

District Court, The Hague

Cause number: 2007/2973

***STATEMENT OF DEFENCE IN THE
INTERIM PROCEEDINGS***

Concerning:

The Foundation **Mothers of Srebrenica Foundation**,
having its seat in Amsterdam;

and

1. Mrs **Sabaheta Fejzić**, resident at Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
2. Mrs **Kadira Gabeljić**, resident at Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
3. Mrs **Ramiza Gurdić**, resident at Sarajevo, Bosnia-Herzegovina;
4. Mrs **Mila Hasanović**, resident at Sarajevo, Bosnia-Herzegovina;
5. Mrs **Kada Hotić**, resident at Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
6. Mrs **Šuhreta Mujić**, resident at Sarajevo, Bosnia-Herzegovina;
7. Plaintiff No. 7;

8. Mrs **Zumra Šehomerović**, resident at Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
9. Mrs **Munira Subašić**, resident at Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
10. Plaintiff No. 10;

Plaintiffs in the main action, defendants in the interim proceedings;

Advocates: M.R. Gerritsen, dr. A. Hagedorn, J. Staab and S.A. of der Sluijs (all Van Diepen Van der Kroef Advocaten)

Against:

The State of The Netherlands, whose seat is established at The Hague

Defendant in the main action, Plaintiff in the interim proceedings:

Advocates: M. Dijkstra and G.J.H. Houtzagers

The Defendant appearing in the main action (hereafter referred to as: ‘the State of The Netherlands’) filed two motions by way of claim on 12 December 2007. Plaintiffs in the main action, now Defendants in the interim proceedings (hereafter referred to in the interests of readability as: ‘The Mothers’), file a statement of defence in the interim proceedings as follows.

I. Introduction

1. Before proceeding to respond to the submissions and claims of the State of The Netherlands, the Mothers will first present a number of introductory comments.
2. The State of The Netherlands and the United Nations (hereafter referred to as: ‘the UN’) did not in July 1995 protect the population of the Srebrenica Safe Area against the attacks by the Bosnian Serbs, despite the express promise and international legal obligations to do so. During the six day-long attack on the Safe Area there appeared to be no serious readiness to stop the attack. The Srebrenica Safe Area fell on 11 July 1995. Almost 10,000 persons died as a consequence of the genocide that thereupon followed. Given the persistent refusal of the State of The Netherlands and the UN to accept their responsibility in this matter the Mothers made approaches to the State of The Netherlands and the UN. The Mothers attempted to enter into a discussion but received no response. Ultimately the Mothers could see no possibility other than to call the State of The Netherlands and the UN to account in these proceedings for their role in the events preceding, during and following the fall of the Srebrenica Safe Area.
3. The UN has elected not to appear in these proceedings. The UN returned the summons and through the Permanent Representative of the State of The Netherlands at the UN let it be known that its policy was not to appear in legal proceedings. Despite the fact that the UN is being held partly responsible for the fact that genocide could occur in Europe for the first time since the Second World War, and that under the eyes of UN troops who were dispatched precisely to prevent that genocide, the UN sees no reason to depart from its policy in this matter. The UN does not wish to account for its involvement in genocide even though that is unaccountably contrary to the official position of the Secretary-Generaal of the UN, who in response to the writ of summons

of 8 June 2007 (through his spokeswoman), declared, as can be read on the UN website under the heading ‘Secretary-General fully supports call for justice in Srebrenica massacres’ (see: [www.un.org/News/oss/g/hilites/hilites_arch_view.asp?HighID=857](http://www.un.org/News/press/docs/2007/070607.sgsm.htm#OpenID=11574)):

‘Asked about a letter sent by the group Women of Srebrenica, the Spokeswoman said she had just learned that the United Nations had received legal documents relating to the case and that the survivors of the Srebrenica massacres are absolutely right to demand justice for the most heinous crimes committed on European soil since World War II. The Secretary-General joins them in that demand, without reservation, and expresses his deepest sympathies to them and to the relatives of those brutally executed at Srebrenica, almost 12 years ago. (...)’

4. The UN has been properly summoned to appear in these proceedings but has not appeared as party to the proceedings. The UN has, apparently, sent a letter to the District Court in which it states that it claims immunity. That is certainly not the correct manner to file a defence. A defence can be advanced only by a procurator.
5. The interim proceedings brought by the State of The Netherlands are an attempt through legal manoeuvres to have the claim of immunity by the UN nevertheless upheld. That is not a good state of affairs. If the UN wishes to claim immunity, it must do so itself in the proceedings. As it has failed to do so the argument of the State of The Netherlands should be rejected.
6. The State of The Netherlands and the UN have since 1995 imputed the responsibility for the fall of the Srebrenica Safe Area to the other. Should it yet be held that the UN does have immunity one may expect that the State of The Netherlands in the main action will argue that it is not the State of The Netherlands that is responsible, but rather that it is the UN that is responsible for the events prior to, during and after the fall of Srebrenica. That follows, for example, from the letter that the Netherlands Ambassador in Bosnia sent in the summer of 2004 to the Bosnian Advocates of the Mothers. That is what the State of The Netherlands also did in the pending cases of H. Nuhanovic and others against the State of The Netherlands (District Court, The Hague,

cause numbers 06-1671 and 06-1672), in which cases the actions of Dutchbat in Srebrenica are likewise raised. That is the true interest of the State of The Netherlands in filing the interim proceedings and thus not the legal treaty obligations outlined by the State of The Netherlands. Those treaty obligations are moreover already met by the statement of defence dated 2 November 2007 (filed with a view to the hearing of 7 November 2007) of the Public Prosecutor that was taken prior to the grant by the District Court of leave to proceed in default of appearance.

7. The Mothers have a legitimate interest that in these proceedings a situation is not created in which the State of The Netherlands can shift all responsibility to a party who, on the ground of immunity, need not furnish a defence. If the interim claims of the State of The Netherlands are dismissed, it still remains incumbent on the UN to advance a substantive defence. The Mothers have an interest in knowing that defence and, in respect of the claims against the UN, in not seeing recourse to the court blocked in advance.

8. The State of The Netherlands has filed two interim claims. The first, primary claim goes to lack of jurisdiction and the secondary, alternative claim goes to joinder/intervention. Before addressing these matters further the Mothers will raise the issue that the State of The Netherlands has no, or at least insufficient interest in either of the two interim claims (Chapter II). The Mothers will then discuss the interim claims of the State of The Netherlands relating to joinder/intervention even though they possess a subsidiary character (Chapter III). Thereupon the Mothers will address further the grant by the District Court against the UN of leave to proceed in default of appearance (Chapter IV). Following that, the motion relating to the jurisdiction of the court and immunity will be addressed (Chapter V). In the subsequent treatment of the position of the State of The Netherlands the Mothers will emphasize that they maintain the assertions advanced in the writ of summons. All the arguments discussed lead to the conclusion that the State of The Netherlands is not entitled to admission of its interim claims, alternatively that those claims must be dismissed.

II. No Interest of the State of The Netherlands in the interim proceedings

9. The State of The Netherlands possesses no interest in the claims made in the interim proceedings. A party to proceedings must as a minimum advance its own defences, in other words, the defences in respect of which that party possesses an interest recognised at law.

The State of The Netherlands has an interest in the immunity of the UN, but that interest resides in the fact that the State of The Netherlands will attempt (given a successful appeal to the immunity of the UN) simply to shift its own responsibility to the UN, which then enjoys immunity from jurisdiction. That interest is not recognized at law and is not a ground, or at least is an insufficient ground, to uphold the interim claims of the State of The Netherlands.

10. The State of The Netherlands asserts that it is party to the UN Charter and the Convention. Those treaties would give the State of The Netherlands a sufficient interest to claim that in this dispute immunity attaches to the UN. The State of The Netherlands actually fails to appreciate that the State of The Netherlands, prior to the grant of leave to proceed in default of appearance, had expressed its view (and that of the UN) already on 2 November 2007 through the statement of the Public Prosecutor when the Public Prosecutor presented a defence deriving from Article 44 Code of Civil Procedure (CCPr). Whatever may also be noted about the substance of that answer, it fulfills the treaty obligations of the State of The Netherlands. All the arguments advanced by the Public Prosecutor in its statement of defence are repeated in the interim pleadings of the State of The Netherlands. Those arguments have correctly, given the operational immunity of international organisations, not led to non-admissibility but to a grant of leave to proceed in default of appearance.

Arguments derived from the Court Process Server Act (Gerechtsdeurwaarderswet)

11. The State of The Netherlands attached particular significance in its interim pleadings to the substance and creation of the Court Process Server Act, in particular Article 3a. Here again the State of The Netherlands has advanced its viewpoint by means of the argument of the Public Prosecutor derived from Article 44 CCPr, prior to the grant of leave to proceed in default of appearance. The Mothers will below address further the

incorrectness of the arguments of the State of The Netherlands that have been derived from Article 3a of the Court Process Server Act.

12. Article 3a paragraph 1 of the Court Process Server Act requires the process server to serve a notice on the Minister if an instruction is received that is possibly in conflict with the obligations of the State of The Netherlands under international law. In such case the Minister can notify the process server that the instruction received or the official act already performed is in conflict with the obligations of the State of The Netherlands under international law (Article 3a paragraph 2). The notification must be reasoned and published. Both notifications are published in the Official Gazette (*Staatscourant*) (Article 3a paragraph 4). Once the ministerial notification has been given the official act can no longer be lawfully performed (Article 3a paragraph 5) and if the official act already performed comprises service of a writ of attachment the official act is a nullity (Article 3a paragraph 6).
13. The Mothers fail to see how Article 3a of the Court Process Server Act forms an obstacle to the jurisdiction of the court in the present proceedings or, alternatively, would have consequences for the validity of the summons. The process server who served the summons on the UN perceived no possible conflict with the obligations of the State of The Netherlands under international law. Nor did the Minister notify the process server. Accordingly, the summons is and remains valid, as follows from the Explanatory Memorandum to Article 3a (TK (Second Chamber) Assembly Year 1992-1993, 23 081, number 3, page 4) cited by the State of The Netherlands.
14. Apart from that, Article 3a Court Process Server Act addresses the obligations under international law relating to the immunity of foreign states (unlike the present proceedings) (see Explanatory Memorandum to Article 3a, TK Assembly Year 1992-1993, 23 081, number 3, page 1):

'For several years there has been renewed attention for the question, how can the State of The Netherlands avoid being embarrassed by a civil law action being brought in The Netherlands against a foreign state or attachment being levied on its property

in situations where that would be in conflict with the obligations of the State under international law.'

(...)

'There is a case to be made during the discussion of this problematic for the drawing of a distinction between, on the one hand, the question whether, and if yes, to what extent, immunity attaches in The Netherlands to a foreign power, and, on the other, the question whether, and if yes, to what extent, such immunity also attaches in the area of execution of judgments.'

15. The process server properly judged that this was not a situation addressed by Article 3a of the Court Process Server Act. It is accordingly for the Court to consider whether it has jurisdiction. The interest advanced by the viewpoint adopted by the State of The Netherlands is already sufficiently served by the argument of the Public Prosecutor derived from Article 44 CCPr, prior to the grant of leave to proceed in default of appearance.
16. As the State of The Netherlands now possesses no interest recognised at law, the interim claims must be dismissed on this ground.

III. Interim claims relating to intervention and joinder

17. In addition to an interim claim questioning the jurisdiction of the District Court in regard to the UN, the State of The Netherlands has filed an interim claim to be permitted to appear in the main action as an intervening party or, alternatively, as a joined party in respect of the claims of the Mothers against the UN. The Mothers will below explain that these interim claims must be dismissed.
18. The State of The Netherlands underpins its interim claims regarding intervention and joinder by stating that the claims brought by the Mothers against the State of The Netherlands and the UN are to be considered as two separate legal claims brought simultaneously. That is incorrect, alternatively not relevant. What is involved here is

one single legal proceedings. Both defendants are already party to the proceedings but the UN has not appeared.

19. The State of The Netherlands evidences a misconceived view of the interim claim regarding joinder or intervention. Article 217 CCPr reads:

‘A person who possesses an interest in proceedings pending between other persons may claim to be allowed to join or intervene in such.’

The interim claims of the State of The Netherlands fail under Article 217 CCPr. After all, what is at issue here are not proceedings pending between other persons. The State of The Netherlands is already a party to the proceedings in which it claims to be allowed to be a party by joinder or intervention. There is settled caselaw that the claim for joinder or intervention is not available to someone who is a party in the pending proceedings. That is possible only where a party appears in more than one capacity, for example, as a trustee and also in a personal capacity (see Kluwer, Burgerlijke Rechtsvordering, Looseleaf, note 3 to Article 285 CCPr (former) and the caselaw there cited (under footnote 4)). The interest asserted by the State of The Netherlands (and disputed by the Mothers) in joinder or intervention is something other than appearing in another capacity. The State of The Netherlands can already advance its point of view in the main action. The UN can itself appear in the proceedings but has declined to do so for reasons of its own. There is no reason to make the Netherlands law of procedure unusable and to allow the interim claims of the State of The Netherlands. The interim claims regarding joinder and intervention by the State of The Netherlands must be dismissed.

20. The State of The Netherlands has under point 4.6 of its interim pleadings cited caselaw that shows that joinder and intervention are also possible in cases where there has been a grant of leave to proceed in default of appearance. However, that does not alter the above. In the caselaw cited by the State of The Netherlands there is no case in which the intervening claimant was also a party in the proceedings in which it was desired to intervene. The caselaw cited by the State of The Netherlands is accordingly irrelevant.

21. The State of The Netherlands claims to be able to ally itself as a joined party on the side of the UN or, alternatively, to be able to intervene. Leaving aside the fact that the claim for joinder and intervention fails on the grounds above, the Mothers note the following. For intervention to succeed the third party (here the State of The Netherlands) must demonstrate an *'interest in preventing prejudice or loss of a personally accrued right that is threatened by the pending proceedings, and for the preservation of which his appearance in the proceedings is necessary'* (A.S. Rueb, Compendium van het burgerlijk procesrecht, Deventer 2007, page 185). There is no sign of any such interest nor has the State of The Netherlands presented any evidence thereof. All that has been advanced is the interest in informing the District Court of the view regarding the immunity of the UN. Leaving aside that this is not an interest that is sufficient for intervention (or joinder), this interest is no longer present given the position of the State of The Netherlands already set out by the Public Prosecutor on the basis of Article 44 CCPr prior to the grant of leave to proceed in default of appearance.
22. In conclusion, the Mothers note the following regarding joinder and intervention. The State of The Netherlands asserts under point 4.4. of the interim pleadings that the legal concept of intervention is the appropriate path (and not joinder). The concept of intervention implies that the State of The Netherlands considers that it has an interest in bringing its own claim against both parties (see Van Maanen 2005, Tekst & Commentaar Burgerlijke Rechtsvordering, Article 217, note 1c), accordingly against both the Mothers and the UN. The State of The Netherlands has failed to elaborate on which claim it has in mind. For this reason also the interim claims must be dismissed.

IV. Grant of leave to proceed in default of appearance

23. The State of The Netherlands has argued in the interim proceedings regarding the jurisdiction of the Court that the District Court was not possessed of jurisdiction to hear the claims against the UN. The State of The Netherlands referred here to Article 13a General Provisions Act (*Wet AB*). That Article provides that the jurisdiction of the Netherlands court is restricted by exceptions recognized under international law.

24. The issue of jurisdiction is a spent issue. Leave to proceed in default of appearance has after all already been granted against the UN. Leave to proceed in default of appearance against a non-appearing international organisation can only be granted following an ex officio review by the court of its jurisdiction under international law. In procedural law terms the grant of leave to proceed in default of appearance means indeed the acceptance of the status of the defendant as a party to the proceedings (see J. Spiegel, *Vreemde staten voor de Nederlandse rechter*, thesis 2001, page 31). If the immunity of the UN were to be absolute, as the State of The Netherlands incorrectly wishes to suggest, then the docket judge should have held that the Netherlands court had no jurisdiction and declared the Mothers not entitled to admission in their claims against the UN. Immunity in respect of an international organisation is not, however, absolute but rather operational. The Mothers will return to address extensively this distinction in the context of their (alternative) defence relating to immunity.
25. Even the State of The Netherlands recognises under points 3.2 et seq. of the interim pleadings that an ex officio review of the court's jurisdiction should occur (in the event of the non-appearance by an international organisation). The result of that ex officio review is given with the grant of leave to proceed in default of appearance, a result that in the opinion of the Mothers is correct. In the light of the above the State of The Netherlands is not entitled to admission in its interim claim, alternatively that such claim must be dismissed. If and to the extent that the court still holds (and in these interim proceedings) that it would be proper to conduct a substantive review of immunity, the Mothers will below (in the context of the discussion of jurisdiction and immunity) demonstrate that in this particular case no immunity attaches to the UN. The assertions on this are of an alternative character.
26. Before proceeding to develop this alternative defence the Mothers will first address the caselaw on the ex officio review of immunity.

Marokko/De Trappenberg Case

27. The State of The Netherlands has addressed the Supreme Court (*Hoge Raad*) case of 25 November 1994 (NJ 1995, 650; *Marokko/De Trappenberg*) under numbers 3.2.9

and 3.2.10.

The State of The Netherlands asserts that this case should not be indicative for the present case and that the comment to the case should be regarded as incorrect. The State of The Netherlands asserts, inter alia, that a distinction exists between legal acts that a state performs on the basis of equality with third parties in civil law matters ('*acte iure gestionis*') and acts that are performed as a governmental authority ('*acte iure imperii*'). The State of The Netherlands concludes under point 3.2.10 that the District Court must *ex officio* recognize the immunity of the UN and must confine itself to the question whether there has been any waiver of immunity in the present proceedings. The position taken by the State of The Netherlands is incorrect and the judgment of the Supreme Court is correct. The follows serves as explanation.

28. The case cited concerns immunity of states from jurisdiction. As has already been noted above, what should be at issue in these proceedings is the operational immunity of an international organisation. The arguments of the State of The Netherlands are not relevant to the extent that those arguments are derived from caselaw on state immunity. Moreover, the State of The Netherlands provides an explanation of the immunity of states that amounts to that immunity being absolute, which is likewise incorrect. Whereas the immunity of states was formerly absolute, these days the immunity of states in the majority of countries has been reduced to a relative immunity (see C.G. Van der Plas, *De taak van de rechter en het IPR*, Serie Onderneming en Recht, Kluwer 2005, page 263 et seq.). The court can have jurisdiction even if it were not the UN that had been sued but instead a foreign state. That development has had repercussions in, for example, the European Convention on State Immunity (Basel 1972), which enumerates when a state cannot plead immunity. One of the enumerated exceptions is where there is an issue of injury to the person or damage to tangible property resulting from a tortious act, which is one of the headings of the claims in this case (see Article 11 of the European Convention on State Immunity).
29. The Marokko/De Trappenberg Case also proceeds from the possibility of a restriction on state immunity, an immunity that by its nature extends (much) further than the immunity of international organisations, which will be addressed extensively below.

The Supreme Court held in the Marokko/De Trappenberg Case not only that exceptions were possible but held also that an exception arose in that case.

30. Another matter that arose without ado in the Marokko/De Trappenberg Case was that if a state appears in the proceedings an appeal to immunity does not arise ex officio. The defendant must expressly plead immunity and the UN has not done that (see legal consideration 3.3.3):

'If the Netherlands court in principle has jurisdiction in the case brought before the court, the court must hear it, even though the defendant is a sovereign state, except where the defendant has made a timely and reasoned appeal to the privilege of jurisdictional immunity. There is accordingly no place for an ex officio examination of the question whether the circumstances of the given case legitimate such an appeal.'

The Mothers note that the UN has made no appeal to immunity in these proceedings. The annotator De Boer in his comment to the case states:

'(...) A sovereign state that does not plead that privilege is subjected to the jurisdiction of the Netherlands court. The court is not obliged to examine ex officio whether a foreign state enjoys immunity. Or as A-G Strikwerda put it: the immunity exception is not a matter of public policy (...) the court must thus direct itself to the position adopted or the procedural course of action taken by the foreign state, and that excludes the ex officio application of the immunity rule.'

31. The annotator stated further that in his view the immunity issue also did not have to arise ex officio in default of appearance cases and it would suffice if there were a review of the ordinary rules of international competence. The annotator stated that jurisdiction is a given unless the foreign state objects thereto. The Supreme Court did not give a judgment on the immunity of international organisations and nor did the annotator. As the immunity of international organisations is (much) more restricted than that of states then the point of departure formulated above that jurisdiction exists

unless a successful appeal is made to the privilege of immunity should also be applied in these proceedings.

ALTERNATIVE DEFENCE:

V. Immunity and jurisdiction

32. To the extent that the District Court may hold that the grant of leave to proceed in default of appearance against the UN does not lead to the State of The Netherlands not being entitled to admission of its interim claims, alternatively to dismissal of those claims, the Mothers will address the fact that no immunity attaches to the UN in this particular case. In support of this the Mothers will assert that an essential difference exists between the immunity of states and the immunity of international organisations. That is a crucial distinction, one that the State of The Netherlands entirely neglects. The foundation of the argument advanced by the State of The Netherlands accordingly rests upon a false assumption.

V.1 State immunity

33. The immunity from jurisdiction of states is different to the immunity of international organisations both in respect of its scope and in respect of its foundation. The immunity of states is based upon the principle of sovereignty, independence and equality of states and results from the maxim '*par in parem non habet imperium*'; among equals no-one has dominion (see for example: ECHR 21 November 2001, Al-Adsani/The United Kingdom, 35763/97, legal consideration 54; P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, 9^e ed., 2002, page 67). In practice this means that the court of the one state cannot give judgment in a case in which another state is a defendant.

34. Immunity from jurisdiction can be difficult to reconcile with individual human rights, such as those laid down in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights (ECHR), which latter Article lays down the right to access to an independent and impartial tribunal established by law.

35. Article 14 paragraph 1 ICCP reads:

'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...).'

36. Article 6 paragraph 1 ECHR reads:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

37. It is universally accepted that the guarantee of *'fair trial'* in Article 6 paragraph 1 ECHR also embodies the right of access to a tribunal. This has been the settled caselaw of the European Court of Human Rights since *Golder/United Kingdom* (ECHR 21 February 1975, NJ 1975, 462, comment EEA; see on this also C.G. Van der Plas, *De taak van de rechter en het IPR*, Kluwer 2005, page 264).

38. The doctrine of state immunity should be viewed in the light that immunity will only be accorded to the relevant state before a judicial body in another state. The rule of immunity of states does not form an obstacle to the civilian suing the relevant state before the court of that state. Accordingly, the immunity of states is in principle reconcilable with the principles of Article 6 ECHR and Article 14 ICCP. For this reason Van der Plas correctly comes to the following conclusion (op. cit., page 265):

'In contrast to proceedings against international organisations, there is in principle always a ready alternative in the case of proceedings against States: the court of the defendant State.'

The caselaw cited by the State of The Netherlands uniformly relates to cases in which a state is sued in another country. Obviously those cases cannot be determinative for the present proceedings in which the UN is being sued. The UN is, after all, an international organisation and not a state.

39. It emerged from the discussion above of the Marokko/De Trappenberg Case that there are treaty restrictions to the principle of state immunity (European Convention on State Immunity). Moreover, in recent years a development has been discernible in the caselaw and literature that immunity is being even further restricted. The Al-Adsani case (ECHR 21 November 2001, 35763/97) cited by the State of The Netherlands under point 3.4.9 of its interim pleadings should be viewed also in that light. The conclusions drawn by the State of The Netherlands from this judgment are applied to an international organisation. The ECHR actually pronounced no judgment in that case on the immunity of international organisations and the argument of the State of The Netherlands is again incorrect for that reason.
40. In the interests of a full understanding the Mothers will address further the judgment of the ECHR in the Al-Adsani case. The plaintiff was a civilian from the state of Kuwait who had instituted a claim for damages in the United Kingdom against the state of Kuwait. The state of Kuwait was deemed by the plaintiff to be liable for the torture inflicted on the plaintiff and was sued for the resulting physical and mental damage. The legal issue before the ECHR was whether the English court had correctly held that immunity be accorded to the state of Kuwait.
41. It is worthy of note that the ECHR upheld the immunity of the state of Kuwait with the barest possible majority among the judges, being nine to eight. That indicates clearly that the absolute character of the doctrine of immunity of states is open to debate under certain circumstances.
42. The above assertion is illustrated by the different dissenting opinions comprising the judgment. Before addressing this further the Mothers here reproduce the *ratio decidendi* of the judgment (see legal consideration 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 use of two words are noticeable in this *ratio decidendi*. In the first place, there is the word 'yet', whereby the ECHR indicates that with the passage of time another view may or even will emerge. In the second place, there is the word 'States' in relation to the fact that immunity remains restricted to the court outside the territory of the relevant state. Al-Adsani could have sued Kuwait in that land, in which case Kuwait could not have pleaded immunity. The Mothers fail to discern in this case a similar alternative. The Mothers will return to this point.

43. It is abundantly clear in the dissenting opinions that the immunity of states is under severe pressure in certain cases and should yield to the interests of the civilian whose rights have been breached. In the dissenting opinion of Judge Loucaides:

'In view of the absolute nature of torture it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of State immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid to any legal liability whatsoever.'

(...)

'In my opinion, they (addition by Advocates: the relevant immunities) are incompatible with Article 6 § 1 in all those cases where their application is automatic without a balancing of the incompeting interests as explained above.'

Apart from that the ECHR has explained that a balancing of interests must be undertaken, namely, that it must be determined whether the restriction of Article 6

ECHR is proportional in relation to the objective that the use of immunity seeks to realise (see legal consideration 55).

44. The joint dissenting opinion of six other judges of the ECHR (including the President) provides a clear insight into the legal reasoning that should be followed where states are concerned. The prohibition of torture is, according to all the judges, an issue of *jus cogens* (see legal considerations 60-61), in other words, that this rule is a peremptory rule of international law (see Kooijmans, op. cit., page 18). According to the dissenting opinion, in the event of a conflict between a *jus cogens* rule and another rule of international law (such as immunity), that other rule must yield (see legal consideration 1 of the dissenting opinion):

'In the event of a conflict between a jus cogens rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.'

45. The following conclusion (see legal consideration 3 of the dissenting opinion) therefore results from this rule of priority:

'The acceptance therefore of the jus 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.'

46. The Mothers point to the distinction between the torture of an individual and the genocide of almost 10,000 persons that the State of The Netherlands and the UN did not prevent. The reasoning to the judgment of the ECHR and the dissenting opinion lead to the conclusion that in the case of the prohibition of genocide as a rule of *jus cogens*, the ECHR will hold that the immunity of a state will be subordinate to the rights of the individual.

47. Apart from that, there is the fact that in the Al-Adsani case the immunity accepted (by nine of the seventeen judges) was severely criticised (see for example A. Orakhelashvili, *State Immunity and International Public Order Revisited*, German Yearbook of International Law 2006, pages 327 through 365). According to that author there should be a hierarchy of norms and there should be no absolute inviolability of states. The decision in the case of Al-Adsani is viewed as a breach of the right that should be guaranteed by Article 6 ECHR (see Orakhelashvili, *loc. cit.*, page 347):

‘The Al-Adsani treatment of Art. 6 is incompatible with the principle repeatedly affirmed in the ECHR’s jurisprudence, that the Convention must be interpreted so as to make its safeguards practical and effective, and not illusory.’

(...)

‘All these considerations demonstrate that Al-Adsani is an inconsistent and badly reasoned decision that was not worth following in subsequent cases.’

48. In addition to the case discussed above, the Netherlands Government, through the statement of the State Secretary of Justice with the introduction of the Court Process Server Act, has also stated that absolute state immunity *‘can no longer be regarded as valid international law’* (Tweede Kamer, Assembly Year 1993-1994, 23081, no. 5, page 3). Contrary to what the State of The Netherlands in the present proceedings suggests, the restrictions on state immunity have accordingly been recognised by the Government in the past.

49. The above produces the following:
1. the immunity of states and the immunity of international organisations are based on different principles and possess a different scope;
 2. absolute state immunity is not current international law;
 3. the immunity of states must be tested against Article 6 ECHR;
 4. contrary to the case of international organizations, in the case of the liability of a state there always exists the possibility to apply to the forum of the land of the state being sued;

5. if the violated international legal norm is a peremptory rule of international law (*jus cogens*), other rules of international law (such as the right of a state to immunity) must yield;
6. even if the rules of state immunity might be applicable to the UN in the present case (which is not the case), it is most likely that the ECHR would allow the immunity in that event to yield to the rights of the Mothers.

V.2. Immunity of international organisations

50. The immunity of international organisations is of an essentially different order and extends (much) less far than the immunity of states. Restrictions on the immunity of international organisations were earlier adopted simply because, otherwise than in the case of states, there is no other court having jurisdiction. The Mothers wish to assert first and foremost that they recognize in principle the law on the operational immunity of the UN. The Mothers actually dispute whether the alleged blameworthy conduct falls under operational immunity. In addition, operational immunity also has its limits. The Mothers will below demonstrate that no immunity attaches to the UN in this case, alternatively that such immunity must yield to the rights of the Mothers. In addition, the assertions of the State of The Netherlands, to the extent that they are applicable, will also be taken into consideration. The following three basic assumptions will underpin the argument:

- a. the present issue does not fall within the scope of operational immunity;
- b. to the extent that the present issue might fall within the scope of operational immunity, such immunity must yield to the rights of the Mothers in the context of a balancing of interests. No appeal to immunity is possible in the event of genocide.
- c. if and to the extent that the appeal to immunity does not fail on the grounds set out above, the Mothers have the right of access to an independent and impartial tribunal as a consequence of Article 6 ECHR. As the UN has not established an

effective right of access to justice the Netherlands court has jurisdiction to hear the claims in the present case.

a. Scope of operational immunity

51. The immunity of international organisations possesses an operational character. The immunity of an international organisation is justified by and its limits lie in the necessity to put the organisation into a position to carry out its tasks in an independent manner (see Kooijmans, *op. cit.*, pages 175-176). The immunity of new international organisations is thus laid down in separate legislation (generally upon the establishment of the organisation). That is not the case with states, to whom immunity generally applies. If an international organisation makes an appeal to immunity, it should be determined whether there exists an operational need for immunity.
52. As was addressed above, every international organisation is subject to its own immunity rules (see for an example thereof the Zwartveld case before the Court of Justice of the European Communities, 13 July 1990 (C-2/88), legal consideration 20). The Mothers will therefore address the specific immunity rules of the UN.

Order of priority UN Charter - Convention

53. Article 105 paragraph 1 UN Charter reads:

‘The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.’

The UN accordingly has immunity to the extent that such is necessary for the fulfilment of its purposes. This does not mean exclusively the general purposes of the UN but also the purposes that result from a specific mandate, such as the mandate to protect the Srebrenica Safe Area and the population there.

54. Article 105 paragraph 3 UN Charter provides that the General Assembly of the UN can propose conventions in order to complete the details required by the application of Article 105 paragraphs 1 and 2 UN Charter. Naturally that does not mean that such

further completion can displace the rule of Article 105 paragraph 1 UN Charter. An order of priority exists between the Charter and the convention, whereby priority is ceded to the Charter as the convention is based on the Charter. The Convention on the Privileges and Immunities of the UN was promulgated by the General Assembly of the UN in 1946. It follows from that Convention that if immunity is accorded to the UN, the UN can waive that immunity. Article II section 2 of the Convention reads:

'The United Nations (...) shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'

Operational immunity

55. A characteristic of any state operating under the rule of law is that a distinction is drawn between the legislature, the executive and the judiciary. In a system in which that distinction is drawn, those powers should control each other in order to guarantee fundamental legal principles and to prevent the rise of a dictatorship. The UN exercises the legislative power by passing its resolutions. Then those resolutions are implemented by UN troops. If the UN subsequently cannot be supervised by a court under any circumstances then the UN would resemble a dictatorial organisation. It is unthinkable that the states that established the UN and the states that have subsequently become members would have envisaged such an organisation dedicated to bringing about world peace. It is recognized also that the UN Charter should be interpreted on the basis of the principles of good faith (see G. Ress, in B. Simma, a Commentary, *The Interpretation of the Charter of the United Nations*, Volume 1, page 19). Such interpretation entails that a possible immunity of the UN cannot be without limits. For that matter, it is also not acceptable that a person or an organisation accords itself unrestricted immunity and that an independent court accepts that. Immunity can only be accorded to others. It is in conflict with the principles of a state subject to the rule of law that persons or bodies themselves determine that they have unrestricted immunity.
56. A. Reinisch correctly observes that international organisations are likewise subject to the principles of 'good governance' (see A. Reinisch, in R. Hofmann et al., *Die*

Rechtskontrolle von Organen der Staatengemeinschaft, 2007, page 84). The Commission of the International Law Association also comes to the same conclusion with regard to ‘Accountability of International Organisations’ (see A. Reinisch, in R. Hofmann et al., Die Rechtskontrolle von Organen der Staatengemeinschaft, 2007, page 84, footnote 223):

‘As a general principle of law and as a basic international human rights standard, the right to a remedy also applies to IO-s in their dealings with states and non-state parties. Remedies include, as appropriate, both legal and non-legal remedies.’

57. The operational (and therefore restricted) character of the immunity of international organisations is confirmed in the caselaw of the highest court (see Court of Justice of the European Communities of 13 July 1990 (Zwartveld), under legal consideration 19):

‘Viewed in the light of these principles, the privileges and immunities accorded to the European Communities by the protocol possess only an operational nature, to the extent that they are intended to prevent the Communities from being obstructed in their operations and independence (...).’

58. The literature confirms that the immunity of international organisations does not mean that such organisations are above the law. They are obliged to observe the law. The following have been given as examples of situations in which an operational need for immunity exists (see Kooijmans, op. cit., pages 171-172):

- Representatives of UN members must be able to travel freely to UN premises even though the guest country has hostile relations with the member state in question;
- Personnel of the international organisation must be able to continue to discharge their functions without obstruction precisely during times when the country in question is less enamoured of the activities being carried out by the organisation.

These examples do not apply to the present case. The present case is concerned with an issue of an entirely different order. This issue concerns indeed responsibility for failing to prevent genocide and that is entirely separate from that which the operational immunity of the UN aims to protect. There is no room here for operational immunity.

Advisory Opinion of the ICJ

59. It is significant that the ICJ on 29 April 1999 issued an Advisory Opinion (hereafter: ‘the Advisory Opinion’). This related to the immunity of international organisations in general and the UN in particular. The State of The Netherlands also referred to the Advisory Opinion under point 3.2.7 of its pleadings. The State of The Netherlands asserted on the basis of this advisory opinion of the ICJ that where proceedings were pending against the UN, the particular country in which the proceedings were brought was obliged to inform the court of the position of the Secretary-General of the UN regarding the issue of immunity. The court would then be bound to adopt the position of the Secretary-General of the UN, unless a peremptory reason existed to decline to recognize such immunity. According to the State of The Netherlands, such a peremptory reason would exist only where the UN had expressly waived the immunity.
60. The assertions of the State of The Netherlands regarding the Advisory Opinion are factually and legally incorrect. The Advisory Opinion is certainly relevant but actually for other reasons. The following serves as explanation.
61. The advisory opinion of the ICJ in the case mentioned above concerned, in the first place, an essentially different set of facts. It concerned a dispute against the Special Rapporteur for the UN Commission on Human Rights regarding the independence of courts and advocates in Malaysia. It did not concern, therefore, proceedings against the UN itself. Following the UN Rapporteur’s negative comments in an interview with a newspaper on what was the subject of his enquiry, he was bombarded in Malaysia with claims for damages in judicial proceedings. This was clearly intended to influence the judgement of the UN Rapporteur by besetting him – during the enquiry – with legal proceedings. Section 22 of the Convention provides for the possibility that the

Secretary-General may issue a directive on the question whether an agent of the UN has acted within the scope of his function, in which case he will be accorded operational immunity. The Secretary-General of the UN concluded that the UN Rapporteur had remained within the scope of his function with his comments with the result that he was accorded operational immunity. According to the ICJ Malaysia should have brought the immunity issue to the attention of the court at the commencement of the legal proceedings.

62. The State of The Netherlands has moreover incorrectly interpreted the competence of the Secretary-General of the UN to issue a directive. That relates, namely, to the question whether there is an exercise of a function and not to the question whether immunity should be accorded (see number 60 of the Advisory Opinion). The scope of immunity is made clear under number 61 of the Advisory Opinion:

‘When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.’

This consideration relates to ‘experts’ in respect of which it is laid down in the Convention under Article 23 that the Secretary-General may only waive immunity where in his opinion immunity would impede the course of justice. There is accordingly in such cases a legal basis for a directive of the Secretary-General, which moreover can be deviated from. Contrary to what the State of The Netherlands then further asserts, the ICJ also did not hold that only the waiver of immunity by the UN would provide such a peremptory reason to constitute a ground to depart from the assumption of immunity. In that event, indeed, a balancing of interests by the national court would never arise. The argument of the State of The Netherlands is therefore also not traceable to the Advisory Opinion.

63. The Mothers further note that the ICJ in its Advisory Opinion expressly addressed the question whether in this specific case the comments of the UN Rapporteur were made in the exercise and within the scope of the function he had been entrusted with, in which case immunity could be accorded (see numbers 47 et seq. of the Advisory Opinion). The Advisory Opinion is a confirmation by the ICJ that in respect of international organisations in general, and the UN in particular, one is dealing with operational (and not absolute) immunity.
64. In passing, the Mothers also note in respect of the Advisory Opinion that the UN have not entered an appearance in the present case, whereas the UN Rapporteur in the case set out above did enter an appearance and had also made an appeal to immunity (see paragraph 6 of the Advisory Opinion). It is not clear to the Mothers how this is reconciled with the assertion of the State of The Netherlands that the policy of the UN is not to enter an appearance in judicial proceedings.
65. The interim conclusion that should be drawn here is that immunity in the case of international organisations is not absolute but remains restricted to those cases in which an operational need for immunity exists. That operational need is not present in this case. The following serves as explanation.

No operational need for immunity in this case

66. The present case, noting the facts set out in the originating writ of summons (under numbers 6 through 287), is of an entirely different order than the case that was discussed by the ICJ in its Advisory Opinion. Thus there is no issue of exerting influence on the UN, against which it is precisely the operational immunity of the UN that offers protection. The mission to protect the civilian population that found itself in the Srebrenica Safe Area ended after all a good twelve years ago. Next to that (co-) responsibility for genocide is not reconcilable with a claim for damages as a consequence of possibly libellous comments made by a UN Rapporteur. Even the examples in the literature of operational need for immunity cited above (see Kooijmans op. cit. pages 171-172) are of a fundamentally different order than the present case.

67. Even the judgment in the Euratom Case (HR 13 November 2007) cited by the State of The Netherlands under point 3.4.5 concerns essentially different facts and another area of law. The Euratom case related, indeed, to immunity from the criminal prosecution of employees of Euratom and not to the consequences of error under civil and international law. As was addressed above, every international organisation has its own immunity provisions. Those of Euratom deviate from those of the UN. The provisions on which the Supreme Court judged related to immunity for coercive measures relating to property rights and assets (Article 1 of the Protocol on the Privileges and Immunities of the EC of 8 April 1965) and the exemption from criminal prosecution of international civil servants. Those cases are not relevant here. Furthermore, the Court of Justice of the European Communities in its judgment in *Zwartveld* of 13 July 1990 (C-2/88) under legal considerations 19 through 21 has again held that it is specifically Article 1 of the Protocol of 8 April 1965 that is subject to the restrictions of operability and relativity. In that case an appeal to immunity was also dismissed.
68. In the view of the Mothers the admissibility of the submitted claims entail no influence on nor constitutes any hindrance to the operability of the UN. As has been extensively asserted in the writ of summons, the UN in its report on Srebrenica has itself judged that it had made numerous errors. These proceedings raise the question of what are the consequences for those errors. The operability of the UN is not itself in issue, but rather the question whether the UN should be protected by the rule of immunity from every form of unlawful act. As will be extensively addressed below in the context of the balancing of interests, responsibility must be borne for allowing genocide to be committed and it cannot be that such would be hindered by the grant of immunity. That applies all the more for an organisation that has set itself the objective of preventing genocide and that permanently champions human rights. This organisation has apparently adopted the policy not to enter an appearance in legal proceedings even to enter an appeal to immunity. The State of The Netherlands is attempting to cover this most spectacular violation of human rights under the cloak of immunity. That is unacceptable.

69. The State of The Netherlands has referred under point 3.4.4 of its interim pleadings to the judgment of the ECHR of 2 May 2007 (Behrami and Saramati, 71412/01 and 78166/01). It should follow from that judgment, according to the State of The Netherlands, that the Netherlands court may not judge to what extent the UN failed in its mission to maintain international peace and security. The State of The Netherlands thereby misunderstands the claims that have been filed and the basis of those claims. The case cited concerns the question to whom should the acts of national contingents in a UN mission be attributed. The judgment says nothing over the immunity of the UN or the operational need therefor. The judgment cited is accordingly not relevant in the context of the interim proceedings.

V.b Balancing of interests: no immunity for genocide

70. The balancing of interests plays a greater role (in the alternative) to the extent that it is judged in this case that the conduct alleged to be unlawful falls within the scope of the operational immunity of the UN. That balancing of interests amounts to a review of the proportionality between the according of immunity and the rights of the citizens as they are recognized in international law. The priority of peremptory rules of law (*jus cogens*) gives them precedence over other rules of international law.

Jus Cogens

71. It was discussed above that there are certain rules in international law that are so important that in the event of a conflict with these rules, other rules of international law must yield. This higher law is termed *jus cogens*. The prohibition of genocide is *jus cogens* (see J.A. Frowein, Encyclopedia of Public International Law, Volume Three, 1997, page 67). The Mothers are conscious that the UN did not itself commit the genocide. What is here at issue is the question whether the UN obligation laid down in the Genocide Convention to prevent genocide has been fulfilled. There is also an issue of *jus cogens* in the case of the violation of other human rights, such as torture, murder and rape. It was predictable that all those human rights would be violated in July 1995 when the UN failed at that time to fulfill its promise to provide

protection (see further numbers 408 through 411 in the writ of summons and the sources given there).

72. The ICJ held in its judgment of 26 February 2007 that genocide was committed in Srebrenica (see legal considerations 278 et seq., together with the conclusion under legal consideration 297):

'The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.'

73. It is further demonstrated in the writ of summons that extremely serious violations of other human rights also occurred in addition to genocide.
74. The ICJ held in its Advisory Opinion that the immunity of the UN can yield. The ICJ did not hold in its Advisory Opinion, contrary to the assertion of the State of The Netherlands, that the court is obliged unconditionally to follow the view of the Secretary-General of the UN regarding the exercise of function and immunity. Indeed, that power of the Secretary-General of the UN to issue a directive can be departed from by the national court for *'the most compelling reasons'*. This also confirms that a balancing of interests must be undertaken.
- As the ICJ has held in the case against Malaysia that there can be compelling reasons to depart from the view of the Secretary-General (regarding the functioning of an agent) already in the case of an insult, that must without more be the case in the event of genocide.
75. It has already been discussed above that a balancing of interests is called for even in respect of the (much) more extensive state immunity (see Al-Adsani, ECHR 21 November 2001, 35763/97). It was there demonstrated that the more there is an issue

of a serious breach of a peremptory rule of international law, so immunity will yield all the sooner.

76. There is no higher norm in international law than the prohibition of genocide. The maintenance thereof is an important reason for the existence of international law and of the most important international organisation, the UN. This entails that no immunity attaches to the international organisation in a case of non-prevention of genocide. Indeed, no greater recrimination can be made of an international organisation other than the active commission of genocide itself. If immunity does not yield in a case of genocide then immunity would never yield and would accordingly be absolute. That would be irreconcilable with the operational character of the immunity of the UN.
77. The Mothers once again note that the non-prevention of genocide is not the only norm with a peremptory character under international law that was breached. The non-prevention of torture, murder, severe cruelty, rape and the non-reporting of war crimes, alternatively the combination of all these violations, are also in conflict with *jus cogens*.

The ICJ Congo Case cited by the State of The Netherlands

78. The State of The Netherlands cited the judgment of the ICJ of 6 February 2006 in the Congo Case in the light of the asserted immunity of the UN. The State of The Netherlands asserts that the fact that the prohibition on genocide has been breached does not give rise to jurisdiction. That assertion is, however, not traceable in the considerations nor in the decision in the case cited. Under legal consideration 64 the ICJ held:

‘The Court observes, however, as it has already had occasion to emphasize, that “erga omnes character of a norm and the rule of consent to jurisdiction are two different things” (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para.29), and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide the basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of parties.'

79. What emerges from the above quotation is something entirely different to the assertion of the State of The Netherlands. The ICJ recognises that peremptory norms of international law exist, including the prohibition of genocide. The prohibition of genocide and the jurisdiction of the ICJ are in fact two different issues, according to the ICJ. According to its Statute the ICJ only has jurisdiction if both parties consent to the ICJ hearing their dispute. That is fundamentally different in the Netherlands law of procedure, where clearly the consent of the defendant is not required to institute legal proceedings. The case cited above is only of interest to the extent that it confirms the broad acceptance of the prohibition of genocide as *jus cogens*.
80. The conclusion drawn on the basis of the above is that a possible appeal to immunity should not be upheld where there is an issue of breach of *jus cogens* and the interests of the Mothers weigh more heavily than the interest of the UN in having immunity.
81. As an aside the Mothers wonder whether in this case the Secretary-General of the UN does not in fact have the obligation to waive any possible right to immunity. Indeed, in the Convention various Articles relating to the immunity of Member States, officials and experts (see Articles 14, 20 and 23) contain a ruling of that type that is to the effect that a review of whether the course of justice would be impeded by the immunity should occur. If that impeding would not prejudice the interests of the UN the immunity should yield. The Mothers wonder how the giving of an account over the non-prevention of genocide would prejudice the interests of the UN. One of the primary objects of the UN is indeed the prevention of genocide as a peremptory international norm (*jus cogens*).

V.c Article 6 ECHR: right of access to the court

82. To the extent that it may be held that the allegedly blameworthy actions imputed to the UN fall under operational immunity and that such immunity weighs more heavily than the interests of the Mothers, the Mothers (in the alternative) invoke Article 6 ECHR and Article 14 ICCP. This fundamental human right enshrines the right to access to an independent and impartial tribunal that has been established by law. Article 14 paragraph 1 ICCP reads:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...).’

Article 6 paragraph 1 ECHR reads:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

As has already been discussed, it is generally recognised that the guarantee of ‘fair trial’ in Article 6 paragraph 1 ECHR also entails access to the court. This is settled caselaw of the European Court for Human Rights since *Golder/United Kingdom* (ECHR 21 February 1975, NJ 1975, 462, annotator EEA; see on this also C.G. Van der Plas, *De taak van de rechter en het IPR*, Kluwer 2005, page 264).

83. The Mothers will address the CAVV Report, the relevant literature and a number of cases below. From this it emerges that what always applies is that where no alternative and effective judicial process is available, the immunity must yield and the court must hear the dispute.

CAVV Report regarding the immunity of international organisations

84. In the writ of summons (under point 452) the Mothers have already noted that the Advisory Commission on Issues arising under Public International Law (CAVV) set up by the State of The Netherlands reported that access to the court is more important than the immunity in the absence of another judicial process. The CAVV thus writes in Article 4.5.2 of its report no. 13 that the national court:

‘(...) should proceed to a prima facie investigation in the light of international legal norms of the availability of adequate internal legal remedies that are available within an international organisation to the aggrieved party. In the event of a negative result it is desirable that national District Courts do not accord immunity and proceed to settlement of the dispute at hand.’

85. In regard to this viewpoint the State of The Netherlands has stated under point 3.4.11 of its interim pleadings that this quote anticipates the legal development advocated and that nothing emerges from the rest of the CAVV Report that no immunity should be accorded to the UN in the event that internal legal remedies are unavailable.

86. The point is precisely that the cited quotation anticipates the legal development advocated by the CAVV. That in no way reduces the force of the argument and the reasoning of the CAVV. The CAVV is of the opinion that in the future the national court should allow the law on access to the court to prevail over the attaching of immunity.

87. The assertion of the State of The Netherlands that the Report should be read as providing support for the view that under existing law immunity attaches to the UN despite the absence of any effective access to the court is incorrect. The CAVV, on the UN under Chapter 3 of the Report no. 13 on the state of the law at the time of the compilation of the Report, precisely did not say that the immunity of international organisations must always be upheld. On the contrary, the CAVV under point 3.5.2 concluded on the state of the law concerning international organisations that:

‘States or individuals can institute legal proceedings before a national court. Here can the same type of problem occur as is recorded in paragraph 3.5.1 (b). The greatest problem in this case is that the organisation often claims immunity from jurisdiction. In practice national courts have sometimes upheld such claims, and sometimes not.’

88. Meanwhile it is accepted in the most recent literature that the immunity of international organisations, such as the UN, is not (or no longer) self-evident (see A. Reinisch, in R. Hofmann et al., *Die Rechtskontrolle von Organen der Staatengemeinschaft*, 2007, page 43). There are an increasing number of national courts that, in order to guarantee an effective state of legal protection, do not recognise the immunity of these organisations. The Mothers will address further a number of these cases. Before proceeding to do so, the Mothers will return briefly to the judgment of the Court of Appeal at Brussels of 15 September 1969 (Maunderlier) (already extensively addressed in the writ of summons). The State of The Netherlands also cites this case under point 3.4.11 of its interim pleadings but draws incorrect conclusions from it.
89. In the proceedings in 1966 between Maunderlier and the UN (see points 450 and 451 of the writ of summons) Maunderlier invoked, inter alia, Article 6 ECHR and Article 10 Universal Declaration of Human Rights (UDHR). It was held in this dispute that the UDHR did not have the force of a law (see 45 ILR, page 451). The Tribunal in Brussels held further that at that time only fourteen countries were party to the ECHR and that the ECHR could not be enforced against the UN (see 45 ILR, page 452). However valid the numerical argument in 1966 may have been, that is at present certainly not the case given that presently 46 countries have acceded to the ECHR. The second argument, that the ECHR does not apply to the UN, is also incorrect. The ECHR gives civilians a direct right of access to the court. That means that the court to which a claim is made must offer access. By so doing the ECHR is not imposed on the UN but rather protection is offered to the recognized – also by the UN – human right of access to the court.

90. The Tribunal in Brussels in the Maunderlier case held in respect of the failure to create legal access that (see 45 ILR, page 451):

'In spite of this provision of the Declaration which the U.N. proclaimed on 10 December 1948, the Organization has neglected to set up the courts which it was in fact already bound to create by Section 29 of the Convention [on Privileges and Immunities] of 13 February 1946.'

One should proceed on the assumption that even the Belgian court, meanwhile some 40 years later, would no longer accept that failure of the UN.

91. It is also confirmed in other literature that the Netherlands court should examine whether, if the operational immunity is established, an alternative and effective judicial proceeding exists for the plaintiff. If that is not the case, the international organisation should be accorded no immunity (see Kooijmans, *op. cit.*, page 175).

K. Wellens has expressed the same view in his publication, 'Fragmentation of international law and establishing an accountability regime for international organizations: The role of the judiciary in closing the gap' (see Michigan Journal of International Law, 11 May 2004). Wellens asserts, citing also Ch. Dominicé, that the right of access to the court should weigh more heavily than the interest of immunity (K. Wellens, *op. cit.*, page 18):

'(...) access should prevail over immunity if no legal remedy is available.'

Finally, the Mothers cite Van der Plas, *op. cit.*, page 265:

'More in point of fact it follows from the caselaw of the ECHR that the right of access is an obstacle to the grant of immunity if the plaintiff would otherwise have no effective legal protection. The curtailment of Article 6 paragraph 1 ECHR would be disproportionate in such case, or would harm the essence of the right of the plaintiff.'

Caselaw relating to the immunity of international organisations

92. The Supreme Court recognized already in 1985 that the immunity of the international organisation should yield to the interests of the plaintiff if there is no alternative and effective judicial process. In its decision of 20 December 1985, NJ 1986, 438 (Spanish/Iran-United States Claims Tribunal) the Supreme Court under legal consideration 3.3.2 held against the employer in regard to an employee of an international organisation:

‘The question whether, and if so in which cases a claim to the privilege of immunity from jurisdiction must be accorded to an international organisation is significant chiefly with a view to – and in these proceedings operates exclusively in relation to – the jurisdiction of the court of the host country. Answering this question requires in principle balancing two opposing interests, each of which is itself weighty: on the one hand, the interest that the international organisation has in ensuring that an independent and unhindered fulfillment of its function is guaranteed under all circumstances; on the other, the interest that the other legal party has that the dispute with the international organisation is heard and decided by an independent and impartial judicial tribunal.’

It was expressly held in the cited case that the fact that the allegedly blameworthy conduct fell under the operational immunity was not an obstacle to the balancing of interests referred to above (see legal consideration 3.3.5). Even if the District Court were to hold that the blameworthy conduct imputed to the UN fell under the operational immunity, the right of access to the court should be weighed against that immunity. For that matter, the immunity was accorded in the cited case only because the involved international organisation provided an alternative and effective judicial process (see legal consideration 3.3.6).

93. The Mothers find support for their assertions also in the decision of the District Court, The Hague, 28 November 2001, NJkort 2002, 1. The District Court held that it had jurisdiction to hear the dispute where an international organisation claimed immunity but no alternative effective judicial process was available. The case involved an

employment dispute between an international organisation (ISNAR) and an employee (Baur). Such a dispute certainly falls (naturally) within the operational immunity. The District Court so held under legal consideration 5.3. ISNAR had asserted in the proceedings that its ‘staff regulations’ provided an alternative judicial process. That assertion was dismissed by the District Court (see legal consideration 5.10):

‘Baur et al. have argued that the proceedings referred to in Article 16 of the staff regulations do not in this present case constitute an effective judicial process and offer insufficient protection. Reference was made in particular to the absence of information on this judicial process or to time periods and to the fact that there has been no implementation of the “regulations” within ISNAR itself: the ISNAR Appeal Committee does not exist and nor does the Chairperson thereof. ISNAR has not dealt substantively with this point but has merely claimed that it is not significant to the question whether immunity is accorded to ISNAR. The District Court has another view on this. Indeed, every person has a right – also under international law – to an effective judicial process in cases such the present. Should it emerge therefore that the judicial process under the staff regulations is not in this specific case effective, then a duty arises upon the Netherlands court.’

94. The State of The Netherlands has asserted under point 3.4.8 of its interim pleadings that the immunity of the UN does not entail that the jurisdiction of the Netherlands court is restricted, rather that the jurisdiction of the Netherlands court does not extend to the UN. Article 6 ECHR does not, according to the State of The Netherlands, entail the obligation of offering the Mothers the possibility of judging their claim. The State of The Netherlands refers on this point to the judgment of the ECHR of 14 December 2006, Markovich/Italy application no. 1398/03.
95. The assertions of the State of The Netherlands are incorrect. In the first place, the State of The Netherlands misunderstands the character of Article 13a of the General Provisions Act (*Wet AB*) in which it is stated literally that recognized exceptions under international law do restrict jurisdiction. In the second place, the viewpoint of the State of The Netherlands rests upon an incomprehensible reading of the case cited. That case

concerned, briefly, the following. During the conflict in Kosovo NATO had, from Italy, bombed a television transmitter in Belgrade, whereby several people lost their lives. The surviving relatives sued Italy for damages in tort as Italy had made air bases available. The Italian court had actually held at the highest level that according to Italian law the court could give no judgment concerning the commission of acts of war (see legal considerations 26 and 27). The plaintiffs then appealed to the ECHR and asserted that their rights had been violated on the ground of Article 6 ECHR. The ECHR did not uphold that claim. The ECHR considered, briefly stated, that Article 6 ECHR provided no guarantee of a substantive character regarding an asserted right. Italian law gave no tortious right of action concerning acts of war. According to the ECHR that was not contrary to Article 6 ECHR as the claim had been examined on the basis of Italian law by all Italian courts and dismissed. The Court emphasised that the question of immunity was not in issue (see legal considerations 113 through 115).

96. The Mothers refer finally to the seminal judgment of the ECHR dated 18 February 1999 in Waite and Kennedy/Germany (application no. 26083/94), which is also cited in the writ of summons (see points 456 et seq. of the writ of summons). Surprisingly enough, the State of The Netherlands fails to discuss this case in its interim pleadings. The dispute in the case cited concerned two employees of the European Space Organisation, ESA. Those employees were dismissed and brought an employment claim before the German court. The German court held that it had no jurisdiction to hear the claim given the immunity of ESA. The employees appealed against that judgment to the ECHR citing Article 6 ECHR. The *ratio decidendi* of the judgment of the ECHR is as follows(see legal considerations 67 and 68):

‘It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

(...)

‘For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants

had available to them reasonable alternative means to protect effectively their rights under the Convention.'

Consequently, the ECHR held under legal consideration 69 that the immunity invoked by ESA prevailed only because an alternative effective judicial process was present. This implies that in the present case immunity cannot be accorded as no alternative effective judicial process against the UN is available to the plaintiffs. The Mothers will below address further the absence of an alternative effective judicial process in this case.

No alternative effective judicial process

97. It is established that no alternative effective judicial process provided with sufficient guarantees is available to the Mothers. In practice, the UN knows of no effective judicial process despite the fact that already in 1946 the UN had assumed the obligation to create its own judicial process. The 'Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina' (hereafter: 'Agreement on the status of UNPROFOR') specified by the State of The Netherlands under point 3.4.10 can in any event not be characterised as being such an effective judicial process. The State of The Netherlands also fails to develop this point. Before proceeding further to address the issue of judicial process, the Mothers point out that the State of The Netherlands attaches legal consequences to the facts put forward by it concerning the Agreement on the status of UNPROFOR. As a general rule of evidence it is for the State of The Netherlands to provide evidence that the UN has an effective alternative judicial process in the present case.
98. The Agreement on the status of UNPROFOR provides in Article 48 for the creation of a 'standing claims commission'. Such commission was never in fact created. That is also not stated by the State of The Netherlands. The State of The Netherlands states only that it is provided for.
99. As the State of The Netherlands recognizes under point 3.4.10 of its interim pleadings, a claim brought before the standing claims commission can only be of a civil law

- character (see also Article 48 Agreement on the Status of UNPROFOR). The claim of the Mothers is also, of course, based on international law. For that there exists no alternative judicial process.
100. The complaints commission under the Agreement on the status of UNPROFOR is not independent and not impartial. In such a case the UN would be judge in its own case as it would appoint one of the three judges, the government of Bosnia would appoint the second judge and the judges so appointed would together appoint a third judge.
 101. Moreover, a claim before the standing claims commission could only be brought up to March 1996. Indeed, Article 55 under b of the Agreement on the status of UNPROFOR lays down that Article 48 remains in force until all claims have been dealt with that were brought before the end of the UNPROFOR mission or within three months thereafter. The UNPROFOR mission ended on 20 December 1995. A claim before the standing claims commission could accordingly only be brought until 20 March 1996. It is not possible to characterise that regulation as an alternative effective judicial process. The Mothers were still groping in the dark at that time regarding the facts. The Mothers refer in that connection to the fact that, for example, the NIOD Report first appeared in April 2002.
 102. The conclusion to be drawn from the above is that the Mothers in the present case have a right on the ground of Article 6 ECHR to access to the Netherlands court, regardless of any possible claim by the UN to immunity.

Summary

103. The State of The Netherlands has no interest in the motions filed. The State of The Netherlands has already expressed its view on the case through the statements of the Public Prosecutor. Moreover, the State of The Netherlands is already a party to the proceedings. That is also the reason why the interim claims regarding joinder and intervention must be dismissed. With the grant of leave to proceed in default of appearance the District Court has already given a judgment on the issue of jurisdiction. The immunity of the UN has already been judged and dismissed as the grant of leave

to proceed in default of appearance assumes jurisdiction. To the extent that the defences may be dismissed, the Mothers have argued in the alternative that the alleged blameworthy conduct falls outside the operational immunity. The State of The Netherlands misunderstands in its assertions the distinction between the immunity of states and that of international organisations. Should it be held that operational immunity should be accorded to the UN in the present case, then that (in the alternative) must yield to a balancing of interests given that there is here an issue of breach of peremptory norms of international law. Should it be held that in such balancing of interests the immunity is weightier than the prohibition of genocide, the Mothers (in the alternative) invoke Article 6 ECHR. Given that no alternative effective judicial process exists, that should yet be offered by the Netherlands court.

Concluding in the interim proceedings:

that the State of The Netherlands is not admissible in the motions filed, alternatively that the interim claims filed by the State of The Netherlands should be dismissed, with condemnation of the State of The Netherlands in the costs of the interim proceedings, such to have immediate effect.