The Immunity of the United Nations before the Dutch Courts (Case Note)

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I. Introduction

On 13 April 2012, the Supreme Court of the Netherlands delivered a judgment in the case between the Mothers of Srebrenica Association *et al.*[1] against the State of the Netherlands (Ministry of General Affairs) and the United Nations.[2] The case is about the responsibility of the Netherlands and the United Nations for a failure to prevent the genocide of around 8000 Bosnian Muslims in the East Bosnian enclave of Srebrenica in 1995.[3] A contingent of the United Nations peacekeeping force, comprised of Dutch soldiers, was present, but failed to prevent the tragedy.[4] The Mothers of Srebrenica, an association established in the Netherlands for the purpose of representing the (legal) interests of the relatives of the victims, wants to hold the UN and the Netherlands accountable.[5] One

1 The claimants are the Dutch association called *Mothers of Srebrenica* plus ten individual surviving relatives: Sabaheta Fejzić, Kadira Gabeljić, Ramiza Gurdić, Mila Hasanović, Kada Hotić, Šuhreta Mujić, Kada Nukić, Zumra Šehomerović, Munira Subašić, and Adisa Tihić. Wherever reference is made in the remainder of this article to the 'Association' or the 'Mothers', these ten individuals are included in that reference. The *Mothers of Srebrenica*, being an association or foundation, is a legal entity under Dutch law with full legal capacity, formed with a view to bringing a collective action within the meaning of Article 3:305a of the Netherlands Civil Code.

2 Judgment of the Supreme Court of the Netherlands of 13 April 2012 (Case no. 10/04437, http://www.ljn.nl/BW1999), 'Supreme Court judgment'. A Conclusion by Mr. P. Vlas, Advocate-General of the Supreme Court of the Netherlands, is annexed to and published together with the Supreme Court judgment, 'Conclusion of Advocate-General'. The judgment in the incidental proceedings of The Hague District Court was rendered on 10 July 2008 (Case no. 295247/HA ZA 07-2973, http://www.ljn.nl/BD6796), 'Trial Court judgment'; and the appeal to the judgment in the incidental proceedings of The Hague Court of Appeal was issued on 30 March 2010 (Case no. 200.022.151/01, http://www.ljn.nl/BL8979), 'Appeals Court judgment'. All judgments are part of the case between the *Mothers of Srebrenica Association et al. versus the Netherlands and the United Nations*. Unless indicated otherwise, all urls cited were last accessed on 15 November 2012.

3 On the legal qualification 'genocide', see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *I.C.J. Reports* 2007, § 297.

4 For a more general discussion of accountability, see O. Spijkers, 'Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica', Vol. 1 *Human Rights & International Legal Discourse* 2007, no. 2.

5 The *Mothers of Srebrenica* contacted a law firm already in 2004 to bring a claim against the Netherlands. Interestingly, it was only at the request of the law firm that they decided also to bring a claim against the UN. See A. Hagedorn, 'Absolute Immunität der Vereinten Nationen? - der Völkermord von Srebrenica als Lackmustest,' in H.-J. Heintze & K. Ipsen (eds), *Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht : 20 Jahre Institut für Friedenssicherungsrecht und humanitäres Völkerrecht - 60 Jahre Genfer Abkommen* (Heidelberg, Springer, 2011), pp. 201.

of the hurdles in their efforts to hold the United Nations accountable is the immunity of the UN from the jurisdiction of domestic courts. The ruling of April 2012 by the Dutch Supreme Court provided the final Dutch word on this preliminary issue of immunity. The immunity of the UN was upheld, and the case between the Mothers of Srebrenica and the Netherlands and the UN now continues without the UN.

This case note analyzes the Supreme Court's judgment on UN immunity and the judgments of the lower Dutch courts that preceded it.[6] The first section discusses the functional immunity of the United Nations (II). This is followed by a section on the existence of alternative legal remedies at the UN level as a prerequisite, or *conditio sine qua non*, for immunity (III). The following sections look at two clashing obligations the State of the Netherlands has to respect simultaneously: first, there is the obligation to respect the immunity of the United Nations. But the Netherlands equally has an obligation to prevent and punish genocide (IV.1); and it has an obligation to guarantee the right of individuals of access to court (IV.2). The clash between UN immunity and the individual's access to court can be approached from three different perspectives: the UN's perspective, that of the individual, and that of the Dutch State. The United Nations wants to carry out its activities without interference from domestic courts. The individual, who has a dispute with the United Nations, wants to be able to settle this dispute through an impartial and independent dispute settlement mechanism. For these two persons, there really is no clash of obligations. However, for the third party, the Netherlands, it is much more difficult. As a Member State of the UN, the Netherlands has an interest and legal obligation in ensuring the effective and unhindered functioning of the UN; but it equally has an interest and legal obligation in guaranteeing access to a court for everyone within its jurisdiction. The Dutch judge, being a State organ, has to comply with both these obligations. Or does one prevail over the other? How crucial is it that the case involves a dispute relating to the obligation of the Netherlands to prevent and punish the crime of genocide, which has the character of a *jus cogens* norm (IV.3)? The 'special nature' of the work of the UN as decisive element in preferring the UN's immunity over the individual's access to court (IV.4) is examined, as well as the role of Article 103 UN Charter as a conflict rule (IV.5). The case note ends with a conclusion and look to the future (V).

Each section consists of the same components: first, the applicable law is presented. This is followed by an analysis of the judgments of

[6] See also R. van Alebeek, 'Mothers of Srebrenica (case note),' *Oxford Reports on International Law in Domestic Courts (ILDC)*, 1760 (NL 2012); 'Val enclave Srebrenica' [Fall of Srebrenica enclave], Vol. 579 *Rechtspraak van de Week* 2012; and a case note in Vol. 17 *Nederlands Juristenblad* 2012, pp. 1204-1206.

the District Court, Appeals Court, and the Supreme Court, in so far as they discuss a particular issue. Before the judges of the Supreme Court of the Netherlands begin to draft their own judgment, they ask their Advocate-General to write a 'conclusion'. In this conclusion, which is also analyzed in the present case note, the Advocate-General provides an overview of the relevant facts, the applicable legislation and case law, and recommendations on how to decide the legal issues. Each section ends with brief comments and a conclusion.

Interestingly, all three courts and the Advocate-General have upheld the immunity of the UN and rejected the arguments of the Mothers of Srebrenica. In this sense the judgments are entirely consistent. However, they all have different reasons for reaching this same conclusion, some more convincing than others. This article thus provides an overview of various arguments in favour of immunity, put forward by one court, and subsequently rejected and replaced by 'better' arguments in favour of the same immunity by the next court. Through their constant disagreement, the Dutch courts unfortunately give the impression that, even though there is no question about the outcome — the UN must enjoy immunity — there is fundamental disagreement about the way to get there.

II. Functional Immunity of the United Nations

The international legal norms establishing the immunity of the United Nations from the civil jurisdiction of the domestic courts of its Member States can be found in the UN Charter[7] and the Convention on the Privileges and Immunities of the United Nations ('Immunities Convention').[8] According to Article 105 of the UN Charter, the United Nations shall enjoy, in the territory of all its Members, such privileges and immunities as are necessary for the fulfillment of its purposes. Article II, Section 2, of the Immunities Convention, establishes the UN's immunity from every form of domestic legal process except insofar as in any particular case it has expressly waived its immunity.

On 17 August 2007, the United Nations informed the Dutch Permanent Representative to the United Nations in a letter that the organization had no intention of waiving its immunity.[9] This letter is the only contribution of the United Nations to the Dutch court proceedings; the UN never showed up in the Dutch courts to defend its immunity. Instead, the

7 Charter of the United Nations, San Francisco, 26 June 1945, entry into force 24 October 1945.

8 Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, entry into force 17 September 1946, *U. N. T. S.* Vol. 1, p. 15. It is sometimes argued that the immunity of an international organization can also be based on customary international law, but that was not relevant in this particular case.

9 Supreme Court judgment, *supra* note 2, at § 3.2.2.

lawyers of the State of the Netherlands have consistently defended the immunity of the UN on the organization's behalf. This might be surprising since, even though the Netherlands and the UN are both respondents in the principal case — they are jointly held responsible for not preventing the genocide in Srebrenica — the immunity incident is essentially between the Mothers of Srebrenica and the UN. In the relation between the Mothers and the Netherlands the issue of immunity does not arise. Clearly, the State of the Netherlands cannot claim immunity from the jurisdiction of its own courts. So how is it possible that the Mothers are faced with a delegation of lawyers representing the State of the Netherlands, and not a single lawyer is representing the UN? The Dutch courts have no problem with this situation, qualified by the lawyer of the Mothers as 'juristisch pikant',[10] mainly because in their view Article 105 UN Charter obliges the Netherlands, as a Member State, to defend the immunity of the United Nations.[11] And the Dutch Code of Civil Procedure allows that anyone with a legal interest in a pending dispute between other parties may claim a right to intervene in that dispute.[12] This is what the Netherlands has done: it has intervened in the dispute between the Mothers and the UN.

With this preliminary issue out of the way, it is time to ask the main question: what to think of the UN's immunity? The Dutch District Court[13] begins by emphasizing that the immunity of international organizations is purely treaty-based. This means that what is "decisive for the establishment of the interpretation of standards of immunity of international institutions is what the parties to the treaty agreed to in the founding treaty in question".[14] The District Court is thus asked to interpret the UN Charter and the UN Immunities Convention. The Dutch court refers to Articles 31 and 32 of the Vienna Convention on the Law of Treaties[15] as the applicable rules on the interpretation of treaties. This is interesting, because strictly speaking the Vienna Convention is not applicable to any of the treaties referred to in the Srebrenica proceedings. After all, Article 4 of the Vienna Convention states that

10 Hagedorn, *supra* note 5, p. 203.

11 Trial Court judgment, *supra* note 2, § 5.6.

12 Article 217, Dutch Code of Civil Procedure.

13 On this judgment, see also O. Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court', Vol. 13 *Journal of International Peacekeeping* 2009, no. 1-2, pp. 197 - 219; as well as O. Spijkers, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica before the Dutch Courts,' Vol. 50 *Military Law and the Law of War Review* 2011, pp. 517 - 534.

14 Trial Court judgment, *supra* note 2, § 5.11.

15 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entry into force 27 January 1980, *U. N. T. S.*, vol. 1155, p. 331.

"the [Vienna] Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States". All three of the Dutch courts seem to have overlooked this, since they all apply the treaty without question.[16]

Assuming that the rules on interpretation in the Vienna Convention on the Law of Treaties reflect customary law,[17] we can proceed. The District Court interprets Article 105 UN Charter to mean that the UN only has those immunities which are necessary for the fulfillment of its purposes. Since the claims of the Mothers relate to peacekeeping, the District Court argues that "the activities of the UN objected to fall within the functional scope of this organization" and that "it is particularly for acts within this framework that immunity from legal process is intended".[18] The decision as to whether a certain dispute does or does not fall within the UN's functional immunity is really up to the UN itself, argued the Dutch District Court, especially when peacekeeping is involved. After all, "it is very likely that more far-reaching testing [by local courts] will have huge consequences for the Security Council's decision-making on similar peace-keeping missions".[19] Considering the Immunities Convention, and Article II, Section 2 in particular, an authoritative 'interpretation' of the functional immunity of the UN, the Dutch District Court concludes that the UN enjoys immunity from every form of domestic legal process. This seems to be in line with the intentions of the drafters of the UN Charter. In an often quoted passage from the report of the Rapporteur of the relevant drafting committee, we can read that: "if there is one certain principle it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other".[20]

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16 See *e.g.*, Trial Court judgment, *supra* note 2, § 5.11; Appeals Court judgment, *supra* note 2, § 4.2; and Supreme Court judgment, *supra* note 2, §§ 4.1.1 and 4.2. Only the Advocate-General seems to have noticed a problem, but then only with regard to the UN Charter. See the Conclusion of the Advocate-General, *supra* note 2, § 2.57.

17 The International Court of Justice has reaffirmed the customary status on numerous occasions, also in reference to the interpretation of treaties concluded before the entry into force of the Vienna Convention on the Law of Treaties. See e.g. ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, judgment, 15 December 2004, § 100; ICJ, *LaGrand (Germany v. United States of America)*, judgment, 27 June 2001, § 99; ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, judgment, 13 December 1999, § 18.

18 Trial Court judgment, *supra* note 2, § 5.12.

19 *Id*., § 5.14.

20 See *e.g.*, K. Tesfagabir, 'The State of Functional Immunity of International Organizations and their Officials and Why it should be Streamlined,' Vol. 10 *Chinese Journal of International Law* 2011, issue 1, p. 102.

The Appeals Court[21] agreed with the District Court that the Immunities Convention was an authoritative interpretation of Article 105 UN Charter, granting the UN "such privileges and immunities as are necessary for the fulfillment of its purposes" in the territory of all its Member States.[22] The Appeals Court equally held that Article II, Section 2 of the Immunities Convention must be interpreted to say that the United Nations cannot be summoned to appear before any domestic court in any of the States party to the Immunities Convention.[23]

The Advocate-General pointed out, as the District Court had also done, that the immunities of international organizations are based on the "need to protect the functioning of international organizations".[24] The distinction that must be made is thus that between official and non-official activities of an international organization; the distinction between official and commercial activities, which is decisive in the case of State immunity, is irrelevant here.[25] Official activities of the organization are "linked to the achievement of the purpose of the organization", and non-official activities are not. The international organization is only entitled to immunity when official or functional activities, *i.e.* activities linked to the achievement of the organization's purposes, are involved. Regarding the UN, it is Article 105 UN Charter which is based on this interpretation of immunity of the international organization as functional immunity.[26] Do the acts concerned fall within the scope of this functional immunity? The Advocate-General believed the acts concerned fell within the UN's activities in the maintenance of international peace and security and he concluded that "once the UN is held liable in a private law dispute relating to the effective performance of its functions and objectives, namely the maintenance of international peace and security, the UN enjoys immunity".[27]

The Supreme Court did not add much to this discussion. It agreed that from Article 105 UN Charter, read together with Article II, Section 2 of the Immunities Convention, it followed that "the UN enjoys the most far-reaching immunity from jurisdiction, in the sense that the UN cannot

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21 Both the Advocate-General and the Supreme Court have summarized the Appeals Court's judgment. See Supreme Court judgment, *supra* note 2, § 4.1.1, and the Conclusion of the Advocate-general, *supra* note 2, § 2.7. See also B. Brockman-Hawe, 'Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation,' Vol. 10 *Washington University Global Studies Law Review* 2011, pp. 733-738.

22 Appeals Court judgment, *supra* note 2, § 4.4.

23 Idem, § 4.2. See also Supreme Court judgment, *supra* note 2, § 4.1.1.

24 Conclusion of Advocate-General, *supra* note 2, § 2.10.

25 *Id*.

26 *Id*.

27 *Id*, § 2.11.

be summoned to appear before any domestic court in the countries that are party to the [Immunities] Convention".[28]

What can be concluded about the functional immunity of international organizations, in particular the United Nations? An international organization enjoying functional immunity has those immunities deemed necessary for the independent fulfillment of its purposes.[29] This suggests that the independent functioning of an organization is in need of protection from something. So what is the danger? This 'danger', so it is argued, is the interference of domestic courts. If various domestic governments or courts in the world can set conditions or pass judgment on the functioning of the UN, the organization could no longer work independently and effectively. Or, as the European Court of Human Rights put it, "the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments".[30] If Member States want to influence the working methods of the international organization, they have to use the internal decision-making procedures of the organization, not their own domestic courts.[31] This way international organizations can truly "serve the collective interest of their entire memberships", instead of adapting their strategies because a particular domestic court says so.[32]

What is necessary to protect the UN from such domestic court interference, and who decides what is necessary? And does one need to look at what is necessary in general or assess the necessity in each particular case where immunity is relied upon? The Mothers seem to argue that you must look at the particular acts objected to in order to determine whether these acts themselves were necessary to fulfill the purposes of the Organization. Following this rationale, it is clear that a failed mission is never necessary to accomplish the purposes of the UN, and thus the UN could only rely on its immunity in relation to a

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28 Supreme Court judgment, *supra* note 2, § 4.2.

29 See e.g., C. Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends,' Vol. 7 *International Organizations Law Review* 2010, issue 1, pp. 121-148; A. Reinisch & U. A. Weber, 'In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement,' Vol. 1 *International Organizations Law Review* 2004, no. 1, pp. 59 - 110.

30 ECtHR, *Waite and Kennedy v. Germany,* Appl. No. 26083/94, Judgment, 18 February 1999, § 63.

31 Tesfagabir, *supra* note 19, p. 109.

32 Th. Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts,' Vol. 57 *Netherlands International Law Review* 2010, issue 2, pp. 267-301.

claim involving a successful mission. This cannot be the proper way of applying the functional immunity doctrine; otherwise the denial of immunity would simply be a punishment for a failed mission. In any case, it is suggested that the success or failure of a mission should not determine whether immunity can be relied upon. What is important is not whether the mission was necessary for the accomplishment of the purposes of the Organization. What is important is whether the accomplishment of the purposes of the Organization requires that the mission is covered by the organization's immunity. The question then becomes whether it is necessary for the United Nations, in order to fulfill its purposes, to have immunity from domestic jurisdiction in all — present and future — cases relating to UN peacekeeping missions.[33] Or, as the Dutch Appeals Court put it, the question is not "whether the invocation of immunity in this particular case in hand is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution in general".[34] The question is to what this "in general" refers. Does it refer to all civil claims relating to peacekeeping missions? This already gives the UN very broad immunities, but it is still far removed from the argument that the UN required immunity from every form of domestic legal process.[35] The most straightforward answer to the scope of the UN's immunities is to say they are treaty-based: Members States of any organization are free to make a treaty in which they grant whatever immunities they consider necessary for the effective functioning to the organization they established. Domestic courts have to accept such agreement.[36] Any other decision would "open a floodgate of baseless claims".[37] At the same time, the fear of the UN for such a floodgate shows a lack of confidence in the impartiality and professionalism of the domestic courts of all its Member State, and this lack of confidence might not be justified. After all, there have not been all that many attempts to hold the UN accountable in a domestic court.[38]

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33 Spijkers, *supra* note 13, pp. 203-204.

34 Appeals Court judgment, *supra* note 2, § 4.4.

35 Spijkers, *supra* note 13, pp. 205-206.

36 See also Ryngaert, *supra* note 28, pp. 123-126 and I. Dekker & C. Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals,' in Netherlands Society of International Law, *Making Choices in Public and Private International Immunity Law* (The Hague, T.M.C. Asser Press, 2011), pp. 90-92.

37 Tesfagabir, *supra* note 19, p. 110. Tesfagabir only mentions this argument, but does not necessarily agree.

38 *Id*., p. 126.

III. Existence of an Alternative Legal Remedy as a Condition for Immunity

If the domestic courts uphold the immunity of the UN, this means the door is shut: the claimants have to go elsewhere. In such case, there arises a need for an alternative avenue, and the UN itself is perhaps the most obvious candidate to provide potential claimants with such an alternative legal forum. It is for this reason that Article VIII, Section 29, of the Immunities Convention calls upon the UN to create its own dispute settlement mechanism for the settlement of disputes of a private law character, such as civil wrongs or torts, in which the United Nations is involved. The United Nations itself has consistently interpreted this obligation to mean that if the UN does not waive its immunity when asked to appear before a domestic court, some alternative method to settle the dispute at the UN level should be found.[39]

The big question is whether such an alternative is (politically) desirable, or (legally) required. What should the domestic court do when no alternative legal remedy is established? According to the Dutch Advisory Commission on Problems of Public International Law, if there are no "adequate legal remedies available to the aggrieved party within the international organization itself […] it is desirable that national courts do not grant immunity and proceed to the settlement of the dispute".[40] Perhaps it is desirable, but is the domestic court legally obliged to deny the UN its immunity?

In this section, the question is whether the availability of an alternative dispute settlement mechanism is a *conditio sine qua non* for the immunity of international organizations from the jurisdiction of domestic courts. In other words: can we say that without the existence of an alternative legal remedy, the international organization cannot rely on its immunity before a domestic court?

The District Court stressed the importance of a UN dispute settlement procedure as an alternative.[41] However, even though the existence of such an alternative dispute settlement mechanism was considered important, the District Court believed that a failure to set up such a mechanism did not mean *per se* that the immunity of the UN could be set aside by a domestic court.[42]

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[39] See already, A. Ehrenfeld, 'United Nations Immunity Distinguished from Sovereign Immunity,' Vol. 52 *American Society of International Law Proceedings* 1958, pp. 93-94.

[40] Spijkers, *supra* note 13, pp. 206-209. The quote is from section 4.5.2, *Advies inzake aansprakelijkheid voor onrechtmatige daden tijdens UN vredesoperaties*. The translation is my own.

[41] Trial Court judgment, *supra* note 2, § 5.15.

[42] *Id*., § 5.15.

The Appeals Court only referred to the existence of alternative legal remedies as an element in the balancing of the interest of the individuals to access to court, and the interest of the United Nations in carrying out its functions free from domestic courts' interference. This is discussed below.[43]

The Supreme Court's Advocate-General agreed with the District Court that it was important that there was an alternative remedy available.[44] On the consequences the existence of such a remedy might have for immunity, the Advocate-General stated that "the presence of an adequate, alternative means for the settlement of disputes with the organization should be seen as a condition for the application of immunity from prosecution".[45] This suggests that the Advocate-General believed it to be a decisive criterion. However, in what followed, he discussed the existence of an alternative legal remedy as part of the balancing act, suggesting that it is an important but not a necessary condition for a successful reliance by an international organization on its immunity.

The Supreme Court dealt at length with the need for an alternative remedy. It found support in a recent judgment of the International Court of Justice (ICJ) on the jurisdictional immunities of States.[46] This judgment was so recent that neither the District Court nor the Appeals Court could have relied on it. In that case, Germany complained about the fact that Italian courts had awarded damages to individuals for acts attributable to the State of Germany which occurred during the Second World War. Germany argued that the German State was immune from the jurisdiction of the Italian courts, and the ICJ agreed, despite the fact that there was no alternative legal remedy available for the claimants. According to the Dutch Supreme Court, it was the ICJ's view that there is "no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress".[47] This is a clear rejection of the existence of alternative legal remedies as a *conditio sine qua non* for immunity. The ICJ case was about the immunity of foreign States, and the Srebrenica dispute is about the immunity of international organizations. Does that make a difference? The Supreme Court held that the same arguments used by the ICJ to uphold the immunity of Germany were also applicable to the immunity of the United Nations:

43 See section IV.2.

44 Conclusion of Advocate-General, *supra* note 2, § 2.19.

45 *Id*., § 2.17.

46 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment, 3 February 2012.

47 Supreme Court judgment, *supra* note 2, § 4.3.13, with reference to § 101 of ICJ, *Jurisdictional Immunities*, *supra* note 45.

> Although UN immunity should be distinguished from State immunity, the difference is not such as to justify ruling on the relationship between the former and the right of access to the courts in a way that differs from the ICJ's decision on the relationship between State immunity and the right of access to the courts. The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association *et al.* base their claims.[48]

Since it held that the same rationale which was applied by the ICJ could be applied to the Srebrenica case, the Supreme Court did not have to look at the existence of alternative legal remedies.

When applying the alternative legal remedies requirement, the Supreme Court basically equated State immunity with the immunity of the UN. This is surprising, considering that the same Court in the same judgment explained that the two types of immunity were very different from each other. And it could be argued that, exactly because of these conceptual differences, there are good reasons to treat the alternative legal remedies requirement differently in both cases.[49] Most importantly, the principle that sovereign States should not judge each other's actions, or *par in parem non habet imperium,* is not applicable in the relations between a State and an international organization. And there are practical differences as well. As Reinisch remarked, "the necessity for the availability of dispute settlement mechanisms may be even more relevant in the case of international organizations than of states since states can (almost) always be sued before their own domestic courts whereas international organizations usually do not have any comparable internal courts".[50] Despite these conceptual and practical differences between State immunity and the immunity of an international organization, the Dutch Supreme Court simply applied the rationale of the ICJ in the *jurisdictional immunities* case to the UN.

The District Court and the Supreme Court did not believe that an alternative legal remedy was a *conditio sine qua non* for invoking immunity. The District Court concluded that the absence of an alternative legal remedy was regrettable, but not decisive; the Supreme Court was even more outspoken, stating that such absence did not preclude the UN from relying on its immunity. The Appeals Court had a slightly different approach. It treated the existence of an alternative mechanism as an important element in the balancing act between the individual's right to access to court and the UN's right to immunity.[51]

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48 Supreme Court judgment, *supra* note 2, § 4.3.14.

49 See also Van Alebeek, *supra* note 6, § A5.

50 Reinisch & Weber, *supra* note 28, p. 67. See also *id*., pp. 88-89.

51 See section IV.2, below.

IV. Clashing Obligations

We have seen that, according to the Dutch Supreme Court, the UN is entitled to immunity from the domestic jurisdiction of the Dutch courts, and the absence of an alternative legal remedy does not preclude such reliance. But the Netherlands, and the Dutch courts, have other rights and other interests to take into account, besides those of the UN. Most importantly, the Netherlands has to make sure everybody within its jurisdiction has access to the courts to settle all legal disputes of a private law character. And it also has an obligation to prevent and punish genocide, and a refusal to provide compensation to victims of genocide might constitute a violation of this obligation. And thus the Dutch court is faced with a problem: it cannot both respect the UN's immunity and deal with the compensation claim at the same time.

First, the obligation to prevent and punish genocide versus the obligation to respect the UN's immunity is examined. The conclusion is that this clash is only apparent, since the obligation of the Netherlands to punish the main perpetrators of the genocide is not violated when victims are denied claims relating to that genocide (IV.1). Then there is the clash between the obligation to guarantee everyone access to the courts versus the obligation to respect the UN's immunity. This requires a delicate balancing act (IV.2). Another way is to look for a conflict rule to decide this clash in favor of one or the other. It has been suggested that from the fact that the proceedings relate to genocide, a *jus cogens* norm, follows that the UN cannot rely on its immunity: *jus cogens* norms prevail over all other norms (IV.3). Another suggestion is that the 'special nature' of the UN is decisive, *i.e.* that the clash must be settled in favor of the UN because the interests of the UN are somehow 'more important' than those of the individual (IV.4). Article 103 UN Charter has also been referred to. In general terms, the hierarchy between obligations of UN Member States under the UN Charter and obligations under any other international agreement is governed by Article 103 UN Charter, which gives priority to UN Charter obligations. But does this solve the problem? That is the topic of the last subsection (IV.5).

1. Obligation to Prevent and Punish Genocide

The obligation to prevent and punish the crime of genocide is based on Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, which proclaims that all States party to the Genocide Convention "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".[52]

[52] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, entry into force 12 January 1951, *U. N. T. S.* Vol. 78, p. 277.

The District Court did not believe that the Genocide Convention obligated "a Netherlands court to enforce the standards of the Genocide Convention by means of a civil action".[53] And thus the clash was only apparent: the Netherlands had no obligation under the Genocide Convention to deal with the tort claim. If the Dutch Courts upheld the immunity of the UN, they were not obstructing the punishment of the perpetrators of the genocide or the prevention of genocide in the future. The higher courts did not add much to this, and thus the argument was rejected.

2. Obligation to Guarantee to Everyone Their Human Right of Access to Court

When the immunity of the UN is upheld, the individuals have no access to the Dutch courts anymore. The question is whether this constitutes a violation, by the Netherlands, of the human right of everyone within its jurisdiction to have access to the Dutch courts.[54]

All persons within the jurisdiction of the Netherlands are entitled to a legal remedy to settle their legal disputes. This follows from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees, to everyone within a Member State's jurisdiction, the right to a fair and public hearing in the determination of his civil rights, by an independent and impartial tribunal.[55] Article 14 of the International Covenant on Civil and Political Rights,[56] and presumably also customary international law, equally guarantee such right.

In *Waite and Kennedy*, the European Court of Human Rights (ECtHR) was also confronted with the clash between the immunity of an international organization and the right of individuals to have access to court.[57] According to the ECtHR,

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53 Trial Court judgment, *supra* note 2, § 5.19.

54 The District Court did not really discuss whether the matter actually falls within the jurisdiction of the Netherlands. All the Court said was that if the human right of access to a court would prevail over the UN's immunity, then "primarily that State would be liable […] within whose territory the institution in question has its seat [*in casu* the USA] or the asserted wrongful act was committed [Bosnia]. In the present case this is certainly not the Netherlands". Trial Court judgment, *supra* note 2, § 5.24. This issue does resurface at the Appeal level, see Appeals Court Judgment, *supra* note 2, § 5.1.

55 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, entry into force 3 September 1953, *U. N. T. S.* Vol. 213, p. 222.

56 International Covenant on Civil and Political Rights, New York, 16 December 1966, entry into force 23 March 1976, *U. N. T. S.* vol. 999, p. 171.

57 ECtHR, *Beer and Regan v. Germany*, Appl. No. 28934/95, Judgment, 18 February

> The right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations […] It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[58]

In other words, the immunity of an international organization can be seen as an impediment to the enjoyment of the human right of access to a court. However, since the right of access to court is not absolute, such impediments or restrictions are permitted, but only under certain conditions: the restriction of the right of access to court has to serve a legitimate purpose, and the restriction must be a proportional means to realize that purpose. The European Court added that "a material factor" in determining whether granting immunity to an international organization from domestic jurisdiction was proportional was "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention".[59] The existence of an alternative legal remedy was thus not a *conditio sine qua non* or absolute prerequisite for immunity, but a material factor in weighing the proportionality of the limitation granting immunity posed on the right of access to court.[60]

In section III above, we also looked at the availability of an alternative legal remedy. However, there the question was whether the availability of an alternative dispute settlement mechanism was a *conditio sine qua non* for the immunity of international organizations from the jurisdiction of domestic courts. The conclusion was that it was not. In this section, the question is much more subtle: we will look at the importance of the availability of an alternative legal remedy in the assessment of the proportionality of the restriction on the right of access to court which the invocation of immunity poses.

The Dutch Courts had different views on the applicability of the *Waite and Kennedy* criteria to the present dispute. The Dutch District Court held that the *Waite and Kennedy* situation was in significant aspects different from the dispute between the Mothers and the UN. First of all, the United Nations was established before the European Convention on Human Rights entered into force, and this meant that "there can be no question […] of a restriction of the protection of human rights under

1999, and *Waite and Kennedy, supra* note 29.

58 *Id*., § 59.

59 *Id.,* § 68.

60 See also Henquet, *supra* note 31, p. 293.

the ECHR by transfer of powers to the UN".[61] This is different from the *Waite and Kennedy* situation because this case involved the European Space Agency, which was established in 1980 and thus after the ECRM had entered into force for Germany. Furthermore, the UN has a universal membership, which the European Space Agency does not have. Since there was no need for a balancing of interests, the Dutch Court did not need to look at the availability of alternative legal remedies at the UN level, which according to *Waite and Kennedy*, would have been a 'material factor' in that balance.[62]

The Appeals Court took the exact opposite view. It applied the *Waite and Kennedy* criteria.[63] The Appeals Court first noted that the UN's immunity served a legitimate aim, namely ensuring the 'effective operation' of the international organization.[64] On the question as to whether granting the UN far-reaching immunities was a proportionate means to achieve that aim, the Appeals Court held that "the immunity from prosecution granted to the UN […] is closely connected to the public interest pertaining to keeping peace and safety in the world", and that is why it is "very important that the UN has the broadest immunity possible allowing for as little discussion as possible".[65] It would be highly problematic if the UN would be exposed to claims by parties to a conflict, each time it intends to keep the peace and bring the parties to such conflict closer together. And thus "only compelling reasons" could lead to the conclusion that UN immunity from the jurisdiction of domestic courts was not proportional to the purpose such immunity intended to serve.[66]

Could such compelling reasons be identified in the present case? In deciding the question of proportionality, the existence of alternative legal remedies was crucial. Even though the United Nations was obliged to set up an alternative dispute settlement mechanism which could be used in this case — the Mothers referred to Article VIII, Section 29 of the Immunities Convention as legal basis for this obligation — the UN had not done so. Both the Mothers and the State of the Netherlands agreed that the UN never provided an alternative legal remedy.[67] And since the

61 Trial Court judgment, *supra* note 2, § 5.24.

62 *Id*., §§ 5.23-24.

63 The general criteria are outlined in Appeals Court judgment, *supra* note 2, § 5.2.

64 *Id*., § 5.6.

65 *Id*., § 5.7.

66 Appeals Court judgment, *supra* note 2, § 5.7. See also Ryngaert, *supra* note 28, p. 144 and p. 148, who believed that the existence of an alternative dispute settlement mechanism, even though a material factor in balancing the rights of the UN and potential claimants, might not have to be decisive when something so important and political as peacekeeping is involved.

67 Appeals Court judgment, *supra* note 2, § 5.11. See also Conclusion of Advocate-

UN was not present in the Dutch courtrooms to make any objections, the Appeals Court had to accept this as a fact.[68] However, the Appeals Court held that it did not see why "there would not be an opportunity for [the Mothers] to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law".[69] Secondly, the Appeals Court also reminded the Mothers that "the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open".[70] These constituted alternative legal remedies in view of the Appeals Court. And thus, applying the *Waite and Kennedy* criteria, the Appeals Court upheld the immunity of the UN because alternative legal remedies were available to the Mothers, and upholding the UN's immunity was thus not a disproportionate restriction on their right of access to court.[71] This application of *Waite and Kennedy* has been criticized in the literature. In Brockman's view, "the Dutch Court of Appeals made a critical error in failing to recognize the importance of the UN as a party to the lawsuit, whose presence is essential to ensuring that the plaintiffs might have their damages redressed completely".[72] In other words, the litigation against the Netherlands is no alternative. Similarly, Dekker and Ryngaert concluded that "the *Waite and Kennedy* test appears to have been applied with a particularly light touch in Mothers of Srebrenica". The so-called alternative remedies were 'besides the point,' noted Dekker and Ryngaert, because "they concern[ed] remedies against other persons (individuals, a state, as opposed to the UN as an international organisation) for other acts (genocide in respect of the perpetrators, as opposed to a failure to present genocide)".[73]

The Advocate-General also concluded that the *Waite and Kennedy* criteria applied to the UN. Applying these criteria, the Advocate-General pointed out that the objective of the UN's immunity was to guarantee the "independent and unhindered exercise of its functions",[74] and this was in his view a legitimate objective. Regarding proportionality, the Advocate-General noted that "the functioning of the United Nations, and the performance of peacekeeping operations based on the UN Charter, would become extremely difficult if not impossible, if such functional activities were not covered by the UN's immunity, and the UN could

General, *supra* note 2, § 2.25.

68 *Id*.

69 *Id*.

70 *Id*., § 5.12.

71 *Id*., § 5.13-5.14.

72 Brockman-Hawe, *supra* note 20, pp. 744-746.

73 Dekker & Ryngaert, *supra* note 35, p. 102.

74 Conclusion of Advocate-General, *supra* note 2, § 2.17.

be brought before a domestic court for such activities".[75] There must thus be compelling reasons to refuse the UN its immunity.

The Advocate-General regarded the existence of an alternative legal remedy as an important element.[76] Was such an alternative legal remedy available? The Advocate-General took issue with the Appeals Court's suggestion that there were alternative remedies available to the claimants because the main perpetrators were facing criminal charges and because the claimants could always file a claim against the Netherlands. The Advocate-General believed the argumentation of the Appeals Court was "flawed as regards the UN", because "it is exactly this organization which cannot be brought to justice [in a domestic court] considering the organization's immunity".[77]

The Advocate-General found another way out. He accepted that the Mothers and the State of the Netherlands both agreed that no alternative dispute settlement mechanism at the UN level was ever established. None of the parties disputed this fact before the Supreme Court.[78] However, according to the Advocate-General, "this finding (undisputed in cassation) applies between the Association and the State, but […] it does not apply to the United Nations".[79] The reasoning behind this is that it would be unfair to the UN, which refused to appear in the Dutch court proceedings, to be bound by any assertions of fact made by the State of the Netherlands. When the Advocate-General rejects the interpretation of the facts by the two parties, one might expect him to investigate for himself. However, this is not the approach of the Advocate-General. Without examining the facts, he referred to Article VIII, Section 29, of the Immunities Convention, and the Status of Forces Agreement, a treaty between Bosnia and the United Nations which entered into force on 15 May 1993, long before the genocide in Srebrenica. Para. 48 of this Agreement stated as follows:

> [A]ny dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the courts of Bosnia and Herzegovina do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose.[80]

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75 *Id*., § 2.24.

76 See also section III.

77 Conclusion of Advocate-General, *supra* note 2, § 2.24.

78 See also A. Hagedorn, *supra* note 5, p. 209, where the lawyer of the Mothers explains why no suitable UN dispute settlement mechanism was available.

79 Conclusion of Advocate-General, *supra* note 2, § 2.25.

80 Agreement between the United Nations and Bosnia and Herzegovina on the Status of the United Nations Protection Force in Bosnia and Herzegovina, Sarajevo, 15 May 1993, entry into force on the same day, *U.N.T.S.* Vol. 1722, p. 77. The Agreement is based on the Model Status of Forces Agreement for peacekeeping operations, UN Doc. A/45/594, distributed 9 October 1990. Cited

The question was whether such a standing claims commission was actually ever established. And both the Mothers and the State of the Netherlands believed it was not. It is thus surprising that in view of the Advocate-General, the UN established an alternative dispute settlement mechanism in the Agreement of 15 May 1993, leaving aside the question of whether the relatives of the victims of the fall of the Srebrenica enclave in the circumstances of the case have had sufficient opportunity to legal remedy.[81] According to the Advocate-General, the signing of the Status of Forces Agreement by itself already constituted an alternative legal remedy, and it was irrelevant whether a standing claims commission was ever actually established. And thus the immunity of the UN should be upheld, because there existed an alternative legal remedy, at least in the world of the "law on the books".

Where the Appeals Court and the Advocate-General basically applied the *Waite and Kennedy* criteria, the Supreme Court explicitly rejected this approach, as the District Court had done earlier.[82] The Supreme Court chose to go a different route, by essentially relying on Article 103 UN Charter as a conflict rule.[83] This had as consequence that the Supreme Court did not have to look at the existence of alternative legal remedies. It could thus avoid the controversial findings of the Appeals Court and the Advocate-General, i.e. that alternative legal remedies existed because the perpetrators of the genocide and the Netherlands could be brought before a court or because the Status of Forces Agreement of 1993 provided a remedy, despite the fact that this part of the Agreement was never implemented.

What to conclude? The general rule, as Ryngaert convincingly argued, is that "international organizations ought to provide for internal or external mechanisms of dispute settlement so as to make sure that aggrieved individuals can somehow have their day in court", and "if they are not, or they are inadequately provided, organizations forfeit their right to immunity".[84] The big question is whether this general rule is also applicable in case of UN peacekeeping missions, considering the special nature of the UN and of such missions. Henquet also dealt with this issue. In Henquet's view, when the "functionality of the UN is intensely at stake", granting immunity might be "proportional to the goal of protecting the effective operation of the UN".[85] In the Srebrenica case, this would mean that UN immunity prevailed because

in the Conclusion of Advocate-General, *supra* note 2, § 2.12.

81 Conclusion of Advocate-General, *supra* note 2, § 2.25.

82 Supreme Court judgment, *supra* note 2, § 4.3.5.

83 See section IV.5, below. See also section III, on the existence of alternative legal remedies as *conditio sine qua non*.

84 Ryngaert, *supra* note 28, pp. 147-148.

85 Henquet, *supr*a note 31, pp. 293-294.

> In disputes such as that in Srebrenica, it is inconceivable that the UN could be held to account by private claimants [..] because such disputes concern the core decision-making within the international organization [and] the functionality of the UN was so central to the Srebrenica case that, even without an alternative remedy, the immunity was proportional to the aim of protecting the independent and proper functioning of the UN.[86]

This provides yet another way the case could have been resolved. But none of the Dutch courts have opted for this route.

3. Obligation to Provide Proceedings Relating to *Jus Cogens* Norms

The Association had argued that the fact that the proceedings related to a failure to prevent genocide, which was a *jus cogens* norm, meant that the interests of the claimants should prevail over those of the UN. The Association had made this argument, referring to the dissenting opinion in *Al-Adsani*, yet another ECtHR case, in which it was argued that "the acceptance [..] of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions".[87] In *Al-Adsani*, it was argued that, because of the *jus cogens* nature of the ban on torture, the right of access to the courts to pronounce itself on a tort involving torture should not be obstructed due to immunity claims. It must be emphasized that the majority in *Al-Adsani* reached the exact opposite conclusion and allowed immunity even in cases involving *jus cogens* violations.

The Appeals Court did not follow the *Al-Adsani* dissent. It acknowledged that the accusation that the UN had not undertaken enough to prevent the genocide in Srebrenica was a serious accusation indeed. But the seriousness of this accusation of negligence alone was insufficient to obstruct the UN's invocation of immunity.[88]

The Supreme Court also looked at the question whether "the right of access to the courts should prevail […] over UN immunity because the claims are based on the accusation of involvement in — notably in the form of failing to prevent — genocide and other grave breaches of fundamental human rights (torture, murder and rape)".[89] In doing so, the Supreme Court took the *Al-Adsani* dissenters' argument quite seriously. It admitted that the dissenting opinion in *Al-Adsani* was important, because it "agree[d] with no small proportion of the literature, both

[86] *Id*., p. 300.

[87] § 3 of the dissenting opinion to ECrtHR, *Al-Adsani v. The United Kingdom*, 35763/97, 21 November 2001, cited in Supreme Court judgment, *supra* note 2, § 4.3.9.

[88] Appeals Court judgment, *supra* note 2, §§ 5.8 and 5.10.

[89] Supreme Court judgment, *supra* note 2, § 4.3.7.

Dutch and foreign, on the subject of State immunity".[90]

Unfortunately for the Association, the International Court of Justice recently affirmed the more traditional viewpoint of the majority of the European Court of Human Rights in *Al-Adsani*. The ICJ did so in the case on *Jurisdictional Immunities of the State*, between Germany and Italy.[91] With approval, the Dutch Supreme Court cited the ICJ's conclusion that "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict".[92] This is because, in view of the ICJ, there is no direct clash between the prohibition to commit *jus cogens* offences and the obligation to respect a foreign State's immunity.[93] This is because "the rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State [meaning that] they do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful".[94] Although some qualify this as "a return to orthodoxy",[95] other scholars agree with the ICJ's approach. Hazel Fox, for example, explained that when a particular court concludes it has no jurisdiction to deal with a *jus cogens* case, that such court "does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement".[96] This is a direct refutation of the argument made in the *Al-Adsani* dissenting opinion. The ICJ's judgment also had a dissenter, siding with the *Al-Adsani* dissenters. Judge Cançado Trindade believed the distinction between procedural rules (immunity)

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90 *Id*., § 4.3.9.

91 See also O. Spijkers, 'Case Note of International Court of Justice, Application of the Interim Accord of 13 September 1995 and Jurisdictional Immunities of the State,' Vol. 87 *Nederlands Juristenblad* 2012, pp. 673-676.

92 § 91 of ICJ, *Jurisdictional Immunities*, *supra* note 45, cited in Supreme Court judgment, *supra* note 2, § 4.3.11.

93 See also S. Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished,' Vol. 25 *Leiden Journal of International Law* 2012, pp. 979-1002 and F. Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening),' Vol. 25 *Leiden Journal of International Law* 2012, pp 1003-1012.

94 § 93 of ICJ, *Jurisdictional Immunities*, *supra* note 45, cited in Supreme Court judgment, *supra* note 2, § 4.3.12.

95 E. Yang, 'The Jurisdictional Immunities Case: Between Immunity and Impunity,' *Oxford University Undergraduate Law Journal*, Issue 1 (2012), p. 32.

96 H. Fox, *The Law of State Immunity* (Oxford, Oxford University Press, 2008, 2nd ed.), p. 151, cited with approval in Talmon, *supra* note 91, p. 980. Talmon himself puts it as follows: "A procedural rule may hinder the application or enforcement of the *jus cogens* rule, but it does not derogate from its content" (*id.*, p. 986).

and substantive rules (prohibition to commit *jus cogens* offences) was somewhat artificial. He referred to the *Al-Adsani* dissent, and agreed that "a State cannot hide itself behind the rules of State immunity in order to evade the consequences of its actions and to avoid civil proceedings for a claim of torture before a foreign jurisdiction".[97] Applying this rationale to the case between Germany and Italy, Cançado Trindade concluded that "Germany cannot hide behind rules of State immunity to avoid proceedings relating to reparations for violations of *jus cogens* norms before a foreign jurisdiction (Italy)".[98] However, the Dutch Supreme Court ultimately sided with the majority judgments of both the ECtHR and the ICJ. And this was probably the correct decision, albeit not the one favored by many human rights lawyers and people sympathetic with the victims. As Talmon convincingly argued, "law, by its very nature, is formalistic and technical", and it is "these traits [which] contribute to clarity, certainty, and predictability – also 'values' not to be discarded lightly".[99] In other words, courts have to apply the law consistently and they should not try to circumvent procedural rules that determine the jurisdiction of a particular court only because otherwise an important case may never be dealt with judicially.

4. Obligation of the Netherlands to Respect the 'Special Nature' of the UN

The *jus cogens* argument referred to above, if accepted, would have tilted the balance in favor of the claimants. There are also arguments which, if accepted, tilt the balance in favor of the UN. One such argument is to prefer the interests of the UN because of the 'special nature' of this organization. This was a decisive element in the judgment of the District Court. It referred extensively to *Behrami*, a decision of the European Court of Human Rights.[100] In the interpretation of the Dutch District Court, the ECtHR held in that case that the ECHR "should not be an impediment to the effective implementation of duties by international missions […] under UN responsibility", and that "[b]y virtue of this, states cannot, according to the Court, be held liable for the actions of national troops they made available for international peace-keeping missions".[101] The *Behrami* case was thus about liability, and not immunity. However, the Dutch Court believed that the underlying idea,

97 Trindade dissenting opinion to ICJ, *Jurisdictional Immunities*, *supra* note 45, § 132.

98 *Id*., § 134.

99 Talmon, *supra* note 91, p. 1002.

100 ECtHR (Grand Chamber), Appl. Nos. 71412/01 and 78166/01, 2 May 2007, *Decision as to the Admissibility of Application no. 71412/01 by Agim Behrami and Bekir Behrami against France and Application no. 78166/01 by Ruzhdi Saramati against France, Germany and Norway*, §§ 146-152.

101 Trial Court judgment, *supra* note 2, § 5.22.

i.e. that European human rights law should not obstruct the effective and independent functioning of the UN, was equally relevant in the present case. Applying the same rationale to the Srebrenica dispute, the District Court held that the ECHR "cannot be a ground for exception to the — as said before, absolute — immunity under international law of the UN itself", and that "[t]he UN therefore cannot be brought before a domestic court just on the grounds of the right to access to a court of law guaranteed in article 6 ECHR".[102]

Saying that European human rights law cannot be an 'impediment' to the work of the UN is not the same as explaining why this is so. Unfortunately, the European Court itself never really explained itself. It only stated that to apply the European Human Rights Convention "would be to interfere with the fulfillment of the UN's key mission in this field including […] with the effective conduct of its operations".[103] It thus relied on a rather vague argument, referring to the importance of the UN's work; and the District Court basically followed the European Court here.

The District Court held that European human rights law could never be an impediment to the UN's activities in the field of peacekeeping and peace enforcement. The Appeals Court disagreed. It did not believe there was support for such a sweeping position in *Behrami*. According to the Appeals Court, the European Court merely pointed out in *Behrami* the "special position of the UN within the international community".[104] It thus proceeded to apply the *Waite and Kennedy* criteria, which are applicable to ordinary international organizations, also to the supposedly special UN.[105]

The Supreme Court basically sided with the District Court on this issue. Considering the special nature of the United Nations, the Supreme Court believed that there was no need to balance the interests of the individual and the UN, or "in any event not in relation to the UN's activities in the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression)".[106] Like the District Court, the Supreme Court also based this belief that the "UN occupies a special place in the international legal community" on *Behrami*.[107] The difference was that the Supreme Court used this argument as support for its reliance on Article 103 UN Charter, whilst the District Court considered the obligation to respect the special nature of the UN's work as the decisive argument.

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[102] *Id*., § 5.22.

[103] ECtHR, *Behrami, supra* note 98, § 149.

[104] Appeals Court judgment, *supra* note 2, § 5.3.

[105] See section IV.4, above.

[106] Supreme Court judgment, *supra* note 2, § 4.3.3.

[107] *Id*., § 4.3.4.

5. The Role of Article 103 UN Charter as a Conflict Rule

Let us now have a look at the argument based on Article 103 UN Charter. Article 103 UN Charter states that "in the event of a conflict between the obligations of the Members of the United Nations under the [UN] Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

The District Court believed that it was possible that other norms of international law might clash with the UN's immunity, despite the hierarchical relationship between the UN Charter and ordinary norms established in Article 103 UN Charter. After having referred to Article 103 UN Charter, the District Court noted that "there are insufficient grounds for accepting a full and unconditional prevailing of international-law obligations of the State under the UN Charter over other international-law obligations of the State".[108] It thus preferred to refer to the special nature of the UN's functions, as explained above.[109]

The Appeals Chamber agreed with the District Court that Article 103 UN Charter could not by itself serve as a conflict rule. This was because the Article was "not intended to allow the [UN] Charter to just set aside like that fundamental rights recognized by international (customary) law or in international conventions".[110] The confidence with which the Appeals Court said this is striking, because a literal reading of Article 103 suggests the exact opposite: that all obligations under the UN Charter prevail over all obligations under any other international agreement. It makes no exception for international agreements on human rights. In support of its interpretation, the Appeals Court recalled that promoting respect for human rights was one of the purposes of the United Nations, also according to the UN Charter itself.[111]

The Advocate-General did not really address this issue. On a clash between obligations arising under Article 103 UN Charter and the right of access to a court as guaranteed in the European Convention on Human Rights, the Advocate-General only said that "the question about the relationship between the UN Charter (cf. Art. 103) and the ECHR can be set aside, because in the present case there is no conflict with the ECHR and thus no conflict between the two instruments".[112] Above, it has already been explained why the Advocate-General did not see a conflict: in his view, there was an alternative legal remedy available to the claimants.[113]

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108 Trial Court judgment, *supra* note 2, § 5.16.

109 See section IV.4, above.

110 Appeals Court judgment, *supra* note 2, § 5.5.

111 *Id*., § 5.5.

112 Conclusion of Advocate-General, *supra* note 2, § 2.24.

113 See section IV.2, above.

The Supreme Court disagreed with the lower courts, and saw Article 103 UN Charter as decisive. It held that both the European Court of Human Rights as well as the International Court of Justice had stated in earlier judgments that Article 103 UN Charter should be interpreted to mean that "the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement".[114] In essence, the Supreme Court held that it followed from Article 103 UN Charter, combined with the special nature of the purposes and work of the United Nations, that there was no need to balance the individual's right of access to court and the UN's right to immunity. The one (immunity) prevailed over the other (right of access to court). Undoubtedly this is one of the most problematic parts of the Supreme Court's judgment. The Supreme Court thus essentially based its judgment on the Article 103 UN Charter principle that whenever there is a conflict between UN obligations and other obligations, the former prevail over the latter. It believed that it was following the European Court of Human Rights here, and referred to *Behrami*.[115] However, as Van Alebeek rightly pointed out, the European Court never reached such sweeping conclusions on the basis of Article 103 UN Charter.[116]

V. Conclusion and a Look to the Future

The United Nations does not want domestic courts to interfere with its activities, and thus it relies on its immunity whenever a claim is brought against it in a domestic court. The Mothers of Srebrenica believe the United Nations failed to prevent the genocide in Srebrenica in 1995, and they want the UN to accept legal responsibility for this failure and pay compensation. Since the UN does not provide an opportunity for the Mothers to claim compensation at the UN level, they bring the UN before a domestic court. The local court is then faced with a dilemma: it cannot both accept to hear the complaint against the UN, and respect the UN's immunity from the jurisdiction of domestic courts. There are many ways to deal with this problem, but the argument that prevailed in the Dutch Supreme Court was that in case of a clash between obligations under the UN Charter and obligations under any other international agreement, the former prevail. The UN Charter proclaims that the UN enjoys all immunities necessary for the fulfilment of its purposes, and the Dutch Court must let this obligation prevail over the obligation of the Netherlands to guarantee the Mothers a fair and public hearing by an independent and impartial tribunal established by law in the

[114] Supreme Court judgment, *supra* note 2, § 4.3.4.

[115] ECtHR, *Behrami*, supra note 98, §§ 146-152.

[116] Van Alebeek, *supra* note 6, § A4. The European Court only made some vague references to Article 103 in *Behrami*. It did not have to state clearly what the correct interpretation of the article as a conflict rule might be.

determination of their civil rights. The fact that the claim related to a *jus cogens* violation did not change that.

When looking to the future, we can look first of all at the future of this particular case. What will happen now that the UN is basically removed from the case? Does it make sense to continue without the UN? We can also look at the influence of the Supreme Court's ruling on the development of the international law.

If we look first at the future of this particular case, two questions can be asked. The first question is: what will happen to the case now that the UN has disappeared from the scene and the case continues between the Association and the Netherlands? When predicting the outcome, we may refer to another case before the Dutch Courts on Srebrenica. In that case, the District Court attributed certain acts of the UN peacekeepers to the UN, and refused to accept that the same acts could equally be attributed also to the Netherlands.[117] This would be bad news for the Mothers of Srebrenica. After all, if the failure to prevent genocide in Srebrenica can be attributed to the UN, and if this excludes attribution also to the Netherlands, then the Mothers are basically left empty-handed.[118] However, the Appeals Court in the same case overturned this decision, and decided that the same acts *could* be attributed to both the UN and the Netherlands.[119] If the latter approach is followed in the Mothers of Srebrenica case, it might not be so disastrous that the UN is now removed from the proceedings.

Second, when looking at the future of this particular case, it must also be noted that the immunity issue is not over yet. The Mothers of Srebrenica have already filed a petition with the European Court of Human Rights.[120] The Association basically argued in its application what it had been arguing for years now: that by preferring to uphold the immunity of the United Nations, the Netherlands violated Article 6 of the ECHR, i.e. the human right of access to a court, as well as Article 13 ECHR, the right to an effective remedy, because "the decision of the [Dutch] Supreme Court and the course of action of the State means that the acts and omissions

[117] *Mustafić and Nuhanović versus the State of The Netherlands*, District Court The Hague, Case Nos. 265618 and 265615, Judgments of 10 September 2008.

[118] Hagedorn, *supra* note 5, p. 203.

[119] *Mustafć and Nuhanović versus the State of The Netherlands*, Court of Appeals The Hague, Case Nos. 200.020.173/01 and 200.020.174/01, judgments of 5 July 2011. On these cases, see also Conclusion of Advocate-General, *supra* note 2, § 3.2, and Spijkers, *supra* note 13.

[120] Application by the Mothers of Srebrenica to the European Court of Human Rights against the decision of the Supreme Court of the Netherlands, 11 October 2012, 'Application to ECHR.' Available on the website of the law firm representing the Association: http://www.vandiepen.com/en/international/srebrenica. See also A. Hagedorn, *supra* note 5, p. 211.

of the UN can never be subject to the scrutiny of any domestic court".[121] The Mothers criticize the Supreme Court's refusal to apply the criteria of *Waite and Kennedy* to the United Nations.[122] The Mothers thus ask the European Court of Human Rights to apply its own criteria: to see whether the granting of immunity to the UN does not "reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired", and to see whether the UN's immunity "pursue[s] a legitimate aim", and to investigate whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".[123] Further, the Mothers criticize the Supreme Court's reliance on the recent judgment of the International Court of Justice on immunities, because that case was about State immunity and not the immunity of international organizations.[124] One of the most important arguments of the Mothers, which has been made before the Dutch courts and was consistently rejected, is that the UN might be entitled to immunity to ensure it can fulfill its purposes, but that "when the organization has clearly failed to achieve its most fundamental purpose — and it has admitted that it did so — the objective of immunity becomes meaningless".[125] This argument is highly problematic, because it basically means that the UN would only be entitled to immunity in case its missions are a success, and that it is not entitled to immunity when the mission turns out to be a failure. Or as Ryngaert put it, when a court argues that "organizations are expected to be 'good' actors, and that they forfeit their immunity if they commit 'bad acts', such a court actually makes a mockery of the immunity clause".[126]

Finally, the possible influence this case might have on the development of the (customary) international law on the immunity of the United Nations for its peacekeeping activities must be examined. Will the outcome of this case influence similar claims directed by individuals at the UN in the future? We will see about that sooner rather than later. Similar cases are presented to the United Nations in other parts of the world. For example, a cholera epidemic broke out in Haiti in late 2010, after the earthquake, killing more than seven thousand Haitians.[127]

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[121] Application to ECHR, supra note 118, Section I.B, Part III and Part V. For the Article 13 ECHR argument, see Section B of Part III of the Application. The Application also argues that Article 6 ECHR was violated because the Dutch Supreme Court did not refer the case to the Court of Justice of the European Union for a preliminary ruling. This is developed in Section III.C.

[122] *Id*., § III.A.3.2.

[123] *Id*., § III.A.3.9, see also III.A.3.18-21.

[124] *Id*., § III.A.3.13-14.

[125] *Id*., § III.A.3.23.

[126] Ryngaert, *supra* note 28, p. 130. See also Henquet, *supra* note 31, pp. 280-284.

[127] See also A. Telesetsky, 'Binding the United Nations: Compulsory Review of

Victims of this epidemic, and relatives of victims, believe that the United Nations Stabilization Mission in Haiti (MINUSTAH), a United Nations peacekeeping force, brought the cholera to the country. They argue *inter alia* that "the UN is liable for negligence, gross negligence, recklessness, and deliberate indifference for the health and lives of Haitian people resulting in petitioners' injuries and deaths from cholera".[128] They thus want the UN to compensate them for the damage caused by this negligence. The victims, represented by a US based association called the Institute for Justice and Democracy in Haiti (IJDH),[129] have asked the UN to issue a public acknowledgement of responsibility and pay appropriate compensation.

The case is in many ways similar to the case presented by the Association of the Mothers of Srebrenica. In both cases, the UN was present in the form of a peacekeeping mission. And in both cases, there is an applicable Status of Forces Agreement, signed by the UN and the State in whose territory the UN peacekeeping mission was operating. This SOFA provides for the establishment, by the UN, of a third party claims procedure to settle disputes of a private-law character. However, in both cases — Srebrenica and Haiti — in reality no such commission was ever established by the UN. This is not surprising, because generally the UN prefers to deal with such claims by paying compensation for injuries sustained during peacekeeping missions on an *ad hoc* basis. Although such *ad hoc* arrangements might be considered an appropriate solution by the victims, it is an unfortunate way-out for international lawyers. After all, it allows the UN to avoid being held responsible, by a court with some authority to make such a determination, for the breach of an international legal obligation.

In any case, since the two cases are so similar, it cannot come as a surprise that the petition for relief contains many arguments that sound familiar. The Haitian victims believe that the UN cannot simply ignore their petition, since the "UN is legally bound to respect victims' right to an effective remedy as guaranteed under international human rights law".[130] Referring to the parts in the SOFA that grant the UN absolute immunity from the jurisdiction of the Haitian courts, the claimants argue that "such a broad application of immunity is only consonant

Disputes Involving UN International Responsibility before the International Court of Justice,' Vol. 21 *Minnesota Journal of International Law* 2012, no. 1, pp. 75 - 119. The author looks at an issue not explored in this article, namely the possibilities of a State to hold the UN accountable.

128 Petition for Relief, submitted to the United Nations by the Institute for Justice and Democracy in Haiti (IJDH), on 3 November 2011, §§ 72-79.

129 The website of the Institute for Justice & Democracy in Haiti contains much more information about the cholera litigation. See: http://www.ijdh.org.

130 Petition for Relief, *supra* note 126, §§ 84-88.

with international human rights law if the UN provides the Petitioners with an alternative adequate avenue for redress".[131] In other words, "the preservation of immunity [of the UN before the Haitian courts] under international law is thus conditioned on the availability of a reasonable alternative means to obtaining a remedy".[132] According to the claimants, various local courts have been inspired by the *Waite and Kennedy* case of the ECtHR, and have applied a "human rights impact assessment when determining the application of immunity".[133]

The future of the Haitian petition is uncertain. Up to now, the UN has only indicated it was "in the process of reviewing the claim" and it pledged to "provide [the IJDH] with a response in due course".[134] Perhaps the UN will once again attempt to offer an *ad hoc* arrangement, as it generally does. Or it might eventually set up an impartial and independent claims commission, as the SOFA prescribes. But what if it does not? Importantly, the UN's letter also points out that "nothing herein or relating to this matter shall be deemed a waiver, express or implied, of any privileges and immunities of the United Nations, including its subsidiary organs".[135] And thus, if no alternative dispute settlement mechanism is established by the UN, and if the victims go to the Haitian local courts, they will undoubtedly be confronted with the same hurdle as the Mothers of Srebrenica: the immunity of the United Nations. And one of the questions raised might be: did the spread of cholera, if proved, fall within the functional immunity of the UN? It is suggested that asking whether the spread of cholera was a 'good act' or a 'bad act,' i.e. whether it helped the UN in maintaining peace and security in Haiti or not, is the wrong question to ask here. Instead, one must ask whether the UN can still effectively and independently carry out its peacekeeping missions, now and in the future, if it can be brought before a local court each time such types of allegations are brought before some local court.

131 *Id*., § 89.

132 *Id*., § 90.

133 *Id*., § 91.

134 Letter signed by Patricia O'Brien, UN Legal Counsel, dated 21 December 2011.

135 *Id*.

Summary – Résumé – Samenvatting – Zusammenfassung – Riassunto – Resumen

Summary – The Immunity of the United Nations before the Dutch Courts (Case Note)

An association called the *Mothers of Srebrenica* believes the United Nations is responsible for not having prevented the genocide in Srebrenica of 1995. The United Nations itself does not provide for a legal remedy to examine its responsibility, and thus the association has brought the UN before a domestic court. Because most of the UN peacekeepers stationed in Srebrenica at the time were Dutch, the association chose the Dutch domestic court to bring its claim. The Dutch court was now faced with a difficult dilemma. The State of the Netherlands has an obligation to respect the UN's immunity from the jurisdiction of its domestic courts, but it also has an obligation to guarantee access to court to everyone within its jurisdiction. The District Court, Appeals Court and Supreme Court all found different ways to deal with this dilemma. However, using different arguments, the conclusion was always the same: the Dutch Courts must let the obligation of the Netherlands to respect the UN's immunity from domestic jurisdiction prevail over the obligation of the Netherlands to guarantee the Mothers a fair and public hearing by an independent and impartial tribunal.

Résumé – L'immunité des Nations Unies devant les juridictions des Pays-Bas (annotation)

Une association nommée les *Mères de Srebrenica* croit que les Nations Unies sont responsables pour ne pas avoir empêché le génocide de Srebrenica en 1995. Les Nations Unies elles-mêmes ne prévoient pas de recours judiciaire pour examiner leur responsabilité et donc, l'association a mené l'organisation devant un tribunal national. En raison du fait que la plupart des forces de maintien de la paix présents à Srebrenica au moment des faits étaient néerlandais, l'association a choisi une juridiction nationale des Pays-Bas pour déposer sa plainte. Le tribunal néerlandais devait faire face à un dilemme difficile. L'Etat néerlandais a en effet l'obligation de respecter l'immunité de juridiction des Nations Unies devant ses tribunaux nationaux, mais a aussi l'obligation de garantir l'accès à un juge à toute personne relevant de sa juridiction. Le Tribunal, la Cour d'Appel, et la Cour Suprême ont tous trouvé différentes façons de faire face à ce dilemme. Bien qu'utilisant des arguments différents, ils étaient toujours les mêmes: les tribunaux néerlandais doivent faire prévaloir l'obligation des Pays Bas de respecter l'immunité des Nations Unies sur l'obligation du pays de garantir aux Mères une audience publique et équitable par un Tribunal indépendant et impartial.

Samenvatting – De immuniteit van de Verenigde Naties voor de Nederlandse rechtbanken (noot)

Een vereniging, genaamd de *Moeders van Srebrenica,* houdt de Verenigde Naties verantwoordelijk voor het niet voorkomen van de volkerenmoord die plaatsvond in Srebrenica in 1995. De Verenigde Naties zelf voorziet niet in een rechtsmiddel om deze verantwoordelijkheid vast te stellen of af te wijzen, en dus heeft de vereniging besloten de VN voor een nationale rechter te brengen. Omdat de VN-vredesmacht gestationeerd in Srebrenica op dat moment voornamelijk bestond uit Nederlandse vredessoldaten, heeft de vereniging ervoor gekozen de Verenigde Naties voor de Nederlandse nationale rechter te brengen. Dit bracht de Nederlandse rechter in een moeilijke positie. De Nederlandse Staat, waar de rechter deel van uitmaakt, heeft namelijk de plicht om de immuniteit van de Verenigde Naties voor de rechtsmacht van de nationale rechter te respecteren. Maar Nederland heeft tegelijkertijd ook een verplichting om de toegang tot de rechter voor iedereen binnen haar rechtsmacht te waarborgen. De Haagse Rechtbank, het Haagse Hof van Beroep en de Nederlandse Hoge Raad zijn alle drie verschillend omgegaan met dit dilemma. Maar het eindresultaat was steeds hetzelfde: de Nederlandse rechter moet de immuniteit van de Verenigde Naties voor de nationale rechtsmacht laten prevaleren boven de verplichting van Nederland om te garanderen dat de *Moeders van Srebrenica* een eerlijke en openbare behandeling krijgen door een onafhankelijk en onpartijdig gerecht.

Zusammenfassung – Die Immunität der Vereinten Nationen vor niederländischen Gerichten (Urteilsbesprechung)

Die Vereinigung "Mütter von Srebrenica" ist der Ansicht, dass die Vereinten Nationen für die Nichtverhinderung des Völkermordes im Jahr 1995 verantwortlich sind. Im Rahmen der Vereinten Nationen besteht kein Rechtsmittel zur Untersuchung der Verantwortlichkeit der Organisation, so dass die Vereinigung die Angelegenheit vor ein nationales Gericht brachte. Weil die Mehrheit der zur Zeit des Völkermordes in Srebrenica stationierten Blauhelme aus den Niederlanden kam, entschied sich die Vereinigung, den Rechtsweg vor einem niederländischen Gericht zu beschreiten. Das niederländische Gericht war nun mit einem schwierigen Dilemma konfrontiert. Die Niederlande haben als Staat einerseits die Verpflichtung, die Immunität der Vereinten Nationen hinsichtlich der nationalen Gerichtsbarkeit zu wahren, andererseits muss jeder der niederländischen Gerichtsbarkeit unterstehenden Person der Rechtsweg gewährleistet werden. Das Bezirksgericht, das Berufungsgericht und der höchste Gerichtshof haben jeweils unterschiedliche Ansätze zur Lösung dieses Dilemmas verfolgt. Wenngleich unterschiedliche Argumente bemüht wurden, war doch die Schlussfolgerung stets identisch: die niederländischen

Gerichte müssen der Verpflichtung der Niederlande, die Immunität der Vereinten Nationen vor nationaler Gerichtsbarkeit zu respektieren, gegenüber der Verpflichtung der Niederlande, den Müttern eine faire und öffentliche Anhörung vor einem unabhängigen und unparteiischen Gericht zu gewähren, Vorrang geben.

Riassunto – L'immunità delle Nazioni Unite davanti alle Corti Olandesi (Case Note)

Un'associazione denominata le *Madri di Srebrenica* ritiene che le Nazioni Unite siano responsabili per non aver impedito il genocidio di Srebrenica nel 1995. Le Nazioni Unite non forniscono un rimedio giuridico per esaminare la propria responsabilità, pertanto l'associazione ha portato le NU davanti ad un tribunale nazionale. Dal momento che molti dei caschi blu stanziati a Srebrenica a quel tempo erano Olandesi, l'associazione ha scelto di portare la propria rivendicazione davanti alla corte nazionale Olandese. La corte Olandese si è trovata ora di fronte a un difficile dilemma. Lo Stato dei Paesi Bassi ha l'obbligo di rispettare l'immunità delle Nazioni Unite dalla giurisdizione dei propri tribunali nazionali, ma esso ha anche l'obbligo di garantire l'accesso alla giustizia a tutti all'interno della propria giurisdizione. La Corte Distrettuale, la Corte d'Appello e la Corte Suprema hanno rinvenuto diversi modi per affrontare questo dilemma. Tuttavia, pur utilizzando argomenti diversi, la conclusione era sempre la medesima: i tribunali Olandesi devono ottemperare all'obbligo dei Paesi Bassi di rispettare l'immunità delle Nazioni Unite dalla giurisdizione nazionale, facendolo prevalere sull'obbligo per lo Stato di garantire alle Madri un processo equo e pubblico da parte di un giudice indipendente ed imparziale.

Resumen – La Inmunidad de las Naciones Unidas frente a los Tribunales Holandeses (Comentario de Sentencias)

La Asociación Madres de Srebrenica sostiene que la Organización de las Naciones Unidas (ONU) es responsable de no haber evitado el genocidio que tuvo lugar en Srebrenica en 1995. La ONU no dispone de un mecanismo legal para exigirse responsabilidad a sí misma y, por esta razón, la asociación ha interpuesto una demanda contra dicha organización ante un tribunal de carácter nacional. Esta asociación ha elegido los tribunales holandeses debido a que la mayoría de las tropas ONU en misión de paz presentes en Srebrenica en aquellas fechas eran de esa nacionalidad. El correspondiente tribunal holandés tuvo entonces que enfrentarse a un difícil dilema. De un lado, el propio Estado holandés tiene la obligación de respetar la inmunidad jurisdiccional de la que goza la ONU frente a los tribunales nacionales. De otro lado, también tiene la obligación de garantizar el derecho fundamental de cualquier ciudadano a la tutela jurisdiccional dentro de su propio

territorio. El Tribunal de Distrito, el de Apelaciones y el Supremo han abordado este dilema de forma diversa. No obstante, sobre la base de las distintas argumentaciones utilizadas, han llegado siempre a la misma conclusión: los tribunales nacionales de Holanda deben hacer prevalecer la inmunidad jurisdiccional de la ONU frente al derecho de las Madres de Srebrenica a un juicio justo, en vista pública y por parte de un tribunal imparcial e independiente.