

COURT OF APPEAL

THE HAGUE

Case list date : 28 January 2010
Case number : 200.022.151/01
Time : 13.30

PLEADINGS NOTES

Concerning:

1. the **Foundation Mothers of Srebrenica**, registered office in Amsterdam;
2. Mrs **Sabaheta Fejzić**, resident in Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
3. Mrs **Kadira Gabeljić**, resident in Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
4. Mrs **Ramiza Gurdić**, resident in Sarajevo, Bosnia-Herzegovina;
5. Mrs **Mila Hasanović**, resident in Sarajevo, Bosnia-Herzegovina;
6. Mrs **Kada Hotić**, resident in Vogošća (Municipality of Sarajevo), Bosnia-Herzegovina;
7. Mrs **Šuhreta Mujić**, resident in Sarajevo, Bosnia-Herzegovina;
8. Mrs **X**, resident in Sarajevo, Ilidža, Bosnia-Herzegovina;

9. Mrs **Zumra Šehomerović**, resident in Vogošća
(Municipality of Sarajevo), Bosnia-Herzegovina;
10. Mrs **Munira Subašić**, resident in Vogošća
(Municipality of Sarajevo), Bosnia-Herzegovina;
11. Mrs **X**, resident in Sarajevo,
Bosnia-Herzegovina;

Appellants, Defendants in the motion,

Attorneys: mr. M.R. Gerritsen (attorney in the proceedings), dr. A. Hagedorn, mr. J. Staab and mr. S.A. van de Sluijs

Against:

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

Respondent, Petitioner in the motion,

Attorney: mr. G.J.H. Houtzagers

2. the organisation with legal personality
The United Nations, having its seat in New York City (NY 10017), New York, United States of America

Respondent

Not entering an appearance and leave to proceed in default of appearance having been granted

Most Distinguished Members of the Court,

1. The Mothers of Srebrenica had expected and hoped that following the issue of the writ of summons in June 2007 the substantive debate would have commenced on the role of the State of the Netherlands ('the State') and the UN in the Srebrenica drama. The 6,000 surviving relatives, who are represented in these proceedings by the Foundation 'Mothers of Srebrenica', have sought the truth, recognition and redress for 15 years. In this respect the surviving relatives find it difficult that once again the international community has let them down now that the UN refuses to appear as a party in these proceedings and give an account. The result of all this is that to date proceedings have been concerned only with procedural matters. In this submission we will not deal any more with the motion relating to joinder and intervention raised on appeal for sufficient pleadings on that have already been submitted. We will confine ourselves as closely as possible in this submission to the issue of immunity. Before that I will dwell briefly on the background and the facts to this affair.

Attitude of the United Nations

2. Despite the fact that the UN let it be known - in the words of Secretary-General Ban Ki Moon - that it supported the Mothers of Srebrenica in their call for justice (see: <http://www.un.org/News/Press/docs/2007/070701.htm>), the UN choose instead not to appear in the proceedings. The UN returned the originating writ of summons after it was legally served. It was made known through the Permanent Representative of the State to the UN that the UN enjoyed immunity and that it would therefore not appear. The UN is also failing to appear in this appeal. The UN persists in refusing to appear before an independent court of law to answer for the fact that the genocide in Srebrenica was not prevented. Nor has the UN had the decency to give an answer to the request to hold discussions outside a court of law.
3. This attitude of the UN is evidence of the little respect shown to the thousands of victims who were abused, deported and 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 inhabitants would be protected. The UN appeared capable of discharging only what was for the civilian population the most adverse aspect of the mandate, namely, disarming the inhabitants. Even when the worst transpired and the inhabitants sought the return of their weapons, it transpired that the UN was not prepared to acquiesce in that request but instead reiterated its pledge to be responsible for their protection and actually to afford them that protection.

Interest of the State of the Netherlands

4. The State plays a remarkable double role in this case. Firstly, the State is a party to the proceedings. As a party to the proceedings the State maintains the position that it can not be held accountable for the events in Srebrenica in 1995, rather that the failure of the Blue Helmets ('Dutchbat') can be imputed only to the UN (see, for example, the judgment of the District Court, The Hague of 10 September 2008, r.o. 4.5; LJN BF0184, 265615 / HA ZA 06-1671). The surviving relatives must turn to the UN, according to the State.
5. Concurrently, the State maintains in the motion at first instance (and also now on appeal) that the UN enjoys absolute immunity and thus cannot be summoned to answer before a court of law. The State knowingly shifts the responsibility for the Srebrenica drama on to the UN, which in the view of the State is thus inviolable. The consequence of this line of reasoning is that the 6,000 surviving relatives of the victims of the genocide have nowhere to turn. Neither to the UN, nor to an independent Court. In this manner they are deprived of the fundamental right to effective judicial protection. This is what I termed in the pleadings at first instance as humanely, morally and legally unacceptable.
6. The keystone in the legal underpinning of the argument presented by the State is formed (most particularly) by a passage in the origins of the Bailiffs Act (in Dutch: Gerechtsdeurwaarderswet). That is revealing. The interests of the surviving relatives and the legal underpinning of their right of access to the court is of an entirely different order, namely, a fundamental human right. The State may thus also argue that its international obligation is to bring the immunity of the UN to the attention of the Court, and that its motives are purely legal and devoid of any self-interest, but it may also be expected of the State in these proceedings that it is attentive to the rights of the thousands of victims. Not one single word was spent on the legal position of the 6,000 surviving relatives. It is pernicious that when reference is made in that context to the fact that the most important advisory body of the State on issues arising under international law (the "CAVV"), in respect to the present issue stated as early as 2002 that the right of access to the court should weigh more heavily than the immunity of the UN, the State contents itself with the observation that that part of the advisory opinion referred to advocated future legal development and not to the current position of existing law. The advocated future development of the law is apparently not an interest

of the State. Conversely, it is evident that the State certainly has an interest in it being held also on appeal that the UN enjoys absolute immunity.

Law versus politics

7. The interests in this case are large. For what would be the consequences if in this case the UN were not to be granted immunity from jurisdiction? It is often suggested that in such an event no country would make troops available for UN peacekeeping missions. The Foundation et al. doubts most seriously whether restrictions on immunity would have any consequences for the functioning of the UN. Does this discussion take place if, for example, it is the functioning of the Netherlands police that is in issue? More to the point, the possibility to hold a government to account is a condition for a properly functioning government. Secondly, is it a responsibility of the UN itself to provide access to justice? Should access to justice constitute an impediment to functioning then that restriction has already been approved by the Member States of the UN. I refer to Section 29 of the Convention on Privileges and Immunities of the UN (further: the Convention). The suggestion that no country would make troops available for the UN in the event of a restriction of immunity is, moreover, not a legal but a political argument. The court, out of respect for political wishes, may not ignore the fundamental norms that underpin our legal system and which it must protect. And certainly when it concerns the world's most important organisation (in this case, the UN), the court must be critical and safeguard the constitutional rights of individuals.

What must be obviated is (I cite Advocate-General to the Court of Justice, M. Poiares Maduro in the “Al Barakaat”, Case C-415/05, under point 45) that:

“(...) to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper.”

It is the legal norm that must be the framework of review by the court, not the political argument.

8. It is here additionally of importance that the UN itself has it in its power to set up an alternative access to justice that would possess sufficient guarantees. From that

moment the national court would be relieved of its obligation in an exceptional case such as the present to undertake a judicial review. That the UN has to the present not instituted any judicial process, despite the fact that it has been under an obligation to do so already since 1946, must be held against the UN in 2010. It is time that the UN as the leading champion of human rights, must respect those same human rights and be subject to the obligations related to those rights.

9. In judging the issue of the immunity of the UN the court does not encroach on the political field but rather reminds itself of the boundaries that the law sets for immunity. It is the duty of a court to investigate the legitimacy of an (apparent) claim to immunity if that right is in conflict with other interests that weigh just as heavily and whose protection is laid on the court. The constitutional rights of individuals cannot be sidelined because that is seen as politically desirable.
10. While speaking of the independent and impartial court I express the concerns of the 6,000 surviving relatives arising from two remarkable incidents before the District Court, The Hague, that have occurred in the Srebrenica cases.

Thus it has emerged that one of the judges (Professor G.K. Sluiter) who gave judgment in the contested judgment that underlies this appeal is counsel to Radovan Karadzic, accused of war crimes and crimes against humanity. Judge of the victims and counsel to the offenders: a remarkable moral flexibility. Although the President of the District Court has stated that Professor Sluiter will no longer be involved in this case, the declaration of the President is unsatisfactory ((see: <http://www.rechtspraak.nl/Actualiteiten/Rechter-plaatsvervanger+prof+Sluiter+niet+betrokken+bij+further+behandeling+Srebrenica-zaken.html>). Thus it was stated that from the outset it was settled that the involvement of Professor Sluiter with the case would be confined to dealing with the motion on jurisdiction. Apart from the fact that this had never previously been made public this is contrary to the settled rule that a judge who is involved in a case also finishes the case. The District Court also let it be known that Professor Sluiter was engaged specifically because of his specialist expertise in international law, and that that expertise was required only in the motion on jurisdiction. Apart from the fact that Professor Sluiter is a professor of international criminal law and not of public international law, the President of the District Court ignores the fact that the claim against the United Nations and the State is precisely also grounded in international law. It is thus incorrect to assume that in dealing with the substance of the case, that is to

say, after resolution of the procedural interim motions raised, no specific international law expertise would be required. Indeed, the claim against the UN and the State are based in part on international law. The issues that arise in that context include: the (scope of the) obligations under the Genocide Convention, whether Dutchbat was in breach of its obligation to report crimes against humanity, and whether there arose any breakdown of the UN command structure and consequent imputation of conduct to The Netherlands.

Further, the surviving relatives recall that an amazing switch occurred in another case against the State also brought by a number of Srebrenica surviving relatives. In that case one of the judges (mr. B.C. Punt) who was involved in the case from the outset and who adopted a rather critical position towards the State during hearings in Chambers, was replaced in 2008 just before the hearing of arguments in court. The explanation provided by the District Court for the change in the composition of the court also rang less than convincing. Thus, in particular the fact that in 2007 mr. Punt had attained the age of 65 years played a role in the decision. At present mr. Punt is still the coordinating Vice-President of the District Court, The Hague and still active as, among others, Relief Judge (for example in *kort geding* of 19 November 2009, LJN BK5227, 314031 HA RK 08-682).

It cannot be excluded that the above events were coincidental. It is certainly awkward. Great sensitivity might be expected of the courts in a sensitive and emotionally charged case such as the present. The issue here is genocide, and the corresponding cry from many thousands for justice. Additionally, there are troublesome dilemmas such as the weighing of interests between immunity from jurisdiction and the conflicting fundamental human rights. My clients raise these issues in this case against the UN and the State, before the Netherlands court. Faith in the UN and the State has suffered virtually irreparable harm through the events that took place in 1995 in Srebrenica. That past history and the great interests in these proceedings demand a heightened sensitivity. The occurrences described above give instead a contrary image that contributes to the fear of the surviving relatives that in this case they will not receive a fair trial.

Circumstances of the case

11. The interim motions submitted by the State possess a highly legal-theoretical character. Accordingly, the danger exists that the decision on the interim 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.

12. However, in the interests of 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. 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.

Summary of the facts and circumstances

13. I will now discuss the facts and circumstances.
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 inhabitants who then found themselves in the enclave were from that moment assured of the protection of the UN.
14. Two UN Resolutions (nos. 836 and 844) followed in June 1993, in which the obligation of the UN to protect the population within the Safe Area, in addition to the protection of the Safe Area, was also expressly set out. The 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).
15. 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 realization of the decision to participate in that mission and its preparation were characterized by (political) overconfidence and an absence of (military) insight and knowledge. I mention the following remarkable facts that are to be found in the NIOD Report (for the reference I refer to the writ of summons at first instance, under points 40 through 56):

- 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 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 Air Brigade was motivated 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 the concluded agreements seriously.
 - d. the soldiers who were despatched had received only poor training and were inexperienced;
 - 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 was conducted nor was any military *intelligence* gathered. Offers by, for example, the CIA to supply intelligence were resolutely rejected.
16. 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, because of the lack of any decisiveness the Bosnian Serbs felt emboldened to risk an attack on the *Safe Area*.
17. 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.
18. Bosnian Serbs troops attacked the Srebrenica Safe Area on 6 July 1995. UN soldiers fired towards the advancing Bosnian Serbs only once during the six-day attack, and then only over their heads. A request for Close Air Support was refused no less than seven times by high-ranking Netherlands UN officers. 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. The air attack was subsequently called off entirely. The Srebrenica Safe Area fell that day, 11 July 1995. Secretary-General Kofi Annan later admitted 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.
 19. 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'.
 20. 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. 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.
 21. 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 those crimes. 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, 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)

22. 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 were confiscated as though they were boarding an aircraft. The Blue Helmets made the most rigorous imaginable selection of who could stay and who not. Even a group of injured men 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.
23. 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 between 8,000 and 10,000 would be murdered. The International Court of Justice at The Hague has in that context held that genocide was committed in Srebrenica.
24. It is these circumstances and facts, established and documented in many official reports and pronouncements of authoritative bodies, and I speak of, inter alia, the NIOD, the French Parliament and the UN, and judgments of the Yugoslavia Tribunal, that must also be considered in the judgment of this Court whether immunity attaches to the UN in this exceptional case.
25. I request that you allow my colleague, Hagedorn, to address you on the question why in this exceptional case no immunity should be granted to the UN.

Immunity

26. The District Court has erroneously held that the UN enjoys absolute immunity. The objections raised by the Foundation et al. at first instance were thus erroneously dismissed and even in part left unconsidered. Prior to proceeding further with the incorrectness of the judgment of the District Court and the defence of the State, I will present you with a summary of the assertions of the Foundation et.al. Given the extent and complexity of the positions adopted at first instance and on appeal, I cannot avoid concentrating on but a few points. I refer you therefore to the written pleadings submitted.
27. I will now summarise briefly the position taken at first instance regarding immunity:
1. The UN was charged with the protection of the population in Srebrenica yet despite that obligation eight to ten thousand persons died.
 2. The prohibition on genocide is peremptory law and cannot be subordinated to the immunity of the UN given that immunity is not peremptory law and is subject to exceptions.
 3. The International Court of Justice laid down in 2007 that genocide was committed in Srebrenica.
 4. As it is established that genocide was committed, it is unacceptable that immunity would deprive the surviving relatives of the victims to have the involvement of the UN assessed by an independent court, all the more so as the UN itself has admitted grave errors regarding Srebrenica.
 5. The essential functioning of the UN would not be affected by not granting immunity in this case. Much more, this issue touches the credibility of the UN as the organisation that monitors compliance with human rights and, where necessary, enforces compliance through sanctions and military actions. It cannot be that the UN is above the law and may itself violate human rights. The UN lays down the international obligations in its resolutions and enforces those rights with troops. Then the UN rejects all judicial supervision. Such limitless immunity is unacceptable for a constitutional state. In these given circumstances it must be the court and not the UN itself that has the last word.

6. The UN offers no alternative and effective access to justice as required under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the autonomous fundamental rights of the law of the European Community and the case law of the European Court of Human Rights and the Dutch *Hoge Raad*. The setting up of an effective legal remedy was inextricably bound up in 1946 - more than 60 years ago! - with the granting of immunity to the UN.
7. 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. We are of the opinion that the UN fails to comply with that in this case. It is evident from the foregoing arguments that in this exceptional case no immunity may be granted to the UN. The decision not to appear in these proceedings and to claim immunity extrajudicially does not comply with the specified criteria. The purpose of the UN merely to preclude an extremely disagreeable discussion is an improper, namely, political reason for claiming immunity.
28. With this foremost, I will discuss a number of assertions of the State on appeal that give occasion thereto.
29. In the first place, the State observed under point 4.45 of its statement of defence that the UN is indisputably the most important international institution in the international community, with an almost universal membership among states. For that reason also there would be, according to the State, no basis to restrict immunity, or not to grant to the UN the same immunity that is accorded to states. This is legally erroneous and breaches a universally recognized distinction drawn in international law between states and international organisations. Furthermore, it was observed more than once at first instance that states can always be brought before their own courts and that such possibility is absent here. Moreover, a general tendency is observable that the immunity of states is in process of erosion, as submitted on this side in the discussion of the Al-Adsani Case (see the observations under ground of appeal 12, more particularly points 164 et seq.). The basic assumption is that a state protects its civilians against the power exercised by that state. That should apply all the more in the situation where all states have combined rather than that an exception be admitted. Human rights are intended precisely to protect individuals, precisely against governments and the power those governments possess. The consequence of such reasoning is that the UN was called into being to guarantee those human rights and, where necessary, to

enforce them. This argument for the protection of human rights is a key element of the grounds given for intervention in problem areas. It appears that the State is arguing that the greater the exercised power, so the more human rights become subordinate and must yield. Why is the State now arguing for such a preposterous position, diametrically opposed to the constant political-moral reproaches for human rights violations in other states than The Netherlands? The answer is banal, namely, the individual interest of the State to evade moral and financial responsibility.

30. Secondly, the State under point 4.60 of its statement of defence dealt with the substance of the judgments of the Belgian court in the Manderlier Case. The State argued that that judgment is not based on the fact that the UN in 1966 still needed time to set up a judicial process. The Tribunal in Brussel did in fact clearly hold that the UN had remained at fault in not establishing a court (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.’

This failure established by the Belgian court to comply with this obligation still exists 40 years later and the State is erroneously of the view that the failure to set up a court should remain without consequence. The passage of time was certainly an element in the reasoning of the Tribunal. Where the Tribunal held that the failure had persisted for 20 years, now it must be concluded that it presently exists for more than 60 years. The District Court held that there existed virtually no relevant caselaw on the immunity of the UN (legal consideration 5.15) and left the Manderlier Case entirely out of its considerations.

31. Thirdly, the State under point 4.61 asserted that - contrary to what this side argued - a judicial process was indeed actually instituted, namely, in the ‘Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina’ of 15 May 1993, erroneously dated 1992 by the State (further: SOFA). However, the Articles 48 through 50 SOFA and Section 29 of the Convention cited by the State have a common denominator, namely, that they did not lead to the actual setting up of a judicial process. Furthermore, these Standing Claims Commissions were internal bodies, and not independent courts possessing sufficient guarantees (see Annexes 7 and 6, Article 3 SOFA). Apart from that, according to the rules of SOFA any claim is subject to

substantial restrictions. These limitations do not do justice to the claims of the Foundation et al. Moreover, under point X, no. 55 Miscellaneous Provisions SOFA it is provided that the possibility to submit a claim ends three months following the termination of the UN Mission. The UNPROFOR Mission finished on 20 December 1995, so that a claim could be submitted only up to 20 March 1996. At that time the claimants were still occupied with survival and were unaware of the facts, never mind the liability of the UN.

Much more important in this context is that the State is alone in the world in asserting that the *Standing Claim Commissions* actually existed. The Secretary-General of the UN in his communication of 20 September 1996 explicitly stated that there never was a *Standing Claims Commission*, and not for any Mission (see Report of the Secretary-General of 20 September 1996: Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters, A/51/389, no. 22 and no. 47). In the Report of the Secretary-General of 21 May 1997 (A/51/903, under 8), two years after the fall of Srebrenica, it was stated also that:

‘The standing claims commission as envisaged under the model agreement has never been established in the practice of United Nations peacekeeping operations.’

This is confirmed in the literature (Prescott, Claims, in D. Fleck, The Handbook of the Law of Visiting Forces, New York 2001, p. 171, and Frowein, in, H.H. Trute et al., Allgemeines Verwaltungsrecht - zur Tragfähigkeit eines Konzepts, p. 346, paragraph 2).

The position of the State is remarkable as the President of the Yugoslavia Tribunal (ICTY), Patrick Robinson, in his address of 8 October 2009 to the General Assembly of the UN, also dwelt on the fact that no access to justice was open to the victims of the war in the former Yugoslavia to obtain compensation (http://www.icty.org/x/file/press/pr_attachments/pr1335a.pdf):

“(…) Currently, there is no effective mechanism by which victims can seek compensation for their injuries, despite the fact that their right to such compensation is firmly rooted in international law.

(…)

But to date, nothing has been done, and I fear that failure by the international community to address the needs of victims of the conflicts that occurred in the former

Yugoslavia will undermine the Tribunal's efforts to contribute to long-term peace and stability in the region. It is for this reason that I implore you to support the establishment of a claims commission as a method of complementing the Tribunal's work by compensating victims of crimes in the former Yugoslavia."

It would appear that the State against its better judgement asserts that an alternative access to justice exists.

32. A fourth assertion of the State concerns the position of the CAVV, the principal advisor of the Netherlands Government in the field of international law, as taken under point 4.62. As previously stated, the CAVV held that in cases of conflict between the right of access to justice and immunity, the right of access should prevail. The State has emphasized that this judgement does not relate to current law but to advocated future legal development. That denies not only that legal development is determined by this case, but also that the CAVV held that in future cases the right of access should weigh more heavily.
33. A final assertion of the State that I will discuss in this regard is the one asserted under point 4.73 of its statement of defence. That assertion concerns the argument of the Foundation et al. that the prohibition on genocide possesses a *ius cogens* character, an obligation with a peremptory character. The State asserts in this regard that this peremptory character does not entail that the prohibition on the prevention of genocide committed by third parties must also be deemed to be *ius cogens*. That is manifestly erroneous. The obligation to employ all means to prevent genocide - irrespective of the efficacy of such employment - has very much a *ius cogens* character. If the obligation to prevent genocide can be weakened then the objective would be undermined. The International Court of Justice in its judgment of 26 February 2007 in Bosnia and Herzegovina against Serbia and Montenegro Case properly emphasized how heavily this obligation weighs (see legal consideration 155 et seq., with the conclusion under legal consideration 165).

Access to the Court

34. The Foundation et al. has repeatedly argued that in this exceptional case the claimed right to immunity must yield before the right of access to the Court, as, for example, that is codified in Article 6 ECHR.

35. The State asserts (under points 4.93 et seq.) that this is not the law, with reference to seven cited judgments. Those judgments should demonstrate that the right of access to the court is limited by immunity. The Foundation et al. observes first that all the case law cited under point 4.93 involves decisions given against states. These decisions add little or nothing to this case and ultimately relate only to the jurisdiction of the ECHR and not to the jurisdiction of the national court.

36. Under point 4.95 et seq. the State dealt with a decision of the ECHR in the Behrami against France and Saramati against France, Germany and Norway Cases. These cases also had no direct connection with the UN or an international organisation. The Behrami Case concerned children who were wounded or killed by previously unexploded munitions in Kosovo and concerned the responsibility of France as a participating country in the UN Mission in question. The Saramati Case concerned a Kosovar who was arrested on the authority of a UN Commandant, for which Mission troops had been supplied by France, Germany and Norway. It were these countries that were sued and expressly not the UN.

37. The ECHR held in the Behrami and Saramati Cases that it lacked jurisdiction to hear the claims brought against the various states (see no. 144). This decision is thus interpreted that the ECHR gave a judgment on the merits that the European Convention for the Protection of Human Rights and Fundamental Freedoms was not applicable to the UN. This decision has consequently been heavily criticized. First, because the ECHR gave a judgment regarding an hypothesized claim against the UN while the UN was not a party to the proceedings in question. Secondly, it is questionable to what extent the reasoning of the ECHR holds true in this exceptional case of genocide. Thirdly, this judgment took absolutely no account of Article 29 of the Convention, which lays down that the UN must provide its own access to justice. As said above, there is universal consensus that such access is non-existent. Fourthly, it has been raised in the literature that national courts have held that the binding force of the ECHR remains, provided Chapter VII Security Council Resolutions do not otherwise provide (see, for example, J. Frowein, in G. Nolte, *Peace through International Law*, 2009, p. 49).

38. Another important facet that has been incorrectly left out of consideration up to the present is that the Secretary-General of the UN himself previously declared that the UN is bound by obligations arising from the Human Rights Conventions (see, the Secretary-General's Bulletin on the Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, of 6 August 1999, under Article 1.1 and the writ of

summons at first instance under point 389 et seq.). This bond, affirmed by the UN itself, is what the Foundation et al. regards for the UN - as the champion of human rights - as something that is self-evident. It is all the more incomprehensible that this bond remains essentially without significance for the UN. It is not credible that the ECHR had wished to go so far.

39. Furthermore, I would point out that the present case is of an entirely different order than any case previously adjudicated by the ECHR. The involvement of the UN with genocide has never previously been in issue, never mind adjudicated by a court. People and organizations have to be held accountable if genocide has taken place. That is the tension with the alleged absolute immunity of the UN. It is for you to judge whether here the law prevails over power.
40. I would add the following. The ECHR has pronounced only on its own jurisdiction and not on the jurisdiction of the Netherlands court. This latter determination is naturally a matter entirely for the Netherlands court. The Netherlands court has in addition an individual obligation to assess whether the right of access is guaranteed. The fact that the ECHR has judged that it lacked jurisdiction in the cases cited does not entail that the Netherlands court can leave Article 6 ECHR and the right of access to an independent court out of consideration. In this context I return to the judgment of the European Court of Justice of 3 September 2008 regarding Kadi and Al-Barakaat.
41. The European Court of Justice held in the Al-Barakaat Case that the court must at all times take the fundamental rights into consideration and that there is no question of any priority of rules of the UN (ECJ, of 3 September 2008, Case C-415/05 P, Al Barakaat International Foundation against Council of the European Union and Commission of the European Communities). I refer you predominantly to the observations made on this judgment under points 199 et seq. of our Statement of Appeal.
42. The State has asserted in connection with Al-Barakaat that that judgment demonstrates that UN Resolutions can in fact not be reviewed for their legality. That is, however, not the position of the Foundation et al. The Foundation et al. does not desire to assail the legality of UN Resolutions. The Foundation et al. does however point out that, according to the European Court of Justice, the community legal order with its fundamental rights of individuals continues to apply in the implementation of UN Resolutions. The European Court of Justice held expressly that Community

- measures arising from the UN Charter do not enjoy immunity from jurisdiction (see, r.o. 300).
43. The State has asserted that the Al-Barakaat Case concerned a Community measure and that no such measure features in this case. The State also asserts in this connection that in the Al-Barakaat Case the European Court of Justice pointed out that the Behrami and Saramati Cases concerned conduct that could be directly imputed to the UN and not conduct that could be imputed to the states who had been sued. Even on the assumption that this is correct, it is irrelevant in this connection. What is at issue here is whether a Netherlands court self-evidently must take for granted that the UN enjoys immunity, or whether the national court on the basis of the community legal order is obliged to undertake its own review of whether the fundamental human rights of the ECHR are compatible with an absolute immunity of the UN. On this the European Court of Justice made no comment and I request you in that connection to refer this question to the European Court of Justice in the form of a preliminary question. Such request is only in issue if and to the extent that this Court should hold that the UN enjoys immunity also in this case. In such event I will expound on this request to refer a preliminary question to the European Court of Justice.
44. What is most evident from the Al-Barakaat Case is that the EU recognizes autonomous fundamental rights that are protected under Article 6 paragraph 3 Treaty on European Union (in the 1 December 2009 version). That includes an effective legal remedy as expressed in Article 47 of the Charter of Fundamental Rights of the European Union. Whenever the exercise of powers by the UN has consequences within the European communities than an assessment must be made whether those consequences are in conflict with the fundamental rights. These fundamental rights cannot simply be set aside.
45. In this context I would point out that the national court is obliged on the basis of settled European caselaw to interpret national law within the spirit of the law of the European Community (for example, ECJ 9 March 2004, Case C-397/01 b C-403/01, Pfeiffer et al./DRK). The issue whether autonomous European fundamental rights are guaranteed must be weighed by the national court where reason to do so exists. Should you consider granting absolute immunity to the UN then there arises the issue of violation of the right to an effective legal remedy that is guaranteed in the European Community. In such case the European Court of Justice is the proper body to determine whether your judgement tallies with the law of the European Community.

46. Article 267 of the Treaty on the Functioning of the European Union provides that the European Court of Justice shall rule on the interpretation of the European Convention by way of preliminary questions. The entire law of the European Community falls within the European Convention, including the autonomous fundamental rights, even where they have not been codified. I would point out that it is not a condition of referring such a question relating to this interpretation that a measure of a European body is required. All that is required is the interpretation of the European Convention, of which the autonomous fundamental rights form a part. Article 267 EU provides that your Court may refer preliminary questions, yet to be formulated, should you consider that necessary.

47. The preliminary questions to be referred to the European Court of Justice could read, as follows:

'Is it conform the law of the European Community, to interpret Article 105 UN Charter together with Article 29 Convention on the Privileges and Immunities of the UN in such manner that within the Member States the UN enjoys absolute immunity, despite the fact that no effective legal process exists within the UN? Is the European fundamental right on effective legal protection to be interpreted in such manner that that this right may be subject to restrictions in the Member States, in particular, the restrictions that are consequential on the right to immunity of the UN? If so, do such restrictions on this fundamental right apply under all circumstances, more especially under the circumstance that a large group of surviving relatives have brought proceedings against the UN for the failure to prevent a genocide established as being such by the International Court and under the circumstance that no effective legal remedy exists?'

48. Before completing my argument I refer you to a recent judgment of the Dutch *Hoge Raad*, namely, that of 23 October 2009 (HR 23 October 2009, NIPR 2009, 290). Professor of international law Strikwerda has there, in his capacity as Advocate-General, given a cogent summary that is well-worth reading of the tension between the immunity from jurisdiction of international organisations and with respect to Article 6 ECHR. The following quotation requires no further commentary (see point 14 of the Opinion of the A-G):

'It can be derived from these considerations that the restrictions on the right of access to the court, that can be the consequence of the grant of immunity from jurisdiction to the international organisation and the referral of the plaintiff to the judicial process within the organisation, must leave untouched the essence of the right of the plaintiff derived from Article 6 paragraph 1 ECHR, must serve a legitimate aim and must be proportional. For the Netherlands court this means that in the particular case it must be assessed whether the legal process within the organization offers the plaintiff 'reasonable alternative means' to protect the plaintiff's rights under Article 6 ECHR effectively.'

I refer you further to the literature cited by Strikwerda. The most important conclusion to be drawn from this quotation is that no right to immunity exists in the absence of judicial process.

Even where a legal process does exist other conditions must be met before the granting of immunity. The grant of immunity must serve a legitimate aim. As stated by us previously, a claim to immunity in a case of answering for the failure to prevent genocide - a fact established by the ICJ - is not legitimate. The third condition for the grant of immunity is its proportionality. That entails that a weighing of interests must be undertaken. Therefore immunity is never absolute. Please let me notice that Strikwerda affirms almost every of our legal considerations concerning the scope and meaning of the immunity of international organisations and the corresponding limitations based on the fundamental right of effective legal remedies.

49. I come to the close of my argument and summarize the most important points thereof. I have set out for you the position of the Foundation et al. that an absolute immunity of the UN is irreconcilable with the ECHR and the autonomous fundamental rights of the law of the European Community, and is in conflict with international law, in particular with the peremptory character of the prohibition on genocide and the corresponding obligation to employ all means to prevent genocide. The fundamental issue here is the choice between protection of the power of the UN or the legal protection of individuals in respect of that power. Unrestricted, absolute power of governments against the legal protection of victims of genocide. What possibilities remain to people if their right to a peaceful resolution of their disputes is withheld from them?