

DISTRICT COURT

THE HAGUE

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hearing d.d. : 18 June 2008  
cause list number : 2007/2973  
time : 10.00

***PLEADINGS AGAINST UN IMMUNITY***

*In the matter of:*

**Mothers of Srebrenica Foundation**, registered office in  
Amsterdam, at Dijsselhofplantsoen 16-18;

1. **Mrs Sabaheta Fejzić**, resident in Vogošća  
(Municipality of Sarajevo), Bosnia-Herzegovina;
2. **Mrs Kadira Gabeljić**, resident in Vogošća  
(Municipality of Sarajevo), Bosnia-Herzegovina;
3. **Mrs Ramiza Gurdić**, resident in Sarajevo,  
Bosnia-Herzegovina;

4. Mrs **Mila Hasanović**, resident in Sarajevo, Bosnia-Herzegovina;
5. Mrs **Kada Hotić**, resident in Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
6. Mrs **Šuhreta Mujić**, resident in Sarajevo, Bosnia-Herzegovina;
7. Plaintiff no. 7;
8. Mrs **Zumra Šehomerović**, resident in Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
9. Mrs **Munira Subašić**, resident in Vogošća (Municipality of Sarajewo), Bosnia-Herzegovina;
10. Plaintiff no. 10;

Plaintiffs in the main proceedings, defendants in the motions,

Advocates: M.R. Gerritsen, dr. A. Hagedorn, J. Staab and S.A. van der Sluijs

*against:*

The **State of The Netherlands** (Ministry of Defence and Ministry for Foreign Affairs), with its seat at The Hague,

Defendant in the main proceedings, plaintiff in the motion,

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

## I. Introduction

### Grant of leave to proceed in default of appearance

1. Actually, today's arguments should be unnecessary. After all, the State of the Netherlands fully informed this Court on the immunity of the United Nations (UN) prior to the grant of leave to proceed in default of appearance and also set out what would be the legal consequences of it. The State of the Netherlands has accordingly fulfilled its obligations under international law to bring the immunity of the UN to the attention of this Court.
2. In addition to that, the Public Prosecutor - on the ground of Article 44 Rv (Code of Civil Procedure) - has delivered a statement and made public the position adopted by the State of the Netherlands regarding the question whether this Court possesses jurisdiction to hear the claims against the UN. Therefore, the issue of the immunity has been brought to the attention of this Court by the State of the Netherlands for the second time.
3. After the parties were permitted by the Court to set out their positions on the issue, the cause list judge of this Court granted leave to proceed in default of appearance against the UN. With that it was established that the Court had held that it possessed jurisdiction regarding claims against the UN. If that had not been so then no leave to proceed in default of appearance would have been granted. Put another way, granting leave to proceed in default of appearance implies possessing jurisdiction.

4. Application of the Netherlands civil law of procedure means that the decision on jurisdiction operates as a final decision. A review of that decision then arises only where the UN enters an appearance before the court to prevent a proceeding in default of appearance. Preventing a proceeding in default of appearance is in that sense a statutory exception to the doctrine of the binding quality of the final decision.
5. Accordingly this procedural discussion should actually be terminated and, one whole year since the service of the writ of summons, attention finally be turned to the substantive issues arising in the case.

#### **Non-admissibility of the State of The Netherlands**

6. The legal consequence of the above is that the State of the Netherlands is non-suited in its motion for the court to declare its lack of jurisdiction.
7. Should the Court hold otherwise, I would argue in the alternative as follows. I will draw the conclusion that the other facts and circumstances and their legal characterisation entail that this Court possesses jurisdiction in this case, and also that the claims regarding joinder and third-party intervention must be dismissed. My colleague, Axel Hagedorn, will continue the argument and deal specifically with the fact that no immunity attaches to the UN in this very exceptional case.

#### **Motions**

8. As remarked earlier, the Mothers had hoped and expected that following the issue of the writ of summons the substantive debate would have commenced on the role of the State of the Netherlands and the UN in the Srebrenica drama. However, the State of the Netherlands raises again, already for the third time in these proceedings, the issue of the immunity of the UN.
9. Apart from the fact that the motions significantly delay the proceedings, the State of the Netherlands here allows the (professed) legal interest of the UN to prevail above the interests of the more than 6,000 relatives, who have been seeking truth,

recognition and satisfaction now for 13 years. The argument of the State of the Netherlands that the motions have been instituted to comply with obligations under international law fails to convince. Indeed, as I have said, the State of the Netherlands has already twice fulfilled that obligation by the letter prior to the leave to proceed in default of appearance and by the statement of the Public Prosecutor (OM).

#### **Attitude of the United Nations**

10. The UN has elected not to appear in these proceedings. After the originating writ of summons was legally served the UN returned the writ of summons. It was made known through the Permanent Representative of the State of the Netherlands to the UN that the UN enjoyed immunity and that it would therefore not appear. The UN thus refused to answer in the presence of an independent court for the non-prevention of the genocide in Srebrenica.
  
11. Such a choice is open to the UN. The consequence of such choice under the law of civil procedure is that on 7 November 2007 the District Court granted against the UN leave to proceed in default of appearance. This attitude of the UN is also evidence of the little respect shown to the thousands of victims who were abused, deported and/or murdered despite the presence of the UN soldiers who, it must be noted, had been sent to Srebrenica to discharge the promise of the UN that the citizens would be protected.

#### **Circumstances of the case**

12. The motions instituted by the State of the Netherlands possess a highly legal-theoretical character. Accordingly, the danger exists that the decision on the motions will be seen as separate from the exceptional circumstances of the case. Indeed, the issue of the immunity of the UN cannot be seen as separate from the facts under which the immunity of the UN has been raised here. I therefore attach great value to summarising what the UN (alongside the State of the Netherlands) is accused of and why these legal proceedings have been brought.

13. However, for the sake of the time I will keep it brief; for the sake of completeness I refer to the writ of summons which deals extensively with what I will here touch upon. I hope, however, that this summary will not mean that the facts and circumstances set out in the writ of summons will not be read. I point out again that what is involved here is the murder of many thousands of persons and that those who should have offered them protection failed. As so many persons are involved it is impossible to put forward all the facts and circumstances. Yet it is precisely these facts and circumstances that should weigh the heaviest in the weighing of the interests. I hope that you are persuaded that - otherwise than in most other cases, which as a rule restrict themselves to individuals and also do not involve genocide - this case raises very exceptional interests of a very large group of persons who in a certain sense have vested hope in justice in this Court in as much as it concerns the role of the State of the Netherlands and the UN.

## II. Summary of facts and circumstances

14. In March 1993 the then commandant of the UN in the former Yugoslavia, the French General Morillon, visited Srebrenica Town. Under the influence of the indescribable misery he encountered in Srebrenica, Morillon declared Srebrenica to be a 'Safe Area'. The citizens who then found themselves in the enclave were from that moment assured of the protection of the UN.
15. Two UN Resolutions (nos. 836 and 844) followed in June 1993, in which in addition to the protection of the Safe Area the obligation of the UN to protect the population within the Safe Area was also expressly set out. The then Secretary-General of the UN, Boutros Boutros-Ghali, confirmed in his statement of 9 May 1994 - thus more than a year before the fall of Srebrenica - that the protection of the population formed part of the mandate of UNPROFOR (see, numbers 22 et seq. of the writ of summons).
16. The Netherlands took the final decision to offer troops to the UN for the former Yugoslavia at the end of 1993. The battalion concerned, known as Dutchbat, had the Srebrenica Safe Area assigned to it. The realisation of the decision to participate in that mission and its preparation were characterised by (political) overconfidence and an absence of (military) insight and knowledge. I mention the following remarkable

facts:

a. the decision to take part in the UN mission was insufficiently thought through. There was no discussion of the decision within the Cabinet. Due to blunders in the communications between the Netherlands Ministries of Defence and for Foreign Affairs, no conditions were placed on the participation even though Dutchbat had the most dangerous and explosive part of Bosnia assigned to it;

b. the choice in favour of the Air Brigade was ill-considered. That choice was made before it was known to which part of Bosnia the troops would be dispatched. The choice in favour of the the Air Brigade was, motivated, moreover, by the political desire to place this new unit of the Armed Forces in the limelight.

c. the choice was made in favour of light weaponry partly due to the political motive not to allow the Air Brigade to appear too much like a regular armoured infantry battalion. The fear at the Ministry of Defence was that the deployment of heavier materiel would also endanger the subsequent purchase of helicopters for the Air Brigade. In addition, the State of the Netherlands hoped that this weaponry would not provoke the Bosnian Serbs, whereas it was then known that the Serbs did not take concluded agreements seriously.

d. the soldiers who were despatched had received only poor training and preparation, were inexperienced and there was virtually no *esprit the corps*;

e. there was no or virtually no exchange of experiences with the Canadian Battalion, Canbat, the battalion that was relieved by Dutchbat. No risk-analysis had been conducted nor was any military intelligence gathered. Offers by, for example, the CIA to supply intelligence were resolutely rejected.

17. The UN troops appeared to be scarcely in a state to carry out the mandate. The problems in the Srebrenica Safe Area increased noticeably. Despite the ominous portents in the course of 1995 of an approaching attack on the Safe Area no

precautionary measures were taken. On the contrary, as a result of the absence of any decisiveness the Bosnian Serbs consequently felt emboldened to risk an attack on the Safe Area.

18. The most important Observation Post manned by the UN Blue Helmets in the Safe Area fell into the hands of the Bosnian Serbs on 3 June 1995. Close Air Support, the most potent weapon available to the UN, was not deployed. No resistance was offered and the Observation Post was captured without a struggle. This apathetic attitude would be characteristic of the period that followed.
  
19. Bosnian Serbs troops attacked the Srebrenica Safe Area on 6 July 1995. Due to a shortage of troops most of the Serbian soldiers were local farm workers. Only a relatively small number of trained soldiers advanced in front. During the six-day attack UN soldiers fired towards the advancing Bosnian Serbs only once, and then only over their heads. A request for Close Air Support was refused no less than nine times by high-ranking UN officers. Modern fighter aircraft circled above the enclave on the morning of the day that Srebrenica would fall. Those aircraft waited only for orders permitting them to attack but were - despite the operational need on the ground - recalled to their base. Subsequently the air attack was called off entirely. Only three unguided bombs were released by an F-16. The only casualty hit was a farm fence. The Srebrenica Safe Area would fall that day, 11 July 1995. The then Secretary-General, Kofi Annan, would later admit that all the criteria for Close Air Support had been met and that it was therefore wrong that Close Air Support was not deployed immediately and consistently.
  
20. The population that was sent fleeing in panic sought protection in great numbers in and around the UN Headquarters in Potocari. The area of the UN compound, large enough - if necessary - to offer room for ten thousand refugees, was opened up only for barely 5,000 refugees. The remainder of some 25,000 refugees had to remain outside the UN compound. The Dutchbat Commander declared the area around the compound to be a so-called 'mini Safe Area'.

21. Despite the fact that the refugees repeatedly heard that they would be safe in this mini Safe Area, they were actually handed over to the Bosnian Serbs. There were many men among the refugees; the NIOD estimates their number to be around 2,000 although it is not possible to determine subsequently exactly how many men there were. They were adult men and boys who had fled to the compound with their mothers as well as older and sick men who had not been able to flee the area through the mountains.

22. Both the UN military observers present in the Safe Area and the Netherlands Blue Helmets were witnesses to many war crimes. There was neither intervention nor any reporting done of these crimes and that was prompted by the desire 'to maintain the peace'. The attitude of the battalion was recorded in the logbook in telegram style: 'no opposition, no provocation' and this while men were continuously being taken away and executed, while decapitated bodies were being found, women were being raped and the identity documents of so-called 'persons to be questioned' were thrown onto piles. Regarding this mountain of identity documents the Yugoslav Tribunal held in its judgment in the case against Krstic that (see, legal consideration no. 160):

'at the stage when Bosnian Muslim men were divested of their identification en masse, it must have been apparent to any observer that the men were not screened for war crimes. In the absence of personal documentation, these men could no longer be accurately identified for any purpose. Rather, the removal of their identification could only be an ominous signal of atrocities to come.'

(emphasis added by advocate)

23. The Blue Helmets showed themselves, moreover, to be helpful with the ethnic cleansing and the deportation. The compound was cleared and the route to the port, where the Bosnian Serbs awaited the refugees, was marked out with tape so that the refugees had to leave the area in a straight line and had nowhere to conceal themselves. The Blue Helmets assisted in separating the men from the women. Most of those who left the compound were also searched by the Blue Helmets. Sharp objects and small scissors were confiscated as though they were boarding an aircraft. Without

pressure being exerted by the Bosnian Serbs the Blue Helmets made the most rigorous imaginable selection of who could stay and who not. A group of injured persons confined to the sick bay in the compound were shoved into the container of a truck on stretchers and 'delivered' to the Serbs by the Blue Helmets. Not one of them would ever return.

24. Many hundreds of the around 2,000 men and boys in and around the compound were murdered there, in the area, it must be noted, that had been declared to be a mini Safe Area. The remainder of them would be transported and murdered in the following days. In total almost 10,000 would be murdered. The International Court of Justice at The Hague has in that context held that genocide was committed in Srebrenica.
25. It is these circumstances and facts, established and documented in many official reports, and I speak of, inter alia, the NIOD, the French Parliament and the UN, judgments of the Yugoslavia Tribunal (including Kristic and Jokic), that must also be considered in the judgment of this Court whether immunity attaches to the UN in this exceptional case.
26. Note, not attaching immunity at this time does not entail automatically that the claims of the Mothers will be upheld. Not allowing the appeal to immunity does mean that the UN can no longer hide behind the issue of immunity and will have to give an account. The 10,000 victims and their relatives have a right to that.

### III. Interest of The Netherlands

27. I turn eagerly to examine further the question of which interest the State of the Netherlands has in invoking the immunity of the UN. It is certainly remarkable that Dutch politicians declare in the media that they support the Mothers, while, on the other hand, the State of the Netherlands as a party to the proceedings avails itself of every possible argument to frustrate the Mothers. The present motions expose here the difference between word and deed. I refer as an aside to the fact that this phenomenon also manifests itself with the UN. Thus, the Secretary-General of the UN, after learning of the writ of summons issued by the Mothers, declared that he

supported the Mothers. What a strange contrast between the disseminated policy and the reality.

28. Is the State of the Netherlands now so cavalier with its duties under international law or does the State of the Netherlands have an interest in keeping the UN out of these proceedings? The fact is that if immunity attaches to the UN in these proceedings, the Mothers will then be non-suited in their claims against the UN. The State of the Netherlands can subsequently easily shift all responsibility for Srebrenica onto the UN. It may then well be responsible but cannot be called to account because of its immunity. That is legally, humanly and morally unacceptable.

#### **IV. Joinder/third-party intervention**

29. Before going deeper into immunity, which, as indicated above, will be discussed by my colleague, Hagedorn, I wish to add a comment to the subsidiary motion, namely, the request of the State of the Netherlands to be permitted to join, alternatively, intervene in the proceedings.
30. I can keep it very brief. What can be said on that is already contained in the statement of defence to the motion. The essence thereof is that the State of the Netherlands is already a party to the proceedings and as such can already submit any argument. What the State of the Netherlands is here attempting is legally incorrect and irreconcilable with the civil law of procedure of The Netherlands. The motion on joinder and intervention must then also be dismissed.

#### **V. Conclusion and summary**

31. I am coming to the end of my argument. The Mothers and the Foundation are of the view that jurisdiction is established by the grant of leave to proceed in default of appearance and the immunity of the UN is no longer an issue. Should a substantive judgment regarding immunity really be necessary then the facts and circumstances of the case must be taken into consideration. I have set out the exceptional circumstances that here play a role. Very serious accusations are made against the UN. My colleague will shortly speak on the legal framework of the review of the issue of immunity, in

which the facts play a role.

32. I have spoken further on the interest of the State of the Netherlands regarding the motions. That interest does not reside in a treaty obligation but can be traced back to the desire to cover its tracks and to shift the blame elsewhere.
33. I note, finally, that the State of the Netherlands is unable to invoke the immunity of the UN, whether autonomously or as a joined or intervening party. The proper party in these proceedings to invoke immunity is the UN itself. The UN, however, has not appeared and that is an end of the matter. What the State of the Netherlands is attempting is yet to raise the issue of immunity through a loophole. I trust that I have made it clear to you in my argument that this is legally and morally improper.

#### V. Immunity

34. In my argument I will go more deeply into the issue of the immunity of the UN. The most important, most essential question that here arises is whether the UN as an international organisation enjoys immunity in this exceptional case, where the UN did not prevent the genocide. Ultimately it is a question of whether the immunity of the UN is unlimited. To anticipate the conclusion to my argument I will argue that such immunity is not unlimited and in this case must yield to the rights of the Mothers of Srebrenica.
35. I will further elucidate a number of important elements. For other matters I refer the Court to the extensive statements of defence to the motions. Following a general introduction I will clarify the content of what is referred to as the functional immunity of international organisations such as the UN. Then I will explain why no immunity attaches to the UN in this case in which I will concentrate primarily upon three aspects:
1. The failure to prevent the genocide at Srebrenica does not fall within the functional immunity of the UN.
  2. Even if the failure to prevent the genocide does fall within the functional immunity of the UN, then according to national and international caselaw a weighing of

interests must take place. The prohibition on genocide - as a legally imperative international obligation - and other human rights must weigh more heavily than the interest of the UN in immunity.

3. Should this Court not accept the reasoning on weighing of interests then irrespective of that the Mothers have the right of access to an independent and impartial court. That right is laid down in Article 6 of the European Convention of the Protection of the Human Rights and Fundamental Freedoms (ECHR). Indeed, the UN has failed to create an effective legal remedy within the meaning of Article 6 ECHR.

## Introduction

36. The UN has, from the moment of its establishment, established a moral standard through declarations of principles, conferences, sub-organisations and resolutions and has acted as its guardian. The UN has been the advocate of human rights for decades past. The purposes assumed and the missions of the UN, for which it deserves all praise in principle, have led to the establishment of tribunals for the trial of war crimes, for example, in the former Yugoslavia.
37. The UN has not entered an appearance in these proceedings. The UN let it be known in a letter to the Permanent Representative of the State of the Netherlands to the UN that immunity is attached to the UN. Apparently the UN is of the view that in these proceedings it is above the law. I will briefly show in this introduction that according to international law the discretionary power of the UN to invoke immunity is restrained by certain rules and limits and that in the present proceedings these have not been observed.
38. It is a principle of a democratic state governed by the rule of law that governmental bodies may not take arbitrary decisions. Each decision must be supported by sufficient reasoning and the reasoning presented must be verifiable at law. As will appear the UN has not engaged in a proper legal consideration of the competing rights involved regarding the invocation of immunity. Moreover, the decision is insufficiently reasoned. The Mothers suspect that the decision was taken merely to preclude a painful

discussion. That is an insufficient reason for a legally effective decision of the UN.

39. Granting immunity in this case would mean that the UN had an absolute immunity and consequently would be the only organisation in the world that was fully above the law. That was never the intention and such a conclusion must be unacceptable also for the State of the Netherlands. The UN determines international obligations through its UN resolutions and it enforces those rights with its troops. With that, the powers of legislation and implementation, together with the absence of supervision by a court, would entail that an unacceptable concentration of power would arise in the UN. As will appear from my further argument, the proposition of the State of the Netherlands entails that the immunity of the UN is unlimited, which is also not supported by international law.

#### **Scope of the functional immunity of the UN**

40. The State of the Netherlands in its written submissions has supported its invocation of the immunity of the UN with references to literature and caselaw. That literature and caselaw relates primarily to the immunity of states. The State of the Netherlands appears therefore not to understand that the UN is not a state but an international organisation and that the rules that apply to the immunity of international organisations are different from those that apply to states. Even in its reasoning supporting this petition to present this argument the State of the Netherlands referred to the case before the Hoge Raad (Supreme Court) of 20 December 2007, a case that, according to the State of the Netherlands, 'is seminal for the issues that arise in the present motion'. However, that case also relates exclusively to the immunity of states.
41. The propositions of the State of the Netherlands rest upon a drastic misunderstanding. The immunity of states was absolute from time immemorial. The judgments cited by the State of the Netherlands show us merely that such absolute immunity is no longer the prevailing law, rather that only a relative immunity is granted to states. This restriction is prompted by the desire to do justice to the democratic legitimacy of states and the securing of human rights. Another essential difference between the immunity of states and that of international organisations lies in the fact that in the event of an action brought against a state the court of the state concerned always has

jurisdiction. There thus exists in any event a legal remedy available to the citizen - contrary to the case of the UN.

42. When one speaks of the immunity of international organisations such as the UN, then one is referring to what is known as functional immunity, in other words, the immunity is accorded to the international organisation to allow it properly to carry out its purposes. An example of this is the UN official who must be free to travel, even if the country concerned is not pleased with the judgment of that UN official. The actual interpretation of the immunity differs across international organisations. The functional immunity of the UN is laid down in Article 105 UN Charter of 26 June 1945 and in the Convention on the Privileges and Immunities of the UN of 13 February 1946. Article 103 UN Charter lays down that the UN Charter has precedence over other international obligations such as in this case the Convention just referred to. The functional immunity of the UN applies so that the UN can properly carry out its assigned purposes. The functional immunity of the UN does not mean that international organisations are entirely above the law.
43. The Mothers accuse the State of the Netherlands and the UN, inter alia, that they did not prevent genocide even though the population of Srebrenica had been promised that protection. In the view of the Mothers the failure to prevent genocide cannot fall within the purposes of the UN and therefore also not under functional immunity. I note that what is not under discussion here is the fact that genocide was committed. The International Court of Justice in its decision of 26 February 2007 in the case Bosnia-Herzegovina against Serbia and Montenegro established that genocide was committed in Srebrenica in 1995. The Yugoslavia Tribunal has also in a number of cases against war criminals established that genocide was committed in Srebrenica. The genocide must be taken as established fact in these proceedings.
44. The UN is here not accused of having committed that genocide. The UN is certainly accused of not having fulfilled its international obligation to have prevented that genocide. That definitely falls under the purposes of the UN. The UN failed unlawfully to do everything necessary to prevent that genocide being committed. These proceedings therefore also do not obstruct the functioning of the UN. The UN must

provide an account of to what extent the UN is jointly responsible for the fact that the genocide could be committed, particularly where the UN in its own report subsequently acknowledged that serious errors were made in Srebrenica. These proceedings constitute an accountability ex post facto without it in any way being able to influence the actions of the UN in Srebrenica. It is precisely in the case of a failure to prevent genocide that such accountability is of the greatest importance, all the more so as the UN itself considers the prohibition on genocide as being of paramount importance.

45. I note, however, that the UN and the State of the Netherlands demonstrate in these proceedings a particular single-mindedness in advancing implausible arguments in an attempt to prevent a substantive consideration of the claim of the Mothers taking place. That single-mindedness of the UN and the State of the Netherlands was missed entirely by the Mothers in Srebrenica in 1995.
46. The above briefly summarised: an unlimited immunity of the UN is unacceptable and undesirable for the proper functioning and the credibility of the UN. Accountability for the failure to prevent genocide does not fall under functional immunity.

#### **Weighing of interests: no immunity in the case of genocide**

47. Should the Court hold that invoking the functional immunity of the UN is correct, then a weighing of interests should (alternatively) be done. In so doing the interest of according immunity should be placed in relation to the other violated rights, such as the failure to prevent genocide, and other breaches of human rights, such as the prohibitions on torture, rape, plundering and deportation.
48. We dealt extensively in our statement of defence with the Advisory Opinion of the International Court of Justice (ICJ) of 29 april 1999. That case concerned a UN Rapporteur who was impeded in the performance of his duties by legal proceedings. The ICJ emphasised in its Advisory Opinion that national courts cannot automatically proceed from the invoked immunity. Two aspects of this Advisory Opinion of 1999 of the International Court of Justice are very important:

1. In that case the UN itself invoked its immunity. In these proceedings of the Mothers the UN apparently considers that it does not need to observe the law of civil procedure of The Netherlands and has not even taken part in these proceedings.
  2. The International Court of Justice has established that the functional immunity of the UN can be set aside for '*most compelling reasons*'. That case also demonstrates - as said above - that the immunity of the UN is not unlimited but that a weighing of interests must be undertaken. Such weighing of interests would mean in this exceptional case that the immunity of the UN would have to yield to the rights of the Mothers.
49. The genocide was committed 13 years ago and the UN claims that it has learnt the lessons from that drama. In the case of the UN rapporteur the issue was whether the rapporteur had made improper statements in the media. Even in that far less weighty case it was recognised by the International Court of Justice that exceptional cases are possible where immunity is not to be accorded to the UN. In the present case the following facts should serve as starting points:
- it is established that the UN had to protect the persons in the Safe Area in order to prevent breaches of their human rights
  - it is established that the UN disarmed the citizens
  - it is established that the UN offered no resistance to the advancing Serbs
  - it is established that relief convoys were not enforced
  - it is established that mass breaches of human rights took place
  - it is established that the UN provided no Close Air Support
  - it is established that the UN co-operated in the deportation of the victims
  - it is established that genocide was committed.

It is incomprehensible that under these circumstances the UN (indirectly) invokes immunity. Whatever might be the reason, in the light of these facts immunity should not be accorded, rather that the rights of the Mothers should prevail, or at least that an independent judicial review should be conducted. Should all the above listed facts not be sufficient to dismiss the invocation of immunity, then there remains but one exception to justify not according immunity: that the UN itself committed genocide.

50. This argument is confirmed by international law. The prohibition on genocide is an imperative rule of law (also referred to as 'jus cogens'). The immunity of the UN has no comparable status. The breach of other human rights, such as the prohibition on torture, murder and rape, are also imperative legal international obligations that are of a higher status than the right to immunity of the UN. When in July 1995 the UN failed to fulfil its pledge to protect the population in the Srebrenica Safe Area, it was then foreseeable that all those human rights would be breached. That foreseeability was after all the most important reason at the time for declaring the Safe Area and for the despatch of the UN troops.
51. A question that should here arise is how culpable is it that a country or an international organisation fails to prevent genocide? By extension of this question there is the oft-repeated contention in The Netherlands argument that the genocide would still have occurred even if the Dutch troops had offered resistance. As will appear, that argument arises from a misplaced interpretation of prevailing international legal obligations. I will briefly consider the caselaw of the International Court of Justice (ICJ) in the Case Bosnia-Herzegovina against Serbia-Montenegro of 26 February 2007.
52. The ICJ has established that states must do everything possible in the given situation to prevent genocide. Furthermore, and this is very important, the ICJ has laid down that a state cannot plead that, even if it had done everything that was possible, it could not have prevented the genocide (see, Legal Consideration 430 of the decision of 26 February 2007). The ICJ does not exclude, in other words, that one action, however lacking in effectiveness it may initially appear, may produce other consequential actions. It is inherent in the judgment of the ICJ that states cannot hide behind the argument of the alleged lack of effectiveness or otherwise of their actions. What is at

issue here, in the view of the ICJ, is maximum effort. Therefore, the UN and the State of the Netherlands had to have made every effort to prevent the genocide. In the main proceedings the Mothers have raised the issue that what the State of the Netherlands and the UN did was entirely insufficient.

53. It follows from the above that the ICJ judges it blameworthy if states allow genocide to occur. The applicable norm is therefore not the question of the effectiveness of the actions that must prevent genocide but the question whether maximum effort was expended. The inaccuracy and legal irrelevance of the oft-repeated assertion in The Netherlands argument that the Dutch troops could not anyway have accomplished anything is therewith established.
54. The UN has always declared that the UN regards it as obligatory to observe the Genocide Convention. That means that the obligation established by the ICJ to prevent genocide also applies without limitation to the UN. More importantly, if immunity being a non-imperative legal international obligation is valued more highly than the prohibition on genocide, then the prohibition on genocide is therefore an empty shell.
55. The above summarised: the immunity of the UN must yield in the case of the non-prevention of genocide in combination with the other breaches of human rights. Otherwise the immunity of the UN - contrary to prevailing law- would be absolute. The ICJ has held that it is not the effectiveness that is central in reviewing the question which obligations exist to prevent genocide. All that is relevant is only the question whether in the particular situation the maximum effort was expended. These obligations apply to states as well as to the UN. If no weighing of interests takes place and immunity prevails, the prohibition on genocide is a dead letter.

#### **Article 6 ECHR: right of access to the court**

56. The following applies separately to the question whether the functional immunity is here accepted and whether the weighing of interests falls in favour of the UN. Article 6 European Convention on Human Rights (ECHR) states that every citizen has the fundamental right of access to an independent and impartial court established by law.

That has been the permanent caselaw of the European Court of Human Rights since 1975 (ECHR concerning Golder/United Kingdom 21 February 1975, NJ 1975, 462 annotation EEA).

57. In its argument on the motions the State of the Netherlands has suggested that the UN has its own legal remedies and to that end refers to the 'Standing Claims Commission'. As has already been set out in our statement of defence, the Standing Claims Commission was never actually set up. The UN offers no effective legal remedy despite the fact that since 1946 the UN has been under the obligation to set up its own means of dispute settlement. The UN offers citizens no legal protection. I am pleased to refer here to an article that appeared last week by an authority on international law and the UN Charter, Professor Dr. J.A. Frowein (Emeritus Director of and affiliated to the Max Planck Institute for Foreign Administrative Law and International Law at Heidelberg, Germany) where on page 342 he writes: 'Ein Rechtsschutz innerhalb des UN-Systems existiert nicht' (appended as annex).
58. The reference by the State of the Netherlands to the Standing Claims Commission reveals distressingly that the State of the Netherlands in reality feels absolutely no compassion or empathy for the relatives of the genocide in Srebrenica. In the 13 years following the genocide neither the State of the Netherlands nor the UN has at any time referred the Mothers to any court whatsoever in order to receive recognition or satisfaction. Put yet more strongly, both the State of the Netherlands and the UN have refused every discussion. In these proceedings the State of the Netherlands suddenly refers to an authority that has never existed. This again is an example of the single-mindedness that was entirely absent in Srebrenica but has been raised to a true art now that the UN and the State of the Netherlands are being called to account at law by the relatives.
59. It is - as Professor Frowein confirms - recognised that the UN offers no effective legal remedy. It is notable that the State of the Netherlands has left entirely out of consideration the seminal decision of the European Court of Human Rights in the Case Waite and Kennedy (ECHR 18 February 1999). This is all the more amazing as that case was extensively considered in the originating writ of summons, which was served more

than a year ago. The case concerned two employees of the European Space Agency (ESA), that, just like the UN, is an international organisation with functional immunity. Those employees were dismissed and brought a claim under employment law before the German court. The German court held that it did not possess jurisdiction to hear the claim due to the immunity of the ESA. The employees went to the European Court of Human Rights against that judgment on the ground of Article 6 ECHR. The European Court of Human Rights subsequently held that the immunity invoked by the ESA prevailed because alternative effective legal remedies were present. That implies that in the present case immunity cannot be accorded as no alternative effective legal remedy at the UN is available to the Mothers. It is decidedly remarkable that the State of the Netherlands has not expressed a single word on this seminal case of the European Court of Human Rights. It is precisely this case that entails that the invocation by the State of the Netherlands of the immunity of the UN must be dismissed. The State of the Netherlands evidently had no defence to the implications of that judgment.

60. It is recognised also in the literature and in Dutch caselaw that the invocation of the immunity of the international organisation should not be accepted where there exists no effective legal remedy. That was held by the Hoge Raad (Supreme Court) in 1985 in the Case Spanish/Iran-United States Claims Tribunal (HR 20 December 1985, NJ 1986, 438). The District Court The Hague in 2001 also held that an invocation of immunity should not be accepted where no effective access to the court is available (District Court The Hague 29 November 2001, NJ kort 2002, 1). We extensively considered those judgments in our statement of defence on the motions. I refer to the conclusion of that consideration, to the effect that no immunity attaches to the UN in this case.
61. Finally I would point out that the Advisory Commission on Issues arising under International Law (CAVV) set up by State of the Netherlands has concluded that in the absence of any other legal remedy the right of access to the court is more important than the claim to immunity. It can surely not be the case that the judgement of the most important advisor to the State of the Netherlands on this point can be pushed aside on opportunistic grounds.

62. The conclusion regarding Article 6 ECHR is that the claim to immunity must yield to the right of access to the court as the UN has no effective remedy available to citizens. That is confirmed by the caselaw and literature. The CAVV also comes to a comparable judgement.

### Summary

63. I come to a winding up of my argument and summarise this for the Court. I have mentioned that the State of the Netherlands in its argument proceeds from the incorrect assumption that the immunity of the UN should be reviewed against the rules that apply to states and that such immunity should be virtually absolute. This is wrong on a number of grounds. Absolute immunity applies to no-one and a functional immunity operates for international organisations. I then dealt with the fact that with regard to the invoked claim to immunity of the UN three important factors played a role, namely, the functional character, the weighing of interests and the right of access to the court. In the first place, the failure by the UN to prevent genocide in combination with allowing other breaches of human rights, as well as actively co-operating in deportation, does not fall under functional immunity. The issue is that the UN must be accountable and such accountability does not impede the functioning of the UN. The UN, as the guardian of human rights, should also have made a different weighing of interests. An unlimited immunity of the UN is unacceptable and undermines the credibility of the UN. Should a functional immunity be accorded to the UN in this exceptional case, then, in the second place, a weighing of interests must take place. In that weighing of interests the prohibition on genocide and the prohibition on the breach of other human rights must weigh more heavily than the interest of the UN in immunity. As we saw, the ICJ held in the case of a possible slander or libel by a UN rapporteur that the possibility of the immunity of the UN yielding did exist. In the present case such weighing of interests must fall in favour of the Mothers in the light of the facts. Should that be otherwise, then I have set out that, in the third place, Article 6 ECHR entails that as no effective legal remedy exists at the UN, jurisdiction attaches to the Netherlands court.
64. By whatever line of reasoning the final decision regarding the claim to immunity is arrived at, immunity should in this exceptional case not be accorded.