana Ranucci per il Presidente del Consiglio dei ministri.

Ritenuto in fatto

1.— Con tre distinte ordinanze di identico tenore, adottate il 21 gennaio 2014 (reg. ord. n. 84, n. 85 e n. 113 del 2014), il Tribunale di Firenze ha sollevato questione di legittimità costituzionale: 1) della «norma prodotta nel nostro ordinamento mediante il recepimento, ai sensi dell'art. 10, primo comma, Cost.», della consuetudine internazionale accertata dalla Corte internazionale di giustizia (CIG) nella sentenza del 3 febbraio 2012, nella parte in cui nega la giurisdizione, nelle azioni risarcitorie per danni da crimini di guerra commessi, almeno in parte nello Stato del giudice adito, iure imperii dal Terzo Reich; 2) dell'art. 1 della legge 17 agosto 1957, n. 848 (Esecuzione dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945), nella parte in cui, recependo l'art. 94 dello Statuto dell'ONU, obbliga il giudice nazionale ad adeguarsi alla pronuncia della CIG quando essa ha stabilito l'obbligo del giudice italiano di negare la propria giurisdizione nella cognizione della causa civile di risarcimento del danno per crimini contro l'umanità, commessi iure imperii dal Terzo Reich, almeno in parte nel territorio italiano; 3) dell'art. 1 (recte: art. 3) della legge 14 gennaio 2013 n. 5 (Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, firmata a New York il 2 dicembre 2004, nonché norme di adeguamento dell'ordinamento interno), nella parte in cui obbliga il giudice nazionale ad adeguarsi alla pronuncia della CIG anche quando essa ha stabilito l'obbligo del giudice italiano di negare la propria giurisdizione nella cognizione della causa civile di risarcimento del danno per crimini contro l'umanità, commessi iure imperii dal Terzo Reich nel territorio italiano, in riferimento agli artt. 2 e 24 della Costituzione.

Le richiamate norme vengono censurate in riferimento agli artt. 2 e 24 Cost., in quanto, impedendo l'accertamento giurisdizionale e l'eventuale condanna delle gravi violazioni dei diritti fondamentali subìte dalle vittime dei crimini di guerra e contro l'umanità, perpetrati sul territorio dello Stato italiano, investito dall'obbligo di tutela giurisdizionale, ma commessi da altro Stato, anche se nell'esercizio dei poteri sovrani (iure imperii), contrasterebbero con il principio di insopprimibile garanzia della tutela giurisdizionale dei diritti, consacrato nell'art. 24 Cost., il quale è principio supremo dell'ordinamento costituzionale italiano ed in quanto tale costituisce limite all'ingresso sia delle norme internazionali generalmente riconosciute, ex art. 10, primo comma, Cost., che delle norme contenute in Trattati istitutivi di organizzazioni internazionali aventi gli scopi indicati dall'art. 11 Cost. o derivanti da tali organizzazioni.

1.1.— Il giudice rimettente premette di essere stato adito: in riferimento al primo giudizio, dal signor F. S. per ottenere la condanna della Repubblica federale tedesca al risarcimento dei danni dal medesimo patiti nel corso della seconda guerra mondiale per essere stato catturato nel territorio italiano da forze militari tedesche e deportato a Mauthausen in dato 8 giugno 1944, dove fu liberato solo il 25 giugno 1945, dopo innumerevoli sofferenze; in riferimento al secondo giudizio, dai legittimi eredi del signor L. C. per ottenere la condanna della Repubblica federale tedesca al risarcimento dei danni dal medesimo patiti nel corso della seconda guerra mondiale per essere stato catturato nel territorio italiano da forze militari tedesche l'8 settembre 1943, deportato in Germania per essere adibito al lavoro forzato, ucciso in uno dei lager di Kahla-Thuringa in Germania e, secondo la Croce rossa internazionale, sepolto in una fossa comune con seimila prigionieri, ridotti in schiavitù; in relazione al terzo giudizio, dal sig. D. B., per ottenere la condanna della Repubblica federale tedesca al risarcimento dei danni dal medesimo patiti nel corso della seconda guerra mondiale per essere stato catturato nel territorio italiano da forze militari tedesche il 9 settembre 1943 a Verona, nell'ospedale dove era ricoverato, dal quale fu deportato in Germania per essere adibito al lavoro forzato, segregato nel campo di concentramento di Zeitz, uno dei sottolager di Buchenwald, prima di essere trasferito nel campo di Hartmannsdorf Stammlager IVF e poi ancora a Granschutz dove veniva liberato dagli alleati alla fine della guerra.

Il rimettente ricorda che la Repubblica federale di Germania, costituitasi nei giudizi, eccepiva il difetto di giurisdizione dell'autorità giudiziaria italiana e chiedeva al giudice di dare attuazione alla sentenza del 3 febbraio 2012 della CIG (CIG), non accettando il contraddittorio sul merito della vicenda. Pertanto, il giudice rimettente sollevava la predetta questione di legittimità costituzionale delle norme che gli imponevano di declinare la giurisdizione.

1.2.— Il Tribunale di Firenze osserva che la questione oggetto dei giudizi consiste nel valutare se l'ordinamento giuridico entro il quale il giudice italiano è chiamato a decidere le controversie, nel conformarsi alle norme dell'ordinamento giuridico internazionale generalmente riconosciute, imponga al giudice dello Stato dove il crimine internazionale è stato commesso di negare l'accesso al giudizio civile risarcitorio di accertamento e condanna, anche quando sul proprio territorio sia stato leso un diritto fondamentale, mediante un crimine di guerra e contro l'umanità, ancorché ad opera di uno Stato estero nell'esercizio di poteri sovrani.

Dopo aver precisato che non è in contestazione la natura di crimine internazionale dei fatti oggetto di causa e la loro potenzialità lesiva di diritti fondamentali, il rimettente ricorda che, prima della sentenza della CIG, la Corte di cassazione aveva affermato che l'immunità dalla giurisdizione civile degli Stati esteri riconosciuta dal diritto internazionale non ha carattere assoluto, ma può trovare un limite anche quando lo Stato operi nell'esercizio della sua sovranità, ove le condotte integrino crimini contro l'umanità, tali da configurare un crimine internazionale (sentenze n. 5044 del 2004 e n. 14202 del 2008).

Il giudice rimettente rileva, tuttavia, che, a seguito della pronuncia emessa dalla CIG in data 3 febbraio 2012, secondo la quale «il diritto consuetudinario internazionale continu(a) a prevedere che ad uno Stato sia riconosciuta l'immunità in procedimenti per illeciti presumibilmente commessi sul territorio di un altro Stato dalle proprie forze armate ed altri organismi statali nel corso di un conflitto armato», anche allorquando lo si accusi di gravi violazioni delle leggi internazionali sui diritti umani, la Corte di cassazione, mutando orientamento sulla scia della predetta decisione internazionale, ha dichiarato il difetto di giurisdizione del giudice italiano rilevando che «la tesi inaugurata dalla Cass. n. 5044 del 2004 è rimasta isolata e non è stata convalidata dalla comunità internazionale di cui la CIG è massima espressione, sicché il principio (...) non può essere portato ad ulteriori applicazioni » (sentenze n. 32139 del 2012 e n. 4284 del 2013).

A conferma di tale orientamento sarebbe, poi, sopraggiunta la legge 14 gennaio 2013, n. 5 (Adesione della

Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni firmata a New York il 2 dicembre 2004 nonché norme di adeguamento dell'ordinamento interno) che all'art. 3 contiene l'espressa esclusione della giurisdizione italiana per i crimini di guerra commessi dal Terzo Reich anche per i procedimenti in corso.

Il Tribunale di Firenze precisa che la CIG ha ritenuto di non dover valutare l'interferenza tra la tutela del diritto fondamentale della persona umana ed il principio di sovranità dello Stato chiamato a rispondere del fatto illecito, escludendo l'esistenza di un conflitto tra norme di ius cogens materiali e norme (come l'immunità) ritenute formali o processuali in quanto operanti su piani differenti. Pertanto il rimettente rileva che, se, da una parte, al giudice italiano è sottratta l'interpretazione della valenza imperativa ed inderogabile dello ius cogens, ambito nel quale la Corte di giustizia ha una competenza assoluta ed esclusiva, non può negarsi la sua competenza a verificare se l'adozione indifferenziata di tale protezione in favore dei singoli Stati ed in danno dei singoli individui gravemente lesi sia conforme alla Costituzione italiana ed alle sue fonti integrative anche sovranazionali; se cioè l'apertura verso ordinamenti diversi, contenuta negli artt. 10, 11 e 117 Cost. sia priva o meno di filtri selettivi in grado di condizionare, nel caso in esame, la decisione della pregiudiziale sollevata dalla Repubblica federale di Germania.

Ad avviso del rimettente, è dubbio che l'immunità degli Stati, in specie fra quelli dell'Unione europea, possa ancora consentire, ancorché solo per effetto di consuetudini internazionali anteriori all'entrata in vigore della Costituzione e della Carta dei diritti dell'Unione europea, l'esclusione incondizionata della tutela giurisdizionale dei diritti fondamentali violati da crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona.

Posto che è la stessa CIG a riconoscere che, nella specie, si determina una lesione concreta e definitiva della tutela giurisdizionale del diritto violato, e, tuttavia, ritiene che la violazione delle norme di natura materiale con valore imperativo inderogabile (dei diritti fondamentali dell'uomo anche se calpestati da una diffusa prassi di crimini di guerra e contro l'umanità) non contrasti con le norme internazionali di natura procedurale sull'immunità statale, il Tribunale di Firenze dubita che, nell'ambito del diritto interno, il principio di eguaglianza sovrana degli Stati, con riguardo al suo corollario in materia di immunità, possa giustificare il sacrificio della tutela giurisdizionale di un diritto fondamentale quando e se la tutela è richiesta verso uno Stato, diverso da quello di appartenenza del giudice adito, che abbia commesso un crimine internazionale ancorché nell'esercizio dei poteri sovrani.

Sebbene non sia più consentito alla giurisdizione interna verificare se il singolo atto criminoso compiuto dal Terzo Reich sul territorio italiano militarmente occupato sia o meno collocabile tra gli atti iure imperii dal punto di vista internazionale, a seguito della pronuncia della CIG, la quale non lascia più margini di valutazione sotto questo profilo, il rimettente ritiene che, però, non possa non considerarsi che il carattere assoluto dell'immunità internazionale preclude, per gli individui interessati, qualsiasi possibilità di veder accertati e tutelati i propri diritti, nella specie già negati nell'ordinamento interno tedesco.

Il Tribunale di Firenze ricorda che, sin da una risalente sentenza (n. 48 del 1979), la Corte costituzionale ha affermato che, nel contrasto fra norme internazionali immesse nell'ordinamento italiano mediante l'art. 10, primo comma, Cost. e principi fondamentali dell'ordinamento giuridico italiano, devono essere questi ultimi a prevalere.

Con una successiva decisione (sentenza n. 73 del 2001), questa medesima Corte — prosegue ancora il rimettente — ha ribadito il principio secondo il quale «l'orientamento di apertura dell'ordinamento italiano nei confronti sia delle norme del diritto internazionale generalmente riconosciute, sia delle norme internazionali convenzionali incontra i limiti necessari a garantirne l'identità e, quindi, innanzitutto i limiti derivanti dalla Costituzione». Pertanto, i principi fondamentali dell'ordinamento costituzionale e i

diritti inalienabili della persona costituirebbero limite tanto all'ingresso delle norme internazionali generalmente riconosciute alle quali l'ordinamento giuridico italiano si conforma in virtù dell'art. 10, primo comma, Cost., quanto alle norme contenute in trattati istitutivi di organizzazioni internazionali aventi gli scopi indicati dall'art. 11 Cost. o derivanti da tali organizzazioni.

Considerato che il principio di cui all'art. 24 Cost. costituisce uno dei principi supremi dell'ordinamento costituzionale italiano, essendo «intimamente connesso con lo stesso principio di democrazia l'assicurare a tutti e sempre, per qualsiasi controversia, un giudice e un giudizio» (sentenza n. 18 del 1982), il rimettente dubita della legittimità costituzionale della norma consuetudinaria. Infatti, il principio supremo di insopprimibile garanzia della tutela giurisdizionale dei diritti sarebbe insuscettibile di cedere di fronte alla norma consuetudinaria di diritto internazionale che rileva nel caso concreto, così come esplicitata dalla CIG, ogniqualvolta a ledere il diritto fondamentale della persona umana sia un crimine contro l'umanità commesso nello Stato investito dall'obbligo di tutela giurisdizionale, ancorché commesso da altro Stato nell'esercizio dei poteri sovrani.

In definitiva, ad avviso del rimettente, il giudice italiano non potrebbe accogliere l'indicazione fornita dalla CIG e quindi negare l'accesso al processo rimettendo la protezione individuale alle dinamiche dei rapporti tra organi politici degli Stati che, per decenni, non sono riusciti a trovare la soluzione. Negare il processo civile di accertamento e condanna per le aberranti condotte del Terzo Reich implicherebbe sacrificare irrimediabilmente il diritto alla tutela dei diritti.

Il rimettente precisa, inoltre, che è una scelta obbligata quella di sollevare questione di legittimità costituzionale, tenuto conto di quanto già affermato dalla Corte costituzionale nella sentenza n. 311 del 2009 e cioè che il verificarsi dell'ipotesi in cui la norma internazionale risulti in contrasto con la Costituzione «esclude l'operatività del rinvio alla norma internazionale e, dunque, la sua idoneità ad integrare il parametro dell'art. 117, primo comma, Cost.»: e, pertanto, «non potendosi evidentemente incidere sulla sua legittimità, comporta (...) l'illegittimità (...) della legge di adattamento (sentenze n. 348 e n. 349 del 2007)».

Per le ragioni esposte, il Tribunale di Firenze rimette la questione al vaglio di legittimità costituzionale, ritenendo non manifestamente infondata la questione di legittimità costituzionale della norma interna, prodotta, ex art. 10, primo comma, Cost., in conformità alla consuetudine internazionale formatasi prima della Costituzione, che nega nelle azioni risarcitorie per danni da crimini di guerra la giurisdizione dello Stato in cui l'illecito ha, almeno in parte, prodotto i suoi effetti lesivi.

Aggiunge il rimettente che l'art. 94 dello Statuto delle Nazioni Unite, che prescrive che «ciascun membro delle Nazioni Unite si impegna a conformarsi alla decisione della Corte internazionale di giustizia in ogni controversia di cui esso sia parte», essendo trasposto nell'ordinamento interno in forza della legge di ratifica avente valore sub-costituzionale anche se in forza di norma di rango costituzionale (l'art. 11 Cost.), obbliga l'ordinamento interno solo se e nella parte in cui è compatibile con la Costituzione. Pertanto, il dubbio di legittimità costituzionale deve coinvolgere — ad avviso del rimettente — anche la legge n. 848 del 1957, nella parte in cui, recependo la Carta ONU ed in particolare l'art. 94 dello Statuto, vincola tutti gli organi dello Stato ad adeguarsi alle sentenze della CIG, ivi compresa quella qui conferente del 3 febbraio 2012.

Sulla base dei medesimi argomenti il rimettente censura, altresì, l'art. 3 della legge n. 5 del 2013, in ragione del fatto che in esso è stato ulteriormente disciplinato l'obbligo del giudice nazionale di adeguarsi alla pronuncia della CIG che ha negato la giurisdizione del giudice italiano nella causa di risarcimento del danno per i crimini ritenuti iure imperii commessi dal Terzo Reich nel territorio italiano.

Infine, il Tribunale di Firenze precisa che le norme censurate sono tutte norme la cui legittimità costituzionale rileva autonomamente nel giudizio principale, in quanto aventi ad oggetto precetti che, anche singolarmente presi, sarebbero idonei ad escludere il proprio potere giurisdizionale.

2.— Nei giudizi è intervenuto il Presidente del Consiglio dei ministri, rappresentato e difeso dall'Avvocatura generale dello Stato, il quale chiede che la questione di legittimità costituzionale sollevata sia dichiarata inammissibile e/o infondata.

La difesa statale sostiene, in primo luogo, l'inammissibilità della questione sollevata, in quanto volta a sottoporre al sindacato di legittimità costituzionale la norma consuetudinaria sull'immunità che sarebbe riconducibile ad una fase anteriore all'adozione della Costituzione e non sarebbe, pertanto, sottoponibile al giudizio promosso dal giudice a quo, secondo l'orientamento a suo dire consolidato della Corte costituzionale, la quale avrebbe affermato che solo le consuetudini internazionali venute ad esistenza dopo l'entrata in vigore della Costituzione possono essere oggetto del giudizio di legittimità costituzionale (a tale proposito, a pretesa conferma, sono richiamate le sentenze nn. 48 del 1979, 471 del 1992, 15 del 1996, 262 del 2009).

Il Presidente del Consiglio dei ministri ritiene, inoltre, che il vaglio circa la sussistenza della giurisdizione assuma un carattere logicamente pregiudiziale rispetto al sindacato di merito, cosicché sostenere che la semplice domanda di risarcimento per danni recati da atti contrari a norme materiali inderogabili sia idonea a fondare la giurisdizione dello Stato territoriale paleserebbe un inammissibile rovesciamento dei rapporti di logica precedenza tra le due distinte valutazioni in rito ed in merito.

Nel merito, l'Avvocatura generale dello Stato, anzitutto, richiama all'attenzione la circostanza che la Corte costituzionale avrebbe affermato che l'art. 10, primo comma, Cost. rinvia alle norme del diritto internazionale generalmente riconosciute, attribuendo ad esse un valore di norme costituzionali ed avrebbe risolto l'apparente contrasto tra immunità e diritto alla tutela giurisdizionale ex art. 24 Cost. alla luce del principio di specialità, riconoscendo che la compressione del principio espresso dall'art. 24 Cost. può giustificarsi in virtù dei preminenti interessi sottesi all'esigenza di garantire l'immunità degli Stati stranieri dalla giurisdizione territoriale. La ragionevolezza insita nella conformazione del diritto di difesa a fronte delle esigenze connesse al rispetto dell'immunità dello Stato estero dimostrerebbe, pertanto, l'infondatezza delle censure di illegittimità costituzionale rivolte alle disposizioni impugnate.

L'obbligo di rispettare l'immunità dello Stato estero troverebbe il suo fondamento anche in altre disposizioni (oggetto di impugnativa) ed in specie nell'art. 94 dello Statuto dell'ONU, recepito in Italia con la legge n. 848 del 1957, il quale impone a ciascuno Stato membro di conformarsi alle decisioni della CIG, e nell'art. 3 della legge n. 5 del 2013, che ne costituisce esatta integrazione. Il dovere per l'Italia di conformarsi alle consuetudini internazionali nonché alle decisioni della CIG, come statuito dal citato art. 94 dello Statuto dell'ONU, troverebbe il proprio fondamento anche nell'art. 11 Cost. il quale imporrebbe all'Italia di rispettare le norme consuetudinarie di diritto internazionale come individuate dalla CIG, alle cui decisioni l'Italia è tenuta a conformarsi ai sensi dello Statuto dell'ONU.

3.— Si sono costituiti, in tutti e tre i giudizi, (reg. ord. n. 84, n. 85 e n. 113 del 2014), gli attori dei processi principali, chiedendo che la Corte costituzionale accolga le questioni sollevate dal Tribunale di Firenze.

3.1.— La difesa degli attori del processo principale premette che la circostanza che la richiesta del risarcimento dei danni è stata effettuata solo dopo sessantasette anni è dovuta alla moratoria che la Repubblica federale tedesca aveva concordato con gli alleati, vincitori della seconda guerra mondiale, e che anche l'Italia aveva dovuto rispettare in base all'art. 18 del Trattato di pace. Precisa, altresì, che, dopo la fine della moratoria, le richieste di risarcimento erano state rigettate dalla Repubblica federale tedesca ed

era stato negato qualsiasi altro rimedio per i crimini commessi dal Terzo Reich e dal suo governo.

Con specifico riferimento alle questioni sollevate dal Tribunale di Firenze, la difesa degli attori del processo principale svolge alcune considerazioni preliminari.

Essa ricorda che, a partire dal 26 giugno 1945, a San Francisco, in risposta alle gravi violazioni dei diritti fondamentali dell'uomo, gli Stati della Comunità internazionale si obbligavano, con l'art. 1, comma 3, e con l'art. 55, lettera c), della Carta dell'ONU, a rispettare i diritti dell'uomo e le libertà fondamentali, senza distinzioni di razza, sesso, lingua, religione. Fra tali diritti era annoverato anche quello di adire un giudice (art. 14 del Patto per i diritti civili e politici del 19 dicembre 1966), divenuto poi un cardine del sistema internazionale per l'osservanza dei diritti dell'uomo (Risoluzione dell'Assemblea generale dell'ONU n. 60/147 recante «Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious violations of International Umanitarian Law»). Pertanto, il conflitto tra la tutela dei diritti dell'uomo ed il divieto di ingerenza negli affari interni (cui si collega l'immunità giurisdizionale degli Stati) non può essere risolto a danno dei diritti fondamentali.

La difesa, quindi, osserva che l'illegittimità costituzionale della legge n. 5 del 2013 non deriverebbe soltanto da una violazione dell'art. 24 Cost., ma dal contrasto con lo stesso diritto internazionale e con la sua pretesa di tutelare i diritti fondamentali, incluso il diritto di adire un giudice competente in materia.

La difesa degli attori chiede, quindi, che la Corte costituzionale accolga la questione di legittimità costituzionale sollevata dal Tribunale di Firenze, anche al fine di evitare che la CIG venga denunciata per aver ecceduto dalla sua competenza.

Rileva, inoltre, che, alla luce del diritto internazionale vigente, esisterebbe la giurisdizione del giudice italiano e che, quindi, le norme censurate, nella parte in cui escludono la giurisdizione del giudice italiano per le azioni risarcitorie inerenti ai danni derivanti dai crimini contro l'umanità posti in essere dalle forze armate tedesche durante la seconda guerra mondiale , si porrebbero in contrasto anche con gli artt. 10 e 117 Cost. in quanto lederebbero il diritto della parte privata di adire il competente giudice per la tutela dei propri diritti ed interessi legittimi, in contrasto con il diritto internazionale consuetudinario e convenzionale.

Pertanto, la difesa degli attori dei processi principali chiede che la Corte costituzionale dichiari l'illegittimità costituzionale della legge n. 5 del 2013 per contrasto con gli artt. 24, 11 e 117 Cost. ed ammetta la giurisdizione del giudice italiano, escludendo l'efficacia anche indiretta della sentenza della CIG del 3 febbraio 2012.

Conseguentemente, chiede che vengano valutati ulteriori profili di illegittimità costituzionale della normativa denunciata attinenti, fra l'altro: al divieto di retroattività di una legge procedurale e al divieto di retroattività del nuovo orientamento giurisprudenziale relativo ai diritti fondamentali affermatosi rispetto al precedente orientamento della Corte di cassazione; al divieto di disapplicare il diritto internazionale generalmente riconosciuto, in virtù del quale lo Stato convenuto può implicitamente o esplicitamente rinunciare alla sua immunità giurisdizionale, non gode di immunità per cause fondate su illeciti commessi mediante atti iure imperii se questi sono avvenuti nel territorio dello Stato ove il giudice adito ha sede e non gode di immunità in cause civili fondate su gravi violazioni dei diritti fondamentali; all'obbligo di rispettare, in base agli artt. 11 e 117, primo comma, Cost., l'art. 28, comma 2, della Convenzione europea per il rimedio pacifico delle controversie tra gli Stati europei del 29 aprile 1957, e l'art. 6 della CEDU; al divieto di disattendere gli artt. 24 e 111 Cost. e/o gli artt. 1, comma 3, e 55, lettera c), della Carta dell'ONU se una persona fisica è stata vittima di un crimine di guerra o di gravi crimini contro l'umanità; agli artt.

101 e 102 Cost., in quanto l'impugnato art. 3 della legge n. 5 del 2013 contiene un ordine del Parlamento o del Governo al giudice, in relazione a specifiche cause, di rinunciare alla propria competenza giurisdizionale senza poter valutare i fatti e il diritto applicabile e di annullare decisioni già definite.

4.— All'udienza pubblica, le parti costituite nel giudizio ed il Presidente del Consiglio dei ministri hanno insistito per l'accoglimento delle conclusioni formulate nelle difese scritte.

Considerato in diritto

1.— Il Tribunale di Firenze dubita della legittimità costituzionale di alcune norme che gli imporrebbero di declinare la giurisdizione, come eccepito dalla convenuta, in relazione a tre giudizi instaurati contro la Repubblica federale di Germania (RFG) per ottenere la condanna di quest'ultima al risarcimento dei danni patiti nel corso della seconda guerra mondiale da tre cittadini italiani, catturati nel territorio italiano da forze militari tedesche e deportati in Germania per essere adibiti al lavoro forzato nei campi di concentramento.

Più precisamente, il Tribunale di Firenze ha sollevato questione di legittimità costituzionale: 1) della norma «prodotta nel nostro ordinamento mediante il recepimento, ai sensi dell'art. 10, primo comma, Cost.», della norma consuetudinaria di diritto internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati, così come interpretata dalla Corte internazionale di giustizia (CIG) nella sentenza Germania c. Italia del 3 febbraio 2012, nella parte in cui comprende tra gli atti iure imperii sottratti alla giurisdizione di cognizione anche i crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, commessi in Italia e in Germania nei confronti di cittadini italiani nel periodo 1943-1945 dalle truppe del Terzo Reich; 2) dell'art. 1 della legge di adattamento alla Carta delle Nazioni Unite (legge 17 agosto 1957, n. 848, recante «Esecuzione dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945»), nella parte in cui obbliga il giudice italiano ad adeguarsi alla pronuncia della CIG, pertanto, anche quando essa ha stabilito l'obbligo dello stesso di negare la propria giurisdizione nella causa civile di risarcimento del danno per crimini contro l'umanità, commessi iure imperii dal Terzo Reich nel territorio italiano; 3) dell'art. 1 (recte art. 3) della legge 14 gennaio 2013, n. 5 (Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, firmata a New York il 2 dicembre 2004, nonché norme di adeguamento dell'ordinamento interno), che ha imposto al giudice di adeguarsi alla sentenza della CIG e per ciò stesso di negare la propria giurisdizione in futuro per tutti gli atti iure imperii dello Stato straniero, anche quando tali atti consistano in violazioni gravi del diritto internazionale umanitario e dei diritti fondamentali, quali i crimini di guerra e contro l'umanità commessi in Italia e in Germania nei confronti di cittadini italiani nel periodo 1943-1945 dalle truppe del Terzo Reich, nonché di ammettere la revocazione delle sentenze già passate in giudicato che non avessero riconosciuto l'immunità.

Le richiamate norme vengono censurate in riferimento agli artt. 2 e 24 Cost., in quanto, impedendo l'accertamento giurisdizionale e la valutazione della pretesa di risarcimento dei danni derivanti dalle gravi violazioni dei diritti fondamentali subìte dalle vittime dei crimini di guerra e contro l'umanità, commessi da altro Stato, anche se nell'esercizio di poteri sovrani (*iure imperii*), contrasterebbero con il principio di insopprimibile garanzia della tutela giurisdizionale dei diritti, consacrato nell'art. 24 Cost., che è un principio supremo dell'ordinamento costituzionale italiano e, quindi, costituisce un limite all'ingresso sia delle norme internazionali generalmente riconosciute, ex art. 10, primo comma, Cost., che delle norme contenute in trattati istitutivi di organizzazioni internazionali aventi gli scopi indicati dall'art. 11 Cost. o derivanti da tali organizzazioni e oggetto di leggi di adattamento.

Il giudice rimettente muove dalla constatazione che la CIG, con la sentenza del 3 febbraio 2012, ha affermato la perdurante vigenza della norma consuetudinaria internazionale che sancisce l'immunità degli

Stati dalla giurisdizione civile degli altri Stati per tutti indistintamente gli atti ritenuti *iure imperii*, escludendo che si sia formata, per consuetudine, un'eccezione relativa agli atti *iure imperii* qualificabili, come espressamente riconosciuto nella specie con riguardo agli episodi di deportazione, lavoro forzato, eccidi, compiuti in Italia e in Germania nei confronti di cittadini italiani nel periodo 1943–1945 dalle truppe del Terzo Reich, quali crimini di guerra o contro l'umanità lesivi di diritti fondamentali della persona; ed ha negato l'esistenza di un conflitto tra norme materiali cogenti (diritto internazionale a tutela dei diritti umani) e norme processuali (immunità degli Stati dalla giurisdizione di altri Stati), in quanto operanti su piani diversi.

Tuttavia, pur riconoscendo alla CIG una "competenza assoluta ed esclusiva" quanto all'interpretazione delle norme di diritto internazionale, il giudice di Firenze dubita della conformità alla Costituzione sia della norma interna corrispondente alla norma consuetudinaria internazionale, che incontra il limite dei principi fondamentali e dei diritti inviolabili costituzionalmente garantiti, fra i quali vi è il diritto alla tutela giurisdizionale dei diritti inviolabili, sia delle corrispondenti norme di recepimento. Il rimettente precisa, infatti, che non può non tenersi in debito conto che il «conferire all'immunità internazionale il carattere assoluto confermato dalla Corte di giustizia internazionale vuol dire precludere, per gli individui interessati, qualsiasi possibilità di veder accertati e tutelati i propri diritti, nel caso di specie già negati nell'ordinamento interno tedesco» (ordinanze di rimessione n. 84 del 2014, pag. 7; n. 85 del 2014, pag. 7, n. 113 del 2014, pag. 7). Conseguentemente, prospetta lo stesso dubbio di legittimità costituzionale nei confronti di quelle disposizioni contenute sia nella legge di adattamento alla Carta delle Nazioni Unite (art.1 della legge n. 848 del 1957), che nella legge di adesione alla Convenzione di New York (art. 3 della legge n. 5 del 2013), nella parte in cui gli impongono, al pari della richiamata norma consuetudinaria internazionale, di negare la propria giurisdizione in ottemperanza alla sentenza della CIG.

Infine, il Tribunale di Firenze precisa che quelle censurate sono tutte norme la cui legittimità costituzionale rileva autonomamente nel giudizio principale, in quanto aventi ad oggetto precetti che, anche singolarmente presi, sarebbero idonei ad escludere l'esercizio della sua giurisdizione.

Inoltre, lo stesso giudice rimettente limita le questioni sollevate alla giurisdizione relativa alla cognizione della pretesa risarcitoria, non anche alla esecuzione.

I tre giudizi, a ragione dell'identità di petitum e di argomentazione, vanno riuniti e definiti con decisione unica.

2.— In via preliminare, questa Corte deve valutare le eccezioni di inammissibilità delle questioni di legittimità costituzionale sollevate dal Tribunale di Firenze.

2.1.— Con la prima eccezione, l'Avvocatura generale dello Stato deduce che l'immunità dalla giurisdizione qui evocata è oggetto di una norma internazionale consuetudinaria generalmente riconosciuta formatasi in epoca precedente all'entrata in vigore della Costituzione italiana e per tale ragione sarebbe insuscettibile di verifica di costituzionalità. Questa Corte avrebbe affermato, nella sentenza n. 48 del 1979 (v. punto 2. del Ritenuto in fatto), che la verifica di compatibilità costituzionale delle norme consuetudinarie internazionali sarebbe consentita esclusivamente per le norme formatesi successivamente all'entrata in vigore della nostra Costituzione.

L'eccezione non è fondata.

Invero, nell'occasione evocata dall'Avvocatura, questa Corte valutò precisamente la legittimità costituzionale della norma consuetudinaria internazionale sulla immunità degli agenti diplomatici, dopo averla definita espressamente «consuetudine più che secolare degli Stati nelle loro reciproche relazioni» e

affermando che «La prospettazione della questione così come formulata dal giudice a quo, riferita all'ordine di esecuzione di cui alla legge n. 804 del 1967, in relazione all'art. 31, paragrafi 1 e 3 della Convenzione di Vienna, appare solo formalmente esatta perché, sul punto che interessa, la disposizione pattizia è meramente ricognitiva della norma di diritto internazionale generale sopra descritta. Il fondamento della questione va considerato, pertanto, con riferimento a quest'ultima norma, ed il vero oggetto del giudizio, cui va rivolto l'esame della Corte, concerne la compatibilità con gli invocati principi costituzionali della norma interna di adeguamento alla consuetudine internazionale generale» (punto 3. del Considerato in diritto).

In un passaggio successivo, poi, questa Corte aggiunse: «Occorre comunque affermare, più in generale, per quanto attiene alle norme di diritto internazionale generalmente riconosciute che venissero ad esistenza dopo l'entrata in vigore della Costituzione, che il meccanismo di adeguamento automatico previsto dall'art. 10 Cost. non potrà in alcun modo consentire la violazione dei principi fondamentali del nostro ordinamento costituzionale, operando in un sistema costituzionale che ha i suoi cardini nella sovranità popolare e nella rigidità della Costituzione» (punto 3. del Considerato in diritto).

Ora, indipendentemente dalla correttezza o meno della lettura operata dall'Avvocatura della decisione n. 48 del 1979, questa Corte intende confermare specificamente quanto rilevato con chiarezza nella sentenza n. 1 del 1956: «L'assunto che il nuovo istituto della "illegittimità costituzionale" si riferisca solo alle leggi posteriori alla Costituzione e non anche a quelle anteriori non può essere accolto, sia perché, dal lato testuale, tanto l'art. 134 della Costituzione quanto l'art. 1 della legge costituzionale 9 febbraio 1948, n. 1, parlano di questioni di legittimità costituzionale delle leggi, senza fare alcuna distinzione, sia perché, dal lato logico, è innegabile che il rapporto tra leggi ordinarie e leggi costituzionali e il grado che ad esse rispettivamente spetta nella gerarchia delle fonti non mutano affatto, siano le leggi ordinarie anteriori, siano posteriori a quelle costituzionali».

E qui oggi si riconosce, pertanto, che il principio affermato nella appena ricordata sentenza n. 1 del 1956, secondo il quale il controllo di legittimità costituzionale riguarda sia norme posteriori che norme anteriori alla Costituzione repubblicana, vale anche per le norme del diritto internazionale generalmente riconosciute di cui al meccanismo di adattamento automatico dell'art. 10, primo comma, Cost. che si siano formate prima o dopo la Costituzione.

Neppure si può escludere dallo scrutinio di legittimità costituzionale la norma oggetto del rinvio operato all'art. 10, primo comma, Cost. ad una norma consuetudinaria internazionale solo perché l'art. 134 Cost. non contempla espressamente questa specifica ipotesi. Tale disposizione assoggetta al controllo accentrato di costituzionalità tutte le leggi, gli atti e le norme le quali, pur provviste della stessa efficacia delle leggi formali, ordinarie e costituzionali, siano venute ad esistenza per vie diverse dal procedimento legislativo, anche quelle da ultimo richiamate. Sono esclusi dallo scrutinio riservato a questa Corte soltanto gli atti che hanno un rango ed una forza inferiori rispetto alla legge. In definitiva, non sussistono, sul piano logico e sistematico, ragioni per le quali il controllo di legittimità costituzionale dovrebbe essere escluso per le consuetudini internazionali o limitato solo a quelle posteriori alla Costituzione, tenuto conto che a queste ultime è riconosciuta la medesima efficacia delle consuetudini formatesi in epoca precedente ed il medesimo limite del rispetto degli elementi identificativi dell'ordinamento costituzionale, vale a dire dei principi fondamentali e dei diritti inviolabili della persona.

La prima eccezione della difesa del Presidente del Consiglio dei Ministri non è pertanto fondata.

2.2.— La seconda eccezione si fonda sull'assunto che il difetto di giurisdizione non potrebbe essere verificato in base alla portata della norma internazionale sull'immunità degli Stati per gli atti ritenuti iure imperii, in quanto altrimenti si determinerebbe un «inammissibile rovesciamento dei rapporti di logica

precedenza tra le due distinte valutazioni in rito e in merito».

Anche questa eccezione non è fondata, per il semplice motivo che un'eccezione relativa alla giurisdizione richiede necessariamente una valutazione del petitum in base alla prospettazione della domanda, come formulata dalle parti.

2.3.— Ancora in via preliminare, occorre ribadire che sono inammissibili le deduzioni della parte privata dirette ad estendere il *thema decidendum* attraverso l'evocazione di ulteriori parametri costituzionali.

L'oggetto del giudizio di legittimità costituzionale in via incidentale è limitato alle disposizioni e ai parametri indicati nelle ordinanze di rimessione (sentenza n. 32 del 2014; ma anche sentenze n. 271 del 2011 e n. 56 del 2009). Pertanto, non possono essere prese in considerazione le censure svolte dalle parti dei giudizi principali, costituitesi nei giudizi davanti a questa Corte, sollevate in riferimento all'art. 117, primo comma, Cost. ed alle norme del diritto internazionale invocate per il suo tramite.

2.4.— Occorre, infine, rilevare che, benché nel dispositivo di tutte e tre le ordinanze di rimessione, fra le norme censurate, sia indicato l'art. 1 della legge n. 5 del 2013, dall'intero contesto delle tre ordinanze si desume con chiarezza come le doglianze riguardino non già il predetto art. 1, che contiene l'autorizzazione all'adesione alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, del 2 dicembre 2004, ma l'art. 3 della medesima legge nella parte in cui ha recepito — con procedimento di adattamento ordinario — quanto deciso dalla CIG con la sentenza del 3 febbraio 2012.

Pertanto, in linea con una costante giurisprudenza costituzionale, secondo la quale il thema decidendum, con riguardo alle norme censurate, va identificato tenendo conto della motivazione delle ordinanze o comunque dell'intero contesto del provvedimento di rimessione (ex plurimis, sentenze n. 258 del 2012 e n. 181 del 2011; ordinanza n. 162 del 2011), è l'art. 3 della legge n. 5 del 2013, e non già l'art. 1, l'oggetto del sindacato di legittimità costituzionale.

3 — Nel merito, la questione di legittimità costituzionale della norma "prodotta nel nostro ordinamento mediante il recepimento, ai sensi dell'art. 10, primo comma, Cost.", della norma consuetudinaria di diritto internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati, non è fondata nei termini di seguito precisati.

3.1.— É anzitutto da prendere atto che dal *thema decidendum* sottoposto a questa Corte è stata esclusa dal giudice rimettente ogni valutazione sulla interpretazione da parte della CIG della norma internazionale consuetudinaria relativa all'immunità degli Stati dalla giurisdizione civile degli altri Stati.

D'altra parte, la Corte non potrebbe procedere ad un tale scrutinio. Si tratta, infatti, di una norma di diritto internazionale, dunque esterna all'ordinamento giuridico italiano, la cui applicazione da parte dell'amministrazione e/o del giudice, in virtù del rinvio operato nella specie dall'art. 10, primo comma, Cost., deve essere effettuata in base al principio di conformità, e cioè nell'osservanza dell'interpretazione che ne è data nell'ordinamento di origine, che è l'ordinamento internazionale. In questa occasione, la norma che interessa è stata interpretata dalla CIG, precisamente in vista della definizione della controversia tra Germania ed Italia, avente ad oggetto la giurisdizione del giudice italiano su atti imputabili alla RFG.

Con la sentenza del 3 febbraio 2012, la CIG ha affermato che, allo stato, non si rinvengono sufficienti elementi nella prassi internazionale per dedurre l'esistenza di una deroga alla norma sull'immunità degli Stati dalla giurisdizione civile degli altri Stati per atti ritenuti iure imperii relativa alle ipotesi, che ha ritenuto sussistenti nella specie, e come ammesso dalla stessa RFG, di crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona. La medesima Corte ha anche espressamente riconosciuto

(sentenza, pag. 144, punto 104) — e risulta confermato dalla difesa della RFG, che ha escluso l'esistenza di altri rimedi giurisdizionali a tutela delle vittime dei predetti crimini (replica RFG, 5 ottobre 2010, pag. 11, punto 34) — che il difetto di giurisdizione dei giudici italiani comporta un sacrificio dei diritti fondamentali dei soggetti che hanno subito le conseguenze dei crimini commessi dallo Stato straniero ed ha individuato, sul piano del diritto internazionale, nell'apertura di un nuovo negoziato il solo strumento per definire la questione.

Ora, deve riconoscersi che, sul piano del diritto internazionale, l'interpretazione da parte della CIG della norma consuetudinaria sull'immunità degli Stati dalla giurisdizione civile degli altri Stati per atti ritenuti iure imperii è un'interpretazione particolarmente qualificata, che non consente un sindacato da parte di amministrazioni e/o giudici nazionali, ivi compresa questa Corte. Lo stesso principio è stato con chiarezza affermato già nelle sentenze n. 348 e n. 349 del 2007 con riguardo all'interpretazione delle norme della Convenzione europea dei diritti dell'uomo e delle libertà fondamentali (CEDU) resa dalla Corte di Strasburgo.

E infatti il giudice rimettente non entra nel merito dell'interpretazione resa dalla CIG della norma internazionale sull'immunità per atti ritenuti iure imperii. Egli prende atto, sia pure con preoccupazione, che quella è la portata attuale della norma consuetudinaria internazionale in quanto così definita dalla CIG. Riferisce, altresì, che neppure è contestato che gli atti attribuiti alla RFG siano atti illeciti, qualificati dalla stessa RFG e dalla CIG crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, questione che comunque rientra nella valutazione di merito della pretesa principale ed è dunque estranea al *thema decidendum* affidato a questa Corte.

Ciò premesso, è tuttavia evidente che resta da verificare e risolvere il prospettato conflitto tra la norma internazionale da immettere ed applicare nell'ordinamento interno, così come interpretata nell'ordinamento internazionale, norma che ha rango equivalente a quello costituzionale, in virtù del rinvio di cui all'art. 10, primo comma, Cost., e norme e principi della Costituzione che con essa presentino elementi di contrasto tali da non essere superabili con gli strumenti ermeneutici.

É ciò che si verifica con i principi qualificanti e irrinunciabili dell'assetto costituzionale dello Stato e, quindi, con i principi che sovraintendono alla tutela dei diritti fondamentali della persona. In tali ipotesi spetta al giudice nazionale, ed in particolare esclusivamente a questa Corte, una verifica di compatibilità costituzionale, nel caso concreto, che garantisca l'intangibilità di principi fondamentali dell'ordinamento interno ovvero ne riduca al minimo il sacrificio.

Ed è precisamente questo il *thema decidendum* che ha sottoposto a questa Corte il Tribunale di Firenze nel sollevare le questioni di legittimità costituzionale precisate in epigrafe: di verificare la compatibilità della norma internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati, così come interpretata dalla CIG, con un principio fondamentale del nostro ordinamento costituzionale quale il diritto al giudice (art. 24), congiuntamente al principio posto a tutela di diritti fondamentali della persona (art. 2). D'altra parte, la possibilità della verifica di compatibilità resta intatta comunque, anche tra norme — come nella specie — entrambe di rango costituzionale, il bilanciamento rientrando tra «le ordinarie operazioni cui questa Corte è chiamata in tutti i giudizi di sua competenza» (sentenza n. 236 del 2011).

3.2.— Non v'è dubbio, infatti, ed è stato confermato a più riprese da questa Corte, che i principi fondamentali dell'ordinamento costituzionale e i diritti inalienabili della persona costituiscano un «limite all'ingresso [...] delle norme internazionali generalmente riconosciute alle quali l'ordinamento giuridico italiano si conforma secondo l'art. 10, primo comma della Costituzione» (sentenze n. 48 del 1979 e n. 73 del 2001) ed operino quali "controlimiti" all'ingresso delle norme dell'Unione europea (ex plurimis: sentenze n. 183 del 1973, n.170 del 1984, n. 232 del 1989, n. 168 del 1991, n. 284 del 2007), oltre che come

limiti all'ingresso delle norme di esecuzione dei Patti Lateranensi e del Concordato (sentenze n. 18 del 1982, n. 32, n. 31 e n. 30 del 1971). Essi rappresentano, in altri termini, gli elementi identificativi ed irrinunciabili dell'ordinamento costituzionale, per ciò stesso sottratti anche alla revisione costituzionale (artt. 138 e 139 Cost.: così nella sentenza n. 1146 del 1988).

In un sistema accentrato di controllo di costituzionalità, è pacifico che questa verifica di compatibilità spetta alla sola Corte costituzionale, con esclusione di qualsiasi altro giudice, anche in riferimento alle norme consuetudinarie internazionali. Vero è, infatti, che la competenza di questa Corte è determinata dal contrasto di una norma con una norma costituzionale e, ovviamente, con un principio fondamentale dell'assetto costituzionale dello Stato ovvero con un principio posto a tutela di un diritto inviolabile della persona, contrasto la cui valutazione non può competere ad altro giudice che al giudice costituzionale. Ogni soluzione diversa si scontra — nel sistema accentrato di controllo — con la competenza riservata dalla Costituzione a questa Corte, restando scolpito nella sua giurisprudenza, fin dal primo passo, che «La dichiarazione di illegittimità costituzionale di una legge non può essere fatta che dalla Corte costituzionale in conformità dell'art. 136 della stessa Costituzione» (sentenza n. 1 del 1956). Anche di recente, poi, questa Corte ha ribadito che la verifica di compatibilità con i principi fondamentali dell'assetto costituzionale e di tutela dei diritti umani è di sua esclusiva competenza (sentenza n. 284 del 2007); ed ancora, precisamente con riguardo al diritto di accesso alla giustizia (art. 24 Cost.), che il rispetto dei diritti fondamentali, così come l'attuazione di principi inderogabili, è assicurato dalla funzione di garanzia assegnata alla Corte costituzionale (sentenza n. 120 del 2014).

3.3.— La norma internazionale consuetudinaria sull'immunità degli Stati dalla giurisdizione civile degli altri Stati, in origine assoluta in quanto comprensiva di tutti i comportamenti degli Stati, in tempi meno remoti, ossia nella prima parte del secolo scorso, è stata oggetto di un'evoluzione progressiva dovuta alla giurisprudenza nazionale della maggior parte degli Stati, fino alla individuazione di un limite negli acta iure gestionis, formula di immediata comprensione. Ed è notorio che è stato merito principalmente della giurisprudenza italiana (ex multis, Tribunale di Firenze, 8 giugno 1906, Riv. Dir. Int. 1907, 379; Cass. 13 marzo 1926, idem 1926, 250; Corte d'appello di Napoli, 16 luglio 1926, idem 1927,104; Corte d'appello di Milano, 23 gennaio 1932, idem 1932, 549; Cassazione 18 gennaio 1933, idem 1933, 241) e di quella belga (ex multis, Cass. 11 giugno 1903, Journ dr. Int. Privé 1904, 136; App. Bruxelles 24 giugno 1920, Pasicrisie belge 1922, II, 122; App. Bruxelles, 24 maggio 1933, Journ. dr. Int. 1933, 1034) la progressiva affermazione del limite appena ricordato all'applicazione della norma sull'immunità (c.d. tesi italo-belga). In definitiva, si è ridotta, ad opera delle giurisdizioni nazionali, la portata della norma del diritto consuetudinario internazionale, nel senso che essa attribuisce l'immunità dalla giurisdizione civile degli altri Stati solo per gli atti ritenuti iure imperii. E ciò principalmente allo scopo di escludere la concessione del beneficio dell'immunità almeno quando lo Stato agisce come privato, ipotesi che appariva una iniqua limitazione dei diritti dei contraenti privati.

Questo processo di progressiva definizione del contenuto della norma internazionale si è ormai da tempo affermato nella Comunità internazionale (sentenza n. 329 del 1992): e va valutata al giusto la circostanza certo significativa che l'evoluzione nel senso precisato sia stata provocata dalla giurisprudenza dei giudici nazionali, ai quali è naturale spetti la valutazione del rispettivo titolo di competenza, lasciando agli organi internazionali la ricognizione della prassi ai fini della rilevazione delle norme consuetudinarie e della loro evoluzione.

Se un simile effetto di ridimensionamento dell'immunità in una prospettiva di tutela dei diritti si è delineato, anche per quanto attiene all'ordinamento italiano, ad opera del controllo dei giudici comuni, in un contesto istituzionale contraddistinto da una Costituzione flessibile, nella quale il riconoscimento dei diritti non era assistito che da ridotte garanzie, è ineludibile affermare che nell'ordinamento costituzionale

repubblicano, fondato sulla tutela dei diritti e sulla connessa limitazione del potere ad essa funzionale e garantito da una Costituzione rigida, lo stesso controllo compete a questa Corte. Ad essa spetta in via esclusiva il compito di assicurare il rispetto della Costituzione ed a maggior ragione dei suoi principi fondamentali e quindi la necessaria valutazione della compatibilità della norma internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati con i predetti principi, con l'effetto di produrre un ulteriore ridimensionamento della portata della predetta norma, limitato al diritto interno ma tale da concorrere, altresì, ad un'auspicabile e da più parti auspicata evoluzione dello stesso diritto internazionale.

3.4.— Una simile verifica si rivela, peraltro, indispensabile alla luce dell'art. 10, primo comma, Cost., il quale impone a questa Corte di accertare se la norma del diritto internazionale generalmente riconosciuta sull'immunità dalla giurisdizione degli Stati stranieri, come interpretata nell'ordinamento internazionale, possa entrare nell'ordinamento costituzionale, in quanto non contrastante con principi fondamentali e diritti inviolabili. Il verificarsi di tale ultima ipotesi, infatti, «esclude l'operatività del rinvio alla norma internazionale» (sentenza n. 311 del 2009), con la conseguenza inevitabile che la norma internazionale, per la parte confliggente con i principi ed i diritti inviolabili, non entra nell'ordinamento italiano e non può essere quindi applicata.

E ciò è proprio quanto è accaduto nella specie.

Ripetutamente questa Corte ha osservato che fra i principi fondamentali dell'ordinamento costituzionale vi è il diritto di agire e di resistere in giudizio a difesa dei propri diritti riconosciuto dall'art. 24 Cost., in breve il diritto al giudice. A maggior ragione, poi, ciò vale quando il diritto in questione è fatto valere a tutela dei diritti fondamentali della persona.

Nella specie, il giudice rimettente ha non casualmente indicato congiuntamente gli artt. 2 e 24 Cost., inestricabilmente connessi nella valutazione di legittimità costituzionale chiesta a questa Corte. Il primo è la norma sostanziale posta, tra i principi fondamentali della Carta costituzionale, a presidio dell'inviolabilità dei diritti fondamentali della persona, tra i quali, nella specie conferente a titolo primario, la dignità. Il secondo è anch'esso a presidio della dignità della persona, tutelando il suo diritto ad accedere alla giustizia per far valere il proprio diritto inviolabile.

La diversità di piano, sostanziale e processuale, non consente di scinderne la comune rilevanza rispetto alla compatibilità costituzionale della regola dell'immunità degli Stati dalla giurisdizione civile degli altri Stati. Sarebbe invero arduo individuare quanto resterebbe di un diritto se non potesse essere fatto valere dinanzi ad un giudice per avere effettiva tutela.

Fin dalla sentenza n. 98 del 1965 in materia comunitaria, questa Corte affermò che il diritto alla tutela giurisdizionale «è tra quelli inviolabili dell'uomo, che la Costituzione garantisce all'art. 2, come si arguisce anche dalla considerazione che se ne è fatta nell'art. 6 della Convenzione europea dei diritti dell'uomo» (punto 2. del Considerato in diritto). In una meno remota occasione, questa Corte non ha esitato ad ascrivere il diritto alla tutela giurisdizionale «tra i principi supremi del nostro ordinamento costituzionale, in cui è intimamente connesso con lo stesso principio di democrazia l'assicurare a tutti e sempre, per qualsiasi controversia, un giudice e un giudizio» (sentenze n. 18 del 1982, nonché n. 82 del 1996). D'altra parte, in una prospettiva di effettività della tutela dei diritti inviolabili, questa Corte ha anche osservato che «al riconoscimento della titolarità di diritti non può non accompagnarsi il riconoscimento del potere di farli valere innanzi ad un giudice in un procedimento di natura giurisdizionale»: pertanto, «l'azione in giudizio per la difesa dei propri diritti (...) è essa stessa il contenuto di un diritto, protetto dagli articoli 24 e 113 della Costituzione e da annoverarsi tra quelli inviolabili e caratterizzanti lo stato democratico di diritto» (sentenza n. 26 del 1999, nonché n. 120 del 2014, n. 386 del 2004 e n. 29 del 2003). Né è

contestabile che il diritto al giudice ed a una tutela giurisdizionale effettiva dei diritti inviolabili è sicuramente tra i grandi principi di civiltà giuridica in ogni sistema democratico del nostro tempo.

Tuttavia, proprio con riguardo ad ipotesi di immunità dalla giurisdizione degli Stati introdotte dalla normativa internazionale, questa Corte ha riconosciuto che nei rapporti con gli Stati stranieri il diritto fondamentale alla tutela giurisdizionale possa subire un limite ulteriore rispetto a quelli imposti dall'art. 10 Cost. Ma il limite deve essere giustificato da un interesse pubblico riconoscibile come potenzialmente preminente su un principio, quale quello dell'art. 24 Cost., annoverato tra i "principi supremi" dell'ordinamento costituzionale (sentenza n. 18 del 1982); inoltre la norma che stabilisce il limite deve garantire una rigorosa valutazione di tale interesse alla stregua delle esigenze del caso concreto (sentenza n. 329 del 1992).

Nella specie, la norma consuetudinaria internazionale sull'immunità dalla giurisdizione degli Stati stranieri, con la portata definita dalla CIG, nella parte in cui esclude la giurisdizione del giudice a conoscere delle richieste di risarcimento dei danni delle vittime di crimini contro l'umanità e di gravi violazioni dei diritti fondamentali della persona, determina il sacrificio totale del diritto alla tutela giurisdizionale dei diritti delle suddette vittime: il che è peraltro riconosciuto dalla stessa CIG, che rinvia la soluzione della questione, sul piano internazionale, ad eventuali nuovi negoziati, individuando nella sede diplomatica l'unica sede utile (punto 104 della sentenza del 3 febbraio 2012). Né si ravvisa, nell'ambito dell'ordinamento costituzionale, un interesse pubblico tale da risultare preminente al punto da giustificare il sacrificio del diritto alla tutela giurisdizionale di diritti fondamentali (artt. 2 e 24 Cost.), lesi da condotte riconosciute quali crimini gravi.

L'immunità dalla giurisdizione degli altri Stati, se ha un senso, logico prima ancora che giuridico, comunque tale da giustificare, sul piano costituzionale, il sacrificio del principio della tutela giurisdizionale dei diritti inviolabili garantito dalla Costituzione, deve collegarsi — nella sostanza e non solo nella forma — con la funzione sovrana dello Stato straniero, con l'esercizio tipico della sua potestà di governo.

Anche in una prospettiva di realizzazione dell'obiettivo del mantenimento di buoni rapporti internazionali, ispirati ai principi di pace e giustizia, in vista dei quali l'Italia consente a limitazioni di sovranità (art. 11 Cost.), il limite che segna l'apertura dell'ordinamento italiano all'ordinamento internazionale e sovranazionale (artt. 10 ed 11 Cost.) è costituito, come questa Corte ha ripetutamente affermato (con riguardo all'art. 11 Cost.: sentenze n. 284 del 2007, n. 168 del 1991, n. 232 del 1989, n. 170 del 1984, n. 183 del 1973; con riguardo all'art. 10, primo comma, Cost.: sentenze n. 73 del 2001, n. 15 del 1996 e n. 48 del 1979; anche sentenza n. 349 del 2007), dal rispetto dei principi fondamentali e dei diritti inviolabili dell'uomo, elementi identificativi dell'ordinamento costituzionale. E ciò è sufficiente ad escludere che atti quali la deportazione, i lavori forzati, gli eccidi, riconosciuti come crimini contro l'umanità, possano giustificare il sacrificio totale della tutela dei diritti inviolabili delle persone vittime di quei crimini, nell'ambito dell'ordinamento interno.

L'immunità dello Stato straniero dalla giurisdizione del giudice italiano consentita dagli artt. 2 e 24 Cost. protegge la funzione, non anche comportamenti che non attengono all'esercizio tipico della potestà di governo, ma sono espressamente ritenuti e qualificati illegittimi, in quanto lesivi di diritti inviolabili, come riconosciuto, nel caso in esame, dalla stessa CIG e, dinanzi ad essa, dalla RFG (supra, punto 3.1.), ma ciò nonostante sprovvisti di rimedi giurisdizionali, come pure è attestato nella sentenza della CIG, nella parte ove dichiara di non ignorare «che l'immunità dalla giurisdizione riconosciuta alla Germania conformemente al diritto internazionale può impedire ai cittadini italiani interessati una riparazione giudiziaria» (punto 104), auspicando conseguentemente la riapertura di negoziati.

Pertanto, in un contesto istituzionale contraddistinto dalla centralità dei diritti dell'uomo, esaltati

dall'apertura dell'ordinamento costituzionale alle fonti esterne (sentenza n. 349 del 2007), la circostanza che per la tutela dei diritti fondamentali delle vittime dei crimini di cui si tratta, ormai risalenti, sia preclusa la verifica giurisdizionale rende del tutto sproporzionato il sacrificio di due principi supremi consegnati nella Costituzione rispetto all'obiettivo di non incidere sull'esercizio della potestà di governo dello Stato, allorquando quest'ultima si sia espressa, come nella specie, con comportamenti qualificabili e qualificati come crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, in quanto tali estranei all'esercizio legittimo della potestà di governo.

Vale, infine, precisare che il diritto al giudice sancito dalla Costituzione italiana, come in tutti gli ordinamenti democratici, richiede una tutela effettiva dei diritti dei singoli (sull'effettività della tutela giurisdizionale dei diritti ex art. 24 Cost., tra le tante, di recente, sentenze n. 182 del 2014 e n. 119 del 2013; anche sentenze n. 281 del 2010 e n. 77 del 2007).

Questa Corte, che pure aveva, come sopra ricordato, riconosciuto che il sistema di controllo giurisdizionale previsto per l'ordinamento comunitario appariva rispondere ai caratteri di un sistema di tutela giurisdizionale equivalente a quello richiesto dall'art. 24 Cost. (sentenza n. 98 del 1965), ha espresso una valutazione diversa di fronte alla prassi della stessa Corte di giustizia UE di differire gli effetti favorevoli di una sentenza su rinvio pregiudiziale anche per le parti che avevano fatto valere i diritti poi riconosciuti, così vanificando la funzione del rinvio pregiudiziale, riducendo vistosamente l'effettività della tutela giurisdizionale richiesta e pertanto non rispondendo in parte qua a quanto richiesto dal diritto al giudice sancito dalla Costituzione italiana (sentenza n. 232 del 1989, che indusse la Corte di giustizia UE a mutare la sua giurisprudenza in proposito).

Significativo è del pari che la Corte di giustizia UE, in riferimento all'impugnazione di un regolamento del Consiglio che disponeva il congelamento dei beni delle persone inserite in un elenco di presunti terroristi predisposto da un organo del Consiglio di Sicurezza delle Nazioni Unite (comitato delle sanzioni), ha anzitutto respinto la tesi del Tribunale di primo grado che aveva sostanzialmente stabilito il difetto di giurisdizione del giudice comunitario, affermandone il dovere di garantire il controllo di legittimità di tutti gli atti dell'Unione, anche di quelli che attuano risoluzioni del Consiglio di Sicurezza delle Nazioni Unite. La Corte ha poi affermato che gli obblighi derivanti da un accordo internazionale non possono violare il principio del rispetto dei diritti fondamentali che deve caratterizzare tutti gli atti dell'Unione. L'esito è stato l'annullamento del regolamento comunitario, per quanto di ragione, per la violazione del principio di tutela giurisdizionale effettiva e la mancanza, nel sistema delle Nazioni Unite, di un adeguato meccanismo di controllo del rispetto dei diritti fondamentali (Corte di giustizia UE, sentenza 3 settembre 2008, cause C-402 P e 415/05 P, punti 316 e seguenti, 320 e seguenti).

3.5. — Nella specie, l'insussistenza della possibilità di una tutela effettiva dei diritti fondamentali mediante un giudice, rilevata, come detto, dalla CIG e confermata, dinanzi alla predetta, dalla RFG, rende manifesto il denunciato contrasto della norma internazionale, come definita dalla predetta CIG, con gli artt. 2 e 24 Cost.

Tale contrasto, laddove la norma internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati comprende anche atti ritenuti iure imperii in violazione del diritto internazionale e dei diritti fondamentali della persona, impone a questa Corte di dichiarare che rispetto a quella norma, limitatamente alla parte in cui estende l'immunità alle azioni di danni provocati da atti corrispondenti a violazioni così gravi, non opera il rinvio di cui al primo comma dell'art. 10 Cost. Ne consegue che la parte della norma sull'immunità dalla giurisdizione degli Stati che confligge con i predetti principi fondamentali non è entrata nell'ordinamento italiano e non vi spiega, quindi, alcun effetto.

La questione prospettata dal giudice rimettente con riguardo alla norma «prodotta nel nostro

ordinamento mediante il recepimento, ai sensi dell'art. 10, primo comma, Cost.», della norma consuetudinaria di diritto internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati è, dunque, non fondata, considerato che la norma internazionale alla quale il nostro ordinamento si è conformato in virtù dell'art. 10, primo comma, Cost. non comprende l'immunità degli Stati dalla giurisdizione civile in relazione ad azioni di danni derivanti da crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, i quali risultano per ciò stesso non privi della necessaria tutela giurisdizionale effettiva.

4.— Diversamente va valutata la questione di legittimità costituzionale sollevata nei confronti dell'art. 1 della legge di adattamento alla Carta delle Nazioni Unite (legge 17 agosto 1957, n. 848). Tale disposizione è censurata per violazione degli artt. 2 e 24 Cost., nella parte in cui, dando esecuzione alla Carta delle Nazioni Unite, ed in specie all'art. 94 della medesima, che prescrive che «ciascun membro delle Nazioni Unite si impegna a conformarsi alla decisione della CIG in ogni controversia di cui esso sia parte», impone espressamente all'ordinamento interno di adeguarsi alla pronuncia della CIG anche quando essa, come nella specie, ha stabilito l'obbligo del giudice italiano di negare la propria giurisdizione in riferimento ad atti di quello Stato che consistano in violazioni gravi del diritto internazionale umanitario e dei diritti fondamentali quali i crimini di guerra e contro l'umanità.

4.1.— La questione è fondata nei limiti di seguito precisati.

L'art. 1 della legge n. 848 del 1957 ha provveduto a dare «piena ed intera esecuzione» allo Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945, il cui scopo è il mantenimento della pace e della sicurezza internazionale. Fra gli organi dell'Organizzazione delle Nazioni Unite è istituita la CIG (art. 7), organo giudiziario principale delle Nazioni Unite (art. 92), le cui decisioni vincolano ciascuno Stato membro in ogni controversia di cui esso sia parte (art. 94). Tale vincolo, che spiega i suoi effetti nell'ordinamento interno tramite la legge di adattamento speciale (autorizzazione alla ratifica e ordine di esecuzione), costituisce una delle ipotesi di limitazione di sovranità alle quali lo Stato italiano ha consentito in favore di quelle organizzazioni internazionali, come l'ONU, volte ad assicurare pace e giustizia fra le Nazioni, ai sensi dell'art. 11 Cost., sempre però nel limite del rispetto dei principi fondamentali e dei diritti inviolabili tutelati dalla Costituzione (sentenza n. 73 del 2001). Ora, la previsione dell'obbligo di conformarsi alle decisioni della CIG, che discende dal recepimento dell'art. 94 della Carta delle Nazioni Unite, non può non riguardare anche la sentenza con la quale la predetta Corte ha imposto allo Stato italiano di negare la propria giurisdizione nelle cause civili di risarcimento del danno per i crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, commessi dal Terzo Reich nel territorio italiano.

Ed è comunque con esclusivo e specifico riguardo al contenuto della sentenza della CIG, che ha interpretato la norma internazionale generale sull'immunità dalla giurisdizione degli Stati stranieri come comprensiva dell'ipotesi di atti ritenuti iure imperii qualificati come crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, che si delinea il contrasto della legge di adattamento alla Carta delle Nazioni Unite con gli artt. 2 e 24 Cost. Considerato che, come si è già ricordato più volte, la tutela giurisdizionale dei diritti fondamentali costituisce uno dei "principi supremi dell'ordinamento costituzionale", ad esso non può opporre resistenza la norma denunciata (l'art. 1 della legge di adattamento), limitatamente alla parte in cui vincola lo Stato italiano, e per esso il giudice, a conformarsi alla sentenza del 3 febbraio 2012 della CIG, che lo costringe a negare la propria giurisdizione in ordine alle azioni di risarcimento danni per crimini contro l'umanità, in palese violazione del diritto alla tutela giurisdizionale dei diritti fondamentali.

Per il resto, è del tutto ovvio che rimane inalterato l'impegno dello Stato italiano al rispetto di tutti gli obblighi internazionali derivanti dall'adesione alla Carta delle Nazioni Unite, ivi compreso il vincolo ad

uniformarsi alle decisioni della CIG.

L'impedimento all'ingresso nel nostro ordinamento della norma convenzionale, sia pure esclusivamente in parte qua, si traduce — non potendosi incidere sulla legittimità di una norma esterna — nella dichiarazione di illegittimità della legge di adattamento speciale limitatamente a quanto contrasta con i conferenti principi costituzionali fondamentali (sentenza n. 311 del 2009).

Ciò è conforme alla prassi costante di questa Corte, come emerge significativamente dalla sentenza n. 18 del 1982 con cui questa Corte ha dichiarato, tra l'altro, «l'illegittimità costituzionale dell'art. 1 della legge 27 maggio 1929, n. 810 (Esecuzione del Trattato, dei quattro allegati annessi, e del Concordato, sottoscritti in Roma, fra la Santa Sede e l'Italia, l'11 febbraio 1929), limitatamente all'esecuzione data all'art. 34, comma sesto, del Concordato, e dell'art. 17, comma secondo, della legge 27 maggio 1929, n. 847 (Disposizioni per l'applicazione del Concordato dell'11 febbraio 1929 tra la Santa Sede e l'Italia, nella parte relativa al matrimonio), nella parte in cui le suddette norme prevedono che la Corte d'appello possa rendere esecutivo agli effetti civili il provvedimento ecclesiastico, col quale è accordata la dispensa dal matrimonio rato e non consumato, e ordinare l'annotazione nei registri dello stato civile a margine dell'atto di matrimonio» (nello stesso senso, fra le tante, sentenze n. 223 del 1996, n. 128 del 1987, n. 210 del 1986 e n. 132 del 1985).

Rimane ferma e indiscussa la perdurante validità ed efficacia della legge di adattamento n. 848 del 1957 per la parte restante.

Deve, pertanto, dichiararsi l'illegittimità costituzionale dell'art. 1 della legge di adattamento n. 848 del 1957, limitatamente all'esecuzione data all'art. 94 della Carta delle Nazioni Unite, esclusivamente nella parte in cui obbliga il giudice italiano ad adeguarsi alla pronuncia della CIG del 3 febbraio 2012, che gli impone di negare la propria giurisdizione in riferimento ad atti di uno Stato straniero che consistano in crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona.

5.— Occorre, infine, esaminare la questione di legittimità costituzionale avente ad oggetto l'art. 3 della legge n. 5 del 2013. Sulla base di argomenti analoghi a quelli svolti a sostegno delle altre questioni (supra, punto 3. e seguenti), il giudice rimettente solleva, in riferimento agli artt. 2 e 24 Cost., il dubbio di legittimità costituzionale del predetto articolo, nella parte in cui obbliga il giudice nazionale ad adeguarsi alla pronuncia della CIG anche quando essa, come nella specie, gli impone di negare la propria giurisdizione di cognizione nella causa civile di risarcimento del danno per crimini contro l'umanità, ritenuti iure imperii, commessi dal Terzo Reich nel territorio italiano. Tale articolo, infatti, impedendo l'accertamento giurisdizionale e l'eventuale condanna delle gravi violazioni dei diritti fondamentali subìte dalle vittime dei crimini di guerra e contro l'umanità, perpetrati sul territorio dello Stato italiano investito dall'obbligo di tutela giurisdizionale, ma commessi da altro Stato nell'esercizio, ancorché illegittimo, dei poteri sovrani, contrasterebbe con il principio di tutela giurisdizionale dei diritti inviolabili, consacrato negli artt. 2 e 24 Cost.

5.1.— La questione è fondata.

La norma censurata si inserisce nell'ambito della legge n. 5 del 2013, con la quale l'Italia ha disposto l'autorizzazione all'adesione e la piena ed intera esecuzione della Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, adottata a New York il 2 dicembre 2004. Tale Convenzione, che entrerà in vigore trenta giorni dopo la data del deposito del trentesimo strumento di ratifica, è volta a recepire, in via convenzionale, il principio del diritto internazionale consuetudinario dell'immunità giurisdizionale degli Stati generalmente riconosciuto, delimitandone l'ambito di operatività mediante l'individuazione dei casi di esenzione (quali, ad esempio, quelli inerenti alle transazioni

commerciali, ai contratti di lavoro ed alle lesioni all'integrità fisica delle persone: artt. 10, 11 e 12), al fine di garantire «la certezza del diritto, in particolare nei rapporti tra gli Stati e le persone fisiche e giuridiche» (così nel preambolo). Il legislatore italiano, pertanto, con la citata legge di adattamento speciale n. 5 del 2013, ha provveduto a recepire nell'ordinamento interno la suddetta Convenzione, mediante la richiamata previsione dell'autorizzazione all'adesione (art. 1), nonché mediante la formula dell'ordine di esecuzione (art. 2), vincolandosi a rispettarne tutti i precetti. Esso ha, tuttavia, anche inserito il censurato art. 3, con il quale ha testualmente disposto che «1. Ai fini di cui all'articolo 94, paragrafo 1, dello Statuto delle Nazioni Unite, [...] quando la CIG, con sentenza che ha definito un procedimento di cui è stato parte lo Stato italiano, ha escluso l'assoggettamento di specifiche condotte di altro Stato alla giurisdizione civile, il giudice davanti al quale pende controversia relativa alle stesse condotte rileva, d'ufficio e anche quando ha già emesso sentenza non definitiva passata in giudicato che ha riconosciuto la sussistenza della giurisdizione, il difetto di giurisdizione in qualunque stato e grado del processo. 2. Le sentenze passate in giudicato in contrasto con la sentenza della CIG di cui al comma 1, anche se successivamente emessa, possono essere impugnate per revocazione, oltre che nei casi previsti dall'articolo 395 del codice di procedura civile, anche per difetto di giurisdizione civile e in tale caso non si applica l'articolo 396 del citato codice di procedura civile».

Si tratta, nella sostanza, di una disposizione di adattamento ordinario, diretta alla esecuzione della sentenza della CIG del 3 settembre 2012. Con tale articolo, in altri termini, si è provveduto a disciplinare puntualmente l'obbligo dello Stato italiano di conformarsi a tutte le decisioni con le quali la CIG abbia escluso l'assoggettamento di specifiche condotte di altro Stato alla giurisdizione civile, imponendo al giudice di rilevare d'ufficio, in qualunque stato e grado del processo, il difetto di giurisdizione, e giungendo fino al punto di individuare un ulteriore caso di impugnazione per revocazione delle sentenze passate in giudicato, rese in contrasto con la decisione della CIG.

Dall'esame dei lavori parlamentari risulta con evidenza che tale articolo è stato adottato, peraltro a breve distanza dalla sentenza del 3 febbraio 2012 della CIG, al fine di garantirne espressamente ed immediatamente il rispetto ed «evitare situazioni incresciose come quelle createsi con il contenzioso dinanzi alla Corte dell'Aja» (atti Camera n. 5434, Commissione III Affari costituzionali, seduta del 19 settembre 2012). E ciò senza escludere le ipotesi in cui la CIG, come nel caso della sentenza del 3 febbraio 2012, abbia affermato l'immunità dalla giurisdizione civile degli Stati in relazione ad azioni risarcitorie di danni prodotti da atti che siano configurabili quali crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona, anche ove posti in essere dalle forze armate dello Stato sul territorio dello Stato del foro. In tal modo la norma impugnata deroga anche a quanto espressamente previsto dalla stessa Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, come risulta confermato dalla dichiarazione interpretativa depositata, unitamente all'adesione, dal Governo italiano, nella quale si esclude espressamente l'applicazione della Convenzione e delle limitazioni in essa previste alla regola dell'immunità nel caso di danni o lesioni prodotte dalle attività delle forze armate sul territorio dello Stato del foro.

L'obbligo del giudice italiano, stabilito dal censurato art. 3, di adeguarsi alla pronuncia della CIG del 3 febbraio 2012, che gli impone di negare la propria giurisdizione nella causa civile di risarcimento del danno per crimini contro l'umanità, commessi iure imperii da uno Stato straniero nel territorio italiano, senza che sia prevista alcuna altra forma di riparazione giudiziaria dei diritti fondamentali violati, si pone, pertanto, come si è già ampiamente dimostrato in relazione alle precedenti questioni (supra, punti 3. e 4.), in contrasto con il principio fondamentale della tutela giurisdizionale dei diritti fondamentali assicurata dalla Costituzione italiana agli artt. 2 e 24 Cost.. Come si è già osservato, il totale sacrificio che si richiede ad uno dei principi supremi dell'ordinamento italiano, quale senza dubbio è il diritto al giudice a tutela di diritti inviolabili, sancito dalla combinazione degli artt. 2 e 24 della Costituzione repubblicana,

riconoscendo l'immunità dello Stato straniero dalla giurisdizione italiana, non può giustificarsi ed essere tollerato quando ciò che si protegge è l'esercizio illegittimo della potestà di governo dello Stato straniero, quale deve ritenersi in particolare quello espresso attraverso atti ritenuti crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona.

Deve, pertanto, dichiararsi l'illegittimità costituzionale dell'art. 3 della legge n. 5 del 2013.

6.— L'affermazione della giurisdizione del giudice rimettente lascia impregiudicato il merito delle domande proposte nei giudizi principali, il cui esame resta a lui riservato.

La pretesa di danni avanzata dai ricorrenti, infatti, non rientra nel *thema decidendum* attribuito al giudizio di questa Corte, per ciò stesso neppure la valutazione di ogni elemento di fatto o di diritto che ne confermi ovvero ne escluda il fondamento.

per questi motivi

La Corte Costituzionale

1) dichiara l'illegittimità costituzionale dell'art. 3 della legge 14 gennaio 2013, n. 5 (Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, firmata a New York il 2 dicembre 2004, nonché norme di adeguamento dell'ordinamento interno);

2) dichiara l'illegittimità costituzionale dell'art. 1 della legge 17 agosto 1957, n. 848 (Esecuzione dello Statuto delle Nazioni Unite, firmato a San Francisco il 26 giugno 1945), limitatamente all'esecuzione data all'art. 94 della Carta delle Nazioni Unite, esclusivamente nella parte in cui obbliga il giudice italiano ad adeguarsi alla pronuncia della Corte internazionale di giustizia (CIG) del 3 febbraio 2012, che gli impone di negare la propria giurisdizione in riferimento ad atti di uno Stato straniero che consistano in crimini di guerra e contro l'umanità, lesivi di diritti inviolabili della persona;

3) dichiara non fondata, nei sensi di cui in motivazione, la questione di legittimità costituzionale della norma «prodotta nel nostro ordinamento mediante il recepimento, ai sensi dell'art. 10, primo comma, Cost.», della norma consuetudinaria di diritto internazionale sull'immunità degli Stati dalla giurisdizione civile degli altri Stati, sollevata, in riferimento agli artt. 2 e 24 della Costituzione, dal Tribunale di Firenze, con le ordinanze indicate in epigrafe.

Così deciso in Roma, nella sede della Corte costituzionale, Palazzo della Consulta, il 22 ottobre 2014.

F.to:

Giuseppe TESAURO, Presidente e Redattore

Gabriella Paola MELATTI, Cancelliere

Depositata in Cancelleria il 22 ottobre 2014.

Il Direttore della Cancelleria

F.to: Gabriella Paola MELATTI

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Judgment

Appeal Court in The Hague

Commerce section

Case number / cause-list number: 200.022.151/01

Case number District Court: 07-2973

Judgment in the first civil law section, March 30, 2010

in the case of

1. the Association of Citizens **MOTHERS OF SREBRENICA,**
established in Amsterdam,

2. **[Name]**,
living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

3. **[Name]**,
living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

4. **[Name]**,
living in Sarajevo, Bosnia-Herzegovina,

5. **[Name]**,
living in Sarajevo, Bosnia-Herzegovina,

6. **[Name]**,
living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

7. **[Name]**,
living in Sarajevo, Bosnia-Herzegovina,

8. **[Name]**,
living in Sarajevo, Ilidža, Bosnia-Herzegovina,

9. **[Name]**,
living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

10. **[Name]**,
living in Vogošća, in the municipality of Sarajevo, Bosnia-Herzegovina,

11. **[Name]**,
living in Sarajevo, Bosnia-Herzegovina,

appellants,
respondents in the incident,

hereinafter to be referred to as the Association et al. (appellants 1 through 11), [F] et al. (appellants 2 through 11) and the Association (appellant sub 1),
lawyer Mr. M.R. Gerritsen, LL.M. in Amsterdam,

versus

1. **THE STATE OF THE NETHERLANDS** (Ministry of General Affairs), established in The Hague,
respondent,
plaintiff in the incident,
hereinafter to be referred to as: the State
lawyer: Mr. G.J.H. Houtzagers, LL.M. in The Hague

2. the organisation having legal personality **THE UNITED NATIONS**,
established in New York, United States of America,
respondent,
hereinafter to be referred to as: the UN (singular)
who failed to appear.

The proceedings

By writ of 7 October 2008 the Association et al. appealed against the judgment of the District Court in The Hague of 10 July 2008 delivered to the parties in the interlocutory claims brought by the State that the court has no jurisdiction with regard to the United Nations, as well as claims petitioning for third-party intervention or the joinder of parties. By statement of appeal the Association et al. put forward 18 grounds of appeal against the contested judgment. The State contested the grounds of appeal by its statement of defence on appeal and brought an interlocutory claim petitioning to be allowed as intervening party, or alternatively, as joining party in the appeal of the Association et al. against the United Nations. The Association et al. presented a statement of defence in this incident moving for the dismissal of the interlocutory claims. On 28 January 2010 the parties gave arguments for their positions in both the matter of the court's jurisdiction and the incident on appeal; the Association et al. by its lawyer as well as by Messrs. A. Hagedorn, LL.M., J. Staab, LL.M., and S.A. van der Sluijs, LL.M., all lawyers in Amsterdam; and the State by its lawyer as well as by Mrs. K. Teuben, LL.M., lawyer in The Hague; all basing themselves on memoranda of oral pleadings submitted to the Court of Appeal. In conclusion, the parties requested judgment.

What's at issue in this case

1.1 In this case, the following is at issue. The Association et al. base their claims primarily on the fact that in the East Bosnian enclave Srebrenica in July 1995 genocide occurred, that [F] et al. and the individuals whose interests the Association represents (the natural persons hereinafter also referred to as: the mothers of Srebrenica) are surviving relatives of the men murdered by Bosnian Serbs in this incident, and that the State and the United Nations are liable toward them for the loss incurred by them, because they, contrary to promises made and to other legal obligations resting with them, failed to prevent the genocide. The Association et al. summoned the UN and the State with respect to this matter. In summary, the Association et al. primarily request to rule, (i) that the State and the UN failed to meet their obligations toward the mothers of Srebrenica, or alternatively acted wrongfully toward them, (ii) that the State and the UN must pay for the loss incurred by [F] et al., to be assessed by the Court at a later

point of time, and must pay an advance toward the compensation owing to them as well as the legal costs.

1.2 In the proceedings before the District Court the State brought an interlocutory claim moving to be allowed as an intervening or, alternatively, joined party in the action between the Association et al. and the UN. Simultaneously, the State brought an interlocutory claim moving that the court has no jurisdiction in the case against the UN with regard to the immunity from prosecution granted to the UN.

1.3 In its judgment of 10 July 2008 the District Court ruled that it has no jurisdiction to hear the claims against the UN, and that a decision in the incident concerning intervention or joinder can be omitted. Summarily, the Court based its decision on the grounds that the UN has been granted absolute immunity and no rights can be derived from any other (mandatory) standards pertaining to international law (such as the Genocide Convention or article 6 of the European Convention on Human Rights and Fundamental Freedoms) to make an exception to that immunity.

Assessment of the incident for intervention or joinder

2.1 With regard to its petition to be allowed on appeal to appear as intervening or joining party the State argued as follows. Pursuant to its obligations to the UN arising from international law laid down in article 105 of the United Nations Charter (hereafter: the Charter) and Article II, § 2 of the Convention on the Privileges and Immunities of the United Nations (regulated by Act of 24 December 1947, Bulletin of Acts and Degrees 1947, H 452, hereafter: the Convention), the State has an interest in guaranteeing the UN's immunity in this case by contesting the grounds for appeal put forward by the Association et al. and, if the Court of Appeal finds that the UN should not be granted immunity in this instance, by being able to institute a legal remedy against such judgment.

2.2 The Association et al. contested that the State has an interest in intervention or joinder. According to the Association the State is a party to the proceedings as a co-defendant already, and in that capacity can submit arguments to plead that the court has no jurisdiction to hear the claims against the UN. Other requirements laid down for intervention or joinder are not satisfied either, according to the Association et al.

2.3 The Court of Appeal considers as follows. There is question of intervention as defined in article 217 of the Netherlands Code of Civil Procedure if the third party (in this case, the State) wishes to institute proceedings against one, or both, of the litigating parties. From the interlocutory claim brought by the State and its motivation emerges that there is no question of such a claim. Essentially, the State wishes to effect that the Court of Appeal upholds the ruling of the District Court, according to which it found it has no jurisdiction to hear the claims against the UN. This means that the interlocutory claim for intervention must be dismissed.

2.4 There is question of joinder within the meaning of article 217 of the Netherlands Code of Civil Procedure if a third party (in this case, the State) joins in the proceedings to assist one of the parties in defending its claim against the other party. As the State wants, as is clear from the preceding, the claim against the UN to be dismissed on the grounds of immunity from prosecution granted to the UN, the interlocutory claim must be assessed on the basis of the requirements in place for the joining of third parties. Joinder is not ruled out on the single ground that the party whom the third party wishes to join has not appeared in the proceedings. Neither is joinder precluded by the fact that the State was summoned by the Association et al. together with the UN. The claim by the Association et al. against the State and the claim by the Association et al. against the UN are independent claims existing separately. The single fact that the

State and the UN were summoned together does not signify that the State became a party to the proceedings instigated by the Association et al. against the UN.

2.5 It is a prerequisite, but also sufficient for joinder that the State has an interest in the outcome of the proceedings because it may have consequences for the State, in law or de facto. In this case the State argues rightfully that it has a reasonable interest in a Netherlands court not delivering any judgments which conflict with the immunity granted to the UN according to Conventions to which the Netherlands is a party (as is the case with article 105 of the Charter and article II § 2 of the Convention), because in that case the State, to whom such rulings should be imputed under international law, would violate its obligations arising from those conventions. The State therefore has a reasonable interest in explaining its interest before a court of law and to defend why that court should find it has no jurisdiction. This interest is not prejudiced by the possibility that the prosecution is heard pursuant to article 44 of the Netherlands Code of Civil Procedure. There are no good reasons why the State should be able or allowed to explain its position in the matter of the UN's immunity to a court of law strictly by those means.

Assessment of the appeal in the principal case

3.1 In ground 1 the Association et al. argue that the District Court wrongly assumed that an advance to the amount of € 10,000 is claimed, whereas in fact it is a sum of € 25,000. This ground, as the State acknowledges too, was rightfully put forward. The Court of Appeal shall assume therefore that [F] et al. claim an advance of € 25,000 per person.

3.2 In ground 2 the Association et al. argue that the District Court interpreted (part of) their defence (namely, against the State's petition that the court has no jurisdiction) wrongly, that is, in too restricted a sense. The Association et al. argue that it is to be expected that the State in the principal case will argue with respect to its own liability that not the State but the UN is to be held liable for the events occurring in Srebrenica in July 1995, after first having kept the UN outside of the proceedings as a result of the interlocutory claim concerning the court's jurisdiction. Such behaviour on the State's part, combined with the fact that the surviving relatives of the genocide victims would then not have any recourse to legal redress is legally, humanly and morally unacceptable. In this case, the State presents its own enlightened self-interest as an obligation under international law. According to the Association et al. the obligation under international law was not established for the purpose of evading the State's own responsibilities.

3.3 This defence does not hold. In the first place the interlocutory claim concerning jurisdiction cannot anticipate defences that might be brought by the State in the principal case against the claims instituted against the State. Besides, it is not clear how the State would evade its liability if any if the claim against the UN would fail as a result of immunity from prosecution. As considered above, the cases against the State and the UN are separate proceedings which will each be assessed on its own merits, regardless of what is found in the other case.

3.4 With ground 3 the Association et al. appeal against the District Court's finding that the non-appearance granted against the UN does not mean that the District Court rendered a (positive) decision on its international jurisdiction. According to the Association et al. non-appearance can only be granted against an international organisation after official testing by a court of law of its international public-law jurisdiction. This defence fails. The question whether non-appearance can be granted against a defaulting defendant precedes and is independent of whether a court has no

jurisdiction because the defendant is entitled to immunity from prosecution. If a court of law establishes that the terms and formalities for granting non-appearance against the defendant have been duly observed, than it must grant leave to proceed against the defendant in default of appearance irrespective of the question of jurisdiction. In other words, international jurisdiction to hear a claim is not part of the formalities that must be satisfied for a court of law to grant leave to proceed against a defendant who is in default of appearing.

3.5 In ground 4 the Association et al. appeal against the motivation given by the District Court in 5.3. In it, the District Court considered that the fact that the Minister of Justice did not apply article 3a of the Bailiffs Act has no consequences whatsoever on the Court's jurisdiction. As this judgment of the Court is correct, the defence shall fail. In so far as the Association et al. wish to argue that the Court should have ruled that article 3a of the Bailiffs Act in this case does not constitute an interest of the State for the interlocutory claim, they do not acknowledge that the Court did not base itself upon this provision when it ruled that the State does have this interest.

3.6 With ground 5 the Association et al. contest the Court's decision that, in summary, entails that the State has an interest of its own in its argument that the Court has no jurisdiction in the Association's claim against the UN. The grounds argued by the Association et al. in connection with this the Court of Appeal has already considered (under 2.4 and 2.5) and rejected. This ground for appeal is therefore denied.

3.7 In ground 6 the Association et al. argue that although the District Court in its motivation under 5.7 considers that possibly the State's defence against the claim brought against it is out of order, the District Court does discuss (part of) that defence in its motivation under 5.9. The defence fails because the grounds adduced by the District Court under 5.7 are correct and because in 5.9 only the State's defence is represented and does not support the Court's judgment.

4.1 In grounds 7 through 18 the Association et al. with various arguments appeal against the District Court's judgment that is has no jurisdiction to hear the Association's claims against the UN. These grounds will be dealt with jointly.

4.2 Article II § 2 of the Convention lays down that the UN, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. Pursuant to article 31 of the Vienna Convention of the law of treaties (Bulletin of Treaties 1977, no. 169) a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Court of Appeal finds that in this light the immunity referred to in article II § 2 of the Convention, which is indisputably defined as broadly as possible, is clear and, considering - amongst other things – the considerations given hereinafter regarding article 105 of the Charter, does not allow any other interpretation than that the UN has been granted the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law in the countries that are a party to the Convention.

4.3 The Association et al. take the position that the question whether the UN has immunity from prosecution should not be assessed on the basis of article II, § 2 of the Convention, but on the basis of article 105 of the Charter, which provides that the UN shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. According to the Association et al. the immunity provided for under article 105 of the Charter is more restricted than that under article II, § 2 of the Convention, because on the basis of the former a court must determine in each and every case brought before it whether the immunity invoked is

necessary for the realization of the UN's objectives. The Association et al. adopt the position that article 105 of the Charter has priority over article II, § 2 of the Convention, because article 105 subsection 3 of the Charter provides that the General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of article 105 of the Charter, but that the Convention has no scope beyond the higher-classed Charter. Moreover, the latter is believed to be confirmed by article 103 of the Charter, which provides that the obligations under the Charter take precedence over the Members' obligations pursuant to other international treaties.

4.4 The Court of Appeal does not share the Association's view. In the opinion of the Court of Appeal it is evident, for it appears from the considerations preceding the provisions of the Convention, that the Convention and therefore also article II § 2 of the Convention, implement (amongst other things) article 105, subsection 3 of the Charter, in the sense that article II § 2 of the Convention further substantiates which immunities are necessary for attaining the objectives of the UN. There is no indication that article II § 2 of the Convention goes beyond the scope allowed by article 105 of the Charter in this respect.

4.5 It would be of no avail to the Association et al. anyway if the invocation of the UN's immunity was tested strictly on the basis of article 105 of the Charter, for the question that needs to be addressed is not whether the invocation of immunity in this particular case in hand is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution in general. The Court of Appeal answers the latter question without doubt affirmatively with reference to the motivation in 5.7 hereinafter.

5.1 The conclusion from the above is that the UN is entitled to immunity from prosecution. However, as the Association et al. argue, the question is whether this immunity should be surpassed in this case for the rights of the Association et al. to have access to a court of law laid down in article 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter: ECHR) as well as article 14 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR). In answering this question the Court of Appeal will base itself on the assumption that article 6 of the ECHR and article 14 of the ICCPR apply to (the claims of) the Association et al. For because the question whether the Mothers of Srebrenica fall under Netherlands jurisdiction within the meaning of article 1 ECHR, or reside within Netherlands territory or are subject to Netherlands jurisdiction within the meaning of article 2 ICCPR can not unequivocally be answered in the affirmative, the Court of Appeal finds that the right to a fair trial and the right of access to a court of law it entails is a matter of customary law, which can be invoked independently of the preceding provisions.

5.2 The European Court of Human Rights (hereinafter: the European Court) has ruled in a number of judgments delivered that the immunity from prosecution under international law must be set aside under certain circumstances for the right of access to a court of law guaranteed by article 6 ECHR. The European Court found that the right of access to a court of law is not absolute but may be subject to restrictions, provided that those restrictions are not that far-reaching that they violate the essence of the law. Moreover, according to the European Court, a restriction must meet the requirement that it serves a legitimate goal, and that it is proportionate to the goal pursued. An important aspect when establishing whether immunity from prosecution constitutes a permissible restriction is the question whether the interested party has access to reasonable alternative means to protect its rights under the ECHR

effectively. Cf: European Court 18 February 1999 in the matter of *Beer and Reagan v. Germany, no. 28934/5* and *Waite and Kennedy, no. 26083/94*.

5.3 Contrary to the District Court the Court of Appeal does not believe that the European Court departed from its ruling motivated above under 5.2 in the cases of *Behrami v. France, no. 1412/01* and *Saramati v. France, Germany and Norway, no. 78166/01*, delivered 2 May 2007. In the cases of Behrami and Saramati neither immunity from prosecution of the UN before a national court of law, nor article 6 ECHR were the issue. In those cases, the issue was whether there was a case to answer in the matter of the complaints brought before the European Court by Behrami and Saramati against a number of separate countries. The European Court in no way indicated that it reconsidered or departed from its previous judgments in the cases of *Beer and Reagan* and *Waite and Kennedy*. In the cases of *Behrami* and *Saramati* the European Court did, however, make observations on the special position of the UN within the international community, which are also pertinent to the present case. The Court of Appeal will get back to this.

5.4 Neither does the Court of Appeal hold decisive that in the cases of *Beer and Regan* and *Waite and Kennedy* an international organisation was at issue which had been founded after the ECHR came into operation. It is true that the rulings of the European Court in these cases were based, amongst other things, on the motivation that it would be incompatible with the objectives of the ECHR if co-signatories to the Convention could evade their responsibilities under the ECHR by transferring powers to an international organisation. However, the Court of Appeal believes it is implausible that this ruling implies that the single fact that an international organisation has existed longer than the ECHR is sufficient reason to believe that the co-signatories are discharged from their obligation to guarantee fundamental rights under the ECHR. Particularly in the case of (older) international organisations (like the UN) that presumably will continue to exist for a long time yet this would mean that part of the rights guaranteed by the ECHR would be barred from application almost permanently.

5.5 Finally, the Court of Appeal believes that article 103 of the Charter does not preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR. Article 103 provides that in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The Court of Appeal is of the opinion that this was not intended to allow the Charter to just set aside like that fundamental rights recognised by international (customary) law or in international conventions. The development of international law since 1945, the year the Charter was signed, has not stopped and shows an increasing attention for and recognition of fundamental rights, that cannot be ignored by the Court of Appeal. Moreover, as is clear from the preamble to the Charter and article 1 subsection 3 of the Charter, the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms. It is implausible that article 103 of the Charter intends to impair the enforcement of such fundamental rights.

5.6 The preceding means that the Court of Appeal as laid down in the criteria worded by the ECHR in the cases of *Beer and Regan* and *Waite and Kennedy* will test whether the invocation by the State of the immunity from prosecution of the UN is compatible with article 6 ECHR. First of all, the Court of Appeal is of the opinion that this immunity serves a legitimate goal. The immunity from prosecution that States usually grant to international organisations is a practice that has been in existence for a long time and aims to promote the effective operation of such international organisations.

The Court of Appeal refers to the motivations given by the ECHR in the case of *Beer and Regan* under 5.3, which also apply to the case in hand.

5.7 With regard to the question whether the immunity from prosecution of the UN is in proportion to the goal aimed for in this case the Court of Appeal postulates the following. Amongst the international organisations the UN has a special position, for under article 42 of the Charter the Security Council may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. No other international organisation has such far-reaching powers. In connection with these extensive powers, which may involve the UN and the troops made available to them in conflict situations more often than not entailing conflicting interests of several parties, there is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any action undertaken by the Security Council, or even preventing it altogether. It is not inconceivable, either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining to keeping peace and safety in the world. For this reason it is very important that the UN has the broadest immunity possible allowing for as little discussion as possible. In this light the Court of Appeal believes that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.

5.8 Essentially the Association et al. argue that such compelling reasons apply in the case in hand. First of all they argue that in this case very serious offences are involved, to wit genocide. In their opinion the United Nations has not undertaken enough to prevent the genocide in Srebrenica and therefore acted contrary to Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (Bulletin of Treaties 1960, 32, hereinafter referred to as the Genocide Convention), which, in summary, provides that genocide is a crime under international law which the Contracting Parties undertake to prevent and to punish. Secondly, the Association et al. point out that the UN, contrary to its obligations under article VIII, § 29 preamble and under (a) of the Convention has made no provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of private law character to which the UN is a party. As a result there is no other way of obtaining redress than by summoning the UN before a national, in this case Netherlands court of law; that is, so it was presented by the Association et al.

5.9 The Court of Appeal predisposes that it appreciates the terrible events the mothers of Srebrenica and their relatives fell victim to, and the suffering inflicted on them as a result. The State has not refuted that genocide took place in Srebrenica; it is a generally known fact. That the mothers of Srebrenica seek redress in a court of law for this is wholly understandable. Not all is said by this, however. As has been considered before, a substantial general interest is served if the United Nations is not forced to appear before a national court of law. In this field of tension the pros and cons must be balanced between two very important principles of law in their own right, of which in the end only one can be deciding.

5.10 In the first place the Court of Appeal concludes that the Association et al. acknowledge that it was not the UN that committed genocide (cf *inter alia* statement

of defence in the interlocutory claims of 6 February 2008, p. 29). Neither can it be inferred from the arguments put forward by the Association that the UN knowingly assisted in committing the genocide. Essentially, the Association et al. blame the UN for failing to have prevented genocide. The Court of Appeal is of the opinion that although this reproach directed at the UN is serious, it is not that pressing that immunity should be waived or that the UN's invocation of immunity is, straightaway, unacceptable. Besides, the Court of Appeal considers, as put forward before, that UN peacekeeping operations will usually occur in areas around the world where a hotspot has developed, and that a reproach that, although it did not commit crimes against humanity itself, the UN failed to act against it adequately, under the circumstances can be latched onto too easily, which could lead to misuse. The reproach that the UN failed to prevent genocide in Srebrenica and therefore was negligent is insufficient in principle to waive its immunity from prosecution. Neither is it deciding that in the present case it is not argued that there is a question of misuse in the sense referred to above. If invocation of UN immunity was only successful if misuse were proved in the case in hand, the immunity would be violated unacceptably.

5.11 The next argument put forward by the Association et al. is the absence of a procedure which sufficiently safeguards access to a court of law. It was pointed out that the UN has failed to make provisions as laid down in article VIII, § 29 in the preamble under (a) of the Convention for appropriate modes of settlement of disputes arising out of contracts or other disputes of private law character to which the UN is a party. That the UN failed to do so has been admitted between the parties. Also, the State has insufficiently refuted the Association's reasoned arguments that the 'Agreement on the status of UNPROFOR' does not offer a realistic opportunity to the Association et al. to sue the UN. The Court of Appeal believes, however, that it has not been established for a fact that the Association et al. have no access whatsoever to a court of law with regard to what happened in Srebrenica. In the first place it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR. If the Association et al. have omitted this because the persons liable cannot be found or have insufficient assets for compensation, the Court of Appeal observes that article 6 ECHR does not guarantee that whoever wants to bring an action will always find a (solvent) debtor.

5.12 Secondly, to the Association et al. the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open. This course has indeed been taken by the Association et al. The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway. This will be no different if in that case, as the Association et al. say they expect – and with some reason, cf the statement in the interim proceedings in the first instance instigated by the State under 3.4.8 – the State argues that its actions in Srebrenica must strictly be imputed to the UN. Even if this defence is put forward (which the Association et al. contest in anticipation anyway, cf the initiating writ of summons nos. 347 and ff.), a court of law will fully deal with the claim of the Association et al. anyway, so that the Association et al. do have access to an independent court of law.

5.13 The above implies that it cannot be said in this case that the right of access to a court of law of the Association et al. is violated if the UN's invocation of immunity from prosecution is allowed. The Court of Appeal refers to the decision in the case of the European Court of 21 September 1990 *Fayed v. United Kingdom, no. 17101/90*, which

shows that the European Court considers even fairly far-reaching restrictions to access to a court of law acceptable. There is no question of such far-reaching restrictions in this case, as the Association et al. can hold two categories of parties liable for the damages incurred by the mothers of Srebrenica, namely the perpetrators of the genocide and the State. Seen in this light the Court of Appeal does not hold decisive, although it regrets, the fact that the UN has not instigated an alternative course of proceedings in conformity with their obligations under article VIII § 29 in the preamble and under (a) of the Convention for claims as this in order to waive the immunity from prosecution.

5.14 The conclusion must be that there is no unacceptable violation of article 6 ECHR or article 14 ICCPR if a Netherlands court of law in this case upholds the immunity from prosecution granted to the UN. The Court of Appeal finds no reason to submit any preliminary questions to the European Court of Justice. Following the above the grounds for appeal are all denied.

6. The District Court's ruling shall be upheld. The Association et al. shall be ordered to pay the costs of the appeal and the incidental proceedings as the party against whom the matter is decided.

Ruling

The Court of Appeal:

In the incident for intervention or joinder:

- allows the State to join the United Nations as party joining in the action;
- disallows the application to be allowed to intervene;
- orders the Association et al. to pay the costs of the incident, set at nil on the State's part;

In the Appeal against the District Court's ruling of 10 July 2008:

- upholds the ruling that was appealed against;
- orders the Association et al. to pay the costs of the appeal, so far set at € 313 for expenses and € 2,682 for lawyer's fees on the State's side, and at nil on the UN's side, and determines that these amounts must be paid within fifteen days of this ruling, to be increased by the interest due as referred to in article 6:119 of the Netherlands Civil Code from the expiry of the specified term until the day on which payment is made in full;
- declares this ruling to be provisionally enforceable with regard to the order to pay the costs.

This judgment was given by Justices A. Dupain, M.A.F. Tan-de Sonnaville and S.A. Boele, and pronounced in open court on March 30, 2010 in the presence of the clerk.

This is an unofficial translation, provided by the Court, of the official judgment in the Dutch language. Only the judgment in the Dutch language is binding.

Ruling Dutch Supreme Court Mothers of Srebrenica

13 April 2012
First Division
10/04437
EV/AS

Supreme Court of the Netherlands

Judgment

in the case of:

1. MOTHERS OF SREBRENICA ASSOCIATION,
established in Amsterdam
2. [Appellant 2],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
3. [Appellant 3],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
4. [Appellant 4],
residing in Sarajevo, Bosnia and Herzegovina,
5. [Appellant 5],
residing in Sarajevo, Bosnia and Herzegovina,
6. [Appellant 6],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
7. [Appellant 7],
residing in Sarajevo, Bosnia and Herzegovina,
8. [Appellant 8],
residing in Sarajevo, Bosnia and Herzegovina,
9. [Appellant 9],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
10. [Appellant 10],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
11. [Appellant 11],
residing in Sarajevo, Bosnia and Herzegovina,
APPELLANTS in the appeal in cassation, defendants in the cross-appeal in cassation,
attorney-at-law: Baron R.G. Snouckaert van Schauburg,

against

1. THE STATE OF THE NETHERLANDS (Ministry of General Affairs),
which has its seat in The Hague,
DEFENDANT in the cassation proceedings, appellant in the cross-appeal in cassation,
attorneys-at-law: K. Teuben and G.J.H. Houtzagers,

2. THE UNITED NATIONS, an organisation possessing legal personality,
which has its seat in New York City, New York, United States of America,
DEFENDANT in the cassation proceedings,
no appearance entered.

The parties will be referred to below as ‘the Association et al.’, ‘the State’ and ‘the UN’.

1. Proceedings before the courts hearing the facts

For the course of the proceedings before the courts hearing the facts the Supreme Court refers to:
a. the judgment of The Hague district court of 10 July 2008 in case no. 295247/HA ZA 07-2973;
b. the judgment of The Hague court of appeal of 30 March 2010 in case no. 200.022.151/01.
The appeal court judgment is appended to this judgment.

2. Cassation proceedings

The Association et al. lodged an appeal in cassation against the judgment of the court of appeal. The State lodged a cross-appeal in cassation. The writ of summons in cassation and the statement of defence containing the cross-appeal in cassation are appended to this judgment and form part of it.
Leave was granted to proceed against the UN in default of appearance.
The Association et al. and the State moved that the respective appeals against them be dismissed.
Counsel presented the case on behalf of the parties. The State withdrew part 1 of its statement of grounds for the cross-appeal, which objected to the appeal court’s ruling that the right of access to the courts is a rule of customary international law which may be invoked separately from article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and article 14 of the International Covenant on Civil and Political Rights (ICCPR). The advisory opinion issued by Advocate General Paul Vlas recommended that both appeals be dismissed.
Counsel for the State and counsel for the Association et al. responded to this submission by letter of 10 February 2012.

3. Basis for the cassation proceedings

3.1 The central question in this case is whether the appeal court was right to rule that the UN is entitled to immunity from jurisdiction, and consequently that the Dutch courts are not competent to hear the action brought by the Association et al. in so far as it is directed against the UN. The following applies in this case.

3.2.1 The Association et al. sued the State and the UN before The Hague district court. They held the State (and Dutchbat, the Dutch unit under UN command) and the UN partly responsible for the fall in 1995 of the Srebrenica enclave in Eastern Bosnia, where Dutchbat was based and which had been designated a ‘Safe Area’ under the protection of the UN peacekeeping force UNPROFOR by Security Council resolutions, and for the consequences of its fall, in particular the genocide committed subsequently which cost the lives of at least 8,000 people, including relatives of appellants 2-11 in the cassation proceedings. They sought, in brief, a declaratory judgment to the effect that the State and the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave and other obligations, including treaty obligations, to which they were subject, in addition to (advances on) payments in compensation, to be determined by the court in follow-up proceedings.

3.2.2 The State forwarded to the district court a copy of a letter of 17 August 2007 from the UN to the Dutch Permanent Representative to the UN, in which the UN drew attention to its immunity from jurisdiction and stated that it would not waive this immunity. The Public Prosecution Service moved accordingly, and the district court granted leave to proceed against the UN in default of appearance and subsequently declared itself not competent to hear the action in so far as it was directed against the UN. In the appeal proceedings instituted by the Association et al., the appeal court allowed the State to join the UN (which did not enter an appearance) as a party in the proceedings and upheld the judgment of the district court.

3.3.1 The relevant provisions of articles 103 and 105 of the Charter of the United Nations (‘the UN Charter’) are as follows:

‘Article 103
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
Art. 105
1. 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.
2. (...)
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.’

3.3.2 Article II, § 2 of the Convention on the Privileges and Immunities of the United Nations (‘the Convention’), which is based on articles 104 and 105 of the UN Charter (Dutch Treaty Series 1948, no. I 224), reads as follows:
‘The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.’

3.3.3 Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.

3.3.4 Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (Dutch Treaty Series 1960, no. 32) states:
‘The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.’

4. Assessment of the grounds for the appeal and the cross-appeal

4.1.1 The thinking (considerations 4.2 to 5.14) underlying the appeal court’s finding that the UN is entitled to immunity from jurisdiction, such that the Dutch courts are not competent to hear the action in so far it is directed against the UN, can be summarised as follows.
Article II, § 2 of the Convention implements inter alia article 105, paragraph 3 of the UN Charter. Taking into consideration the provisions of article 31 of the Vienna Convention on the Law of Treaties, the only possible interpretation of the immunity defined in article II, § 2 is that the UN is entitled to the most far-reaching immunity, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the Convention. However, the question is whether, as the Association et al. argue, the right of access to an independent court enshrined in article 6 ECHR and article 14 ICCPR prevails over that immunity. On the basis of the criteria set out by the European Court of Human Rights (ECtHR) in Beer and Regan v. Germany and Waite and Kennedy v. Germany the appeal court examined the question of whether the State’s invocation of the UN’s immunity is compatible with article 6 ECHR. In that connection, the first thing that could be established is that the immunity serves a legitimate aim, namely ensuring the proper functioning of international organisations. In answering the question of whether in this case immunity is proportional to the purpose to be served, it must be noted from the outset that the UN occupies a special position among international organisations.

Under article 42 of the UN Charter the Security Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. The immunity granted to the UN is directly connected to the general interest served by the maintenance of peace and security in the world. That is why it is essential for the immunity enjoyed by the UN to be as unconditional as possible and for it to be subject to as little debate as possible. Accordingly, only compelling reasons can lead to the conclusion that UN immunity is not proportional to the purpose it is intended to serve.

The Association et al. take the view that compelling reasons of this kind exist in this case, citing in the first place the fact that it is a case of genocide. Essentially, however, they accuse the UN of being negligent in failing to prevent genocide. That is a serious accusation but not so compelling as to prevail over immunity. Secondly, the Association et al. claims that there can be no question of proportionality in the absence of a procedure offering sufficient guarantees of access to a court of law. In this connection they point to the fact that the UN has not, as prescribed by article VIII, § 29, opening words and (a) of the Convention, made provision for any modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.

However, the appeal court argues that it has not been established that the Association et al. are completely without access to a court of law where the events in Srebrenica could be addressed. Firstly, it is not clear why they would not be able to take the perpetrators and those responsible for them to court. Secondly, they brought the State before the Dutch courts, on accusations similar to those levelled at the UN. The State cannot plead immunity in these proceedings. Given both these circumstances, it cannot be said that the right of the Association et al. to access to the courts would be undermined if the plea of UN immunity was accepted.

4.1.2 In so far as grounds 3 to 7 of the appeal allege a lack of reasonableness, they overlook the fact that the answer to the question of whether the UN is entitled to immunity is a decision on a question of law. They also advance a series of complaints against all the major elements of the reasoning that led the appeal court to accept the plea of immunity. Grounds 2 and 3 of the cross-appeal allege that the UN's immunity cannot be reviewed in the light of the right of access to the courts, in any event not in a case such as the present one relating to action taken by the UN under Chapter VII of the UN Charter.

Basis for and scope of the UN's immunity

4.2 The basis for the UN's immunity (to be distinguished from the immunity granted to its officials and to experts performing missions for the UN) is article 105 of the UN Charter and article II, § 2 of the Convention. The court of appeal was correct to interpret the latter provision – which is an elaboration of article 105, paragraph 1 – in the light of article 31 of the Vienna Convention on the Law of Treaties, to mean that the UN enjoys the most far-reaching immunity from jurisdiction, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the Convention.

Both the basis for and the scope of this immunity, which is aimed at ensuring that the UN can function completely independently and thus serves a legitimate purpose, are therefore different from those underlying the immunity from jurisdiction enjoyed by foreign states. As stated in section 13a of the General Legislative Provisions Act, the latter, after all, stems from international law (par in parem non habet imperium), and applies exclusively to acts of a foreign state performed in a governmental capacity (acta iure imperii).

UN immunity and access to the courts

4.3.1 As stated in 4.1.1, the appeal court examined, on the basis of the criteria set out by the ECtHR in Beer and Regan v. Germany (ECtHR 18 February 1999, no. 28934/95) and Waite and Kennedy v. Germany (ECtHR 18 February 1999, no. 26083/94), whether the invocation of UN immunity is compatible with the right of access to the courts enshrined in article 6 ECHR and article 14 ICCPR. In the cassation proceedings the State is no longer contesting the argument that this right – which is not an absolute right – also constitutes a rule of customary international law.

4.3.2 Both the cases cited above involved proceedings before the German courts against the European Space Agency (ESA) in which the claimants wanted the court to establish that they had become employees of ESA under German law. ESA, an international organisation, pled immunity from jurisdiction under article XV, §2 of the Convention for the establishment of a European Space Agency of 30 May 1975 in conjunction with Annex I to the same Convention (Dutch Treaty Series 123). The German court had

accepted that plea. The ECtHR held that this did not constitute a violation of article 6 ECHR. This conclusion was preceded by the following considerations (the numbering is from the judgment in Waite and Kennedy):

'59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the 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 will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship between the means employed and the aim sought to be achieved (...).
67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (...).
68. 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.
69. The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation (...).'

4.3.3 According to paragraphs 67-69 [of the above judgment], the fact that the Convention for the establishment of a European Space Agency expressly provides for alternative modes of settlement of private-law disputes, which were available to the applicants, was particularly relevant in relation to the ECtHR's ruling that respecting the immunity of international organisations like ESA does not constitute a violation of article 6 ECHR. It should be noted here that paragraph 67 of the judgment refers to 'international organisations' without any qualification but that – in the absence of any consideration concerning the relationship between article 6 ECHR on the one hand and articles 103 and 105 of the UN Charter plus article II, § 2 of the Convention on the other – there are no grounds for assuming that the ECtHR's reference to 'international organisations' also included the UN, in any event not in relation to the UN's activities in the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression).

4.3.4 The UN occupies a special place in the international legal community, as expressed by the ECtHR in its decision in the cases of Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECtHR 2 May 2007, no. 71412/01 and 78166/01. In this decision, which concerns acts and omissions of the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO Kosovo Force (KFOR) operating in Kosovo pursuant to a UN Security Council resolution, the ECtHR held inter alia as follows:
'146. The question arises in the present case whether the Court is competent ratione personae to review the acts of the respondent States carried out on behalf of the UN, and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.
147. (...) More generally, it is further recalled, as noted in paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).
148. Of even greater significance is the imperative nature of the principal aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. (...) The responsibility of the

UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraph 18-20 above).
149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. (...)"

In paragraph 27, as referred to above, the ECtHR states inter alia that the ICJ considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement. And in paragraph 149 the ECtHR holds that since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions to the scrutiny of the Court.

4.3.5 The interim conclusion must be that the appeal court erred in examining, on the basis of the criteria formulated in Beer and Regan and Waite and Kennedy, whether the right of access to the courts as referred to in article 6 ECHR prevailed over the immunity invoked on behalf of the UN.

4.3.6 That immunity is absolute. Moreover, respecting it is among the obligations on UN member states which, as the ECtHR took into consideration in Behrami, Behrami and Saramati, under article 103 of the UN Charter, prevail over conflicting obligations from another international treaty.

4.3.7 However, this does not answer the question of whether, as argued by the Association et al. with reference to the dissenting opinions in the ECtHR's judgment of 21 November 2001 in the case of Al-Adsani v. the United Kingdom no. 35763/97 concerning state immunity, the right of access to the courts should prevail in the present case over UN immunity because the claims are based on the accusation of involvement in – notably in the form of failing to prevent – genocide and other grave breaches of fundamental human rights (torture, murder and rape). On this matter, the Association et al. argue in 5.13 of their writ of summons in cassation:
'There is no higher norm in international law than the prohibition of genocide. This norm in any event takes precedence over the other norms at issue in this legal dispute. The enforcement of this norm is one of the main reasons for the existence of international law and for the most important international organisation, the UN. This means that in cases of failure to prevent genocide, international organisations are not entitled to immunity, or in any event the prohibition should prevail over such immunity. The view that the UN's immunity weighs more heavily in this instance would mean de facto that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by the appeal court is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights'.

4.3.8 The case of Al-Adsani v. the United Kingdom concerned a claim for damages brought in the English courts against the State of Kuwait. Mr Al-Adsani held Kuwait liable for the damage he suffered as a result of undergoing torture in Kuwait after the Gulf War in 1991. After the English courts accepted Kuwait's plea of immunity, Mr Al-Adsani applied to the ECtHR, arguing, where relevant to the case at hand, that this decision constituted a violation of article 6 ECHR. He took the position that because of the ius cogens nature of the ban on torture the right of access to the courts enshrined in article 6 should prevail over the

immunity invoked by Kuwait.
The application was dismissed by the ECtHR by nine votes to eight on the basis, inter alia, of the following considerations:
'61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in Furundzija and Pinochet, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.
62. It is true that in its Report on Jurisdictional Immunities of States and their Property (...) the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of ius cogens, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human right norms with the character of ius cogens, in most cases (...) the plea of sovereign immunity had succeeded.
(...)
66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.'

4.3.9 This majority view was opposed inter alia by the dissenting opinion endorsed by six judges of the Grand Chamber and cited by the Association et al. in support of their case. Part of the dissenting opinion – which agrees with no small proportion of the literature, both Dutch and foreign, on the subject of State immunity – reads as follows:
'3. The acceptance therefore of the ius cogens nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it ex officio, to refuse an applicant adjudication of a torture case. Due to the interplay of the ius rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of ius cogens.'

4.3.10 Even more important than the fact that this opinion does not reflect even the current status of the view accepted by the ECtHR, is the ruling by the International Court of Justice (ICJ), cited by the State in its response to the Advocate-General's advisory opinion, in its judgment of 3 February 2012 in the case Jurisdictional Immunities of the State (Germany vs. Italy: Greece intervening). At issue in this case was inter alia the question of whether the Italian courts should have respected Germany's immunity in cases in which compensation was claimed from Germany for violations of international humanitarian law committed by German forces during the Second World War. The ICJ concluded that they should have.

4.3.11 In so far as relevant here, the ICJ rejected Italy's contention that to deprive Germany of its immunity would be justified by the gravity of the offences on which the claims were based:
'91.The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.
(...)'

4.3.12 Nor did the ICJ accept the argument that, since the rules that were breached by the German forces had the character of ius cogens, they should prevail over Germany's immunity.
'93. (...) Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.
(...)
96. In addition, this argument about the effect of jus cogens displacing the law of State immunity has been rejected by the national courts of the United Kingdom, [Canada, Poland, Slovenia, New Zealand and Greece], as well as by the European Court of Human Rights in Al-Adsani v. United Kingdom and Kalogeropoulou and others v. Greece and Germany (...).
97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens, the applicability of the customary international law on State immunity was not affected.'

4.3.13 And finally, in paragraph 101 of its judgment the ICJ held that it could find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.

4.3.14 Although UN immunity should be distinguished from State immunity, the difference is not such as to justify ruling on the relationship between the former and the right of access to the courts in a way that differs from the ICJ's decision on the relationship between State immunity and the right of access to the courts. The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association et al. base their claims.

Concluding considerations
4.4.1 The foregoing considerations lead to the conclusion that the complaints on grounds of law in grounds of appeal 3 to 7 in the appeal in cassation are untenable. Nor can the complaints in grounds of appeal 1, 2, 8 and 9 – the Supreme Court sees no reason to request a preliminary ruling from the Court of Justice of the European Union on ground of appeal 8 – result in cassation. Under section 81 of the Judiciary (Organisation) Act no further reasons for this decision need be given, since the complaints do not warrant the answering of questions of law in the interests of the uniform application or development of the law.

4.4.2 According to the considerations set out in 4.3.1 to 4.3.13 above, the complaints in grounds of appeal 2 and 3 in the cross-appeal are largely well-founded, but this does not result in cassation. Nor do the remaining grounds of appeal result in cassation. Under section 81 of the Judiciary (Organisation) Act no further reasons for this decision need be given, since the complaints do not warrant the answering of questions of law in the interests of the uniform application or development of the law.

5. Decision

The Supreme Court:
in the appeal in cassation:
dismisses the appeal;

orders the Association et al. to pay costs in respect of the cassation proceedings, estimated up to this judgment at €385.34 in disbursements and €2,200 in fees for the State;

in the cross-appeal:
dismisses the appeal;
orders the State to pay costs in respect of the cassation proceedings, estimated up to this judgment at €68.07 in disbursements and €2,200 in fees for the Association et al..

This judgment was given by Vice-President J.B. Fleers as the president of the Division, and Justices A.M.J. van Buchem-Spapens, F.B. Bakels, C.A. Streefkerk and W.D.H. Asser, and was pronounced in open court by Justice J.C. van Oven on 13 April 2012.

Oxford Public International Law

Stichting Mothers of Srebrenica and ors v Netherlands and United Nations, Final appeal judgment, LJN: BW1999, ILDC 1760 (NL 2012), 13th April 2012, Supreme Court [HR]

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Netherlands (Ministry **of** General Affairs), United Nations

Judges/Arbitrators: JB Fleers; AMJ van Buchem-Spapens; FB Bakels; CA Streefkerk; WDH Asser

Procedural Stage: Final appeal judgment

Related Development(s):
Stichting ***Mothers*** ***of*** ***Srebrenica*** ***v*** ***Netherlands*** *and United Nations*, LJN: BD6795, District Court **of** the Hague, 10 July 2008
Stichting ***Mothers*** ***of*** ***Srebrenica*** ***v*** ***Netherlands*** *and United Nations*, LJN: BL8979, Court **of** Appeal The Hague, 30 March 2010

Subject(s):

Right to a judge — Right to fair trial — Immunity from jurisdiction, international organizations — Genocide — UN Security Council — Peremptory norms / ius cogens — Peace keeping

Core Issue(s):

Whether the United Nations enjoyed immunity from Dutch jurisdiction in the absence of an alternative remedy.

Whether the United Nations enjoyed immunity from Dutch jurisdiction in respect of acts related to genocide.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper and Professor Erika de Wet, University of Amsterdam Center for International Law.

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Facts

F1 In July 1995 the 'Safe Area' **of** **Srebrenica** was attacked and taken over by the Bosnian Serb Army. At least 8,000 Bosnian Muslims were murdered. The Safe Area was under the protection **of** the UN Peacekeeping force UNPROFOR pursuant to, in particular, Resolution 836, UN Doc S/RES/836, UN Security Council, 4 June 1993. The Dutch battalion 'Dutchbat' was stationed in **Srebrenica**.

F2 Relatives **of** the victims, as well as the foundation **Mothers** **of** **Srebrenica** on their behalf, brought an action before the District Court ('court') in The Hague against the United Nations ('UN') and the **Netherlands**. They asked the court to find that both defendants had committed a tort by not complying with the undertakings given before the fall **of** the enclave (ie, the promise to protect the Bosnian Muslims) and by not complying with (treaty) obligations: inter alia, the obligation to protect the rights **of** individuals under international humanitarian law and international human rights law and the obligation to prevent genocide under the Convention on the Prevention and Punishment **of** the Crime **of** Genocide (9 December 1948) 78 UNTS 227, entered into force 12 January 1951, and claimed (later to be determined) damages.

F3 The **Netherlands** sent the court a copy **of** a letter that the UN had sent to the Dutch Permanent Representation at the UN, in which it underlined, and declared not to waive, its immunity from jurisdiction. The UN did not appear in the proceedings and the Court **of** Appeal granted the **Netherlands** leave to intervene on behalf **of** the United Nations. (paragraph 3.3.2)

F4 The District Court and the Court **of** Appeal **of** The Hague recognized the immunity **of** the United Nations and dismissed the claim. (paragraph 3.3.2)

F5 Two arguments were central in the appeal to the Supreme Court. First, the **Mothers** **of** **Srebrenica** argued that granting immunity to the United Nations would violate the right **of** access to court under Article 6 **of** the Convention for the Protection **of** Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953 ('European Convention on Human Rights', 'ECHR') and Article 14 **of** the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR') since no 'reasonable alternative means' to settle the claim were available (relying on *Waite and Kennedy* ***v*** *Germany*, App no 26083/94; IHRL 3200 (ECHR 1999), 18 February 1999 ('*Waite and Kennedy*') and *Beer and Regan* ***v*** *Germany*, App no 28934/95; IHRL 2869 (ECHR 1999), 18 February 1999. Second, **Mothers** **of** **Srebrenica** argued that an exception to the immunity **of** the United Nations had to be made because the UN stood accused **of** complicity with genocide and other serious violations **of** fundamental human rights.

Held

H1 Article II(2) **of** the Convention on the Privileges and Immunities **of** the United Nations (13 February 1946) 1 UNTS 15, 90 UNTS 327 (corrigendum to vol 1), entered into force 17 September 1946 ('UN Immunities Convention') implemented the immunity **of** the United Nations under Article 105(1) **of** the Charter **of** the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945 ('UN Charter') and provided for absolute immunity from jurisdiction. (paragraph 4.2)

H2 The immunity **of** the UN served a legitimate aim since it secured the independent functioning **of** the organization. Both the basis and the scope **of** this immunity were different from state immunity. (paragraph 4.2)

H3 In *Waite and Kennedy*, the European Court **of** Human Rights ('ECtHR') did not consider the relation between Article 6 **of** the ECHR and Article 103 **of** the UN Charter. There was therefore no reason to assume that that the Court meant to include the UN when it held that the availability **of** 'reasonable alternative means to protect effectively their rights under the Convention' was 'a

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material factor' in determining whether the grant of immunity to an international organization was permissible under the ECHR, at least not as far as the acts of the UN under Chapter VII of the UN Charter were concerned. (paragraph 4.3.3)

H4 The UN (Security Council) held a special position in the international legal order, as was expressed by the ECtHR in *Behrami and Behrami v France; Saramati v France, Germany and Norway*, Admissibility, App nos 71412/01, 78166/01, 2 May 2007 ('*Behrami and Saramati*'). The ECtHR concluded at *Behrami and Saramati*, [27] that according to the International Court of Justice ('ICJ'), Article 103 of the UN Charter meant that the obligations under the UN Charter took precedence over obligations under all other (regional) treaties. The ECtHR held at *Behrami and Saramati*, [149] that the ECHR could not be interpreted in such a way as to subject the acts or omissions of contracting parties which were covered by UN Security Council Resolutions to the scrutiny of the court. Therefore, the Court of Appeal had erred in applying the *Waite and Kennedy* criteria to the case. As the ECtHR held in *Behrami and Saramati*, upholding the immunity of the UN was an obligation that took precedence over conflicting obligations under other international agreements. (paragraphs 4.3.4–4.3.6)

H5 The ECtHR, in *Al-Adsani v United Kingdom*, App no 35763/97; IHRL 2981 (ECHR 2001), 21 November 2001 ('*Al-Adsani*'), and the ICJ, in *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)*, Judgment; ICGJ 434 (ICJ 2012), 3 February 2012 ('*Jurisdictional Immunities of the State*'), had ruled that the gravity of the alleged crimes or their qualification as violations of *ius cogens* norms was no ground for an exception to, or an overriding of, state immunity. The argument that the immunity of the UN did not apply because of the gravity of the allegations of the claimants was rejected. (paragraphs 4.3.7–4.3.14)

H6 In *Jurisdictional Immunities of the State*, [101], the ICJ held that it could 'find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress'. The difference between the immunity of states and the immunity of international organizations did not justify a different assessment of the relation between the immunity of the UN and the right of access to court than of the relation between the immunity of the state and that right. The immunity of the UN applied irrespective of the gravity of the allegations. (paragraphs 4.3.13–4.3.14)

Date of Report: 30 April 2012

Reporter(s): Rosanne van Alebeek

Analysis

A1 This judgment concluded the immunity 'incident' that arose in the procedure instigated against the **Netherlands** and the UN by the relatives of the Bosnian Muslims massacred in the UN-controlled 'safe-area' of **Srebrenica** in 1995 by the Bosnian Serbs. The UN did not appear in the proceedings, but its immunity claim was brought to the attention of the court by the **Netherlands**, which eventually intervened in the incident on behalf of the UN and argued the immunity claim before the courts. Now that the immunity incident has been concluded, the proceedings concerning the claim of the **Mothers of Srebrenica** against the **Netherlands** will be resumed.

A2 The Supreme Court regarded Article II(2) of the UN Immunities Convention to be the implementation of Article 105 of the UN Charter, but unlike the Court of Appeal and the Advocate-General, it did not use the notion 'functional immunity' in this respect. This may not surprise. The Supreme Court has, in a consistent line of jurisprudence, defined functional immunity of international organizations as a rule of customary international law applying in disputes over acts immediately connected to the functions of international organizations only (see

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AS ***v*** *Iran-United States Claims Tribunal*, Final appeal judgment, LJN: AC9158; ILDC 1759 (NL 1985), 20 December 1985; *Greenpeace Nederland* ***v*** *Euratom*, Judgment on appeal in cassation, LJN: BA9173; RvdW (2007) No 992; ILDC 838 (NL 2007), 13 November 2007; *X* ***v*** *European Patent Organisation*, Final appeal judgment, Case No 08/00118; LJ BI9632; ILDC 1464 (NL 2009), 23 October 2009). Similarly, in doctrine the concepts **of** 'functional' immunity and 'absolute' immunity are often juxtaposed (see eg T Henquet, 'International Organisations in the **Netherlands**: Immunity from the Jurisdiction **of** the Dutch Courts' (2010) 57 NILR 267, at 277–8). The Court **of** Appeal and the Advocate General dismissed such juxtaposition. Explicit acknowledgment by the Supreme Court **of** the fact that functional immunity is the immunity necessary for the fulfilment **of** the organization's purposes, the scope **of** which may vary between organizations and between time and place, would have been welcome.

A3 The most promising line **of** argument for the claimants in this case was the access to court argument. While Section 29(a) **of** the UN Immunities Convention provides that '[t]he United Nations shall make provisions for appropriate modes **of** settlement **of** … disputes **of** a private law character to which the United Nations is a party', in practice, such a general alternative remedy has not been established. The Supreme Court did not discuss whether the remedy provided for in Paragraph 48 **of** the Agreement between the United Nations and the Government **of** Bosnia and Herzegovina on the Status **of** the United Nations Protection Force in Bosnia and Herzegovina (15 May 1993) 1722 UNTS 77, entered into force 15 May 1993fulfilled the 'reasonable alternative means' test. In his Opinion, the Advocate General had argued alternatively that the access to court argument could be dismissed because this procedure provided the alternative means required by Article 6 **of** the ECHR. (paragraph 2.25) This is remarkable, since the Court **of** Appeal in this case had concluded that the **Netherlands**, which had intervened in the proceedings on the part **of** the UN, had not sufficiently rebutted the arguments **of** the claimants that the procedure provided for by the Status **of** Forces Agreement ('SOFA') did not offer a real possibility to hold the UN accountable and that therefore it was established between the parties that the UN had not foreseen in a procedure for the settlement **of** disputes **of** a private law character. That conclusion was not appealed, but according to the Advocate General, the UN was not bound by it since it had not appeared in the proceedings. Even more remarkable is the fact that the Advocate General did not consider it necessary to rebut the arguments **of** the claimants himself to come to his conclusion; he only mentioned the procedure provided for by the SOFA but did not discuss it in substance.

A4 The Supreme Court based its rejection **of** the access to court argument principally on Article 103 **of** the UN Charter. This is not uncontroversial in itself. Firstly, it is sometimes argued that Article 103 is limited to 'international agreements' and does not apply to customary international law and, as the Supreme Court explicitly noted, the parties agreed that the right **of** access to court also had a customary character. (paragraph 4.3.1) While strong arguments have been voiced against that position (see R Bernhardt, 'Article 103', in D Simma (ed) *The Charter* ***of*** *the United Nations — A Commentary* (2nd ed 2002) 1292, 1298–9), the issue warrants express mention in the judgment. More importantly, the question **of** the extent to which Article 103 **of** the UN Charter can also be relied on to supersede international human rights norms continues to be a bone **of** contention in academic doctrine (see eg A Tzanakopoulos, 'Collective Security and Human Rights', in E de Wet & J Vidmar (eds), *Hierarchy in International Law: The Place* ***of*** *Human Rights* (2012 Oxford University Press, Oxford) 42–70). Even more controversial is the Supreme Court's explicit reliance on *Behrami and Saramati* as controlling precedent. In its decision in these cases the ECtHR did not unequivocally state that Article 103 **of** the UN Charter took precedence over the ECHR. The decision did contain some troublesome allusions to the article but no clear position was taken, since the question was not before the Court. In fact, when the question was squarely before the Court, in *Al-Jedda* ***v*** *United Kingdom*, App no 27021/08; IHRL 206 (ECHR 2011), 7 July 2011 ('*Al-Jedda*'), the ECtHR skilfully avoided taking position on this prickly issue (see eg M Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 1 EJIL 121). The reference to *Behrami and Saramati* provides the Supreme Court's judgment with misguided authority.

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A5 Also, the prominent reference to *Jurisdictional Immunities of the State*, [101] (see H6) is notable. It is odd that the Supreme Court discussed this paragraph in the context of the assessment of the argument that the gravity of the allegations warranted an exception to the immunity of the UN. In fact, the paragraph squarely addresses the access to court argument. More pertinently, it is exactly the difference between the immunity of states and that of international organizations which may warrant a different assessment of the access to court argument (see eg A Reinisch and UA Weber, 'In the Shadow of Waite and Kennedy, The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative means of Dispute Settlement' (2004) 1 Int'l Organizations L Rev 59, at 67). The reasoning of the Supreme Court proves the concerns of commentators correct that the paragraph could be seen to cast doubt on the *Waite and Kennedy* doctrine (see eg A Bianchi, 'On Certainty', Ejiltalk on 16 February 2012).

A6 The lower courts had relied on different reasoning when rejecting the access to court argument. The District Court emphasised the fact that the UN was established before the entry into force of the ECHR and that hence the transfer of powers to the organization could not be seen as having limited human rights protection under the ECHR. Moreover, the District Court argued that the special position of the UN as established in *Behrami and Saramati* meant that Article 6 of the ECHR could not be interpreted as offering a basis for an exception to the immunity of the UN and that therefore the *Waite and Kennedy* case did not apply to the UN, but did so without any reference to Article 103 of the UN Charter. The Court of Appeal of the Hague, on the other hand, disagreed that *Behrami and Saramati* made inroads into the *Waite and Kennedy* principle, and *did* apply the principle to the case. It did discuss Article 103 of the UN Charter, but held that this article could not be seen to set aside customary norms or fundamental rights, with the right of access to court fitting both categories. The Court of Appeal, however, gave a rather disconcerting twist to the *Waite and Kennedy* principle. It dismissed the reliance on Article 6 of the ECHR, since it was not established that the claimants did not 'have access whatsoever to a court of law with regard to what happened in **Srebrenica**'. First, the court said, they could have sued the individual perpetrators of the genocide, and second, they could sue the **Netherlands**. It is understandable that the Supreme Court did not want to repeat this argumentation. First, it is not convincing on a conceptual level. While the ECtHR in *Waite and Kennedy* did admittedly refer to possible alternative remedies against actors other than the organization, this did not take away from the gist of the doctrine, which requires a remedy against the organization. Moreover, on a more practical level, reference to the possibility of suit of the **Netherlands** could have been seen to run ahead of the separate case against the state, in which the attribution of the acts committed by Dutchbat in the context of the UNPROFOR mission to the **Netherlands** was highly controversial.

A7 It is difficult to predict where the case will go from here. In another **Srebrenica**-related claim against the state, *Nuhanović* ***v*** ***Netherlands***, Appeal judgment, LJN:BR5388; ILDC 1742 (NL 2011), 5 July 2011 ('*Nuhanović*'), the Court of Appeal of The Hague explicitly recognized the possibility of dual attribution to both the UN and the troop-contributing state. While the facts of that decision were different, the judgment raised some very cautious expectations that the disputed acts of Dutchbat in the instant case might also be attributed to the **Netherlands**, although most commentators agree that *Nuhanović* is likely to be distinguished on the facts (see also the Analysis on *Nuhanović* by A Nollkaemper, ILDC 1742 (NL 2011), [A17]). In any case, the strong reliance on *Behrami and Saramati* in the judgment at hand does not bolster the prospects of the claimants—although with some luck, the 'news' of *Al-Jedda* will have reached the Supreme Court by then.

Date of Analysis: 01 May 2012
Analysis by: Rosanne van Alebeek

Instruments cited in the full text of this decision:

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International

Charter **of** the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945, Chapter VII, Articles 103, 104, 105

Convention on the Privileges and Immunities **of** the United Nations (13 February 1946) 1 UNTS 15, 90 UNTS 327 (corrigendum to vol 1), entered into force 17 September 1946, Article II(2), 29(a)

Convention on the Prevention and Punishment **of** the Crime **of** Genocide (9 December 1948) 78 UNTS 227, entered into force 12 January 1951

Convention for the Protection **of** Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, Article 6

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 14

Agreement between the United Nations and the Government **of** Bosnia and Herzegovina on the Status **of** the United Nations Protection Force in Bosnia and Herzegovina (15 May 1993) 1722 UNTS 77, entered into force 15 May 1993

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*Al-Adsani **v** United Kingdom*, App no 35763/97, IHRL 2981 (ECHR 2001), 21 November 2001

*International Court **of** Justice*

*Jurisdictional Immunities **of** the* State *(Germany **v** Italy, Greece intervening)*, Judgment; ICGJ 434 (ICJ 2012), 3 February 2012

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Decision - full text

1 . Het geding in feitelijke instanties

Voor het verloop van het geding in feitelijke instanties verwijst de Hoge Raad naar de navolgende stukken: a. het vonnis in de zaak 295247/HA ZA 07-2973 van de rechtbank 's-Gravenhage van 10 juli 2008; b. het arrest in de zaak 200.022.151/01 van het gerechtshof te 's-Gravenhage van 30 maart 2010.

Het arrest van het hof is aan dit arrest gehecht.

2 . Het geding in cassatie

Tegen het arrest van het hof hebben de **Stichting** c.s. beroep in cassatie ingesteld. De Staat heeft incidenteel cassatieberoep ingesteld. De cassatiedagvaarding en de conclusie van antwoord tevens houdende incidenteel cassatieberoep zijn aan dit arrest gehecht en maken daarvan deel uit.

Tegen de VN is verstek verleend.

De **Stichting** c.s. en de Staat hebben over en weer geconcludeerd tot verwerping van het beroep.

De zaak is voor partijen toegelicht door hun advocaten. De Staat heeft onderdeel 1 van het incidentele middel, dat een klacht bevat tegen het oordeel van het hof, dat het recht op toegang tot de rechter een regel van (internationaal) gewoonterecht is waarop ook los van art. 6 EVRM en art. 14 IVBPR een beroep kan worden gedaan, ingetrokken.

De conclusie van de Advocaat-Generaal P. Vlas strekt tot verwerping van zowel het principaal beroep als het incidenteel beroep. Zowel de advocaten van de Staat als de advocaat van de **Stichting** c.s. hebben bij brief van 10 februari 2012 op die conclusie gereageerd.

3 . Uitgangspunten in cassatie

3.1 In deze zaak, waarin centraal staat de vraag **of** het hof terecht heeft geoordeeld dat de VN immuniteit van jurisdictie toekomt zodat de Nederlandse rechter niet bevoegd is kennis te nemen van de hierna te noemen vorderingen van de **Stichting** c.s. voor zover deze zijn gericht tegen de VN, kan van het volgende worden uitgegaan.

3.2.1 De **Stichting** c.s. hebben de Staat en de VN gedagvaard voor de rechtbank 's-Gravenhage. Zij houden de Staat (met het Nederlandse VN-bataljon Dutchbat) en de VN mede verantwoordelijk voor de val in 1995 van de, in resoluties van de Veiligheidsraad als "Safe Area" onder bescherming van de VN-vredesmacht UNPROFOR aangewezen, Oost-Bosnische enclave **Srebrenica**, waarin Dutchbat zijn basis had, en voor de gevolgen daarvan, in het bijzonder de toen gepleegde genocide die het leven heeft gekost aan ten minste 8000 mensen (onder wie familieleden van eiseressen in cassatie 2-11). De vorderingen zijn gericht op het verkrijgen van, samengevat, een verklaring voor recht dat de Staat en de VN, wegens het niet nakomen van vóór de val van die enclave door hen gedane toezeggingen en van andere op hen rustende (verdrags)verplichtingen, onrechtmatig hebben gehandeld, alsmede van (voorschotten op) nader bij staat op te maken schadevergoedingen.

3.2.2 De Staat heeft de rechtbank een afschrift doen toekomen van een brief van 17 augustus 2007 van de VN aan de Nederlandse Permanente Vertegenwoordiger bij de VN. Daarin wees de VN op haar immuniteit van jurisdictie en verklaarde daarvan geen afstand te doen. Het Openbaar Ministerie concludeerde dienovereenkomstig, en de rechtbank verklaarde zich, na verstek te hebben verleend tegen de VN, onbevoegd om kennis te nemen van de vorderingen voor zover

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deze zijn gericht tegen de VN. In het door de **Stichting** c.s. ingestelde hoger beroep heeft het hof, dat de Staat toeliet als gevoegde partij aan de zijde van de niet verschenen VN, het vonnis van de rechtbank bekrachtigd.

3.3.1 De art. 103 en 105 van het Handvest van de Verenigde Naties (hierna: Handvest VN) luiden voor zover hier van belang:

> **"Art. 103**
>
> In geval van strijdigheid tussen de verplichtingen van de Leden van de Verenigde Naties krachtens dit Handvest en hun verplichtingen krachtens andere internationale overeenkomsten, hebben hun verplichtingen krachtens dit Handvest voorrang.
>
> **Art. 105**
>
> **1** . De Organisatie geniet op het grondgebied van elk van haar Leden de voorrechten en immuniteiten die noodzakelijk zijn voor de verwezenlijking van haar doelstellingen.
>
> **2** . (...)
>
> **3** . De Algemene Vergadering kan aanbevelingen doen met het oog op de vaststelling der bijzonderheden van de toepassing van het eerste en tweede lid van dit artikel, **of** kan aan de Leden van de Verenigde Naties overeenkomsten tot dit doel voorstellen."

3.3.2 Art. II, § 2, van het op art. 104 en 105 Handvest VN gebaseerde Verdrag nopens de voorrechten en immuniteiten van de Verenigde Naties (Trb. 1948, nr. I 224), hierna: de Convention, luidt voor zover hier van belang:

> "De Verenigde Naties (...) zullen vrijgesteld zijn van rechtsvervolging, behoudens wanneer de Verenigde Naties in een bijzonder geval uitdrukkelijk afstand zullen hebben gedaan van haar immuniteit. Het is echter wel te verstaan, dat afstand van immuniteit zich niet uitstrekt tot enige maatregel van tenuitvoerlegging."

3.3.3 Regelingen voor passende wijzen van beslechting van geschillen die voortvloeien uit overeenkomsten, **of** van andere geschillen van privaatrechtelijke aard, waarbij de VN partij is, zijn, anders dan art. VIII, § 29, aanhef en onder (a), Convention in het vooruitzicht stelt, door de VN niet getroffen.

3.3.4 Art. I van het Verdrag inzake de voorkoming en de bestraffing van genocide (Trb. 1960, nr. 32) luidt: "De Verdragsluitende Partijen stellen vast, dat genocide, ongeacht **of** het feit in vredes- dan wel oorlogstijd wordt bedreven een misdrijf is krachtens internationaal recht, welk misdrijf zij op zich nemen te voorkomen en te bestraffen."

4 . Beoordeling van de middelen in beide beroepen

4.1.1 De gedachtegang (rov. 4.2–5.14) die ten grondslag ligt aan het oordeel van het hof dat de VN immuniteit van jurisdictie toekomt, zodat de Nederlandse rechter niet bevoegd is kennis te nemen van de vorderingen voor zover deze zijn gericht tegen de VN, kan als volgt worden samengevat.

Met art. II, § 2, Convention is uitvoering gegeven aan (onder meer) art. 105 lid 3 Handvest VN. De in art. II, § 2, omschreven immuniteit laat — het bepaalde in art. 31 Verdrag van Wenen inzake het verdragenrecht in aanmerking genomen — geen andere uitleg toe dan dat aan de VN de meest vergaande immuniteit is verleend, in die zin dat de VN niet voor enig nationaal gerecht van de landen die partij zijn bij de Convention kan worden gedaagd. De vraag is echter **of**, zoals de **Stichting** c.s. betogen, deze immuniteit moet wijken voor het (in art. 6 EVRM en art. 14 IVBPR

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neergelegde) recht op toegang tot de onafhankelijke rechter. Op de voet van de criteria die het EHRM in de zaken Beer en Regan tegen Duitsland en Waite en Kennedy tegen Duitsland heeft geformuleerd, zal worden getoetst **of** het door de Staat gedane beroep op immuniteit van de VN zich verdraagt met art. 6 EVRM. In dat verband kan allereerst worden vastgesteld dat die immuniteit een legitiem doel dient, te weten het bevorderen van de goede werking van internationale organisaties. Bij de beantwoording van de vraag **of** de immuniteit in dit geval proportioneel is ten opzichte van het daarmee nagestreefde doel, moet worden vooropgesteld dat de VN onder de internationale organisaties een bijzondere plaats inneemt.

De Veiligheidsraad kan immers krachtens art. 42 Handvest VN overgaan tot zulk optreden door middel van lucht-, zee- **of** landstrijdkrachten als nodig is voor het handhaven **of** het herstel van de internationale vrede en veiligheid. De immuniteit die aan de VN is verleend, houdt rechtstreeks verband met het algemene belang dat met de handhaving van vrede en veiligheid in de wereld gemoeid is. Om die reden is het van groot belang dat de VN over een zo sterk mogelijke immuniteit beschikt, waarover zo min mogelijk discussie mogelijk moet zijn. Alleen klemmende redenen kunnen dan ook tot het oordeel leiden dat de immuniteit van de VN niet proportioneel is ten opzichte van het daarmee nagestreefde doel.

De **Stichting** c.s. stellen zich op het standpunt dat zodanige klemmende redenen in dit geval aanwezig zijn en beroepen zich daartoe in de eerste plaats erop dat sprake is van genocide. In wezen verwijten zij de VN echter nalatig te zijn geweest in het voorkomen van genocide. Dat is een ernstig verwijt, maar niet zo pregnant dat de immuniteit daarvoor moet wijken. De tweede omstandigheid die volgens de **Stichting** c.s. moet leiden tot het oordeel dat van proportionaliteit niet kan worden gesproken, is het ontbreken van een met voldoende waarborgen omgeven rechtsgang. Daarbij wijzen zij erop dat de VN niet, zoals art. VIII, § 29, aanhef en onder (a), Convention voorschrijft, regelingen heeft getroffen voor passende wijzen van beslechting van geschillen die voortvloeien uit overeenkomsten **of** andere geschillen van privaatrechtelijke aard, waarbij de VN partij is.

Het staat echter, aldus het hof, niet vast dat de **Stichting** c.s. voor de gebeurtenissen in **Srebrenica** in het geheel geen toegang tot de rechter hebben. In de eerste plaats is niet duidelijk geworden waarom zij de daders en degenen die voor dezen verantwoordelijk zijn niet voor de rechter zouden kunnen brengen. In de tweede plaats hebben zij de Staat, ter zake van verwijten vergelijkbaar met die welke zij tot de VN richten, voor de Nederlandse rechter gedaagd. In die procedure kan de Staat zich niet op immuniteit beroepen. Gegeven deze beide omstandigheden kan niet worden gezegd dat voor de **Stichting** c.s. het wezen van het recht op toegang tot de rechter is aangetast indien het beroep op immuniteit van de VN wordt gehonoreerd.

4.1.2 De middelen 3-7 in het principale beroep, die voor zover daarin over onbegrijpelijkheid wordt geklaagd eraan voorbijzien dat het antwoord op de vraag **of** de VN immuniteit toekomt een rechtsbeslissing is, keren zich met een reeks van klachten tegen alle dragende onderdelen van de redenering van het hof die is uitgemond in aanvaarding van het beroep op immuniteit. In het incidentele beroep strekken de klachten onder 2 en 3 ertoe dat voor toetsing van die immuniteit aan het recht op toegang tot de rechter geen plaats is, althans niet in een geval als dit waarin de vorderingen betrekking hebben op optreden van de VN in het kader van Hoofdstuk VII Handvest VN.

Grondslag en reikwijdte van de VN-immuniteit

4.2 De immuniteit van de VN, te onderscheiden van de immuniteit van haar functionarissen en van deskundigen die zendingen voor haar verrichten, vindt haar grondslag in art. 105 Handvest VN en art. II, § 2, Convention.

Deze laatste bepaling, die de nadere uitwerking vormt van art. 105 lid 1, is door het hof — met

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toepassing van art. 31 Verdrag van Wenen inzake het verdragenrecht — terecht aldus uitgelegd dat aan de VN de meest vergaande immuniteit van jurisdictie is verleend, in die zin dat zij niet kan worden gedaagd voor enig nationaal gerecht van de landen die partij zijn bij de Convention.

Zowel de grondslag als de reikwijdte van deze immuniteit, waarmee wordt beoogd het geheel onafhankelijk functioneren van de VN zeker te stellen en die dan ook zonder meer een legitiem doel dient, is dus een andere dan de aan vreemde staten toekomende immuniteit van jurisdictie. Deze laatste vloeit immers, zoals tot uitdrukking is gebracht in art. 13a Wet algemene bepalingen, voort uit het volkenrecht (par in parem non habet imperium), en ziet alleen op handelingen van een vreemde staat die door deze zijn verricht in de uitoefening van zijn overheidstaak (acta iure imperii).

VN-immuniteit en toegang tot de rechter

4.3.1 Het hof heeft, zoals hiervoor in 4.1.1 vermeld, op de voet van de criteria die door het EHRM zijn geformuleerd in de zaken Beer en Regan tegen Duitsland, EHRM 18 februari 1999, no. 28934/95, en Waite en Kennedy tegen Duitsland, EHRM 18 februari 1999, no. 26083/94, onderzocht **of** het beroep op VN-immuniteit zich verdraagt met het (in art. 6 EVRM en art. 14 IVBPR vastgelegde) recht op toegang tot de rechter. Dat het bij dat — niet absolute — recht (ook) gaat om een regel van internationaal gewoonterecht wordt door de Staat in cassatie niet meer bestreden.

4.3.2 Beide hiervoor genoemde zaken betreffen een procedure tegen European Space Agency (ESA) voor de Duitse rechter waarin de eisers vorderden vast te stellen dat zij naar Duits recht werknemer van ESA waren geworden. ESA, een internationale organisatie, had zich beroepen op haar immuniteit van jurisdictie ingevolge art. XV, § 2, (in verbinding met Bijlage I van het) Verdrag tot oprichting van een Europees Ruimte-Agentschap, 30 mei 1975, Trb. 123. De Duitse rechter had dat beroep gehonoreerd. Het EHRM oordeelde dat dit geen schending van art. 6 vormde, en liet daaraan onder meer de volgende overwegingen voorafgaan (de nummering van de overwegingen is die van het arrest Waite en Kennedy):

> "**59** . The Court recalls that the right **of** access to the courts secured by Article 6 § 1 **of** the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right **of** access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin **of** appreciation, although the final decision as to the observance **of** the Convention's requirements rests with the 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 will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship between the means employed and the aim sought to be achieved (...).
>
> **67** . The Court is **of** the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields **of** activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection **of** fundamental rights. It would be incompatible with the purpose and object **of** the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field **of** activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right **of** access to the courts in view **of** the prominent place held in a democratic society by the right to a fair trial (...).
>
> **68** . For the Court, a material factor in determining whether granting ESA immunity from

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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.

69 . The ESA Convention, together with its Annex I, expressly provides for various modes **of** settlement **of** private-law disputes, in staff matters as well as in other litigation (…)."

4.3.3 Blijkens de paragrafen 67–69 is voor het oordeel van het EHRM dat het honoreren van de immuniteit van internationale organisaties als de ESA geen schending van art. 6 EVRM oplevert, vooral van belang dat het Verdrag tot oprichting van een Europees Ruimte-Agentschap uitdrukkelijk voorziet in een alternatieve rechtsgang voor de beslechting van privaatrechtelijke geschillen, waar de eisers gebruik van kunnen maken. Opmerking verdient daarbij dat in paragraaf 67 is weliswaar sprake van "international organisations" zonder meer, maar dat — reeds bij gebreke van enige overweging met betrekking tot de verhouding tussen art. 6 EVRM enerzijds en art. 103 en 105 Handvest VN alsmede art. II, § 2, Convention anderzijds — geen grond bestaat om aan te nemen dat het EHRM met "international organisations" mede het oog heeft gehad op de VN, in elk geval niet voor zover het gaat om handelen van deze organisatie in het kader van Hoofdstuk VII Handvest VN (Optreden met betrekking tot bedreiging van de vrede, verbreking van de vrede en daden van agressie).

4.3.4 De VN (Veiligheidsraad) neemt in de internationale rechtsgemeenschap een bijzondere plaats in, zoals ook door het EHRM tot uitdrukking is gebracht in het arrest Behrami en Behrami tegen Frankrijk en Saramati tegen Frankrijk, Duitsland en Noorwegen, EHRM 2 mei 2007, no. 71412/01 en 78166/01. In dit arrest, waarin het gaat om nalaten en handelen van United Nations Interim Administration Mission in Kosovo (UNMIK) en NATO Kosovo Force (KFOR) bij inzet in Kosovo uit hoofde van een resolutie van de Veiligheidsraad, overweegt het EHRM onder meer het volgende:

"**146** . The question arises in the present case whether the Court is competent ratione personae to review the acts **of** the respondent States carried out on behalf **of** the UN, and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII **of** its Charter.

147 . (…) More generally, it is further recalled, as noted in paragraph 122 above, that the Convention has to be interpreted in the light **of** any relevant rules and principles **of** international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions **of** the Charter, Articles 25 and 103, as interpreted by the International Court **of** Justice (see paragraph 27 above).

148 . **Of** even greater significance is the imperative nature **of** the principle aim **of** the UN and, consequently, **of** the powers accorded to the UNSC under Chapter VII to fulfil that aim. (…) The responsibility **of** the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use **of** force (see paragraph 18–20 above).

149 . In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII **of** the UN Charter are fundamental to the mission **of** the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions **of** Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course **of** such missions, to the scrutiny **of** the Court. To do so would be to interfere with the fulfilment **of** the UN's key mission in this field including, as argued by certain parties, with the effective conduct **of** its operations. It would also be

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tantamount to imposing conditions on the implementation **of** a UNSC Resolution which were not provided for in the text **of** the Resolution itself. (…)"

In de in dit citaat bedoelde paragraaf 27 stelt het EHRM onder meer vast dat art. 103 Handvest VN naar de opvatting van het Internationaal Gerechtshof betekent dat de verplichtingen die ingevolge dit Handvest rusten op de leden van de VN voorrang hebben boven daarmee strijdige verplichtingen uit hoofde van een ander verdrag, ongeacht **of** dit werd gesloten voor **of** na het Handvest **of** slechts een regionale regeling behelst. En in paragraaf 149 oordeelt het EHRM, dat gelet op het belang voor de internationale vrede en veiligheid van operaties die op grond van resoluties van de Veiligheidsraad plaatsvinden in het kader van Hoofdstuk VII van het Handvest VN, het EVRM niet aldus kan worden uitgelegd dat het handelen en nalaten van Lidstaten dat wordt beheerst door resoluties van de Veiligheidsraad onderworpen zou zijn aan beoordeling door het EHRM.

4.3.5 De tussenconclusie moet zijn dat het hof ten onrechte aan de hand van de in Beer en Regan alsmede Waite en Kennedy geformuleerde criteria heeft onderzocht **of** het ten behoeve van de VN gedane beroep op immuniteit moet wijken voor het recht op toegang tot de rechter als bedoeld in art. 6 EVRM

4.3.6 Die immuniteit is absoluut. Het handhaven daarvan behoort bovendien tot de verplichtingen van de leden van de VN die, zoals ook het EHRM in Behrami, Behrami en Saramanti in aanmerking heeft genomen, ingevolge art. 103 Handvest VN in geval van strijdigheid voorrang hebben boven verplichtingen krachtens andere internationale overeenkomsten.

4.3.7 Daarmee is echter nog niet de vraag beantwoord **of**, zoals de **Stichting** c.s. betogen onder verwijzing naar met name de dissenting opinions in het arrest van het EHRM van 21 november 2001 in de op staatsimmuniteit betrekking hebbende zaak Al-Adsani tegen het Verenigd Koninkrijk, no. 35763/97, de VN-immuniteit hier moet wijken voor het recht op toegang tot de rechter omdat de vorderingen zijn gebaseerd op het verwijt van betrokkenheid bij — met name in de vorm van niet voorkomen van — genocide en andere ernstige schendingen (marteling, moord en verkrachting) van fundamentele mensenrechten. De **Stichting** c.s. voeren daartoe in hun cassatiedagvaarding onder 5.13 aan:

"In het volkenrecht is er geen hogere norm dan het verbod op genocide. Althans deze norm is hoger dan de overige in deze rechtsstrijd aan de orde zijnde normen.

De handhaving daarvan is een belangrijke bestaansreden van het internationaal recht en van de belangrijkste internationale organisatie, de VN. Dit brengt met zich mee dat in geval van niet voorkomen van genocide aan de internationale organisaties geen immuniteit toekomt, althans immuniteit daarvoor moet wijken. (…) Het oordeel dat de immuniteit van de VN in dit geval zwaarder weegt zou de facto betekenen dat de VN absolute macht hebben. Deze macht zou immers niet aan beperkingen onderhevig zijn en voorts betekenen dat de VN aan niemand verantwoording zijn verschuldigd, doordat zij niet zouden zijn onderworpen aan de rule **of** law: het principe dat niemand boven de wet staat en dat macht wordt beperkt en gereguleerd door het recht. Een zodanig vergaande immuniteit als het hof heeft aangenomen, is in strijd met de rule **of** law en ondermijnt bovendien de geloofwaardigheid van de VN als voorvechter van de mensenrechten.", aldus de **Stichting** c.s.

4.3.8 De hiervoor genoemde zaak Al-Adsani tegen het Verenigd Koninkrijk betreft een in Engeland aanhangig gemaakte vordering tot schadevergoeding gericht tegen de staat Koeweit. Al-Adsani stelde Koeweit aansprakelijk voor de schade ten gevolge van martelingen door hem in Koeweit ondergaan na afloop van de Golfoorlog in 1991.

De Engelse rechter aanvaardde het door Koeweit gedane beroep op immuniteit, waarna Al-Adsani

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zich tot het EHRM wendde met de klacht, voor zover thans van belang, dat die beslissing een schending van art. 6 EVRM opleverde. Daarbij stelde hij zich op het standpunt dat, nu het verbod van foltering tot het ius cogens behoorde, de door Koeweit ingeroepen immuniteit diende te wijken voor het in art. 6 neergelegde recht op toegang tot de rechter.

De klacht werd door het EHRM met negen tegen acht stemmen afgewezen op grond van onder meer de volgende overwegingen:

> "**61** . While the Court accepts, on the basis **of** these authorities, that the prohibition **of** torture has achieved the status **of** a peremptory norm in international law, it observes that the present case concerns not, as in Furundzija and Pinochet, the criminal liability **of** an individual for alleged acts **of** torture, but the immunity **of** a State in a civil suit for damages in respect **of** acts **of** torture within the territory **of** that State. Notwithstanding the special character **of** the prohibition **of** torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as amatter **of** international law, a State no longer enjoys immunity from civil suit in the courts **of** another State where acts **of** torture are alleged. In particular, the Court observes that none **of** the primary international instruments referred to (Article 5 **of** the Universal Declaration **of** Human Rights, Article 7 **of** the International Covenant on Civil and Political Rights and Articles 2 and 4 **of** the UN Convention) relates to civil proceedings or to State immunity.
>
> **62** . It is true that in its Report on Jurisdictional Immunities **of** States and their Property
>
> (…) the working group **of** the International Law Commission noted, as a recent development in State practice and legislation on the subject **of** immunities **of** States,the argument increasingly put forward that immunity should be denied in the case **of** death or personal injury resulting from acts **of** a State in violation **of** human rights norms having the character **of** ius cogens, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation **of** human right norms with the character **of** ius cogens, in most cases (…) the plea **of** sovereign immunity had succeeded.
>
> (…)
>
> **66** . The Court, while noting the growing recognition **of** the overriding importance **of** the prohibition **of** torture, does not accordingly find it established that there is yet acceptance in international law **of** the proposition that States are not entitled to immunity in respect **of** civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect **of** personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community **of** nations as part **of** the doctrine **of** State immunity."

4.3.9 Tegenover deze meerderheidsopvatting stond onder meer de door zes rechters van de Grote Kamer onderschreven, en door de **Stichting** c.s. ter ondersteuning van hun standpunt ingeroepen, dissenting opinion die — in overeenstemming met althans een niet gering deel van de binnen- en buitenlandse literatuur met betrekking tot het onderwerp (staats)immuniteit — onder meer luidt:

> "**3** . The acceptance therefore **of** the ius cogens nature **of** the prohibition **of** torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences **of** the illegality **of** its actions. In the circumstances **of** this case, Kuwait cannot validly hide behind the rules on State

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immunity to avoid proceedings for a serious claim **of** torture made before a foreign jurisdiction; and the courts **of** that jurisdiction (the United Kingdom) cannot accept a plea **of** immunity, or invoke it ex officio, to refuse an applicant adjudication **of** a torture case. Due to the interplay **of** the ius cogens rule on prohibition **of** torture and the rules on State immunity, the procedural bar **of** State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light **of** the imperative precepts **of** ius cogens."

4.3.10 Belangrijker nog dan het feit dat deze opinion ook naar de huidige stand van zaken niet de door het EHRM aanvaarde opvatting weergeeft, is hetgeen het Internationaal Gerechtshof (IGH) in zijn, door de Staat in zijn reactie op de conclusie van de Advocaat-Generaal genoemde, vonnis van 3 februari 2012 heeft geoordeeld in de zaak Jurisdictional Immunities **of** the State (Germany vs. Italy: Greece intervening). Daarin ging het onder meer om de vraag **of** de Italiaanse rechters in de door hen behandelde zaken waarin van Duitsland vergoeding werd gevorderd van schade als gevolg van schendingen van het internationale humanitaire recht door Duitse troepen in de Tweede Wereldoorlog, de immuniteit van Duitsland hadden moeten respecteren. Die vraag werd door het IGH bevestigend beantwoord.

4.3.11 Het IGH verwierp, voor zover thans van belang, in de eerste plaats het standpunt van Italië dat het ontzeggen van immuniteit werd gerechtvaardigd door de ernst van de feiten die aan de vorderingen ten grondslag lagen:

"**91** . The Court concludes that, under customary international law as it presently stands, a State is not deprived **of** immunity by reason **of** the fact that it is accused **of** serious violations **of** international human rights law or the international law **of** armed conflict.

(…)"

4.3.12 Evenmin werd als juist aanvaard dat, nu de door de Duitse troepen geschonden regels tot het ius cogens behoorden, de immuniteit van Duitsland diende te wijken:

"**93** . (…) Assuming for this purpose that the rules **of** the law **of** armed conflict which prohibit the murder **of** civilians in occupied territory, the deportation **of** civilian inhabitants to slave labour and the deportation **of** prisoners **of** war to slave labour are rules **of** jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets **of** rules address different matters. The rules **of** State immunity are procedural in character and are confined to determining whether or not the Courts **of** one State may exercise jurisdiction in respect **of** another State. They do not bear upon the question whether or not the conduct in respect **of** which the proceedings are brought was lawful or unlawful.

(…)

96 . In addition, this argument about the effect **of** jus cogens displacing the law **of** State immunity has been rejected by the national courts **of** the United Kingdom, [Canada,Poland, Slovenia, New Zealand and Greece], as well as by the European Court **of** Human Rights in Al-Adsani **v**. United Kingdom and Kalogeropoulou and others **v**. Greece and Germany (…).

97 . Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations **of** jus cogens, the applicability **of** the customary international law on State immunity was not affected."

4.3.13 En ten slotte oordeelde het IGH in paragraaf 101 van genoemd vonnis dat in de

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statenpraktijk waaruit het internationaal gewoonterecht wordt afgeleid, geen grond te vinden is voor het oordeel dat naar internationaal recht aan een staat slechts immuniteit toekomt ingeval is voorzien in een effectieve alternatieve wijze van geschilbeslechting.

4.3.14 Hoewel de VN-immuniteit te onderscheiden valt van staatsimmuniteit, is niet sprake van een verschil dat rechtvaardigt met betrekking tot de verhouding tussen eerstgenoemde immuniteit en het recht op toegang tot de rechter anders te oordelen dan het IGH heeft beslist ten aanzien van de verhouding tussen staatsimmuniteit en het recht op toegang tot de rechter. Die immuniteit komt de VN toe ongeacht de buitengewone ernst van de verwijten die de **Stichting** c.s. aan hun vorderingen ten grondslag leggen.

Slotoverwegingen

4.4.1 Het hiervoor overwogene leidt ertoe dat de rechtsklachten van de middelen 3-7 in het principale beroep geen doel treffen. De klachten van de middelen 1,2, 8 en 9 — de Hoge Raad ziet geen aanleiding tot het stellen van prejudiciële vragen aan het Hof van Justitie van de Europese Unie in verband met middel 8 — leiden evenmin tot cassatie. Zulks behoeft, gezien art. 81 RO, geen nadere motivering, nu de klachten niet nopen tot beantwoording van rechtsvragen in het belang van de rechtseenheid **of** de rechtsontwikkeling.

4.4.2 De klachten van de onderdelen 2 en 3 in het incidentele beroep zijn blijkens het hiervoor in 4.3.1 – 4.3.14 overwogene weliswaar grotendeels gegrond, maar tot cassatie leidt dat niet. Ook voor het overige leidt het middel niet tot cassatie. Zulks behoeft, gezien art. 81 RO, geen nadere motivering, nu de klachten niet nopen tot beantwoording van rechtsvragen in het belang van de rechtseenheid **of** de rechtsontwikkeling.

5 . Beslissing

De Hoge Raad:

in het principale beroep:

verwerpt het beroep;

veroordeelt de **Stichting** c.s. in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van de Staat begroot op € 385,34 aan verschotten en € 2.200,— voor salaris;

in het incidentele beroep:

verwerpt het beroep;

veroordeelt de Staat in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van de **Stichting** c.s. begroot op € 68,07 aan verschotten en € 2.200,— voor salaris.

Dit arrest is gewezen door de vice-president J.B. Fleers als voorzitter en de raadsheren A.M.J. van Buchem-Spapens, F.B. Bakels, C.A. Streefkerk en W.D.H. Asser, en in het openbaar uitgesproken door de raadsheer J.C. van Oven op 13 april 2012.

Conclusie

10/004437

Mr. P. Vlas

Zitting, 27 januari 2012

Conclusie inzake:

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1) de **stichting** **Stichting** **Mothers** **of** **Srebrenica**,

2) [Eiseres 2],

3) [Eiseres 3],

4) [Eiseres 4],

5) [Eiseres 5],

6) [Eiseres 6],

7) [Eiseres 7],

8) [Eiseres 8],

9) [Eiseres 9],

10) [Eiseres 10] en

11) [Eiseres 11],

verzoeksters tot cassatie

(hierna gezamenlijk: de **Stichting** c.s.).

tegen

1) de Staat der Nederlanden (Ministerie van Algemene Zaken) en

2) de rechtspersoonlijkheid bezittende organisatie De Verenigde Naties,

verweerders in cassatie

(hierna afzonderlijk: de Staat en de VN)

In deze trieste zaak is thans uitsluitend de vraag aan de orde **of** aan de VN immuniteit van jurisdictie toekomt in een voor de Nederlandse rechter tegen de VN en de Nederlandse Staat aangespannen procedure. De procedure is aanhangig gemaakt door de **stichting** **Stichting** **Mothers** **of** **Srebrenica** die de belangen behartigt van circa 6000 nabestaanden van slachtoffers van de val van de enclave **Srebrenica**, en tien individuele nabestaanden.

1 . Feiten en procesverloop

1.1 In cassatie kan van de volgende feiten worden uitgegaan.(1) Bij dagvaarding van 4 juni 2007 hebben de **Stichting** c.s. de Staat en de VN gedagvaard voor de rechtbank te 's-Gravenhage. De **Stichting** c.s. vorderen — samengevat — verklaringen voor recht dat de VN en de Staat toerekenbaar zijn tekortgeschoten in de nakoming van hun verbintenissen zoals in de dagvaarding omschreven, dat de VN en de Staat onrechtmatig hebben gehandeld jegens de **Stichting** c.s. zoals in de dagvaarding omschreven en dat de VN en de Staat hun verplichtingen om genocide te voorkomen, zoals bepaald in het Verdrag inzake de voorkoming en bestraffing van genocide, hebben geschonden. Zij vorderen voorts dat de Staat en de VN hoofdelijk worden veroordeeld tot vergoeding van de door thans verzoeksters tot cassatie 2 t/m 11 (hierna: [eiseres] c.s.) geleden schade, nader op te maken bij staat, alsmede tot betaling van een voorschot op de hun toekomende schadevergoeding en van de proceskosten.

1.2 De **Stichting** c.s. leggen aan hun vorderingen in hoofdzaak ten grondslag dat in juli 1995 in de Oost-Bosnische enclave **Srebrenica** genocide heeft plaatsgevonden, dat Fejzic c.s. en de personen wier belangen de **Stichting** behartigt (deze natuurlijke personen worden hierna ook wel

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aangeduid als: de Moeders van **Srebrenica**) nabestaanden zijn van de mannen die daarbij door de Bosnische Serviërs zijn vermoord, en dat de Staat en de VN jegens hen aansprakelijk zijn voor de als gevolg daarvan door hen geleden schade omdat zij, in strijd met gedane toezeggingen en met andere op hen rustende rechtsplichten, de genocide niet hebben voorkomen.

1.3 Bij brief van 17 september 2007 heeft de Staat aan de rechtbank doen toekomen een afschrift van de brief van 17 augustus 2007 van de VN aan de Nederlandse Permanente Vertegenwoordiger bij de VN. In deze brief heeft de VN gewezen op haar immuniteit van jurisdictie en uitdrukkelijk verklaard hiervan geen afstand te doen.

1.4 Bij brief van 20 september 2007 van de **Stichting** c.s. aan de rechtbank is hierop gereageerd.

1.5 Op de rolzitting van 7 november 2007 heeft het Openbaar Ministerie ambtshalve geconcludeerd dat de rechtbank zich onbevoegd zal verklaren voor zover de vorderingen van de **Stichting** c.s. zijn gericht tegen de VN.

1.6 Op de rolzitting van 7 november 2007 is door de rechtbank tegen de niet verschenen VN verstek verleend.

1.7 Bij incidentele conclusie van 12 december 2007 heeft de Staat gevorderd dat de rechtbank zich onbevoegd verklaart voor zover de vorderingen van de **Stichting** c.s. zijn gericht tegen de VN. Voor het geval de rechtbank de incidentele vordering tot onbevoegdheid ten opzichte van de VN zou afwijzen, heeft de Staat gevorderd dat zij als tussenkomende, dan wel als gevoegde partij wordt toegelaten in de hoofdzaak, voor zover de vorderingen van de **Stichting** c.s. tegen de VN zijn gericht.

1.8 De **Stichting** c.s. hebben in de incidenten verweer gevoerd.

1.9 Bij vonnis van 10 juli 2008 in de incidenten heeft de rechtbank zich onbevoegd verklaard tot kennisneming van de vordering tegen de VN en voorts geoordeeld dat een beslissing in het incident tot tussenkomst subsidiair tot voeging, achterwege kan blijven. De rechtbank heeft in de hoofdzaak de zaak verwezen naar de rol voor conclusie van antwoord aan de zijde van de Staat.

1.10 De **Stichting** c.s. zijn bij het hof 's-Gravenhage in hoger beroep gekomen van het vonnis van de rechtbank van 10 juli 2008.

1.11 De Staat heeft in appel verweer gevoerd en tevens een incidentele vordering ingesteld om te worden toegelaten als tussenkomende subsidiair als gevoegde partij in het hoger beroep van de **Stichting** c.s. tegen de VN.

1.12 De **Stichting** c.s. hebben verweer gevoerd in het incident.

1.13 Bij arrest van 30 maart 2010 heeft het hof in het incident de vordering van de Staat tot tussenkomst afgewezen en de Staat toegelaten als gevoegde partij aan de zijde van de VN. In het hoger beroep tegen het vonnis van de rechtbank van 10 juli 2008 heeft het hof dat vonnis bekrachtigd.

1.14 De **Stichting** c.s. hebben (tijdig) cassatieberoep ingesteld van het arrest van het hof, dat met betrekking tot de bevoegdheid ten aanzien van de vordering van de **Stichting** c.s. tegen de VN een eindarrest is.

1.15 De Staat heeft in cassatie verweer gevoerd en heeft voorts incidenteel cassatieberoep ingesteld. De **Stichting** c.s. en de Staat hebben hun standpunten schriftelijk doen toelichten gevolgd door repliek en dupliek. Tegen de VN is verstek verleend.

2 . Bespreking van het principaal cassatieberoep

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2.1 Het door de **Stichting** c.s. ingestelde principale cassatieberoep is opgebouwd uit negen middelen, uiteenvallend in verschillende onderdelen. Middel 1 heeft betrekking op de vraag **of** de Staat voldoende belang heeft bij het bevoegdheidsincident. Middel 2 is gericht tegen het oordeel van het hof dat door de verstekverlening tegen de VN niet tevens een oordeel is gegeven over de rechtsmacht van de Nederlandse rechter. De middelen 3 t/m 9 hebben, in de kern genomen, betrekking op verschillende aspecten van het oordeel van het hof over de aan de VN toegekende immuniteit.

2.2 Middel 1 is gericht tegen rov. 3.2 en 3.3 van het bestreden arrest, waarin het hof — volgens de klacht ten onrechte althans onbegrijpelijk — heeft geoordeeld dat de Staat voldoende belang heeft bij het bevoegdheidsincident. Volgens het middel heeft het hof met zijn oordeel de materiële samenhang van het feitencomplex miskend en de in deze zaak vergaande verwevenheid van de Nederlandse Staat en de VN. De desbetreffende rechtsoverwegingen luiden als volgt:

> '**3.2** In grief 2 betogen de **Stichting** c.s. dat de rechtbank (een onderdeel van) hun verweer (tegen de vordering van de Staat dat de rechtbank zich onbevoegd verklaart) onjuist, want te beperkt, heeft opgevat. De **Stichting** c.s. voeren aan dat de Staat naar verwachting in de hoofdzaak, ten aanzien van zijn eigen aansprakelijkheid, zal aanvoeren dat niet de Staat maar de VN dient te worden aangesproken voor de gebeurtenissen in **Srebrenica** in juli 1995 nadat eerst de VN door de incidentele vordering betreffende de bevoegdheid buiten de procedure is gehouden. Deze handelwijze van de Staat in combinatie met het feit dat er voor de nabestaanden van de genocide alsdan geen enkele toegang tot het recht bestaat, is juridisch, menselijk en moreel bezien onaanvaardbaar. De Staat presenteert hier het welbegrepen eigen belang als een volkenrechtelijke verplichting. Die volkenrechtelijke verplichting is niet in het leven geroepen met het doel om de eigen aansprakelijkheid van de Staat te ontlopen, aldus de **Stichting** c.s..
>
> **3.3** Deze grief gaat niet op. In de eerste plaats kan in (het hoger beroep van) dit bevoegdheidsincident niet vooruit worden gelopen op verweren die de Staat in de hoofdzaak kan voeren tegen de jegens hem aanhangig gemaakte vordering. Bovendien valt niet in te zien hoe de Staat zijn eventuele eigen aansprakelijkheid zou ontlopen doordat de vordering tegen de VN zou afstuiten op immuniteit van jurisdictie. Zoals hiervoor is overwogen zijn de zaken tegen de Staat en de VN afzonderlijke rechtsgedingen die ieder op hun eigen merites zullen worden beoordeeld, onafhankelijk van wat in de andere zaak zal worden beslist.'

2.3 Voor zover het middel is gericht tegen rov. 3.2 faalt het, omdat het hof in rov. 3.2 slechts een weergave heeft gegeven van hetgeen door de **Stichting** c.s. in grief 2 is betoogd. Voor het overige stuit het onderdeel af op hetgeen het hof in rov. 2.4 en 2.5, onbestreden in cassatie, heeft overwogen en waarnaar het hof in rov. 3.6, eveneens onbestreden in cassatie, heeft verwezen. In rov. 2.4 en 2.5 heeft het hof het volgende overwogen:

> '**2.4** Van voeging in de zin van art. 217 Rv. is sprake indien een derde (in dit geval de Staat) zich in het geding mengt om een van beide partijen bij te staan bij haar verweer tegen de vordering van de ander. Nu, zoals hiervoor is geconstateerd, de Staat wenst dat de vordering tegen de VN wordt afgewezen op grond van de aan de VN toekomende immuniteit van jurisdictie, dient de incidentele vordering te worden beoordeeld aan de hand van de eisen die voor voeging gelden. Voeging is niet uitgesloten door het enkele feit dat de partij aan wiens zijde de derde zich wenst te voegen niet in de procedure is verschenen. Aan voeging staat evenmin in de weg dat de Staat tezamen met de VN door de **Stichting** is gedagvaard. De vordering van de **Stichting** c.s. tegen de Staat en de vordering van de **Stichting** c.s. tegen de VN zijn zelfstandige vorderingen die onafhankelijk van elkaar bestaan. Door het enkele feit dat de Staat en de VN tezamen zijn gedagvaard is de Staat niet partij geworden in het geding van de **Stichting** c.s. tegen de

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VN.

2.5 Voor voeging is noodzakelijk maar ook voldoende dat de Staat belang heeft bij de uitkomst van de procedure omdat deze rechtens **of** feitelijk gevolgen voor hem kan hebben. In dit verband betoogt de Staat terecht dat hij er een redelijk belang bij heeft dat de Nederlandse rechter geen vonnissen wijst die conflicteren met de aan de VN verleende immuniteit van jurisdictie in verdragen waarbij Nederland partij is (zoals in art. 105 van het Handvest en Article II, § 2 van de Convention), omdat in zo'n geval de Staat, aan wie dergelijke rechterlijke uitspraken internationaalrechtelijk moeten worden toegerekend, zijn verplichtingen die voor hem uit die verdragen voortvloeien zou schenden. De Staat heeft er dan ook een redelijk belang bij om voor de rechter, bij wie het geding tegen de VN aanhangig is, zijn standpunt uiteen te zetten en te verdedigen dat die rechter zich onbevoegd moet verklaren. Aan dat belang doet niet af de mogelijkheid voor het Openbaar Ministerie om zich op de voet van art. 44 Rv. te laten horen. Niet valt in te zien waarom de Staat uitsluitend langs die weg zijn standpunt ten aanzien van de immuniteit van de VN aan de rechter zou kunnen **of** mogen overbrengen. Het hof zal de vordering tot voeging dan ook toewijzen.'

Anders dan het onderdeel betoogt, heeft het hof aldus niet de materiële samenhang van het feitencomplex miskend, maar heeft het hof kennelijk het belang van de Staat om zijn internationaalrechtelijke verplichtingen (in het onderhavige geval jegens de VN) na te komen zwaarder laten wegen. Dat oordeel geeft niet blijk van een onjuiste rechtsopvatting.

2.4 Onderdeel 1.4 klaagt dat het hof heeft miskend dat het geen beletsel is om in een incident vooruit te lopen op het te voeren verweer ten gronde in een procedure als de onderhavige. Het onderdeel faalt, omdat het blijk geeft van een onjuiste rechtsopvatting. Weliswaar kan de gedaagde die de exceptie van onbevoegdheid opwerpt er spoedshalve belang bij hebben ook reeds te doen blijken van zijn standpunt in het materiële geschil(2), maar dit laat onverlet dat het verweer dat de Nederlandse rechter geen rechtsmacht heeft geheel los van het geschil in de hoofdzaak en derhalve vóór alle weren ten gronde moet worden aangevoerd en ook dient te worden beoordeeld.(3)

2.5 Middel 2 is gericht tegen rov. 3.4 van het bestreden arrest, waarin het hof heeft geoordeeld dat internationale bevoegdheid om van een vordering kennis te nemen niet tot de formaliteiten behoort waaraan voldaan moet zijn, wil de rechter verstek verlenen. Het middel betoogt dat verstekverlening tegen een niet verschenen internationale organisatie alleen kan worden verleend na een ambtshalve toetsing door de rechter van zijn internationaalpubliekrechtelijke bevoegdheid.

2.6 Het middel faalt, omdat het uitgaat van een onjuiste rechtsopvatting. Het hof heeft terecht geoordeeld dat de vraag **of** tegen een niet verschenen gedaagde verstek kan worden verleend, voorafgaat aan en geheel los staat van de vraag naar de internationale bevoegdheid van de rechter. De vraag naar de internationale bevoegdheid van de aangezochte rechter, met inbegrip van de vraag naar immuniteit van jurisdictie, komt pas aan de orde ná de verstekverlening. Dit volgt duidelijk uit HR 26 maart 2010, LJN:BK9154, NJ 2010/526, m.nt. Th.M. de Boer (Azeta/Chili). In dit arrest betrof het weliswaar een kwestie van immuniteit van jurisdictie van een vreemde staat, maar niet valt in te zien dat in het geval van immuniteit van jurisdictie van een internationale organisatie anders zou moeten worden geoordeeld.

2.7 De middelen 3 t/m 9 zijn gericht tegen rov. 4.1 t/m 5.14 van het bestreden arrest, waarin het hof is ingegaan op de vraag **of** aan de VN immuniteit van jurisdictie toekomt. Het daarin gegeven oordeel van het hof komt samengevat op het volgende neer.

(i) De in art. II (2) van de 'Convention on the privileges and immunities **of** the United Nations' (hierna: de Conventie) omschreven immuniteit laat geen andere uitleg toe dan dat aan de VN de meest vergaande immuniteit is verleend, in die zin dat de VN niet voor enig

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nationaal gerecht van de landen die partij zijn bij de Conventie kan worden gedaagd (rov. 4.2).

(ii) Met de Conventie en dus ook met art. II (2) is uitvoering gegeven aan art. 105 lid 3 van het Handvest VN, in die zin dat in art. II (2) van de Conventie nader is bepaald welke immuniteiten noodzakelijk zijn voor de verwezenlijking van de doelstellingen van de VN (rov. 4.4–4.5).

(iii) De vraag rijst **of** deze immuniteit in dit geval moet wijken voor het in art. 6 EVRM en art. 14 Internationaal Verdrag inzake burgerrechten en politieke rechten (IVBPR) neergelegde recht op toegang tot de rechter (rov. 5.1). Deze vraag moet volgens het hof aan de hand van de criteria neergelegd in de rechtspraak van het EHRM ontkennend worden beantwoord (rov. 5.2–5.7), omdat de immuniteit van jurisdictie die aan de VN is verleend rechtstreeks verband houdt met het algemene belang dat met handhaving van vrede en veiligheid in de wereld is gemoeid.

(iv) Alleen klemmende redenen kunnen tot de gevolgtrekking leiden dat de immuniteit van de VN niet proportioneel is ten opzichte van het daarmee nagestreefde doel (rov. 5.7). De **Stichting** c.s. hebben in de eerste plaats als klemmende reden aangevoerd dat de VN onvoldoende heeft gedaan om de genocide in **Srebrenica** te voorkomen en daarmee in strijd heeft gehandeld met art. 1 van het Verdrag inzake de voorkoming en bestraffing van genocide. In de tweede plaats is als klemmende reden aangevoerd dat de VN, in strijd met haar verplichting uit art. VIII, § 29 aanhef en onder (a) van de Conventie, geen regelingen heeft getroffen voor passende wijzen van beslechting van geschillen die voortvloeien uit overeenkomsten **of** andere geschillen van privaatrechtelijke aard waarbij de VN partij is (rov. 5.9).

(**v**) Over de als eerste aangevoerde omstandigheid heeft het hof overwogen dat de **Stichting** c.s. hebben erkend dat de VN niet zelf genocide heeft gepleegd. Volgens het hof wordt de VN door de **Stichting** c.s. in wezen verweten dat zij nalatig is geweest in het voorkomen van genocide. Dit verwijt is, aldus het hof, ernstig, maar niet zo pregnant dat de immuniteit van de VN daarvoor moet wijken **of** dat het door de VN gedane beroep op immuniteit reeds daarom onaanvaardbaar is (rov. 5.10).

(vi) De tweede omstandigheid van het ontbreken van een met voldoende waarborgen omklede rechtsgang wordt door het hof niet als een zo vergaande beperking van het recht op toegang tot de rechter geacht, omdat de **Stichting** c.s. in ieder geval twee categorieën partijen kunnen aanspreken voor de door de Moeders van **Srebrenica** geleden schade, te weten de daders en de Staat (rov. 5.13 en 5.14).

2.8 Middel 3 richt zich — in de onderdelen 3.1 t/m 3.6 — tegen de rechtsoverwegingen 4.1 t/m 5.1 van het arrest. Volgens de klacht heeft het hof ten onrechte althans onbegrijpelijk geoordeeld dat de VN immuniteit toekomt waar een behoorlijke rechtsgang ontbreekt.

2.9 De onderdelen 3.2 t/m 3.4 (onderdeel 3.1 bevat geen zelfstandige klacht) betogen dat het oordeel van het hof dat de immuniteit van de VN zo breed mogelijk is geformuleerd en dat de VN niet voor enig nationaal gerecht kan worden gedagvaard, in strijd is met het (internationaal) recht. Volgens de onderdelen kent het internationaal recht de VN een beperktere vorm van immuniteit toe, welke — onder andere — afhankelijk is van het bestaan van een alternatieve effectieve rechtsgang ten behoeve van de rechtzoekende. Dit heeft het hof volgens de onderdelen miskend.

2.10 Bij de bespreking van dit middel kunnen de volgende opmerkingen voorop worden gesteld. Bij staatsimmuniteit ligt de grondslag in de soevereine gelijkheid van staten en wordt een onderscheid gemaakt tussen typische overheidshandelingen (acta iure imperii), waarvoor immuniteit wordt verleend, en rechtshandelingen die de staat op voet van gelijkheid met

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particulieren is aangegaan (acta iure gestionis) en waarvoor geen immuniteit wordt verleend. De grondslag van de immuniteit van internationale organisaties ligt in de noodzaak het functioneren van internationale organisaties te beschermen.(4) Bij immuniteit van internationale organisaties moet een onderscheid worden gemaakt tussen officiële en niet-officiële activiteiten. Van officiële activiteiten, waarvoor immuniteit wordt verleend, is sprake wanneer deze samenhangen met het bereiken van het doel van de organisatie. In dit verband wordt ook wel gesproken van de functionele immuniteit. Doorgaans kunnen internationale organisaties aanspraak maken op immuniteiten en diverse privileges(5) die veelal in hun oprichtingsstatuut zijn geregeld. Een nadere uitwerking van deze immuniteiten en privileges vindt plaats in afzonderlijke, tussen de lidstaten van de desbetreffende organisatie, gesloten multilaterale verdragen.(6) Een voorbeeld hiervan is de reeds onder 2.7 genoemde 'Convention on the privileges and immunities **of** the United Nations' (Verdrag nopens de voorrechten en immuniteiten van de Verenigde Naties van 13 februari 1946, Stb. 1946, I 224; hierna: de Conventie), welk verdrag voor Nederland is goedgekeurd bij Wet van 24 december 1947, Stb. 1947, H 452. In de considerans van de Conventie wordt verwezen naar art. 104 en art. 105 van het Handvest der Verenigde Naties (hierna: Handvest VN). In art. 104 is bepaald dat de Organisatie van de Verenigde Naties op het grondgebied van elk van haar Leden de handelingsbevoegdheid geniet die nodig kan zijn voor de uitoefening van haar functies en de verwezenlijking van haar doelstellingen. Art. 105 lid 1 Handvest VN bepaalt dat de Organisatie op het grondgebied van elk van haar Leden de voorrechten en immuniteiten geniet die noodzakelijk zijn voor de verwezenlijking van haar doelstellingen. Hier is sprake van een toekenning van functionele immuniteit, namelijk in het geval immuniteit noodzakelijk is om de organisatie in staat te stellen haar taak **of** taken effectief uit te voeren en haar doelstelling te verwezenlijken.(7) De doelstellingen van de Verenigde Naties zijn neergelegd in art. 1 Handvest VN en hebben onder meer betrekking op de handhaving van de internationale vrede en veiligheid.

2.11 In art. II, § 2, van de Conventie is de immuniteit van de VN nader geregeld en is in de Engelse tekst(8) het volgende bepaald:

> **'Section 2 .**
>
> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form **of** legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver **of** immunity shall extend to any measure **of** execution.'

Ingevolge art. II, § 2, van de Conventie wordt aan de VN immuniteit toegekend, tenzij de VN daarvan afstand doet. Doet de organisatie geen afstand van immuniteit, dan is het voor de burger die meent dat zijn rechten door de organisatie zijn geschonden, in beginsel onmogelijk de organisatie in rechte voor een nationale rechter aan te spreken. De tekst van art. II, § 2, wijst in de richting van toekenning van absolute immuniteit ('from every form **of** legal process'), terwijl de bepaling een nadere uitwerking is van art. 105 lid 1 Handvest VN waarin een functionele immuniteit is neergelegd ('as necessary for the fulfilment **of** its purposes'). Zodra de VN privaatrechtelijk wordt aangesproken in een geschil dat betrekking heeft op de effectieve uitvoering van haar taken en doelstellingen, te weten de handhaving van de internationale vrede en veiligheid, geniet de VN immuniteit. Gezegd kan worden dat deze (functionele) immuniteit in dat geval absoluut is.(9)

2.12 In het algemeen geldt dat de omstandigheid dat aan een internationale organisatie (functionele) immuniteit wordt toegekend, niet betekent dat derden geen enkel middel hebben om deze organisatie op haar (privaatrechtelijke) verplichtingen aan te spreken. De immuniteit heeft niet tot doel een organisatie te vrijwaren van haar verplichtingen jegens derden.(10) Soms wordt in een alternatieve wijze van geschillenbeslechting met de internationale organisatie voorzien. Deze alternatieve rechtsgang kan zijn grondslag hebben in het oprichtingsstatuut van de desbetreffende organisatie, maar ook kan in een verdrag aan de organisatie de verplichting wordt opgelegd daarvoor zorg te dragen.(11) Zo schrijft art. VIII, § 29, van de Conventie voor dat de VN een

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regeling zal treffen voor passende wijzen van beslechting van (privaatrechtelijke) geschillen. De bepaling luidt als volgt:

> **'Section 29 . The United Nations shall make provisions for appropriate modes of settlement of:**
>
> **(a)** disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
>
> **(b)** disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'(12)

De regeling waarop art. VIII, § 29, betrekking heeft, ziet op de beslechting van geschillen van privaatrechtelijke aard ('contracts or other disputes of a private law character'). Reeds in 1949 is door de VN een onafhankelijk orgaan (United Nations Administrative Tribunal) in het leven geroepen voor de beslechting van geschillen over arbeidsovereenkomsten van stafleden van het secretariaat van de VN. In 2009 is een volledig nieuw systeem voor de beslechting van dit soort geschillen ingevoerd.(13) Voor de aansprakelijkheid voortvloeiend uit VN vredesoperaties is op basis van art. VIII, § 29, van de Conventie een model voor een 'status-of-forces agreement for peace-keeping operations' opgesteld.(14) Dit model is onder meer 'intended to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries on whose territory peace-keeping operations are deployed'.(15) Het model bepaalt in art. III dat de Conventie op de desbetreffende VN vredesoperatie van toepassing is en kent in art. VII een regeling inzake geschillenbeslechting op grond waarvan

> 'any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision in the present Agreement, shall be settled by a standing claims commission to be established for that purpose. (...)'.

2.13 In dit verband vermeld ik dat op 15 mei 1993 te Sarajevo tussen de VN en Bosnië-Herzegovina is ondertekend de 'Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina'.(16) Dit verdrag is opgesteld op basis van het genoemde model van een 'status-of-forces agreement' en regelt de status van de 'United Nations Protection Force in Bosnia and Herzegovina' (UNPROFOR). Nederland heeft door uitzending van onder meer een infanteriebataljon (bekend onder de naam 'Dutchbat') van de Luchtmobiele Brigade van de Koninklijke Landmacht deelgenomen aan UNPROFOR.(17) In de overeenkomst van 15 mei 1993 wordt in art. II verwezen naar de Conventie:

> '**3** . The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to UNPROFOR subject to the provisions specified in the present Agreement.
>
> **4** . Article II of the Convention, which applies to UNPROFOR, shall also apply to the property, funds and assets of participating States used in connection with UNPROFOR'.

In art. VII van deze overeenkomst is de 'settlement of disputes' geregeld in overeenstemming met hetgeen is bepaald in het model van de 'status-of-forces agreement'. Art. VII van de Overeenkomst van 15 mei 1993 luidt, voor zover hier van belang, als volgt:

> '**48** . Except as provided in paragraph 50, any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the Courts of Bosnia and Herzegovina do not have jurisdiction because of any provision of the

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present Agreement, shall be settled by a standing claims commission to be established for that purpose'.

Daarnaast regelt § 48 enige procedurele aspecten, waaronder de oprichting en de tripartiete samenstelling van de claims commission. De Overeenkomst blijft ingevolge art. X, § 55, van kracht totdat de laatste troepen van UNPROFOR uit Bosnië-Herzegovina zijn vertrokken, waarbij de bepalingen van art. VII, § 48, blijven gelden 'until all claims have been settled that arose prior to the termination **of** the present Agreement and were submitted prior to or within three months **of** such termination'.(18)

2.14 In het rapport van 20 september 1996 aan de Algemene Vergadering heeft de Secretaris-Generaal enige aanbevelingen ten aanzien van de aansprakelijkheid voor VN vredesoperaties gedaan en daarin opgemerkt dat de bestaande procedures onder de verschillende 'status-**of**-forces agreements' adequaat zijn.(19)

2.15 De Commissie van Advies inzake Volkenrechtelijke Vraagstukken (CAVV) heeft in haar advies van 8 mei 2002 inzake aansprakelijkheid voor onrechtmatige daden tijdens VN vredesoperaties opgemerkt dat het leerstuk van de aansprakelijkheid van internationale organisaties 'nog in de kinderschoenen' staat en dat, gelet op de geringe hoeveelheid praktijkgevallen waarin de aansprakelijkheid van de VN voor VN vredesoperaties aan de orde is gekomen, voorzichtigheid is geboden bij het trekken van conclusies.(20) De CAVV heeft de oprichting van een 'Central Claims Commission' binnen de VN bepleit waarbij slachtoffers van VN vredesoperaties een claim kunnen indienen en heeft gesuggereerd dat Nederland hiertoe initiatieven zou moeten ontwikkelen.(21)

2.16 Een algemene regeling voor de aansprakelijkheid van internationale organisaties is evenmin tot stand gebracht.(22) Wel heeft de Algemene Vergadering van de VN in 2001 aan de International Law Commission (ILC) gevraagd een dergelijke regeling te ontwerpen met betrekking tot de aansprakelijkheid van internationale organisaties. De ILC heeft in 2011 tijdens haar 63e Zitting in Genève in een tweede lezing een ontwerp-tekst aanvaard en aan de Algemene Vergadering van de VN aanbevelingen gedaan om te komen tot een verdrag op basis van dit ontwerp.(23)

2.17 De vraag dient zich aan **of**, en zo ja in welke gevallen, een internationale organisatie zich kan beroepen op immuniteit van jurisdictie. In het algemeen geldt dat de aanwezigheid van een behoorlijke, alternatieve wijze voor de beslechting van geschillen met de organisatie moet worden gezien als een voorwaarde voor toepassing van immuniteit van jurisdictie. Een internationale organisatie kan zich niet met een beroep op immuniteit onttrekken aan haar verantwoordelijkheden.(24) In beginsel zullen twee, ieder voor zich zwaarwegende, maar tegenstrijdige belangen moeten worden afgewogen: enerzijds het belang dat de internationale organisatie er bij heeft dat onder alle omstandigheden een onafhankelijke en ongehinderde vervulling van haar taken is gewaarborgd, anderzijds het belang dat haar wederpartij erbij heeft dat haar geschil met de internationale organisatie door een onafhankelijke en onpartijdige rechterlijke instantie wordt behandeld en beslist.(25) Dat laatste belang komt tot uitdrukking in het recht op toegang tot de rechter, zoals dit wordt gewaarborgd door art. 14 lid 1 IVBPR en het op dit punt daarmee overeenstemmende art. 6 lid 1 EVRM.(26) Nu beide verdragen — het mondiale IVBPR en het regionale EVRM — een gelijk beschermingsniveau bieden(27), bestaat in de onderhavige zaak geen concreet belang bij een beroep op art. 14 IVBPR, zodat ik deze laatste bepaling verder buiten beschouwing laat.(28)

2.18 In het kader van art. 6 lid 1 EVRM geldt dat het toekennen van immuniteit van jurisdictie aan staten en aan internationale organisaties een proportionele beperking van het recht op toegang tot de rechter is en past binnen de aan de verdragsstaten bij het EVRM toekomende 'margin **of** appreciation'.(29) Het EHRM kreeg in de zaak Waite and Kennedy/Germany(30) te oordelen over de vraag **of** art. 6 lid 1 EVRM is geschonden in het geval dat de Duitse rechter immuniteit van jurisdictie heeft verleend aan de 'European Space Agency' (ESA) in een procedure die tegen deze

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organisatie door twee van haar voormalige werknemers is aangespannen. Het EHRM heeft, voor zover van belang, het volgende overwogen:

'**63** . Like the Commission, the Court points out that the attribution **of** privileges and immunities to international organisations is an essential means **of** ensuring the proper functioning **of** such organisations free from unilateral interference by individual governments.

The immunity from jurisdiction commonly accorded by States to international organizations under the organisations' constituent instruments or supplementary instruments is a long-standing practice established in the interest **of** the good working **of** these organizations. The importance **of** this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains **of** modern society.

Against this background, the Court finds that the rule **of** immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.

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

(...).

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

68 . 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.

69 . The ESA-Convention, together with its Annex I, expressly provides for various modes **of** settlement **of** private-law disputes, in staff matters as well as in other litigation (...).

Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board.

(...)

72 . The Court shares the Commission's conclusion that, bearing in mind the legitimate aim **of** immunities **of** international organisations (see paragraph 63 above), the test **of** proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 **of** the Convention and its guarantee **of** access to court as necessarily requiring the application **of** national legislation in such matters would, in the Court's view, thwart the proper functioning **of** international organizations and run counter to the current trend towards extending and strengthening international cooperation.'

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2.19 Uit deze beslissing volgt dat een alternatieve rechtsgang beschikbaar moet zijn en dat daarvoor een interne rechtsgang die door de organisatie in het leven is geroepen in aanmerking kan komen.(31) Bovendien brengt volgens het EHRM de proportionaliteitseis mee dat een internationale organisatie niet op basis van art. 6 lid 1 EVRM gedwongen kan worden zich aan de rechtsmacht van de nationale rechter te onderwerpen voor de beslechting van het onderhavige arbeidsgeschil. Anders zou de 'proper functioning' van internationale organisaties worden doorkruist.

2.20 De aansprakelijkheid onder het EVRM voor het handelen van nationale troepen in het kader van een VN vredesoperatie is bij het EHRM aan de orde gekomen in de (gevoegde) zaken Behrami en Saramati.(32) Hierin heeft het EHRM in rov. 149 het volgende overwogen:

> 'Since operations established by UNSC Resolutions under Chapter VII **of** the UN Charter are fundamental to the mission **of** the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions **of** Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course **of** such missions, to the scrutiny **of** the Court. To do so would be to interfere with the fulfillment **of** the UN's key mission in this field including, as argued by certain parties, with the effective conduct **of** operations. It would also be tantamount to imposing conditions on the implementation **of** UNSC Resolution which were not provided for in the text **of** the Resolution itself. This reasoning equally applies to voluntary acts **of** the respondent States such as the vote **of** a permanent member **of** the UNSC in favour **of** the relevant Chapter VII Resolution and the contribution **of** troops to the security mission: such acts may not have amounted to obligations flowing from membership **of** the UN but they remained crucial to the effective fulfillment by the UNSC **of** its Chapter VII mandate and, consequently, by the UN **of** its imperative peace and security aim'.

In deze beslissing ging het niet over de immuniteit van jurisdictie van de VN en evenmin over art. 6 EVRM, maar ging het om de vraag **of** de in de procedures betrokken staten aansprakelijk waren voor het handelen van hun in het kader van VN missies ingezette troepen. Het optreden van deze onder VN mandaat optredende troepen wordt in beginsel aan de VN toegerekend, maar het EHRM is ratione personae onbevoegd van de klachten kennis te nemen.

2.21 Ik keer terug naar het middel. Het geschil in de onderhavige zaak heeft betrekking op de uitvoering van de kerntaken van de VN en de verwezenlijking van haar doelstellingen, namelijk de handhaving van de internationale vrede en veiligheid.(33) De **Stichting** c.s. stellen zich immers op het standpunt dat de VN zijn taken niet goed heeft vervuld en is tekortgeschoten in de nakoming van zijn verplichtingen. Het hof heeft terecht overwogen dat uit art. 105 Handvest VN en art. II, § 2, Conventie volgt dat de VN de meest vergaande immuniteit toekomt, in die zin dat de VN niet voor enig nationaal gerecht van de landen die partij zijn bij de Conventie kan worden gedaagd (rov. 4.2). Het hof heeft voorts terecht overwogen dat in art. II, § 2, Conventie, uitvoering is gegeven aan art. 105 lid 1 Handvest VN en dat daarin is bepaald welke immuniteiten nodig zijn voor de verwezenlijking van de doelstellingen van de VN (rov. 4.4). Het hof heeft voorts overwogen dat het niet gaat om de vraag **of** het beroep op immuniteit in het voorliggende geval noodzakelijk is voor de verwezenlijking van de doelstellingen van de VN, maar **of** het daarvoor noodzakelijk is dat de VN in het algemeen immuniteit van jurisdictie wordt verleend (rov. 4.5). In de daarop volgende rechtsoverwegingen (vanaf rov. 5.1) heeft het hof bezien **of** in het onderhavige geval die immuniteit moet wijken voor het recht op toegang tot de rechter. Dit brengt mee dat het in rov. 5.1 gegeven oordeel 'dat aan de VN immuniteit van jurisdictie toekomt' niet anders moet worden begrepen dan dat de VN in beginsel immuniteit van jurisdictie toekomt. Dat oordeel gaat, in het licht van hetgeen ik hierboven heb uiteengezet, uit van een juiste rechtsopvatting en is niet onbegrijpelijk, zodat de onderdelen 3.2 en 3.3 falen.

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2.22 Onderdeel 3.4 verwijt het hof te hebben miskend dat bij gebreke van een alternatieve effectieve rechtsgang bij de internationale organisatie, geen ruimte is voor immuniteit.

2.23 Uit het hierboven in 2.18 aangehaalde en door het hof in zijn overwegingen betrokken arrest van het EHRM van 18 februari 1999 (Waite and Kennedy/Germany) blijkt dat het EHRM de toekenning van immuniteiten ziet als een essentieel middel ter verzekering van de 'proper functioning' van de internationale organisatie en dat de beperking van het recht op toegang tot de rechter proportioneel dient te zijn. Het hof heeft, nadat het heeft geoordeeld dat het beroep op immuniteit legitiem is, bij de beantwoording van de vraag **of** het beroep ook proportioneel is, terecht rekening gehouden met de omstandigheid dat de VN onder de internationale organisaties een bijzondere plaats inneemt (zie rov. 5.7).(34) Tegen die achtergrond is het hof van oordeel dat alleen klemmende redenen tot de conclusie kunnen leiden dat de immuniteit van de VN niet proportioneel is ten opzichte van het daarmee nagestreefde doel. Dat oordeel is niet onjuist en evenmin onbegrijpelijk.

2.24 In rov. 5.11 heeft het hof overwogen dat uit de stellingen van de **Stichting** c.s. niet duidelijk is geworden waarom voor hen niet de mogelijkheid zou bestaan om de daders van de genocide en mogelijk ook degenen die voor hen verantwoordelijk kunnen worden geacht, aan te spreken voor een gerecht dat aan de eisen van art. 6 EVRM voldoet. Hoewel deze redenering van het hof mank gaat ten aanzien van de VN, die immers juist niet in rechte kan worden aangesproken gelet op de aan deze organisatie toekomende immuniteit, faalt onderdeel 3.4 bij gebrek aan belang. Uit de onder 2.18 aangehaalde rechtspraak van het EHRM over art. 6 lid 1 EVRM volgt dat de toekenning van immuniteit aan internationale organisaties een proportionele beperking van het recht op toegang tot de rechter is en past binnen de aan de verdragsstaten toekomende 'margin **of** appreciation'. De door de **Stichting** c.s. tegen de VN ingestelde vordering raakt de VN in de kern van haar taken en doelstellingen, zoals het hof in rov. 5.7 ook heeft overwogen. Het functioneren van de VN en daarmee het uitvoeren van onder het Handvest VN vallende vredesoperaties zou buitengewoon bemoeilijkt zo niet onmogelijk worden gemaakt, indien aan de VN voor deze functionele activiteiten geen immuniteit zou toekomen en de VN voor een nationale rechter kan worden gedaagd ter zake van deze activiteiten. Voorts volgt uit het arrest van het EHRM van 2 mei 2007 (in de zaken Behrami en Saramati) dat het EHRM zich terughoudend opstelt wanneer VN operaties in het geding zijn. Het hof heeft daarom terecht geoordeeld dat de door de **Stichting** c.s. aangevoerde redenen niet klemmend genoeg zijn om aan de VN geen immuniteit toe te kennen. De vraag naar de verhouding tussen het Handvest VN (vgl. art. 103) en het EVRM laat ik buiten beschouwing, omdat in het onderhavige geval van strijd met het EVRM en derhalve van een conflict tussen beide instrumenten geen sprake is.

2.25 Ten overvloede merk ik nog het volgende op over de vraag **of** in het onderhavige geval een alternatieve rechtsgang heeft bestaan. Zoals ik hierboven in 2.13 heb aangegeven, is in de 'Agreement on the status **of** UNPROFOR' van 15 mei 1993 in art. VII, § 48, voorzien in een wijze van geschillenbeslechting. In de feitelijke instanties hebben de **Stichting** c.s. betoogd dat deze Overeenkomst in feite geen reële mogelijkheid biedt om de VN aan te spreken.(35) De Staat heeft deze stellingen onvoldoende weersproken, zodat het hof in rov. 5.11 heeft overwogen dat daarom tussen partijen vaststaat dat de VN geen regeling heeft getroffen voor de beslechting van geschillen van privaatrechtelijke aard. Deze vaststelling (in cassatie onbestreden) geldt tussen de **Stichting** c.s. en de Staat, maar zij geldt naar mijn mening niet ten opzichte van de VN. De VN is immers in de procedure niet verschenen, de Staat is door het enkele feit samen met de VN te zijn gedagvaard nog geen partij geworden in het geding van de **Stichting** c.s. tegen de VN (rov. 2.4) en de Staat is uiteindelijk door het hof toegelaten als gevoegde partij aan de zijde van de (niet-verschenen) VN.(36) Het hof heeft het vonnis van de rechtbank 's-Gravenhage van 10 juli 2008 bekrachtigd, waarin de onbevoegdheid is uitgesproken tot kennisneming van de vordering tegen de VN. Er is geen rechtsregel die bepaalt dat de proceshouding en de stellingen van de gevoegde partij worden toegerekend aan de partij aan wier zijde de gevoegde partij zich heeft geschaard.(37) Ik meen dan ook dat de hierboven vermelde vaststelling niet geldt ten aanzien van

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de VN. Daaruit volgt dat geconstateerd moet worden dat de VN in de genoemde Overeenkomst van 15 mei 1993 in een alternatieve wijze van geschillenbeslechting heeft voorzien, nog daargelaten de vraag **of** de nabestaanden van de slachtoffers van de val van de enclave **Srebrenica** in de omstandigheden van het concrete geval voldoende gelegenheid hebben gehad deze alternatieve rechtsgang te benutten.(38) Uit het arrest van het EHRM inzake Waite and Kennedy volgt dat een interne rechtsgang kan worden aanvaard met het oog op de vraag **of** daarmee het recht op toegang tot de rechter in de zin van art. 6 lid 1 EVRM is gewaarborgd. Naar mijn oordeel kan ook hierop het middel stranden.

2.26 Nu middel 3 faalt, stranden de daarop voortbouwende klachten in de middelen 4 t/m 9 bij gebrek aan belang. Deze middelen zijn immers erop gebaseerd dat een afweging moet worden gemaakt tussen het recht op immuniteit voor de internationale organisatie en het recht op toegang tot de rechter voor de burger. Deze afweging moet bij de huidige stand van de (internationale) rechtsontwikkeling in het onderhavige geval ertoe leiden dat aan de VN als internationale organisatie voor de handhaving van de vrede en de veiligheid in de wereld met het oog op de uitoefening van haar taken en de verwezenlijking van haar doelstellingen het voorrecht van immuniteit wordt toegekend. Dat de VN in het kader van haar 'proper functioning' zoals omschreven in het Handvest VN eerder immuniteit zal toekomen dan welke andere internationale organisatie dan ook, legt op de VN naar mijn mening een zware verplichting zorg te dragen voor een effectieve alternatieve rechtsgang voor de beslechting van geschillen die naar aanleiding van VN vredesoperaties tussen de organisatie en burgers zijn ontstaan. Ik moge op dit punt volstaan met te verwijzen naar het advies van de CAVV van 8 mei 2002 (zie onder 2.15) en tegelijkertijd de wens uitspreken dat voor de toekomst een adequate oplossing zal worden geboden.

2.27 Zoals gezegd, bouwen de middelen 4 t/m 9 voort op middel 3. Voor de volledigheid loop ik deze middelen kort na. Middel 4 dat is opgebouwd uit de onderdelen A, B en C, richt zich tegen rov. 4.4, 4.5, 5.1, 5.2, 5.6 en 5.7 van het bestreden arrest, waarin het hof heeft beslist dat na afweging van de mogelijkheden van de nabestaanden van de slachtoffers van **Srebrenica** om recht te zoeken, aan de VN immuniteit toekomt.

2.28 Onderdeel A, uiteenvallend in de onderdelen 4.1 t/m 4.3, heeft betrekking op het oordeel in rov. 5.1 en het toepassingsgebied van art. 6 EVRM. Volgens het onderdeel heeft het hof miskend dat art. 6 EVRM en art. 14 IVBPR rechtstreekse werking hebben en niet slechts via gewoonterecht.

2.29 Het onderdeel bouwt voort op middel 3 en moet in het lot daarvan delen. Overigens missen de **Stichting** c.s. belang bij deze klacht. Wat er immers zij van de vraag **of** het hof ten onrechte (slechts) veronderstellenderwijs van de toepasselijkheid van art. 6 EVRM en art. 14 IVBPR is uitgegaan, het hof heeft in de daarop volgende overwegingen de maatstaven van het EVRM tot uitgangspunt genomen.

2.30 Onderdeel B, uiteenvallend in de subonderdelen 4.4 en 4.5, is gericht tegen rov. 5.2 van het bestreden arrest en betoogt in de kern genomen dat het hof art. 6 EVRM heeft miskend. Het onderdeel faalt, omdat het eveneens voortbouwt op middel 3.

2.31 Onderdeel C, opgebouwd uit de subonderdelen 4.6 t/m 4.20, is gericht tegen rov. 4.4, 4.5, 5.6 en 5.7 van het bestreden arrest. Volgens onderdeel 4.6 geeft het hof blijk van een onjuiste rechtsopvatting althans van een onbegrijpelijke motivering ten aanzien van het karakter en de omvang van de immuniteit, ook in relatie tot overige bepalingen van internationaal recht.

2.32 De klacht faalt, omdat — anders dan in het onderdeel wordt betoogd — het hof niet heeft geoordeeld dat sprake is van een algemene en onbeperkte immuniteit. Het hof heeft geoordeeld — althans het oordeel van het hof kan niet anders worden begrepen dan — dat de VN in beginsel immuniteit van jurisdictie toekomt (zie rov. 4.2), maar dat daarbij moet worden nagegaan **of** deze immuniteit in een specifiek geval moet wijken voor het in art. 6 EVRM en art. 14 IVBPR neergelegde recht op toegang tot de rechter.

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2.33 De onderdelen 4.7 en 4.8 bevatten geen zelfstandige klacht.

2.34 Onderdeel 4.9 betoogt dat de Conventie, anders dan het hof heeft overwogen, wel degelijk wordt beperkt door het hoger gerangschikte art. 105 Handvest VN. Het onderdeel faalt, omdat het feitelijke grondslag mist. Anders dan de klacht kennelijk betoogt, heeft het hof niet geoordeeld dat de Conventie niet wordt beperkt door het Handvest VN. Het hof heeft slechts geoordeeld dat de Conventie in haar uitwerking van art. 105 Handvest VN niet verder is gegaan dan door dat Handvest is toegestaan.

2.35 De onderdelen 4.10 t/m 4.12 klagen dat het hof in rov. 4.5 blijk heeft gegeven van een onjuiste rechtsopvatting door te oordelen dat het voor de verwezenlijking van de doelstellingen van de VN noodzakelijk is dat aan de VN in het algemeen immuniteit van jurisdictie wordt verleend en dat een specifieke, voor dit geval bestemde, toetsing niet aan de orde is. Voor zover de onderdelen voortbouwen op middel 3, delen zij in het lot daarvan. Voor het overige falen de onderdelen, niet alleen omdat rov. 4.5 geen dragende overweging is, maar het hof bovendien in rov. 4.1 t/m 4.5 slechts heeft overwogen **of** de VN in verband met de verwezenlijking van haar doelstellingen immuniteit toekomt.

2.36 Onderdeel 4.13 is gericht tegen rov. 5.6 van het bestreden arrest, waarin het hof heeft vastgesteld dat de immuniteit van de VN in het algemeen een legitiem doel heeft. Volgens het onderdeel geeft het hof met die vaststelling blijk van een onjuiste rechtsopvatting.

2.37 De klacht faalt. De grondslag van de immuniteit van internationale organisaties is gelegen in de noodzaak om het functioneren van internationale organisaties te beschermen. Ik verwijs naar mijn opmerkingen onder 2.10. Het hof heeft zich onder meer gebaseerd op uitspraken van het EHRM (Waite and Kennedy) en heeft met zijn bestreden oordeel niet blijk gegeven van een onjuiste rechtsopvatting.

2.38 Voor zover het onderdeel nog klaagt dat het hof ten onrechte niet heeft getoetst **of** het niet voorkomen van genocide en van andere ernstige schendingen van fundamentele mensenrechten onder de functionele immuniteit van art. 105 VN-Handvest valt, faalt het omdat het feitelijke grondslag mist. Het hof heeft ten aanzien hiervan in rov. 5.10 immers overwogen dat hoewel het aldus aan de VN gemaakt verwijt ernstig is, het niet zo pregnant is dat de immuniteit daarvoor moet wijken **of** dat het beroep van de VN op immuniteit reeds daarom onaanvaardbaar is.

2.39 In onderdeel 4.14 valt de klacht te lezen dat het hof ten onrechte de mensenrechten ondergeschikt maakt aan een op deze wijze grenzeloze macht van de VN.

2.40 Het onderdeel kan niet tot cassatie leiden. Het hof heeft in rov. 5.9 ten aanzien van het belang van de VN om niet genoodzaakt te worden voor de nationale rechter te verschijnen en ten aanzien van het belang van de Moeders van **Srebrenica** geoordeeld dat het gaat om twee ieder voor zich uiterst belangrijke rechtsbeginselen. Het hof heeft dus, anders dan het onderdeel doet voorkomen, niet de mensenrechten — zonder meer — ondergeschikt gemaakt aan het belang van de VN. De omstandigheid dat — naar 's hofs oordeel — uiteindelijk maar één de doorslag kan geven, doet daaraan niet af. Voorts is het oordeel dat in dit geval geen onaanvaardbare inbreuk wordt gemaakt op het recht op toegang tot de rechter niet onjuist en evenmin onbegrijpelijk.

2.41 Volgens onderdeel 4.15 heeft het hof ten onrechte volstaan met een algemene schets van de noodzakelijkheid van de immuniteit van de VN, zonder in te gaan op de vraag **of** in dit geval toekenning van immuniteit legitiem en proportioneel is ten opzichte van de beperking op artikel 6 EVRM. Het hof heeft daarbij ten onrechte de afwezigheid van een alternatieve effectieve rechtsgang buiten beschouwing gelaten en heeft nagelaten de proportionaliteit in dat kader te toetsen. Het hof heeft voorts nagelaten om de aard van het juridisch conflict bij de oordeelsvorming te betrekken, aldus het onderdeel.

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2.42 Het onderdeel kan niet tot cassatie leiden. Anders dan het onderdeel doet voorkomen, heeft het hof in de rov. 5.7 t/m 5.13 een proportionaliteitstoets uitgevoerd, waarbij het in rov. 5.11 ook mogelijke alternatieve rechtsgangen is nagegaan. Voor zover het onderdeel klaagt dat het hof ten onrechte de aard van het conflict buiten beschouwing heeft gelaten, is het ook tevergeefs voorgesteld. De aard van het conflict is in zoverre van belang dat het recht op toegang tot de rechter (neergelegd in art. 6 EVRM en art. 14 IVBPR) betrekking heeft op het recht om burgerlijke rechten en verplichtingen door de rechter te doen vaststellen. Waar het hof in rov. 1.1 heeft overwogen dat het hier gaat om een verklaring voor recht dat de Staat en de VN jegens de Moeders van **Srebrenica** tekortgeschoten zijn in de nakoming van hun verbintenissen dan wel onrechtmatig jegens hen hebben gehandeld en voorts dat de Staat en de VN hoofdelijk worden veroordeeld tot vergoeding van in dat verband geleden schade, heeft het hof zich daarmee voldoende rekenschap gegeven van de aard van het conflict. Voor zover het onderdeel bedoelt dat het hof anderszins rekening had moeten houden met de aard van het conflict, gaat het uit van een onjuiste rechtsopvatting. Overigens heeft het hof — hoewel het daartoe niet gehouden was en anders dan het onderdeel betoogt — wel degelijk oog gehad voor het (gevoelige) karakter van het onderhavige conflict. Dat volgt uit rov. 5.9 waarin het hof vooropgesteld heeft dat het 'oog heeft voor de vreselijke gebeurtenissen waarvan de moeders van **Srebrenica** en hun verwanten slachtoffer zijn geworden en voor het leed dat hen daardoor is aangedaan'.

2.43 De klacht in onderdeel 4.16 komt er — in de kern genomen — op neer dat het hof met zijn oordeel dat alleen klemmende redenen kunnen leiden tot de conclusie dat de immuniteit van de VN niet proportioneel is ten opzichte van het nagestreefde doel, heeft miskend dat dit alleen het geval is wanneer een effectieve alternatieve rechtsgang bestaat. Het onderdeel bouwt voort op middel 3 en moet in het lot daarvan delen. Ik volsta met te verwijzen naar mijn bespreking onder 2.21–2.25.

2.44 Onderdeel 4.17 klaagt dat het hof in rov. 5.8 e. **v**. twee stellingen van de **Stichting** c.s. onbegrijpelijk heeft weergegeven. Allereerst heeft het hof overwogen dat de **Stichting** c.s. aan de VN het verwijt maken dat de VN onvoldoende heeft gedaan om genocide te voorkomen. De **Stichting** heeft de VN echter meer verweten: dat zij andere ernstige mensenrechtenschendingen heeft laten gebeuren en dat de VN actief heeft meegewerkt aan de scheiding van mannen en kinderen, daarmee accepterend dat deze mannen en mannelijke kinderen zouden worden gemarteld en vermoord en voorts dat de VN actief aan de deportatie heeft meegewerkt.(39)

2.45 Begrijp ik de klacht juist dan wordt daarin betoogd dat het hof essentiële stellingen heeft gepasseerd. Inderdaad vallen in de stellingen waarnaar wordt verwezen meer, althans verdergaande, verwijten te lezen dan het niet voorkomen van genocide. De klacht faalt echter bij gebrek aan belang. Het hof heeft geoordeeld dat het verwijt dat de VN nalatig is geweest in het voorkomen van genocide weliswaar ernstig is, maar niet zo pregnant dat de immuniteit moet wijken. Ook wanneer bij de beantwoording van deze vraag alle door de **Stichting** c.s. genoemde stellingen worden betrokken, zal niet tot een andersluidend oordeel inzake immuniteit worden gekomen. Ik verwijs naar de bespreking van middel 3 onder 2.21–2.25.

2.46 Voor zover het onderdeel klaagt dat het hof onbegrijpelijk heeft geoordeeld dat volgens de **Stichting** c.s. buiten de gang naar de nationale (in casu Nederlandse) rechter geen andere mogelijkheid bestaat om genoegdoening te krijgen, is het tevergeefs voorgesteld. In het onderdeel valt niet te lezen — en het verwijst ook niet naar stellingen in de processtukken in dat verband — dat de **Stichting** c.s. hebben gesteld dat niet uitsluitend de gang naar de Nederlandse rechter mogelijkheden tot genoegdoening biedt. De **Stichting** c.s. betogen juist dat, nu de VN zelf geen regeling heeft getroffen om geschillen als de onderhavige te beslechten, geen andere mogelijkheid bestaat dan zich te wenden tot de nationale — in dit geval Nederlandse — rechter. Ook voor zover het onderdeel bedoelt dat naar het oordeel van het hof de gewenste genoegdoening uitsluitend financieel is te verkrijgen, kan het niet tot cassatie leiden. Allereerst laat het onderdeel ook op dit punt na te verwijzen naar stellingen die hieromtrent in feitelijke instanties betrokken zijn. Het onderdeel gaat in zoverre bovendien uit van een onjuiste lezing van het arrest van het hof, omdat

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het hof niet heeft miskend dat genoegdoening ook anders dan financieel kan worden verkregen. Het hof heeft in rov. 5.9 overwogen dat het gegeven dat genoegdoening wordt gezocht voor de in **Srebrenica** gepleegde genocide volkomen begrijpelijk is. Het heeft daarbij geheel in het midden gelaten waaruit die genoegdoening zou (moeten) bestaan.

2.47 Onderdeel 4.20 betoogt nog dat het hof heeft miskend dat de vordering jegens de VN een andere vordering is dan de vordering op de Nederlandse Staat en de vordering op de Servische daders en dat het hof heeft miskend dat de omstandigheid dat de benadeelden wellicht nog een vordering in hun vermogen hebben, geen reden is om hen de vordering jegens de VN te ontnemen. De klacht faalt bij gebrek aan belang, omdat aan de VN immuniteit toekomt. Ik verwijs naar de bespreking van middel 3 (onder 2.21–2.25).

2.48 Middel 5 richt zich — in de onderdelen 5.1 tot en met 5.14 — tegen rov. 5.9 van het arrest van het hof. Volgens de klacht heeft het hof ten onrechte, althans onbegrijpelijk, overwogen dat het gaat om de afweging van twee rechtsbeginselen, te weten het belang van de VN bij immuniteit en het recht van toegang tot de rechter. Het hof beperkt zich ten onrechte tot de beginselen van immuniteit en toegang tot de rechter. Het hof had bij zijn oordeel evenwel ook moeten betrekken dat sprake is geweest van zware schendingen van mensenrechten.

2.49 De klacht bouwt voort op middel 3 en moet daarom in het lot daarvan delen. Overigens heeft het hof — anders dan de klacht in onderdeel 5.2 betoogt — het verwijt dat de VN de genocide niet heeft voorkomen wel in zijn beoordeling (met betrekking tot de proportionaliteit) meegewogen. Het hof heeft — tegen de achtergrond dat alleen klemmende redenen tot de gevolgtrekking kunnen leiden dat de immuniteit van de VN niet proportioneel is ten opzichte van het daarmee nagestreefde doel (rov. 5.7 in fine) — ten aanzien daarvan overwogen dat het aldus gemaakte verwijt aan de VN ernstig is, maar niet zo pregnant dat de immuniteit daarvoor moet wijken **of** dat het beroep van de VN op immuniteit reeds daarom onaanvaardbaar is. Dat oordeel is niet onjuist en evenmin onbegrijpelijk.

2.50 Middel 6 is gericht tegen rov. 5.10 waarin het hof heeft overwogen dat immuniteit niet wijkt voor toegang tot de rechter. Het hof heeft — aldus onderdeel 6.1 — stellingen van de **Stichting** c.s. onjuist begrepen/te beperkt opgevat en — volgens onderdeel 6.2 — daarnaast blijk gegeven van een onjuiste rechtsopvatting. In onderdeel 6.3 wordt betoogd dat het hof heeft miskend dat overtreding van het gebod om genocide te voorkomen een misdaad tegen de menselijkheid is.

2.51 De klacht bouwt voort op middel 3 en deelt in het lot daarvan. Voor zover het onderdeel klaagt dat het hof ten onrechte stellingen van de **Stichting** c.s. niet in zijn beoordeling heeft betrokken, omdat de **Stichting** c.s. de VN veel meer heeft verweten dan het hof heeft weergegeven, bouwt het voort op onderdeel 4.17 en deelt het in het lot daarvan.

2.52 Onderdeel 6.4 klaagt nog dat de overweging aan het einde van rov. 5.10 rechtens onjuist en onbegrijpelijk is. Het onderdeel is vergeefs voorgesteld. Het hof onderbouwt in de bestreden overweging zijn oordeel dat het verwijt dat genocide niet is voorkomen weliswaar ernstig is, maar niet voldoende om de immuniteit van de VN op te heffen. Dat oordeel geeft niet blijk van een onjuiste rechtsopvatting en is ook niet onbegrijpelijk.

2.53 Middel 7 komt er samengevat op neer dat het hof in de rov. 5.11 t/m 5.14 ten onrechte, althans onbegrijpelijk, heeft overwogen dat in de afweging tussen immuniteit en toegang tot de rechter, immuniteit hier prevaleert. De onderdelen 7.3 tot en met 7.8 klagen — samengevat — dat het hof ten onrechte heeft overwogen dat er alternatieve partijen kunnen worden gedagvaard. Waar het onderwerp van de vorderingen van de **Stichting** c.s. haar rechten jegens de VN betreffen, kunnen die rechten niet worden vastgesteld door een derde aan te spreken. De uitleg van art. 6 EVRM door het hof vormt een ongeoorloofde beperking van het recht op toegang tot de rechter. Ook dit middel faalt, omdat het voortbouwt op middel 3 en daarom in het lot daarvan moet delen.

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2.54 Middel 8 keert zich tegen de rov. 4.1 t/m 5.14 van het arrest en klaagt dat het hof ten onrechte, althans onbegrijpelijk, heeft overwogen dat het recht op toegang tot de rechter hier wijkt voor immuniteit van de VN. Het hof heeft — aldus de klacht — het beroep van de **Stichting** c.s. op het beginsel van effectieve rechtsbescherming (art. 47 Handvest van de grondrechten van de EU) niet getoetst.

2.55 Voor zover het middel voortbouwt op middel 3, faalt het op de bij de bespreking van dat middel aangegeven gronden (zie onder 2.21–2.25). Voor het overige strandt het middel op de omstandigheid dat het Handvest van de grondrechten van de EU niet van toepassing is op feiten die dateren van vóór 1 december 2009, de datum waarop het Handvest verbindend is geworden.(40) Het Handvest richt zich bovendien tot de instellingen, organen en instanties van de Unie wanneer zij het recht van de Unie ten uitvoer brengen (art. 51 lid 1). Ook overigens bestaat geen belang bij de klacht, omdat de bescherming ten aanzien van burgerlijke rechten op grond van art. 47 lid 2 van het Handvest van de grondrechten van de EU inhoudelijk gelijk is aan de bescherming onder art. 6 lid 1 EVRM. Het oordeel van het hof dat het geen aanleiding ziet om prejudiciële vragen te stellen aan het HvJEU geeft dus niet blijk van een onjuiste rechtsopvatting. Alle klachten van het middel stuiten af op het voorgaande.

2.56 Ook middel 9 is gericht tegen de rov. 4.1 t/m 5.14 van het arrest van het hof. Het middel betoogt — opnieuw — dat het hof ten onrechte, althans onbegrijpelijk heeft geoordeeld dat immuniteit van de VN hier niet wijkt voor toegang tot de rechter.

2.57 Voor zover het middel voortbouwt op middel 3 deelt het in het lot daarvan. Voor zover het middel in onderdeel 9.5 klaagt dat het hof het Weens Verdragenverdrag van 23 mei 1969 (hierna: WVV)(41) heeft miskend, kan het niet tot cassatie leiden. Artikel 4 WVV bepaalt dat het WVV slechts van toepassing is op verdragen gesloten door Staten na zijn inwerkingtreding voor die Staten. Waar het Handvest van de VN al in 1945 in werking is getreden, mist het WVV hier rechtstreeks toepassing.

2.58 Op grond van het voorgaande dient het principaal cassatieberoep te worden verworpen.

3 . Bespreking van het incidenteel cassatieberoep

3.1 De Staat heeft (onvoorwaardelijk) incidenteel cassatieberoep ingesteld tegen het arrest van het hof 's-Gravenhage van 30 maart 2010. De Staat heeft vier middelen aangevoerd, waarvan het eerste middel is ingetrokken in de schriftelijke toelichting zijdens de Staat (onder 6.2.1). Het tweede middel, uiteenvallend in twee subonderdelen, betoogt kort samengevat dat het hof heeft miskend dat het EHRM heeft geoordeeld dat gedragingen van EVRM-verdragsstaten in verband met VN vredesoperaties niet onderworpen zijn aan het EVRM en dat art. 105 lid 1 VN Handvest en art. II, § 2, van de Conventie voorrang hebben boven het EVRM en/**of** het IVBPR. Het derde middel bouwt hierop voort. Het vierde middel, uiteenvallend in twee subonderdelen, heeft betrekking op rov. 2.3 van het bestreden arrest, waarin het hof de vordering van de Staat tot tussenkomst heeft afgewezen.

3.2 Nu naar mijn mening het door de **Stichting** c.s. ingestelde principaal cassatieberoep dient te falen en het arrest van het hof in stand kan blijven, mist de Staat belang bij het incidenteel cassatieberoep. De Staat heeft zich immers op het standpunt gesteld dat aan de VN immuniteit van jurisdictie moet worden toegekend, welk standpunt door het hof is gevolgd door bekrachtiging van het vonnis van de rechtbank 's-Gravenhage van 10 juli 2008 waarin de Nederlandse rechter onbevoegd is verklaard kennis te nemen van de vordering van de **Stichting** c.s. tegen de VN. De bij de Staat kennelijk aan het incidentele middel ten grondslag liggende wens om van de Hoge Raad een principiële uitspraak te verkrijgen over enkele van de door het hof gebezigde overwegingen, levert onvoldoende belang bij het incidentele cassatieberoep op.(42)Bij de behandeling van het principaal beroep heb ik reeds enige kwesties besproken die thans ook door het incidentele beroep aan de orde worden gesteld, zodat ik volsta daarnaar te verwijzen. Ook bij het vierde middel mist

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de Staat belang. De Staat heeft niet betoogd dat door afwijzing van de vordering tot tussenkomst bepaalde stellingen niet konden worden aangevoerd **of** dat bepaalde stellingen daardoor niet in behandeling konden worden genomen. De Staat heeft als gevoegde partij zijn zienswijze naar voren kunnen brengen. De Staat heeft in het vierde middel, onderdeel b, nog betoogd dat de Staat (in verband met zijn volkenrechtelijke verplichtingen jegens de VN) zelfstandig een rechtsmiddel wenst te kunnen instellen indien het hof tot het oordeel mocht komen dat aan de VN in de onderhavige procedure geen immuniteit toekomt. Dit onderdeel miskent dat ook aan de gevoegde partij het recht toekomt 'zelfstandig en op zelfstandig aangevoerde gronden een rechtsmiddel tegen de uitspraak aan te wenden om te voorkomen dat de uitspraak in kracht van gewijsde gaat en de beslissingen daarin jegens haar gezag van gewijsde krijgen' (aldus HR 9 april 2010, LJN: BK4549, rov. 3.2 (SGP)). 3.3 Op grond van het bovenstaande faalt het incidenteel cassatieberoep.

4 . Conclusie

De conclusie strekt tot verwerping van zowel het principaal beroep als het incidenteel beroep.

De Procureur-Generaal bij de

Hoge Raad der Nederlanden,

A-G

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Footnotes:

1 Zie rov. 2.2 van het vonnis van de rechtbank 's-Gravenhage van 10 juli 2008 in verbinding met rov. 1.1 t/m 1.3 van het bestreden arrest van het hof 's-Gravenhage van 30 maart 2010.

2 HR 3 november 1972, LJN: AB3659, NJ 1973/45.

3 Vgl. art. 11 Rv.

4 Zie o.a. A. Nollkaemper, Kern van het internationaal publiekrecht, Den Haag 2011, p. 179. Vgl. ook de conclusie van AG Strikwerda vóór HR 23 oktober 2009, LJN: BI9632, NJ 2009/527.

5 Hierbij kan worden gedacht aan vrijdom van (bepaalde) belastingen voor de organisatie en haar personeel, aan onschendbaarheid van de gebouwen en de archieven van de organisatie en aan het garanderen van bewegingsvrijheid van de voor de organisatie werkzame ambtenaren **of** experts die taken voor de organisatie uitvoeren, zie Niels Blokker, Recht van internationale organisaties, in: Nathalie Horbach e.a., Handboek Internationaal Recht, Den Haag 2007, p. 448.

6 Zie Niels Blokker, a.w., p. 446–447; H. Fox, The Law **of** State Immunity, New York 2008, p. 726.

7 I.F. Dekker, Cedric Ryngaert, Immunity **of** international organisations: Balancing the organisation's functional autonomy and the fundamental rights **of** individuals, Preadvies Nederlandse Vereniging voor Internationaal Recht, Mededelingen NVIR nr. 138, 2011, p. 87–109, i.h.b. p. 92; A.S. Muller, International Organisations and their Host States, Aspects **of** their Legal Relationship, Den Haag/London/Boston, 1995, p. 151.

8 De Conventie is opgesteld in de Engelse en de Franse taal, welke teksten gelijkelijk authentiek zijn. De Nederlandse vertaling van art. II, § 2, luidt als volgt: 'De Verenigde Naties, haar eigendommen en bezittingen, waar deze ook gelegen zijn, en wie deze ook onder zich heeft, zullen vrijgesteld zijn van rechtsvervolging, behoudens wanneer de Verenigde Naties in een bijzonder geval uitdrukkelijk afstand zullen hebben gedaan van haar immuniteit. Het is echter wel verstaan, dat afstand van immuniteit zich niet uitstrekt tot enige maatregel van tenuitvoerlegging'.

9 Zie Michael Gerster, in: Bruno Simma (ed.), The Charter **of** the United Nations, a Commentary, 1995, Article 105, p. 1140 ('The absolute immunity (Art. II/2) **of** the Organization as a juridical person and **of** UN property (…) from every form **of** legal proceedings before national courts and authorities has never been a matter **of** dispute'); Isabelle Pingel, in: Jean-Pierre Cot, Alain Pellet, La Charte des Nations Unies, Commentaire article par article, II, 2005, Article 105, p. 2160.

10 P.C. Szasz, International organizations, privileges and immunities, Encyclopedia **of** Public International Law, deel II, p. 1331–1332.

11 P.C. Szasz, p. 1331; vgl. ook August Reinisch, International Organizations Before National Courts, Cambridge 2000, p. 157.

12 In Nederlandse vertaling: '§ 29. De Verenigde Naties zullen regelingen treffen voor passende wijzen van beslechting van: (a) geschillen, die voortvloeien uit overeenkomsten, **of** andere geschillen van privaatrechtelijke aard, waarbij de Verenigde Naties partij zijn; (b) geschillen, waarbij een functionaris van de Verenigde Naties betrokken is, die krachtens zijn officiële positie immuniteit geniet, indien van de immuniteit door de Secretaris-Generaal geen afstand is gedaan'.

13 Meer gegevens zijn hierover te vinden op de officiële VN-website: http://www.un.org/en/internaljustice.

14 Zie UN Doc. A/45/594 (9 October 1990), Report **of** the Secretary-General, Comprehensive

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review **of** the whole question **of** peace-keeping operations in all their aspects, Model status-**of**-forces agreement for peace-keeping operations.

15 Zie UN Doc. A/45/594, onder 1.

16 United Nations, Treaty Series/Nations Unies, Receuil des Traités 1993, Vol. 1722, I-30006. Deze Overeenkomst is ingevolge art. X, § 54, op de datum van ondertekening (15 mei 1993) in werking getreden.

17 Zie hierover Christ Klep, Richard van Gils, Van Korea tot Kabul, De Nederlandse militaire deelname aan vredesoperaties sinds 1945, Den Haag 2005, p. 309–317.

18 De geldingsduur van deze Overeenkomst is in overeenstemming met het model van de 'status-**of**-forces agreement'. De Overeenkomst is beëindigd op 20 december 1995 door de omstandigheid dat UNPROFOR werd opgevolgd door de door de NAVO geleide vredesmacht KFOR (gegevens ontleend aan Christ Klep, Richard van Gils, a.w., p. 302). Slachtoffers van de val van **Srebrenica** (juli 1995) konden nog tot een periode van drie maanden na 20 december 1995 claims indienen bij de standing claims commission.

19 Zie Report **of** the Secretary-General, Financing **of** the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters, General Assembly, UN Doc. A/51/389, onder 47.

20 Zie Rapport CAVV, 8 mei 2002, p. 2–3.

21 Zie Rapport CAVV, 8 mei 2002, p. 24 en 28.

22 Zie Niels Blokker, a.w., p. 445–446; P.H. Kooijmans, Internationaal publiekrecht in vogelvlucht (bewerkt door M.M.T.A. Brus, N.M. Blokker, L.A.J. Senden), 2008, p. 175.

23 Zie laatstelijk VN Doc. A/CN.4/L.778 van 30 mei 2011; gegevens zijn verder te vinden op de officiële website van de ILC (http://untreaty.un.org/ilc/summaries/summaries.htm).

24 Zie o.a. A.S. Muller, a.w., p. 176 e.**v**.; conclusie van AG Strikwerda vóór HR 23 oktober 2009, LJN: BI9632, NJ 2009/527.

25 HR 20 december 1985, LJN: AC9158, NJ 1986/438 m.nt. P.J.I.M de Waart.

26 Zie T. Barkhuysen, M.L. van Emmerik, E.R. Rieter, Procederen over mensenrechten onder het EVRM, het IVBPR en andere VN-verdragen, Nijmegen 2008, p. 81–82; A. Nollkaemper, a.w., p. 271–272.

27 Nollkaemper, t.a.p.

28 Overigens kan nog worden gewezen op art. 46 IVBPR, waarin is bepaald dat geen bepaling van dit verdrag mag worden uitgelegd als een aantasting van de bepalingen van het Handvest VN.

29 Zie Harris, O'Boyle & Warbrick, Law **of** the European Convention on Human Rights, Oxford/New York 2009, p. 202 en p. 242 ('Immunity from civil proceedings for international organizations, in accordance with international law, may also be permissible').

30 EHRM 18 februari 1999, zaaknr. 26083/94, 30 ECHR 261 GC, LJN: AL2027, JB 1999, 162, m.nt. AWH; in gelijke zin: EHRM 18 februari 1999, zaaknr. 28934/95, 33 ECHR 54 GC (Beer and Regan/Germany).

31 Kritisch hierover o.a. Heringa in zijn noot onder het arrest van het EHRM, JB 1999, 162.

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32 EHRM 2 mei 2007, zaaknr. 71412/01 en 78166/01 (Behrami en Behrami/Frankrijk; Saramati/Frankrijk, Duitsland en Noorwegen), EHRC 2007, 111, LJN: BB3180. Zie ook Harris, O'Boyle & Warbrick, a.w., p. 790. Verder kan worden verwezen naar EHRM 5 juli 2007, zaaknr. 6974/05 (Kasumaj/Griekenland), waarin de uitspraken inzake Behrami en inzake Saramati worden herhaald.

33 Zie T. Henquet, International Organisations in The **Netherlands**: Immunity from the Jurisdiction **of** the Dutch Courts, NILR 2010, p. 267–301, die op p. 293 ten aanzien van het geschil dat in de onderhavige zaak aan de orde is, opmerkt dat dergelijke geschillen 'touch on the very core **of** the decision-making within the UN: how to act, or not to act, in respect **of** maintaining or restoring international peace and security. In other words, the functionality **of** the UN is intensely at stake here'.

34 Vgl. ook het reeds aangehaalde arrest van het EHRM 2 mei 2007, LJN: BB3180, EHRC 2007, 111 (Behrami en Saramati), waarin is overwogen dat handelingen van staten ter uitvoering van VN vredesoperaties niet mogen worden onderworpen aan de rechtsmacht van het EHRM. Zie ook T. Henquet, a.w., p. 294, die opmerkt dat in het thans aan toetsing in cassatie onderworpen arrest van het hof 's-Gravenhage de immuniteit proportioneel was in relatie tot 'protecting the effective operation **of** the UN'.

35 Zie conclusie van antwoord in de incidenten, nr. 97 t/m 101, op 6 februari 2008 door de **Stichting** c.s. genomen op de rol van de rechtbank.

36 De VN heeft immers bij brief van 17 augustus 2007 gericht aan de Nederlandse Permanente Vertegenwoordiger bij de VN bericht in de procedure voor de Nederlandse rechter niet te zullen verschijnen in verband met de aan de VN toekomende immuniteit. De VN heeft daarin Nederland verzocht 'appropriate action' te nemen ter verzekering van de aan de VN toegekende privileges en immuniteit. De brief bevindt zich in het procesdossier (als bijlage bij de brief van 17 september 2007 van de Staat aan de rechtbank).

37 Vgl. Asser Procesrecht/van Schaick 2 2011, nr. 46.

38 Aan de slachtoffers stond voor het indienen van hun claims niet veel tijd ter beschikking. De enclave viel immers in juli 1995, terwijl op 20 december 1995 de Overeenkomst van 15 mei 1993 is geëindigd. Claims konden nog tot drie maanden daarna worden ingediend bij de standing claims commission (art. X, § 55, van de Overeenkomst).

39 De **Stichting** c.s. verwijzen in verband hiermee naar de inleidende dagvaarding onder 253 t/m 266, 385, 393 en 419; de pleitnota in eerste aanleg, nrs. 23, 47, 49, 63, de mvg onder 97 en de pleitnota in hoger beroep nr. 22.

40 Het Handvest werd van kracht door het inwerkingtreden van het Verdrag van Lissabon van 13 december 2007 tot wijziging van het Verdrag betreffende de Europese Unie en het Verdrag tot oprichting van de Europese Gemeenschap, PbEG C 306/1. Zie ook H.C.F.J.A. de Waele, Het EU-Handvest van de Grondrechten in de Nederlandse rechtspraktijk, Trema 2011, p. 245–251.

41 Trb. 1977, 169; Trb. 1985, 79 (rectificatie in Trb. 1996, 89), inwerkingtreding voor Nederland op 9 mei 1985.

42 Zie Asser Procesrecht/Veegens-Korthals Altes-Groen (2005), nr. 48, p. 112 (met verdere rechtspraakverwijzingen); W.D.H. Asser, Civiele Cassatie, Nijmegen 2011, p. 59–60.

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UNESCO - United Nations Educational, Scientific and Cultural Organisation and others v. Max-Henri Boulois, ” Cour d'Appel [Court of Appeal], Paris,, 19 June 1998

Facts

On 21 June 1996, UNESCO and Mr. Boulois entered into a contract containing an arbitration clause.

On 20 October 1997, alleging the existence of a dispute relating to the performance of the contract, Mr. Boulois obtained an order in summary proceedings (*ordonnance de référé*) from the President of the Paris Court of First Instance directing UNESCO to appoint an arbitrator within fifteen days.

UNESCO appealed, maintaining that there was no dispute between the parties and relying on its immunity from jurisdiction based on Art. 12 of the France-UNESCO Agreement of 2 July 1954; it also argued that the President of the *Tribunal de Grande Instance* wrongly inferred a waiver of immunity from the existence of an arbitration clause in the contract with Mr. Boulois.

The Court of Appeal affirmed the decision of the President, reasoning that immunity from jurisdiction should not be a means to escape from the principle of *pacta sunt servanda*.

Excerpt

I. Immunity From Jurisdiction

[1] “The immunity from jurisdiction on which UNESCO relies cannot allow it to escape from the principle of *pacta sunt servanda* by refusing to appoint an arbitrator according to the arbitration clause in the contract with page "294" Max-Henri Boulois on the ground, which falls squarely under the sole appreciation of the arbitrators, that there is no dispute as to the performance of the said contract.

[2] “Further, granting appellant's request against Mr. Boulois would inevitably lead to preventing [Mr. Boulois] from bringing his case to a court. This situation would be contrary to public policy as it

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Albert Jan van den Berg

Jurisdiction

France

Court

” Cour d'Appel [Court of Appeal], Paris,

Case date

19 June 1998

Parties

Appellant, UNESCO – United Nations Educational, Scientific and Cultural Organisation, in the person of its legal representatives (France)
Appellee, Max-Henri Boulois (France)

Key words

immunity from jurisdiction
pacta sunt servanda
European Convention on Human Rights (Art. 6)

Publication Source

Revue de l'arbitrage (1999, no. 2) pp. 343-

constitutes a denial of justice and a violation of the provisions of Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Liberties; thus, the state court – which furthermore intervenes in the present case only as a supporting court (*juge d'appui*) – should grant the appellee's request.

[3] "For these reasons and the reasons given by the lower court, which this Court takes as its own, the attacked order shall be fully affirmed on this point."

II. Inadmissibility of the Appeal

[4] "In opposition to the order rendered by the President of the Paris Court of First Instance based on Art. 1444(1) of the New Code of Civil Procedure, [(1)] the appeal filed by UNESCO does not allege that the arbitration clause in ... the contract signed by the parties on 21 June 1996 is manifestly null or insufficient to allow for the constitution of the arbitral tribunal, and the appeal must be declared inadmissible according to Art. 1457(1) of the same Code."[(2)] page "295"

345 with note Ch. Jarrosson, pp. 345-349

Source

UNESCO - United Nations Educational, Scientific and Cultural Organisation and others v. Max-Henri Boulois, " Cour d'Appel [Court of Appeal], Paris,, 19 June 1998 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1999 - Volume XXIV, Volume XXIV (Kluwer Law International 1999) pp. 294 - 295

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[1] Art. 1444(1) of the French New Code of Civil Procedure reads:

> "If, after the dispute has arisen, the constitution of the arbitral tribunal encounters a difficulty due to the acts of one of the parties or with respect to the functioning of the method of appointment, the President of the *Tribunal de Grande Instance* shall appoint the arbitrator or arbitrators."

[2] Art. 1457(1) of the French New Code of Civil Procedure reads:

> "In the cases covered by Arts. 1444, 1454, 1456 and 1463, the President of the court, seized as in urgent proceedings (*référé*) by a party or the arbitral tribunal, shall decide by non-appealable order."

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Cour de cassation de Belgique

Arrêt

N° S.04.0129.F

UNION DE L'EUROPE OCCIDENTALE, dont le secrétariat général est établi à Bruxelles, rue de l'Association, 15,

demanderesse en cassation,

représentée par Maître Philippe Gérard, avocat à la Cour de cassation, dont le cabinet est établi à Bruxelles, avenue Louise, 523, où il est fait élection de domicile,

contre

S. M., ayant fait élection de domicile en l'étude de l'huissier de justice Roger B. Moreels, établie à Forest, avenue Albert, 137,

défenderesse en cassation.

I. La procédure devant la cour

Le pourvoi en cassation est dirigé contre l'arrêt rendu le 17 septembre 2003 par la cour du travail de Bruxelles.

Le président Christian Storck a fait rapport.

L'avocat général Jean-Marie Genicot a conclu.

II. Les moyens de cassation

La demanderesse présente trois moyens, dont les deux premiers sont libellés dans les termes suivants :

Premier moyen

Dispositions légales violées

- article 4 de la Convention sur le statut de l'Union de l'Europe occidentale, des représentants nationaux et du personnel international, signée à Paris le 11 mai 1955 et approuvée par la loi du 19 juillet 1956 ;

- articles 6, spécialement § 1er, 19 et 32 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 et approuvée par la loi du 13 mai 1955 ;

- articles 49 à 59 du Règlement du personnel de l'Union de l'Europe occidentale, adopté par la Résolution adoptant le Règlement du personnel de l'Union de l'Europe occidentale et fixant la date de son entrée en vigueur, prise le 5 décembre 1956 par le Conseil de l'Union de l'Europe occidentale lors de sa soixante-septième réunion.

Décisions et motifs critiqués

La cour du travail a refusé à la demanderesse le bénéfice de son immunité de juridiction, a rejeté l'appel incident qu'elle avait formé sur ce point et, par confirmation du jugement dont appel, a déclaré l'action originaire de la défenderesse recevable et fondée à concurrence des sommes allouées par le premier juge.

Sa décision se fonde sur les motifs que :

« La Convention sur le statut de l'Union de l'Europe occidentale, des représentants nationaux et du personnel international, signée à Paris le 11 mai 1955 et approuvée par la loi du 19 juillet 1956, dispose en son article 4 : 'L'organisation, ses biens et avoirs, quels que soient leur siège et leur détenteur, jouissent de l'immunité de juridiction, sauf dans la mesure où le secrétaire général, agissant au nom de l'organisation, y a explicitement renoncé dans un cas particulier ; il est toutefois entendu que la renonciation ne peut s'étendre à des mesures de contrainte et d'exécution'. La question se pose si l'immunité de juridiction dont l'organisation est ainsi dotée se heurte à l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales [...]. Les privilèges et immunités des organisations internationales ont pour objet de permettre à celles-ci de remplir leur mission de service public international avec toute l'indépendance nécessaire, à l'abri d'ingérences étatiques. A la différence des privilèges et immunités des Etats étrangers, dont la source est essentiellement coutumière, les privilèges et immunités des organisations internationales ont des sources presque uniquement conventionnelles et la coutume ne joue qu'un rôle accessoire. Le fondement de ces privilèges et immunités repose, non sur une quelconque prééminence de l'organisation internationale par rapport aux Etats, mais sur la volonté des Etats membres (E. David, Droit des organisations internationales, P.U.B., 2001, vol. 2, pp. 366 à 368). Les organisations internationales sont en effet des sujets dérivés de droit international, c'est-à-dire qu'elles sont nées de la volonté des Etats. Elles ont une personnalité juridique différente de celle des Etats et ne disposent que des compétences dont

1'Etat se dessaisit. Etant donné la limitation de leurs compétences, il n'y a pas lieu d'appliquer à leur immunité de juridiction, sauf convention particulière, la distinction entre actes iure imperii et actes iure gestionis, qui est souvent appliquée aux Etats étrangers (E. David, o.c., p. 374). On considère que les organisations internationales bénéficient d'une immunité de juridiction plus importante que celle qui est reconnue aux Etats pour différentes raisons :

- à la différence des Etats, les organisations internationales n'ont que des compétences restreintes à leurs fonctions institutionnelles et toutes leurs activité[s] sont supposées en être l'expression. Elles doivent pouvoir remplir ces fonctions sans entrave et, dès lors, l'immunité de juridiction qui leur est reconnue n'a d'autres limites que celle de l'objet pour lequel elles sont créées ;

- les organisations internationales sont désarmées face aux Etats, ne pouvant faire jouer une réciprocité lorsqu'il est empiété sur les immunités ;

- les cas d'abus de l'immunité de juridiction sont considérés comme théoriques : les Etats membres pourraient revoir le régime d'immunité accordé. L'immunité de juridiction exclut en principe tout examen du fond du différend par les tribunaux internes des Etats membres.

Elle trouve à s'appliquer :

- lorsqu'elle est prévue explicitement dans une convention liant 1'Etat du for ;

- lorsque le différend porte sur une matière pour laquelle il est prévu un mode spécifique de règlement autre que les juridictions originaires de 1'Etat du for.

Dans ces deux hypothèses, c'est la volonté des Etats parties à l'accord en cause qui fonde l'immunité de juridiction de 1'organisation internationale, tantôt explicitement en la stipulant, tantôt implicitement en prévoyant un mode particulier du règlement des litiges. La pratique, la jurisprudence et la doctrine enseignent aujourd'hui que le droit permet de tracer une limite à l'immunité de juridiction d'organisations internationales dans les cas suivants :

- les textes de base excluent l'immunité ;

- l'organisation renonce à son immunité ;

- les faits en cause sont étrangers à sa mission ;

- l'organisation internationale bénéficie de l'immunité de juridiction mais ne dispose d'aucun système propre et indépendant de règlement des litiges avec des particuliers, plus particulièrement avec ses agents ou les personnes effectuant des prestations dans les liens d'un contrat. Dans ce cas, il est considéré que l'organisation internationale doit se soumettre à la juridiction des tribunaux internes, en application du principe général du droit imposant d'écarter un déni de justice et du droit de toute personne à un procès équitable consacré notamment par les articles 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et 14, § 1er, du Pacte international relatif aux droits civils et politiques (E. David, o.c., p. 385).

L'immunité de juridiction accordée par la Convention fixant le statut de l'Union de l'Europe occidentale s'impose aux Etats liés par la convention. Dès lors qu'elle a été approuvée par la loi et fait l'objet de publication au Moniteur belge, elle produit entièrement ses effets en droit belge en vertu de l'article 167, § 2, de la Constitution (Trav. Bruxelles, 21 janvier 1999, RG 36.747). Le règlement du personnel pris par l'organisation en application de son acte constitutif prévoit la création d'une commission de recours à laquelle est attribuée la compétence de trancher les litiges nés de la violation du règlement ou des contrats (conclus avec les membres du personnel). Il échet de vérifier si le système de règlement des litiges prévu permettait à [la défenderesse] de protéger efficacement ses droits conformément à l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales fixant le droit à un procès équitable. Selon la Cour européenne des droits de l'homme, les garanties procédurales énoncées [à] l'article 6 concernant l'équité, la publicité et la célérité seraient dépourvues de sens si le préalable à la jouissance de ces garanties, savoir l'accès à un tribunal, n'était pas protégé. Elle l'a établi comme élément inhérent aux garanties consacrées à l'article 6 en se référant aux principes de la prééminence du droit et de l'absence d'arbitraire qui sous-tendent la majeure partie de la Convention. L'article 6, § 1er, garantit à chacun le droit à ce qu'un tribunal connaisse de toute contestation relative à ses droits et obligations de caractère civil (arrêts G.

c/Royaume-Uni du 21 novembre et du 21 février 1975, série A, n° 18, pp. 13-18, §§ 28-36 ; A.-A. c/Royaume-Uni du 21 novembre 2001 ; Mc E. c/Irlande du 21 novembre 2001, § 33). La Cour a souligné que le principe selon lequel une contestation civile doit pouvoir être portée devant un juge compte au nombre des principes fondamentaux du droit universellement reconnus et qu'il en va de même du principe du droit international qui prohibe le déni de justice (affaire G., § 35). La Cour a cependant rappelé à maintes reprises que le droit d'accès aux tribunaux reconnu par l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales n'est pas absolu, qu'il se prête à des limitations implicitement admises car il commande par sa nature même une réglementation par l'Etat et que les Etats contractants jouissent en la matière d'une certaine marge d'appréciation. La Cour a toutefois souligné que les limitations mises en oeuvre ne peuvent restreindre l'accès offert à l'individu d'une manière ou à un point tel que le droit s'en trouve atteint dans sa substance même et qu'en outre pareille limitation ne se concilie avec 1'article 6, § 1er, que si elle tend à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (arrêt W. et K. c/Allemagne, § 59, arrêt Beer et Regan c/Allemagne, § 49, avec référence à l'arrêt Osamn, p. 3169, et le rappel des principes pertinents dans l'arrêt F. c/Royaume-Uni du 21 septembre 1994, série A, n°/294-B, pp. 49-50, § 65 ; R.T.D.H., 2000, 81 ; mêmes considérations dans 1'affaire A. A. S., § 53). De l'avis de la Cour européenne, l'octroi de privilèges et immunités aux organisations internationales est un moyen indispensable au bon fonctionnement de celles-ci, sans ingérence unilatérale de tel ou tel gouvernement ; le fait pour les Etats d'accorder généralement l'immunité de juridiction aux organisations internationales en vertu des instruments constitutifs de celles-ci ou d'accords additionnels constitue une pratique de longue date, destinée à assurer le bon fonctionnement de ces organisations, et l'importance de cette pratique se trouve renforcée par la tendance à l'élargissement et à l'intensification de la coopération internationale qui se manifeste dans tous les domaines de la société contemporaine. Dans ces conditions, la règle de l'immunité de juridiction poursuit un but légitime (§§ 51 à 53, B. et R. c/Allemagne ; §§ 63-64, W.t[e] et K. c/Allemagne). Dans ces deux affaires, la Cour européenne,

examinant la question de la proportionnalité, était d'avis que lorsque les Etats créent des organisations internationales pour coopérer dans certains domaines d'activité ou pour renforcer leur coopération et qu'ils transfèrent des compétences à ces organisations et leur accordent des immunités, la protection des droits fondamentaux peut s'en trouver affectée, mais qu'il serait toutefois contraire au but et à l'objet de la Convention que les Etats contractants soient ainsi exonérés de toute responsabilité au regard de la Convention dans le domaine d'activité concerné. Elle a rappelé que la Convention a pour but de protéger des droits non pas théoriques ou illusoires mais concrets et effectifs, et qu'il en est ainsi en particulier pour le droit d'accès aux tribunaux, vu la place importante que le droit à un procès équitable occupe dans une société démocratique. Selon la Cour, l'immunité de juridiction est admissible au regard de la Convention si les intéressés disposaient d'autres voies raisonnables pour protéger efficacement leurs droits garantis par la Convention (§ 68, affaire W. et K. ; §§ 57-58, affaire B. et R.). Un système institutionnel qui ne prévoirait pas un mode de règlement des litiges serait dès lors incompatible avec la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. Dans ces deux affaires, la Cour a toutefois considéré que les tribunaux allemands n'avaient pas violé l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales en acceptant l'immunité de juridiction de l'Agence spatiale européenne étant donné que la Convention et son annexe prévoyaient expressément divers modes de règlement de litiges de droit privé, qu'il s'agisse de différends touchant son personnel ou d'autres litiges (B. et R., § 58, Waite et Kennedy, § 68). La Cour conclut que, 'compte tenu du but légitime des immunités des organisations internationales, le critère de proportionnalité ne saurait s'appliquer de façon à contraindre une telle organisation à se défendre devant les tribunaux nationaux au sujet des conditions de travail énoncées par le droit interne du travail. Interpréter l'article 6, § 1er, de la Convention et ses garanties d'accès à un tribunal comme exigeant forcément que l'on applique la législation nationale en la matière entraverait, de l'avis de la Cour, le bon fonctionnement des organisations internationales et irait à l'encontre de la tendance actuelle à l'élargissement et à l'intensification de la coopération internationale' (§ 62, arrêt B. et R. ; § 72 ; arrêt W. et K.). Dans les affaires W.

et K. et B. et R., la Cour européenne n'a pas examiné si le recours prévu offrait toutes les garanties inhérentes à la notion de procès équitable telle qu'elle est conçue par l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. Celles-ci concernent le droit d'accès à un tribunal indépendant et impartial, établi par la loi, le droit à ce que la cause soit entendue équitablement (ce qui implique notamment 1'égalité des armes, le principe du contradictoire, la motivation des jugements, le droit de comparaître en personne), la publicité de la procédure et des décisions, le délai raisonnable de celles-ci. La notion de 'tribunal' a un contenu propre à la Convention et ne s'identifie pas nécessairement à une juridiction de type classique intégrée aux structures judiciaires ordinaires du pays. Du point de vue organique et formel, il doit être indépendant par rapport à l'exécutif et aux parties mais également vis-à-vis du parlement et des pouvoirs de fait, tels des groupes de pression, et présenter les garanties d'une procédure judiciaire. Au sens matériel, il doit avoir la compétence de prendre des décisions contraignantes sur le fond du litige, sur la base de normes de droit et à l'issue d'une procédure organisée. Il doit être établi par la loi, entendue en son sens formel, du moins pour en établir les principes de base et habiliter 1'exécutif pour fixer les modalités de détail. En ce qui concerne l'exigence de publicité, certaines exceptions sont admises en ce qui concerne la publicité des débats, mais l'exigence de publicité des décisions ne souffre aucune exception. Elle doit permettre de vérifier si la décision est prise conformément à la loi ou au droit. La commission de recours de [la demanderesse] a bien été investie d'un rôle juridictionnel et a compétence pour trancher un litige, prononcer le cas échéant l'annulation d'une décision attaquée devant elle et condamner l'organisation à réparer le dommage causé par une décision attaquée et à rembourser les frais exposés (article 59). Le caractère contradictoire de la procédure est assuré. Rien n'est toutefois prévu quant à l'exécution de ses décisions. En revanche, la publicité des débats n'est pas assurée [les audiences de la commission de recours sont secrètes (article 57)] pas plus que la publicité des décisions (article 5) ; la désignation des membres est dévolue au comité intergouvernemental qui nomme les membres de la commission pour une durée de deux ans. Le mode de désignation et la courte durée du mandat comportent le risque que les membres de la commission soient trop étroitement

liés à l'organisation. L'inamovibilité est un corollaire nécessaire à la notion d'indépendance. Une possibilité de récusation, garantie de l'impartialité, n'est pas prévue. Le recours organisé par le statut du personnel de [la demanderesse] n'offre donc pas toutes les garanties inhérentes à la notion de procès équitable et certaines des conditions les plus essentielles font défaut. Il échet de constater, dès lors, que la limitation d'accès au juge ordinaire en raison de l'immunité juridictionnelle de [la demanderesse] ne s'accompagne pas de voies de recours effectives au sens de l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. La cour [du travail] estime dès lors qu'à juste titre, le premier juge a considéré qu'il avait le pouvoir de connaître du litige ».

Griefs

Aux termes de l'article 4 de la Convention sur le statut de [la demanderesse], des représentants nationaux et du personnel international, signée à Paris le 11 mai 1955 et ratifiée par la Belgique par la loi du 19 juillet 1956, la demanderesse, « ses biens et avoirs, quels que soient leur siège et leur détenteur, jouissent de l'immunité de juridiction, sauf dans la mesure où le secrétaire général agissant au nom de [la demanderesse] y a expressément renoncé dans un cas particulier ».

L'hypothèse de la renonciation par le secrétaire général de la demanderesse n'étant pas vérifiée en l'espèce, l'immunité de juridiction accordée à la demanderesse ne pouvait en outre être écartée par application de l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

Première branche

Au vu de l'état le plus récent de sa jurisprudence, la Cour européenne des droits de l'homme, à qui revient l'interprétation autonome et authentique des droits fondamentaux protégés par la Convention des droits de l'homme, considère désormais qu'aucun desdits droits, pas même le droit d'accès à un tribunal garanti par l'article 6, § 1er, de la Convention, ne tient en échec l'immunité de juridiction accordée par traité à un Etat ou à une organisation internationale.

Elle estime que l'octroi de l'immunité de juridiction à un Etat - et a fortiori à une organisation internationale - dans une procédure civile poursuit un but légitime. Elle poursuit que cette immunité de juridiction constitue une limite admissible au droit d'accès à un tribunal, tenant notamment en échec l'action judiciaire aux termes de laquelle une personne sollicite des juridictions d'un Etat la condamnation d'un autre Etat, ou d'une organisation internationale, à la réalisation de droits contractuels issus d'une relation de travail.

Il s'ensuit qu'en considérant (sur pied d'une jurisprudence antérieure de la Cour européenne des droits de l'homme à laquelle la cour du travail a prêté une portée inexacte, critiquée en ordre subsidiaire par la seconde branche du moyen) que l'immunité de juridiction accordée à la demanderesse est paralysée par le droit d'accès au tribunal garanti par l'article 6, § 1er, de la Convention des droits de l'homme, l'arrêt viole cette dernière disposition - qui, dans l'interprétation authentique et autonome que la Cour européenne des droits de l'homme lui donne actuellement, ne fait pas échec aux immunités de juridiction accordées aux Etats et aux organisations internationales (violation des articles 19 et 32 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, en vertu desquels la jurisprudence de ladite Cour s'impose aux Etats membres et à leurs juridictions), tout autant que l'article 4 de la Convention sur le statut de l'Union de l'Europe occidentale, des représentants nationaux et du personnel international, signée à Paris le 11 mai 1955 et ratifiée par la Belgique par la loi du 19 juillet 1956 en tant que cette

disposition supranationale institue l'immunité de juridiction illégalement écartée par l'arrêt.

Deuxième branche (subsidiaire)

Aux termes d'une jurisprudence plus ancienne, à laquelle se réfère encore l'arrêt, la Cour européenne des droits de l'homme avait considéré que l'immunité de juridiction accordée à une organisation internationale présente un caractère absolu, sous la réserve de sa compatibilité avec le droit d'accès aux tribunaux dérivé de l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

Les articles 19 et 32 de cette convention confient la définition - authentique et autonome - de ce droit à la Cour européenne des droits de l'homme. Celle-ci estimait que le droit d'accès aux tribunaux, reconnu par l'article 6, 1er, de la Convention des droits de l'homme, n'est pas absolu : il se prête à des limitations implicitement admises car il commande, par sa nature même, une réglementation par l'Etat. Aux yeux de la Cour européenne des droits de l'homme, l'attribution de l'immunité de juridiction à des organisations internationales figurait précisément au nombre de ces limitations admises. Elle considérait que l'octroi de privilèges et immunités aux organisations internationales est un moyen indispensable au bon fonctionnement de celles-ci, sans ingérence unilatérale de tel ou tel gouvernement. Le fait pour des Etats d'accorder généralement l'immunité de juridiction aux organisations internationales en vertu des instruments constitutifs de celles-ci ou d'accords additionnels constitue, selon elle, une pratique de longue date, destinée à assurer le bon fonctionnement de ces organisations.

L'importance de cette pratique se trouve renforcée par la tendance à l'élargissement et à l'intensification de la coopération internationale qui se manifeste dans tous les domaines de la société contemporaine.

Dans ces conditions, la règle de l'immunité de juridiction poursuit, à l'aune de cette jurisprudence de la Cour européenne des droits de l'homme, un but légitime.

Elle ajoutait que, compte tenu du but légitime des immunités des organisations internationales, le critère de proportionnalité ne saurait s'appliquer de façon à contraindre une telle organisation à se défendre devant les tribunaux nationaux au sujet de conditions de travail énoncées par le droit interne du travail.

Interpréter l'article 6, § 1er, de la Convention et ses garanties d'accès à un tribunal comme exigeant forcément que l'on applique la législation nationale en la matière entraverait, de l'avis de la Cour, le bon fonctionnement des organisations internationales et irait à l'encontre de la tendance actuelle à l'élargissement et à l'intensification de la coopération internationale.

Toujours aux termes de cette jurisprudence antérieure, la Cour européenne des droits de l'homme énonçait que, lorsque des Etats créent des organisations internationales pour coopérer dans certains domaines d'activité ou pour renforcer leur coopération, et qu'ils transfèrent des compétences à ces organisations et leur accordent des immunités, la protection des droits fondamentaux peut s'en trouver affectée.

Pour déterminer si l'atteinte ainsi portée aux droits fondamentaux est admissible au regard de l'article 6, § 1er, de la Convention, il importe, poursuivait-elle, d'examiner si la personne contre laquelle l'immunité de juridiction est invoquée dispose d'autres voies raisonnables pour protéger efficacement ses droits garantis par la Convention.

La Cour européenne des droits de l'homme considérait se trouver en présence de semblables voies raisonnables justifiant le maintien de l'immunité de juridiction lorsque le travailleur congédié par une organisation internationale bénéficiant de semblable immunité de juridiction dispose de la faculté de soumettre le litige à une commission de recours interne dotée d'indépendance par ses textes fondateurs.

Dans le cadre de cette analyse - désormais périmée au vu de la jurisprudence plus récente évoquée par la première branche du moyen -, la Cour européenne des droits de l'homme s'arrêtait au constat de l'existence de cette possibilité de soumettre le litige à une commission de recours, qualifiée d'indépendante par les instruments l'instituant.

Comme le reconnaît expressément l'arrêt, la Cour européenne des droits de l'homme s'abstenait, dans le cadre de cette même analyse, de rechercher plus avant si, de par son statut, sa composition ou encore la procédure mue devant elle, cette commission de recours satisfaisait scrupuleusement à toutes et chacune des garanties édictées par l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

Semblables recherches n'auraient d'ailleurs guère de sens car il serait contradictoire, d'un côté, de reconnaître - à l'instar de la Cour européenne des droits de l'homme - que l'immunité de juridiction accordée aux organisations européennes constitue une atteinte sérieuse mais - eu égard à sa finalité - admissible aux garanties procédurales consacrées par l'article 6, § 1er, de la Convention des droits de l'homme, tout en exigeant, d'un autre côté, que la commission de recours appelée à statuer sur les prétentions dirigées contre l'organisation internationale immunisée offre, quant à elle, de manière cumulative et scrupuleuse, toutes et chacune desdites garanties.

C'est donc à tort qu'après avoir constaté que le Règlement du personnel de la demanderesse, formant partie intégrante du contrat d'emploi l'unissant à la défenderesse, institue (article 49) et régit (articles 50 à 59) une commission de recours chargée de trancher les litiges auxquels pouvait donner lieu le contrat d'emploi de la défenderesse, et après avoir constaté que cette dernière avait du reste obtenu de ladite commission la condamnation de la demanderesse à lui verser « la somme de 70.448,33 euros à titre d'indemnité compensatoire de préavis correspondant à six mois de rémunération, soit le montant maximum prévu par le règlement du personnel de [la demanderesse] ainsi qu'une somme de 12.394,50 euros à titre d'indemnité pour licenciement abusif, majorés des intérêts au taux légal de 7 p.c. l'an et 5.000 euros pour couvrir ses frais d'assistance judiciaire », la cour du travail ne s'est point contentée, pour apprécier la compatibilité de l'immunité de juridiction accordée à la demanderesse au droit d'accès à un tribunal garanti par l'article 6 de la Convention des droits de l'homme (c'est-à-dire l'existence d'une « voie raisonnable » de protection de ce droit), de relever que ladite commission de recours existe et qu'en vertu de l'article 51, littera d), du Règlement précité, les membres de celle-ci « exercent leur fonction en pleine indépendance ».

C'est donc à tort, en d'autres termes, et au prix de la contradiction dénoncée ci-dessus, que l'arrêt s'attache à considérer, aux termes des motifs critiqués, que cette commission de recours ne satisferait pas à toutes et chacune des garanties édictées par l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

Ce faisant, l'arrêt, au prix d'une extension des exigences de l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme au-delà de la définition authentique et autonome qu'en donne la Cour européenne des droits de l'homme, méconnaît l'immunité de juridiction accordée à la demanderesse (violation des articles 6, § 1er, 19 et 32 de la Convention des droits de l'homme et de l'article 4 de la Convention sur le statut de l'Union de l'Europe occidentale, des représentants nationaux et du personnel international, signée à Paris le 11 mai 1955 et ratifiée par la loi du 19 juillet 1956) et viole les dispositions supranationales dont l'existence justifie le constat de conformité de cette immunité de juridiction au droit d'accès au tribunal garanti par l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (violation des articles 49 à 59 [et spécialement 51, littera d)] du Règlement du personnel de l'Union de l'Europe occidentale, adopté par la résolution prise le 5 décembre 1956 par le Conseil de l'Union de l'Europe occidentale, siégeant en sa soixante-septième réunion).

Deuxième moyen

Dispositions légales violées

- article 149 de la Constitution ;

- principe général du droit consacrant la primauté sur les dispositions de droit national des dispositions de droit international ayant un effet direct ;

- article A, points 3 et 4, de l'annexe VI (intitulée « réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le

Conseil le 31 août 1972 ») intégrée au Règlement du personnel de l'Union de l'Europe occidentale, adoptée par résolution du 5 décembre 1956 du conseil de l'Union de l'Europe occidentale siégeant en sa soixante-septième réunion en application de l'article VIII du Traité entre la Belgique, la France, le Luxembourg, les Pays-Bas et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord, signé à Bruxelles le 17 mars 1948 et approuvé par la loi du 29 avril 1948, tel qu'il a été modifié par l'article 4 du Protocole signé à Paris le 23 octobre 1954 modifiant le Traité de Bruxelles du 17 mars 1948, approuvé par la loi du 16 avril 1955 ;

- article VIII du Traité entre la Belgique, la France, le Luxembourg, les Pays-Bas et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord, signé à Bruxelles le 17 mars 1948 et approuvé par la loi du 29 avril 1948, tel qu'il a été modifié par l'article 4 du Protocole signé à Paris le 23 octobre 1954 modifiant le Traité de Bruxelles du 17 mars 1948, approuvé par la loi du 16 avril 1955 ;

- articles 1er, 39 et 82 de la loi du 3 juillet 1978 sur le contrat de travail ;

- article 1134 du Code civil.

Décisions et motifs critiqués

L'arrêt dit y avoir lieu uniquement à l'application de la loi du 3 juillet 1978 sur le contrat de travail à l'exclusion des dispositions du Règlement du personnel de la demanderesse et, sur le fondement de ladite loi et par confirmation du jugement dont appel, alloue à la défenderesse une indemnité de 74.448,33 euros majorée des intérêts moratoires depuis le 1er juillet 2000.

Après avoir énoncé que « le règlement du personnel pris [par la demanderesse] » l'avait été « en application de son acte constitutif », et avoir rappelé qu'en vertu de son article 1er, la loi du 3 juillet 1978 sur le contrat de travail présente en l'espèce un caractère subsidiaire, en sorte que, dans l'évaluation des droits et obligations nés du licenciement de la défenderesse, il

pouvait être dérogé aux règles fixées par les articles 39 et 82 de ladite loi pour autant que cette dérogation résulte d'une loi ou d'une norme supérieure, l'arrêt conclut à l'absence de semblable dérogation et fonde la décision critiquée sur les motifs, critiqués eux aussi, que, « pour pouvoir déroger aux dispositions de la loi du 3 juillet 1978, il est toutefois nécessaire que les dispositions 'statutaires' soient établies en vertu d'une loi ou d'une norme supérieure. La cour [du travail] constate que ni la Convention de Bruxelles du 17 mars 1948 ni la Convention du 11 mai 1995 [lire : 1955] fixant le statut de [la demanderesse] n'ont mandaté le Conseil pour fixer le statut du personnel de l'organisation. Dans ces conditions, la cour [du travail] estime que les dispositions impératives de la loi sur le contrat de travail sont applicables et notamment celles [des articles] 39 et 82, dispositions de police et de sûreté ».

Griefs

Première branche

En vertu de l'article 1er de la loi du 3 juillet 1978 sur le contrat de travail, l'évaluation des droits nés du licenciement d'une personne employée sous contrat de travail par une organisation internationale peut, comme l'indique l'arrêt, déroger aux règles fixées par les articles 39 et 82 de ladite loi, pour autant que cette dérogation résulte elle-même d'une loi ou d'une norme supérieure.

En tant qu'il fixe les plafonds que ne peuvent dépasser les indemnités revenant, en cas de licenciement, aux membres du personnel engagés sous contrat à durée déterminée par la demanderesse, l'article A, points 3 et 4, de l'annexe VI (intitulée « réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le Conseil le 31 août 1972 ») intégrée au règlement du personnel de la demanderesse constitue une norme supérieure dérogeant valablement aux dispositions précitées de la loi du 3 juillet 1978.

Ledit règlement et ladite annexe forment en outre parties intégrantes du contrat de travail de la défenderesse, qui les incorpore.

Il est sans importance que, ni le Traité de Bruxelles du 17 mars 1948 portant constitution de la demanderesse, ni la Convention de Paris du 11 mai 1955 sur le statut de l'Union de l'Europe occidentale, des représentants nationaux et du personnel international, n'ait expressément habilité (ou « mandaté », selon l'expression de l'arrêt) le conseil de la demanderesse pour édicter ledit Règlement du personnel dont l'annexe VI (intitulée « Réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le conseil le 31 août 1972 ») et toutes les dispositions énoncées par celle-ci font parties intégrantes.

L'établissement du règlement de son personnel constitue, dans le chef d'une organisation internationale comme la demanderesse, l'exercice normal et nécessaire d'un pouvoir d'administration propre qu'elle tire, implicitement mais certainement, des instruments conventionnels internationaux qui l'instituent et la régissent.

Pris en vertu de ce pouvoir implicite, le règlement fixant le statut du personnel d'une organisation internationale constitue en outre, au même titre que toute autre décision émanant de cette organisation, un instrument du droit dérivé de celle-ci.

Comme toute autre décision formant le droit dérivé d'une organisation internationale, le Règlement du personnel de la demanderesse - porté à la connaissance de la défenderesse, notamment par voie d'incorporation à son contrat de travail - constitue, en outre, une norme supranationale directement applicable en droit belge, lequel lui accorde au demeurant la primauté sur les dispositions législatives de droit interne.

En déniant aux dispositions du Règlement du personnel de l'Union de l'Europe occidentale adopté par résolution du 5 décembre 1956 du Conseil de l'Union de l'Europe occidentale siégeant en sa 67e réunion, et notamment aux dispositions de l'annexe VI (intitulée « Réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts

budgétaires des gouvernements approuvé par le conseil le 31 août 1972 ») intégrée à ce règlement, la portée de normes de rang supérieur devant prendre le pas sur les dispositions des articles 39 et 82 de la loi du 3 juillet 1978 relative aux contrats de travail, l'arrêt viole donc :

- l'article 1er de la loi du 3 juillet 1978, en vertu duquel une norme de degré équivalent ou supérieur à la loi peut - pour la détermination des droits du personnel engagé sous statut par une personne morale de droit public - déroger à ses dispositions ;

- les articles 39 et 82 de cette loi qui, parce qu'ils devaient être écartés au profit des dispositions de l'annexe VI, précitée, au Règlement du personnel de l'Union de l'Europe occidentale, ne trouvaient pas à s'appliquer en l'espèce ;

- le principe général du droit consacrant la primauté sur les dispositions du droit national des dispositions de droit international ayant un effet direct, en vertu duquel le Règlement du personnel de l'Union de l'Europe occidentale, y compris les dispositions de l'annexe VI (intitulée « Réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le conseil le 31 août 1972 ») s'intégrant à ce règlement, devait l'emporter sur les dispositions de la loi du 3 juillet 1978 relative aux contrats de travail ;

- l'article A, points 3 et 4, de l'annexe VI (intitulée « Réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le conseil le 31 août 1972 ») au Règlement du personnel de l'Union de l'Europe occidentale, adoptée par résolution du 5 décembre 1956 par le conseil de l'Union de l'Europe occidentale en sa 67e réunion ;

- l'article VIII du Traité entre la Belgique, la France, le Luxembourg, les Pays-Bas et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord, signé à Bruxelles le 17 mars 1948 et approuvé par la loi du 29 avril 1948, tel qu'il a été modifié par l'article 4 du Protocole signé à Paris le 23 octobre 1954 modifiant le Traité de Bruxelles du 17 mars 1948, approuvé par la loi du 16

avril 1955, dotant le Conseil de l'Union de l'Europe occidentale d'un pouvoir décisionnel qui n'est assorti d'aucune restriction l'empêchant, notamment, d'édicter le règlement du personnel de la demanderesse ;

- l'article 1134 du Code civil, dans la mesure où la cour du travail a méconnu l'effet obligatoire de la convention de travail avenue le 1er juillet 1991 en langue anglaise entre la demanderesse et la défenderesse, convention qui prévoit, par renvoi et incorporation, l'application des dispositions du règlement du personnel de la demanderesse (y compris les dispositions de son annexe VI intitulée « Réglementation de l'indemnité de perte d'emploi - annexe V au 78e rapport du comité de coordination des experts budgétaires des gouvernements approuvé par le Conseil le 31 août 1972 »), à l'exclusion de toute autre disposition, de droit belge notamment.

Seconde branche

Dans l'examen de la compatibilité de l'immunité de juridiction alléguée par la demanderesse, l'arrêt énonce que « le règlement du personnel [est] pris par l'organisation en application de son acte constitutif ».

Cette considération entre en contradiction avec le motif aux termes duquel la « cour [du travail] constate que, ni la Convention de Bruxelles du 17 mars 1948, ni la Convention du 11 mai 1995 [lire : 1955], fixant le statut de l'Union n'ont mandaté le Conseil pour fixer le statut du personnel de l'organisation », car ce dernier motif revient à dire que le Règlement du personnel de la demanderesse n'a pas été pris en application de son acte constitutif.

Il s'agit là manifestement d'une contradiction de motifs qui entache l'arrêt d'une violation de l'article 149 de la Constitution.

III. La décision de la cour

Sur le premier moyen :

Quant à la première branche :

L'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales garantit à chacun le droit à ce qu'un tribunal connaisse de toute contestation relative à ses droits et obligations de caractère civil.

Ce droit d'accès aux tribunaux n'est pas absolu : il se prête à des limitations implicitement admises car il commande, par sa nature même, une réglementation par l'Etat. L'Etat jouit en la matière d'une certaine marge d'appréciation.

Les limitations mises en œuvre ne peuvent toutefois restreindre l'accès offert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même. En outre, pareilles limitations ne se concilient avec l'article 6, § 1er, que si elles tendent à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé.

L'octroi de privilèges et immunités aux organisations internationales est un moyen indispensable au bon fonctionnement de celles-ci, sans ingérence unilatérale d'un gouvernement. Le fait pour les Etats d'accorder généralement l'immunité de juridiction aux organisations internationales en vertu des instruments constitutifs de celles-ci ou d'accords additionnels constitue une pratique de longue date, destinée à assurer le bon fonctionnement de ces organisations. L'importance de cette pratique se trouve renforcée par la tendance à l'élargissement et à l'intensification de la coopération internationale, qui se manifeste dans tous les domaines de la société contemporaine. Dans ces conditions, la règle de l'immunité de juridiction des organisations internationales poursuit un but légitime.

Si des mesures qui reflètent des principes de droit international généralement reconnus en matière d'immunité des organisations internationales ne peuvent, de façon générale, être considérées comme une restriction disproportionnée au droit d'accès à un tribunal tel que le consacre l'article 6, § 1er, il demeure que la question de la proportionnalité doit être appréciée en chaque cas à la lumière des circonstances particulières de l'espèce. Pour déterminer si l'atteinte portée aux droits fondamentaux est admissible au regard de l'article 6, § 1er, il importe d'examiner, conformément à la jurisprudence de la Cour européenne des droits de l'homme, si la personne contre laquelle l'immunité de juridiction est invoquée dispose d'autres voies raisonnables pour protéger efficacement les droits que lui garantit la Convention.

Le moyen, qui, en cette branche, soutient que, de façon générale, aucun des droits fondamentaux protégés par la Convention, y compris ceux que vise l'article 6, § 1er, de celle-ci, ne tient en échec l'immunité de juridiction accordée par traité à une organisation internationale, manque en droit.

Quant à la seconde branche :

Lorsque, pour déterminer si l'immunité de juridiction invoquée par une organisation internationale est admissible au regard de l'article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, le juge saisi de la contestation constate que la personne à laquelle cette immunité est opposée dispose de la possibilité de soumettre le litige à une commission de recours, il ne peut se limiter à prendre acte que les instruments qui instituent cette commission la qualifient d'indépendante.

L'arrêt constate que la demanderesse a pu exercer un recours interne au sein de la demanderesse, que la commission de recours interne « a bien été investie d'un rôle juridictionnel et a compétence pour trancher un litige » mais que « la désignation des membres [de celle-ci] est dévolue au comité intergouvernemental qui nomme les membres de la commission pour une durée de deux ans ».

Il considère que « le mode de désignation et la courte durée du mandat comportent le risque que les membres de la commission soient trop étroitement liés à l'organisation » et que « l'inamovibilité est un corollaire nécessaire de la notion d'indépendance ».

Par ces énonciations, l'arrêt, sans méconnaître l'autorité de la chose interprétée par la Cour européenne des droits de l'homme, justifie légalement sa décision que la commission de recours interne de la demanderesse n'est pas indépendante et que, dès lors, l'atteinte portée aux droits garantis à la défenderesse par l'article 6, § 1er, précité n'est pas admissible.

Le moyen, en cette branche, ne peut être accueilli.

Sur le deuxième moyen :

Quant à la première branche :

En cas de conflit entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir pour autant que le traité ait reçu l'assentiment du pouvoir législatif.

L'approbation préalable d'un accord conclu en exécution d'un traité de base qui a fait l'objet de l'assentiment parlementaire peut résulter des dispositions mêmes de ce traité pour autant que les dispositions de l'accord n'excèdent pas les limites fixées par ce dernier.

L'article VIII du Traité entre la Belgique, la France, le Luxembourg, les Pays-Bas et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord, signé à Bruxelles le 17 mars 1948, approuvé par la loi du 29 avril 1948, publiée au Moniteur belge du 16 octobre 1948, tel qu'il a été modifié par l'article 4 du protocole signé à Paris le 23 octobre 1954, approuvé par la loi du 16 avril 1955, publiée au Moniteur belge du 5 mai 1955, prévoit la création d'un conseil pour connaître des questions relatives à l'application du Traité, de ses

protocoles et de ses annexes. L'article VIII ajoute que ce conseil sera organisé de manière à pouvoir exercer ses fonctions en permanence.

Le conseil a approuvé, le 31 août 1972, le 78e rapport du comité de coordination des experts budgétaires des gouvernements, dont l'annexe V réglemente l'indemnité de perte d'emploi due aux agents de la demanderesse. Dès lors qu'en organisant ainsi la gestion de son personnel, le conseil n'a pas excédé les limites fixées par l'article VIII du Traité, sa décision ne devait plus être soumise à l'assentiment du pouvoir législatif.

Les articles 3 et 4 de l'annexe V contenant la « réglementation de l'indemnité de perte d'emploi » déterminent avec précision le mode de calcul du montant de l'indemnité due à l'agent de la demanderesse à la suite de la rupture de son contrat. Ils ont un effet direct dans l'ordre juridique interne belge.

L'arrêt constate que le règlement du personnel de la demanderesse « fixe de manière complète les droits et obligations des parties » et que, « en signant les différents contrats avec [la demanderesse], [la défenderesse] a marqué son accord de se soumettre à ce règlement ».

L'arrêt, qui décide néanmoins que les dispositions impératives de la loi belge sur le contrat de travail sont applicables à l'espèce, méconnaît le principe général du droit relatif à la primauté sur les dispositions de droit national des dispositions de droit international ayant un effet direct.

Le moyen, en cette branche, est fondé.

Sur les autres griefs :

Il n'y a lieu d'examiner ni la seconde branche du deuxième moyen ni le troisième moyen, qui ne sauraient entraîner une cassation plus étendue.

Par ces motifs,

La Cour

Casse l'arrêt attaqué, sauf en tant qu'il reçoit les appels ;

Ordonne que mention du présent arrêt sera faite en marge de l'arrêt partiellement cassé ;

Réserve les dépens pour qu'il soit statué sur ceux-ci par le juge du fond ;

Renvoie la cause, ainsi limitée, devant la cour du travail de Mons.

Ainsi jugé par la Cour de cassation, troisième chambre, à Bruxelles, où siégeaient le président Christian Storck, les conseillers Christine Matray, Sylviane Velu, Martine Regout et Alain Simon, et prononcé en audience publique du vingt et un décembre deux mille neuf par le président Christian Storck, en présence de l'avocat général Jean-Marie Genicot, avec l'assistance du greffier Marie-Jeanne Massart.

M. -J. Massart A. Simon M. Regout

S. Velu C. Matray C. Storck