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UN-immunity and the genocide of Srebrenica

Axel Hagedorn says UN immunity must be restricted

Axel Hagedorn

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The United Nations is the only organisation in the world that is legally uncontrolled and above the law. Even when the UN is involved in genocide there is no independent Court to judge possible failure of international peace keeping missions. How can a worldwide organisation seeking to protect human rights not be bound by these human rights standards itself?

Axel Hagedorn is a prominent lawyer in The Netherlands who wants to challenge the immunity of the United Nations. On behalf of 6000 mothers from Srebrenica he and his colleague Marco Gerritsen started a civil case against the Dutch government and the United Nations. They already lost the first stage of the procedure. The District Court of The Hague confirmed in July this year the absolute immunity of the United Nations.

Hagedorn announced to appeal the verdict and is convinced that his arguments will eventually prevail. He doesn't think that local courts will restrict the immunity of the UN because they are reluctant to make such a drastically verdict. His hopes are with the European Court for Human Rights in Strasbourg to rule in favour of the victims. In this article he explains clearly why the immunity of the UN should be restricted.



UN-immunity and the genocide of Srebrenica

On 10 July 2008 the District Court in The Hague (DC) decided on the procedural issue in the civil case of the foundation Mothers of Srebrenica, representing 6.000 relatives of victims of the genocide in 1995, versus the State of the Netherlands and the United Nations. The District Court ruled that the United Nations has absolute immunity.

The plaintiffs brought forward various arguments against the (absolute) immunity of the UN in this specific case. I would like to discuss the following

arguments:

- Article 105 subsection 1 of the UN Charter grants immunity with respect to tasks "(...) necessary for the fulfilment of its purposes". The involvement of the UN in the genocide in Srebrenica is not a task of the UN;

- There are two conflicting obligations under international law: the prevention of genocide (Article 1 of the Genocide Convention) versus the immunity of the UN.

Prevention of genocide is an imperative obligation (*ius cogens*), while immunity of the UN has a subordinated status. Therefore the Genocide Convention outweighs the immunity of the UN;

- Section 29 of the underlying Convention on the Privileges and Immunities of the United Nations provides for the obligation to set up alternative legal remedies.

The UN failed to do so since 1946. As a consequence, the UN is the only organization in the world that stands above the law and is uncontrolled. The European Court of Human Rights has decided in the case of *Waite and Kennedy vs. Germany* that the immunity invoked by the European Space Agency (ESA) could prevail only because alternative legal remedies were available.

The foundation Mothers of Srebrenica have appealed the decision of the DC as the arguments of the DC to grant absolute immunity to the UN in this case are not convincing.

Legal status of immunity

First of all, the DC held without further explanation that "in international-law practise the absolute immunity of the UN is the norm and is respected" (par. 5.13). The DC did not take into account that this is the first time that the UN is sued in connection with their involvement in a genocide. The UN-troops were stationed in the safe area Srebrenica for just one purpose: to prevent an expected genocide.

One should not forget that it was the United Nations who issued several resolutions regarding the safety of the fugitives in Srebrenica, disarmed the people in Srebrenica, failed to implement the promised humanitarian relief, failed to use any military means to stop the attacking Bosnian Serbs, denied to return the weapons to the disarmed Bosniacs, failed to give close air support and after the fall of Srebrenica, supported the separation of men and women for deportation. The United Nations therefore did not prevent the mass executions of the Bosniacs.

As the International Court of Justice (ICJ) has clearly stated in its decision of 26 February 2007, the obligation of States is to employ all means reasonably available to them to prevent genocide as far as possible. The secretary-general of the United Nations, Kofi Annan, stated in 2004 that the United Nations as an international community have a key obligation to prevent genocide. The question whether in light of the above-mentioned failures the UN should still be legally protected by absolute immunity, has not been dealt with by the DC, even though these failures fulfil not at all the obligation to prevent genocide.

Furthermore, the DC fails to discuss the immunity of the UN in relation to their obligation to set up legal remedies as provided in section 29 of the Convention on Privileges and Immunities.

The DC also neglects the Dutch Advisory Commission on Issues arising under Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken, CAVV*), which clearly advised the Dutch Government to deny immunity in national courts if there are no legal remedies available.

The DC does take into account the Advisory Opinion of the International Court of Justice concerning an UN special rapporteur dated 29 April 1999, but does not discuss the findings of the ICJ in this Advisory Opinion that immunity can be set aside "for the most compelling reasons". Clearly, the ICJ is not supporting an absolute immunity.

Therefore, it seems correct to conclude that there is no case law concerning the involvement of the UN in legal proceedings with regard to genocide, and instead that there are indications in literature and jurisdiction that immunity of the UN is and cannot be absolute.

Prevention of genocide vs. UN-immunity

Regarding the second argument of the Mothers of



Srebrenica that prevention of genocide is prevailing the immunity of the UN, the DC found that the scope of the Genocide Convention is purely criminal and does not extend to civil actions. This is a valid argument as such, but limits the protection of civilians massively. As the aim of the Genocide Convention is to protect civilians, one can also argue that therefore civil actions on the basis of the Genocide Convention should be allowed in preventing genocide. The risk of civil liability of States and the UN shall quite likely increase efforts to prevent genocide wherever it takes place. To be very clear, this is not an unlimited civil liability, but a possible civil liability if genocide takes place whilst UN-troops are around and neglect to do what is in their power.

Remarkably, the DC held that national courts should not assess the acts and omissions of the UN because: "It is very likely that more far-reaching testing will have huge consequences for the Security Council's decision-making on similar peace-keeping missions." This political statement shows the underlying problem and might be the real reason why the DC granted absolute immunity to the UN. At the same time the political question should be asked whether it is acceptable that the UN can do whatever they want in any manner, with no concerns about civilians being scrutinized at all. The DC even recognizes that "the State acknowledges in itself the failure of the UN mission in question". This leads to the broader discussion whether the UN should be allowed to be the only organization in the world that is legally uncontrolled and above the law despite article 6 European Convention on Human Rights (ECHR).

The DC argues that article 6 ECHR cannot be a ground for exception to the immunity of the UN, as the European Court of Human Rights ruled that the ECHR should not be an impediment to the effective implementation of duties by international missions in Kosovo. However, until today it is not clear whether the European Court of Human Rights - in light of the decision of *Behrami v. France* - ruled that the UN are not bound by the European Convention on Human Rights at all. Besides that, the case of *Behrami* was concerning negligence of duties of much less gravity than genocide. At the same time, it is quite astonishing that a Dutch Court found that the ECHR is not applicable to the UN. In other words, the UN fighting for the protection of human rights is at the same time not bound to these human rights standards itself. And this is probably the most political decision by the DC and should not be accepted by democratic states and the UN itself, if the UN want to keep their credibility worldwide.

Article 6 ECHR and UN-immunity

The DC recognizes that its judgement is - on the face of it - conflicting with the case *Waite and Kennedy vs. Germany* of the European Court of Human Rights (ECHR). The Court accepted the immunity of the European Space Agency (ESA) on the grounds that the ESA has its own effective legal remedies. Nevertheless, the DC finds it unnecessary to follow this decision as in the view of the DC, the ESA is not to compare with the UN, because the ESA was only founded in 1980. Besides, according to the DC, this jurisprudence is not applicable, because the UN have an almost universal membership and were founded before the ECHR came into force. This is a surprising argumentation: why should human rights not be applicable because of a later implementation?

In the case of *Manderlier vs. UN* related to misbehaviour of UN-troops in Belgium Congo, the Court of Appeal in Brussels in 1969 decided that the UN could invoke immunity, although they did not fulfil their obligation to create alternative legal remedies, because the UN existed twenty years only and did not have sufficient time to create legal remedies. This argument is not valid any more.

The DC fails to discuss that the obligation to create legal remedies is stipulated to have some judicial controlling in case immunity is granted. The founding states wanted to create human rights standards when granting the immunity. Furthermore, although the DC is using the argument of article 31 Vienna Convention of the Law of Treaties for the interpretation of treaties at another point, it seems that article 31 should be used here too. Article 31 states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

terms of the treaty in their context and in the light of its object and purpose." With this in mind, it is surprising that the DC does not discuss immunity in relation to the obligation to provide for legal remedies at all. This shows that the overall discussion about absolute immunity of the UN is conflicting with the case-law of the European Court of Human Rights and with article 6 ECHR.

The only question is, if there is a court that shall dare to state this fact. Until now, political interests are not in favour of protecting civilians against the universal and absolute, legally uncontrolled, power of the UN. At this point of almost absolute power of the UN, the value of the ECHR should be even stronger. The aim of the ECHR is the protection of civilians, not of absolute powers of States or international organizations misusing their powers. How can an international organization proclaiming the protection of human rights enjoy credibility, if it is not bound itself to the same human rights and democratic principles?

Final remarks

Maybe it is necessary to create a special court, perhaps situated at the International Court of Justice in The Hague, to deal with questions of failures around peace-keeping or peace-enforcing missions. Such an International UN-Court shall quite likely produce guidelines by verdicts within a few years of jurisdiction, which shall give clarity to all members of the United Nations around potential liability of the United Nations. This is what the UN had to do for the last 60 years and only this is in the own interest of the United Nations as protector of human rights.

Otherwise, how can it be guaranteed that peace-keeping missions meets standards that prevent genocide?

Read more about the srebrenica case here

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