

COMMENTARY

Immunity of the United Nations before the Dutch Courts

The District Court of The Hague, Judgment of 10 July 2008 (Mothers of Srebrenica et al. v. State of the Netherlands and United Nations)¹

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INTRODUCTION

On 10 July 2008, the District Court of The Hague handed down its judgment in the incidental proceedings in the case brought by the Association *Mothers of Srebrenica* and ten individual plaintiffs versus the State of the Netherlands (the State) and the United Nations (UN). This case - as well as two other cases pending before the District Court² - originates from the July 1995 massacre in the Eastern Bosnian enclave of Srebrenica. This enclave, in which the Netherlands UN battalion Dutchbat had its base, had been declared a 'safe area' in various UN Security Council resolutions³ and many Muslim citizens of Bosnia-Herzegovina had taken refuge in the enclave. When the enclave fell to the Bosnian Serb army, the result was the deportation and subsequent murder of thousands of Muslim men.⁴ According to the individual plaintiffs – who are all surviving relatives of men murdered by Bosnian Serbs – and the Association representing the interests of the victims' relatives, the acts and omissions of the State and the UN surrounding

¹ Case no. 295247, published on www.rechtspraak.nl under LJN number: BD6795. See also LJN: BD6796 for the English translation of the judgment. I will refrain from quoting large parts of the text of the judgment given the availability of the full English text.

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² Cases of *Nuhanović v. The Netherlands* and *Mustafić v. The Netherlands*. Judgment in these cases is expected on 10 September 2008. Only the *Mothers of Srebrenica et al.* case was brought against both The Netherlands and the UN.

³ See UN Security Council Resolution 819 (1993).

⁴ For a detailed account, see the Report of the UN Secretary-General pursuant to UNGA Resolution 53/35 'The fall of Srebrenica', A/54/549, 15 November 1999.

the fall of the enclave were “wrongful towards them” and give them a right to compensation. In the judgment of 10 July, the District Court only ruled on the procedural issue of whether it had jurisdiction to hear a case against the UN.

In this commentary I will touch on three aspects of the judgment: (1) the cause of action for the State; (2) the (scope of) immunity of the UN; and (3) whether immunity can be restricted if it is incompatible with peremptory or other fundamental standards of international law. This will be followed by a brief outlook to conclude.

1. THE CAUSE OF ACTION FOR THE STATE

The first procedural issue the District Court had to decide was whether the State had a cause of action in its own right to petition the Court to declare that it has no jurisdiction to address the claims pertaining to the UN. This issue became relevant because the UN failed to appear before the District Court. Instead, it confined its response to the proceedings to a letter expressly invoking its immunity, which it sent to the Permanent Representative of the Netherlands to the UN.⁵ The State transmitted this letter to the District Court, but the Court granted leave to proceed in default of appearance against the UN. Although granting leave to proceed in default of appearance in itself only means that the Court has established that the defendant was summoned in a legally valid manner,⁶ no doubt this decision prompted the State to start the interim proceedings. Maybe earlier experiences of the State with a domestic court not assessing as a preliminary matter the (scope of) immunity of an international legal person *ex officio* played a role.⁷ Then again, the Public Prosecutor’s Department, acting pursuant to its general right to give its advisory opinion to the Court not as a party to the proceedings had already drawn the District Court’s attention to the matter of jurisdiction. Therefore, it may well be that the State felt obliged to act as it did in order to ensure the observance of the immunity of the UN before the Dutch courts to the greatest extent possible.

The District Court subsequently allowed the motion of the State. The Court found that “the State’s own interest in its claim to respect UN immunity follows particularly from the State’s obligation under international law by virtue of Article 105 subsection 1 of the UN Charter”.⁸ Although it should be mentioned that the State did not advance this argument as such - the State instead referred to

⁵ See the Judgment para. 5.13.

⁶ Cf. Section 139 Dutch Code of Civil Proceedings which distinguishes between the court decision to grant leave to proceed in default of appearance and the court assessment with regard to the action against the defendant. These decisions do not necessarily have to be rendered at the same time; see also para. 5.2 of the Judgment.

⁷ Well-known is the *Azeta B.V. v. Republic of Chile* judgment of December 1984 where Chile failed to appear and the Rotterdam District Court in interim injunction proceedings not only granted leave to proceed in default of appearance against Chile but at the same time decided in favor of Azeta without considering Chile’s immunity. More than twenty years later, the Court of Appeal of The Hague ruled in favor of Chile in its judgment of 20 December 2007, case C06/12, LJN: BC0733.

⁸ See para. 5.6 of the Judgment.

the Dutch Bailiffs Act as the source of its own interest in invoking respect for the UN's immunity, and referred to Article 105 of the UN Charter only to argue that the Court should grant immunity *ex officio* - the District Court can be followed in its interpretation that "under the UN Charter the State has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective how far it extends" and that "pleading the immunity [of the UN] in proceedings before a national court of law at least falls within the bounds of possibility".⁹ It seems to be a matter of policy of the State in each case to decide whether or not it will intervene in court proceedings. To my knowledge there are not yet sufficient examples in Dutch case law to consider invoking immunity in defense of the non-appearing international legal person before the domestic courts as a common and established practice of the State.¹⁰ Other ways to fill in the obligation to uphold the UN's immunity as much as possible are available as well.¹¹ Although the judgment implies that if the State did nothing at all to warrant UN immunity in its territory it may breach an international obligation towards the Organization,¹² it is up to the State to determine how it should best fulfill this obligation in each case.

2. IMMUNITY OF THE UN

The District Court then turned to the heart of the matter: whether or not the UN enjoys immunity of jurisdiction. The Court starts by examining the contents of Article 105(1) of the UN Charter as detailed in Article II(2) of the Convention on the Privileges and Immunities of the United Nations (the Convention), using Articles 31 and 32 of the Vienna Convention on the Law of Treaties as its interpretative framework. It is interesting that the District Court first established

⁹ See para. 5.6 of the Judgment. For an earlier example (in the context of State immunity of execution, again with respect to *Azeta B.V. v. Republic of Chile*), see the judgment of the District Court of Rotterdam 14 May 1998, KG 1998, 251, where the State started a court action to lift the attachment of the bank account of the Chilean Embassy in the Netherlands and according to the Court had an interest of its own in doing so.

¹⁰ A recent example of involvement of the State, albeit of the Public Prosecutor's Office, was the seeking of the nullification of an Appeals Court judgment in the public interest in the case of *Greenpeace Nederland v. Euratom*. Euratom did not appeal to the Supreme Court from a judgment of the Amsterdam Court of Appeal where it was denied immunity of jurisdiction. The State did appeal, in the public interest. The Supreme Court ruled that the decision of the Court of Appeal was based on a wrong application of the law, see Supreme Court judgment of 13 November 2007, case 01984/07 CW, LJN: BA9173.

¹¹ Notably the State can give an instruction to the bailiff, in accordance with Article 3a(2) of the Bailiffs Act, that an official act he will be instructed to perform or that has already been performed by him is contrary to the international law obligations of the State.

¹² The International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Rep. 1999, 62, paras. 62-63, has made clear that States have an obligation pursuant to Article 105 of the UN Charter to provide their national courts with information on the position taken by the UN with respect to its immunity in a given case, and must see to it that the national court deals with the question of UN immunity expeditiously and as a preliminary matter.

that the acts and omissions on which the Plaintiffs base their action against the UN relate to the functional framework within which the UN operates. These acts took place in the implementation of a peacekeeping mission which was based on resolutions made by the UN Security Council acting under Chapter VII of the Charter. Therefore, according to the Court, the “UN acts objected to fall within the functional scope of this organization. It is particularly for acts within this framework that immunity from legal process is intended.”¹³ The District Court then observes that in international legal practice the UN has always invoked its immunity within the functional framework mentioned and that no exceptions were ever made in practice. As a result, the Court concludes that “absolute immunity of the UN is the norm and is respected.”¹⁴ The term “absolute” immunity here refers to the strict wording used in Article II(2) of the Convention.¹⁵ It cannot refer to the ancient doctrine of absolute State immunity recognizing nothing but *acta iure imperii*, not only because the dispute settlement clause of the Convention clearly indicates otherwise,¹⁶ but also because the District Court first established that the UN had invoked its immunity within the functional framework of a UN peacekeeping mission.¹⁷ Therefore, in my view, the District Court correctly expressed that the UN enjoys absolute *functional* immunity.

The Plaintiffs pointed to the restrictive language in Article 105(1) of the UN Charter, asking the Court to examine whether the stated acts and omissions of the UN for which immunity is sought were ‘necessary’ for the fulfillment of the purposes of the Organization.¹⁸ As could be expected, the District Court indicates that it is in principle not at the discretion of a national court to give its opinion on the ‘necessity’ of the UN’s actions, also considering the (strict) wording of Article II(2) of the Convention. The testing of the acts and omissions of UN bodies in peacekeeping missions must be done with the greatest caution and restraint. Any further-reaching test would be contrary to the ratio of immunity of the UN as enshrined in international law and – using a practical-political argument – “will have huge consequences for the Security Council’s decision-making on similar peacekeeping missions.”¹⁹ This conclusion seems obvious, for if the right of the UN to immunity before the national courts of the member states is dependent on the domestic courts’ assessment of the necessity of the UN acts, the whole

¹³ See the Judgment para. 5.12.

¹⁴ See the Judgment para. 5.13.

¹⁵ Article II(2) stipulates that the UN shall enjoy immunity from “every form of legal process” (except for the possibility of an express waiver on a case by case basis).

¹⁶ See Article VIII(29) of the Convention: “The United Nations shall make provisions for appropriate modes of settlement of (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

¹⁷ See the Judgment paras. 5.12 and 5.14. Furthermore, the District Court expressly considers that the immunity of States and of international organizations are very dissimilar although without any hierarchical relationship, see the Judgment para. 5.11.

¹⁸ Article 105(1) of the UN Charter reads: “the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”

¹⁹ See the Judgment para. 5.14.

principle of non-intervention by a single State (-organ) in the official affairs of the international organization would be lost. It also explains why the District Court's examination of the functional framework of the UN mission was limited.

The Court finally observes that the (scant) jurisprudence relating to the scope of the standard of Article 105(1) UN Charter confirms that a national court cannot proceed in any other way than with the utmost restraint. The Plaintiffs inventively argued that in the absence of a remedy under Article VIII(29) of the Convention, the national court should provide a remedy itself. This argument was based on the *Cumaraswamy* Advisory Opinion, where the International Court of Justice (ICJ) ruled that any claims for wrongful acts against the UN are not open to assessment by national courts but should be settled in the context of appropriate modes of settlement pursuant to Article VIII(29) of the Convention.²⁰ The District Court however made clear that the absence of an adequate provision for settlement within the meaning of the Convention does not justify an infringement of the principal rule of Article 105(1) of the UN Charter, even irrespective of whether (1) it is at issue in this case and (2) the question what scope for testing the court would have.²¹ As to the latter consideration, it would seem that disputes related to whether the UN has created appropriate modes for settlement in a given case should be referred in principle to the International Court of Justice.²²

3. EXCEPTIONS BASED ON INCOMPATIBLE INTERNATIONAL STANDARDS?

The last fundamental question for the Court to decide was whether certain mandatory standards of international law may be incompatible with, and would therefore warrant an exception to, the absolute (functional) immunity of the UN. The standards invoked by Plaintiffs are the *jus cogens* prohibitions of genocide and torture, and the fundamental right of access to a court as enshrined in Articles 14 International Covenant on Civil and Political Rights (ICCPR) and 6 European Convention on Human Rights (ECHR).

The State as a first line of defense relies on Article 103 of the UN Charter, arguing that its obligations pursuant to the Charter have priority over any other international law. The District Court rejects the idea of the full and unconditional precedence of international law obligations of the State under the UN Charter over other international law obligations of the State. The rule of Article 103 "does not always and right away bring relief in the event of conflicting obligations of a peremptory nature (*ius cogens*) or conflicting human rights obligations of an international customary law nature."²³ This is an interesting point of view, given

²⁰ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Rep. 1999, 62, at p.89.

²¹ See the Judgment para. 5.15.

²² Cf. Article VIII(30) of the Convention on the Privileges and Immunities of the United Nations.

²³ See the Judgment para. 5.16.

that the ICJ has been more rigorous in its interpretation of Article 103 and has introduced a clear hierarchy of norms.²⁴ The customary international law nature of the obligations (although codified in an agreement) makes the difference.

It appears the District Court thus adopted the widely carried position that Article 103 cannot simply, as a matter of hierarchy, extend to conflicts between Charter rules and norms of *jus cogens*, although the Court by its general reference to ‘customary human rights obligations’ has – wisely – avoided the conceptual question whether the right of access to a court can be a norm of *jus cogens* that intrinsically allows for exceptions.²⁵ However, the Plaintiffs did not get the chance to exploit this potential ‘opening’. With regard to the peremptory norms, the District Court, referring to the ICJ *Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)* and the European Court of Human Rights (European Court) *Al Adsani v. the UK* case, arrived at the conclusion that there is currently no ground for an exception to the rule of immunity within the framework of enforcement through *civil law* of the standards of *jus cogens* like the prohibitions on genocide and torture. This means there is no ground for prioritizing conflicting standards of international law or weighing of interests.²⁶ This is a valid observation, although in my view the nature of the UN (as an international legal person that shall not without its consent be submitted to ‘any form’ of legal process) eventually would account for its immunity rather than the absence of incompatibility of norms based on the type of the legal action at the national level.²⁷

With regard to the argument based on the right of access to a court, the District Court, in short, concluded that Article 6 of the ECHR (or Article 14 of the ICCPR) does not give a right to bring the UN before a domestic court on the single basis of the right of access to a court as guaranteed by it.²⁸ The right of access thus

²⁴ See the *Nicaragua Case (Nicaragua v. United States of America)* ICJ Rep. 1984, 392, para. 107; *Lockerbie Case*, Order of 14 April 1992, ICJ Rep. 1992, p. 16 (*Libya v. USA*) and p. 113 (*Libya v. UK*). Earlier the District Court held that on the basis of Article 103 the rules of the UN Charter and therefore those of the UN Security Council prevail over “any other” set of rules, see District Court of The Hague, Judgment of 31 August 2001 (*Slobodan Milošević v. State of the Netherlands*), case KG 01/975, LJN: AD3266, para. 3.5.

²⁵ See for this view, Court of First Instance of the European Communities, Case T-315/01 (*Y.A. Kadi v Council and Commission*), Judgment of 21 September 2005, paras. 226, 282, 286, 288, and 290. See also Case T-306/01 (*A.A. Yusuf and Al Barakaat v Council and Commission*), judgment of 21 September 2005, paras. 341-343; Case T-253/02 (*C. Ayadi v. Council*), judgment of 12 July 2006, para. 116. As far as I can see, this view would inevitably mean that the right to access is both non-derogable and not absolute in nature at the same time. The appeal of the *Kadi* case is pending. Advocate General Maduro in his Opinion to the ECJ of 16 January 2008 has advised to set aside the judgment, arguing *inter alia* that it is unacceptable in a democratic society to impair the very essence of the right of access to a court of law (but without referring to *jus cogens* in that regard).

²⁶ See the Judgment para. 5.20-5.21.

²⁷ If ever the UN Organization got involved in criminal law proceedings before a Dutch court in connection with these peremptory norms, would it (or: the State) be unsuccessful in invoking immunity? Considering the ruling of the Dutch Supreme Court in *Greenpeace v. Euratom* (*supra* note 10) which was based on administrative-criminal law enforcement albeit of Dutch environmental law, the legal test would still seem to be whether the acts in question are directly connected to the fulfillment of the official tasks of the international organization concerned.

²⁸ See the Judgment paras. 5.22 and 5.25.

gives way to the rule of immunity, at least with respect to the UN in the context of peacekeeping missions. The Court arrived at this conclusion by an interpretation of the cases of *Behrami v. France* and *Saramati v. France, Germany, and Norway*, in which the European Court decided that the European Convention should not be an impediment to the effective implementation of duties by international missions under UN responsibility. Accordingly, the contributing States cannot be held liable before the Court for acts and omissions of their troops in missions covered by UN Security Council resolutions and which occurred prior to or in the course of such missions.²⁹ If contributing States cannot be subjected to the Court's jurisdiction for those acts, according to the District Court, Article 6 of the ECHR cannot be used as a ground for exception to the UN's absolute immunity under international law. The implicit consideration is that the UN, which for its missions relies on the support of its member states, cannot effectively implement its responsibility to maintain international peace and security if it runs the risk of being held liable before domestic courts for acts or omissions of the troops that operate in those missions under UN authorization and command. Still, this – valid³⁰ – argument highlights the importance of remedies *within* the UN system for 'victims' of UN peacekeeping missions if the possibility of holding troop-contributing states liable is considered undesirable in principle.

The District Court refrains from examining whether there is an alternative remedy available for the Plaintiffs within the UN system. This is not surprising in view of its earlier observations on the limited scope of testing for national courts (in the context of Article VII(29) of the Convention). The jurisprudence of the European Court quoted by Plaintiffs (*viz. Beer and Regan v Germany* and *Waite and Kennedy v Germany*) does not make a difference.³¹ The District Court considers – clearly inspired by the observations of the European Court in *Behrami* and *Saramati* – that there can be no question of a restriction of the protection of human rights under the ECHR by transfer of powers to the UN, as the UN was founded before the ECHR came into force and also considering that the UN has almost universal membership.³²

Even though I can agree with the opinion of the Court, it seems to me that these arguments are not the most convincing. After all, the practice of peacekeeping by the UN such as in the mission in Bosnia-Herzegovina is hardly based on a transfer of powers from the member states to the UN Organization which took place in 1945. It took a long time to develop UN peacekeeping and at the time of the mission in 1995 it did not contain the type of clear and robust mandate

²⁹ See ECHR *Behrami v. France* (no 71412/01) and *Saramati v. France, Germany and Norway* (78166/01), Decision of 2 May 2007, p.43.

³⁰ *Cf.* also ECHR *Behrami* and *Saramati*, where the Court considers that its exercising jurisdiction would also be “tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.”

³¹ The European Court in these cases has ruled that the foundation of international organizations and immunities granted are only compatible with Article 6 ECHR if the organization offers a reasonable alternative means for the protection of the rights under the ECHR. See also ECHR *Bosphorus v Ireland*, which was invoked in *Behrami* and *Saramati* (para. 150).

³² See the Judgment para. 5.24.

necessary to enable military enforcement action which comes close to the original Chapter VII-concept of the ‘stand-by armed forces’ of the UN as envisaged in the Charter.³³ Also, the introduction of *safe areas*, which arguably is at the heart of the matter, was a recent UN ‘invention’ in reaction to the Yugoslav wars.³⁴ The year of foundation of the UN therefore is less relevant than the development of the concept and practice of UN peacekeeping over time. Furthermore, it can be argued that the universal membership of the UN implies that immunities of the organization will be respected by domestic courts all over the world, making it even more important that (a court can put to the test whether) alternative remedies are available at the UN itself. In addition, the conclusion of the District Court, viz. the European Court’s conclusion that the motivations in *Beer and Regan* and *Waite and Kennedy* “do not apply to the UN”, does not seem totally convincing as a legal argument in view of the District Court’s prior considerations with respect to Article 103 of the UN Charter.³⁵ Although the Court indicates as well that it considers the fact that the European Court in *Behrami* and *Saramati* took account of the ‘special position’ of the UN relevant, the judgment in my view would have gained clarity if this had been made more explicit: the European Court attaches fundamental significance to the ‘imperative nature’ of the principle aim of the UN – the maintenance of international peace and security – and the ‘unique responsibility’ of the powers accorded to the Security Council under Chapter VII to fulfill that aim, notably through the use of coercive measures, as a counterpart to the (now customary international law) prohibition on the unilateral use of force.³⁶ The essence of the argument is that all-out failure of UN peacekeeping would mean failure of the system of collective security which would justify the return to the unilateral use of armed force as a means to settle international disputes (not in self-defense). That fundamental concern is even more important than the right of access to a court.

Another possibility is that the European Court’s motivations in *Beer and Regan* and *Waite and Kennedy* should really be interpreted as a call to provide access to domestic courts (denying immunity) in case the transfer of powers by the states to the international organization where the corresponding granting of immunities were motivated by the desire to circumvent the states’ own international obligations which it otherwise would have breached.³⁷ Such an

³³ See in particular Article 42 and 43 of the UN Charter. Also note the wording “acting in self-defence” in UN Security Council Resolution 836 (1993), para. 9, where the mandate of the mission to Bosnia was extended.

³⁴ See UN Security Council Resolution 824 (1993) and Report of the UN Secretary-General pursuant to UNGA Resolution 53/35 ‘The fall of Srebrenica’, A/54/549, 15 November 1999, p.16. The “no fly” zones in Northern Iraq in 1991 came close to the concept first.

³⁵ Arguably, the right to an effective remedy before a national court to guarantee the enjoyment of fundamental human rights – see e.g. the Universal Declaration of Human Rights, Article 8 – is a customary international human rights law standard, which in the event of conflict with Article 103 of the UN Charter is not necessarily set aside by the latter.

³⁶ ECHR *Behrami* and *Saramati*, pp.42-43.

³⁷ Cf. Draft Article 28(1) of the Draft Articles on Responsibility of International Organizations, which currently reads: “A state member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with

interpretation would also fit in well with the final observation of the District Court on this issue, namely that even if the right of access to a court was applicable to the UN it would still not be enforceable in (or against) the Netherlands, as that is not the state where the UN has its seat or where the alleged wrongful acts were committed.³⁸

OUTLOOK

Directly after the Court handed down the judgment, newspapers reported that counsel for the Plaintiffs had announced their appeal. The intense and ongoing legal struggle almost hides the sad reality of the many lives lost in the massacre, which the ICJ, the ICTY and the State have all described as genocide.³⁹ However the State, anticipating its defense in the principal case, has made clear that in its view only the Bosnian Serbs are responsible for the crimes committed under international law in Srebrenica, not the State or the UN due to the fact that they could not prevent or stop the genocide.⁴⁰ If the reasoning of the District Court with respect to the *Behrami* and *Saramati* cases of the European Court is followed in pending and future cases, there is little chance that the State will be held accountable for the acts or omissions of Dutchbat in Srebrenica. The reasoning however could well be that this is not because the State could not stop or prevent genocide, but because a different outcome would constitute an impediment to the effective implementation of the duties of (future) international missions under UN responsibility. If so, it would seem that the preliminary question of UN immunity has at least partly been decided by the Court's anticipation of the (preferred?) answer to the principal question of responsibility. Such a fundamental principal question deserves a fundamental legal answer.

competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation." See *International Law Commission, Report of the work of its Fifty-Ninth Session* (2007), A/62/10, at p. 194.

³⁸ See the Judgment para. 5.24. The District Court clearly took its inspiration from ECHR *Behrami* and *Saramati*, pp. 43-44.

³⁹ ICJ *Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 384, 26 February 2007; ICTY *inter alia* in *Prosecutor v. R. Krstić*, Trial Chamber Judgment of 2 August 2001; State: see the Judgment, para. 5.9.

⁴⁰ See the Judgment, para. 5.9. In an earlier stage, the State had left open the possibility that the UN would be responsible, see District Court of The Hague, judgment of 27 November 2003, NJF 2004/159 (*Zene Srebrenica v. State of the Netherlands*), at 9. In this case the District Court rejected the Association's request for the provisional hearing of witnesses with respect to the role of the State in the war in the former Yugoslavia.