Chapter 10
Dutch Courts and Srebrenica: Ascribing Responsibilities and Defining Legally Relevant Relationships

Aleksandar Momirov

Abstract This contribution addresses the legal developments leading up to two judgments rendered by the Dutch Supreme Court and the Court of Appeal in The Hague in two parallel litigations related to the tragic events in Srebrenica. Throughout these two proceedings, the Dutch judiciary has gradually been framing, in terms of law, the relationship between the Dutch UN battalion and the events in Srebrenica. In so doing, the proceedings before the Dutch courts add to the broader debate concerning the responsibilities – and the appropriate allocation thereof – of UN peacekeeping forces and contributing states. Owing to the underlying claims and the nature of the respondents, the courts in both cases have addressed two distinct legal issues. In *Mustafić/Nuhanović,* acts of Dutch soldiers operating under UN flag were attributed to the Netherlands, albeit on very narrow grounds, thereby limiting the possible spin-off of the judgment with respect to other proceedings. In the last stage of the *Mothers of Srebrenica* litigation where the UN was alleged to be responsible for failing to prevent genocide, immunity was upheld in its most absolute form by the Dutch Supreme Court. This contribution provides an overview of the procedural history of both cases and reflects on the main reasoning of the courts and the possible ramifications thereof.

Keywords Srebrenica · International organizations · Dutchbat · United Nations · Peacekeeping · Immunity · Attribution

The author is Assistant Professor of Public International Law at the Erasmus School of Law of the Erasmus University Rotterdam.

A. Momirov (✉)
Department of Public International Law, Erasmus School of Law, Erasmus University Rotterdam, Rotterdam, The Netherlands
e-mail: momirov@law.eur.nl

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10.1 Introduction

July 2012 marked the 17th anniversary of the tragic events surrounding the Bosnian town of Srebrenica, which the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have qualified as genocide.[1] Various proceedings related to the events have been initiated before Dutch courts. In 2012, the Dutch judiciary adopted two judgments pertaining to the events in Srebrenica and the involvement of the Netherlands, i.e. the relationship between the Dutch UN Battalion (Dutchbat) and the fall of the enclave.[2] Throughout the two underlying proceedings, the Dutch judiciary has gradually been framing, in terms of law, the relationship between the Dutch UN battalion and the events in Srebrenica. Owing to the nature of the claims and the respondents, the courts in both cases have addressed two distinct legal issues. In *Mustafić/Nuhanović,* acts of Dutch soldiers operating under UN flag were attributed to the Netherlands, albeit on very narrow grounds, thereby limiting the possible spin-off of the judgment with respect to other proceedings. In the last instalment of the *Mothers of Srebrenica* litigation where the UN was alleged to be responsible for failing to prevent genocide, immunity was upheld in its most absolute form by the Dutch Supreme Court.

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[1] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007 (*Genocide Case*) and, amongst others, *Prosecutor v. Krstić,* Appeals Chamber, Judgment, Case No. IT-98-33, 19 April 2004 (*Krstić*).

[2] Supreme Court of the Netherlands, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* (10/04437, LJN: BW1999), First Division, Judgment, 13 April 2012 (*Mothers of Srebrenica cassation*), English translation available at http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf. Court of Appeal in The Hague, *M. c.s. v. the Netherlands,* (200.020.173/01, LJN: BW9014), Civil Law Section, Judgment, 26 June 2012 (*Mustafić incidental*).

This brief contribution addresses the manner in which domestic courts in the Netherlands have been dealing with the events in Srebrenica in the two above-mentioned parallel proceedings. First, the contours and procedural chronology of both proceedings are provided. Subsequently, several thorny legal issues – most importantly the issues of attribution and immunity – which meander throughout the proceedings are highlighted in the main part of this contribution. Finally, some concluding remarks are provided as to the ramifications of the way the Dutch judiciary has thus far been constructing a legally relevant relationship between the Netherlands and the events in Srebrenica.

10.2 Mapping the Proceedings

The shared factual backdrop to the two cases has been summarized by the ICTY:

> Srebrenica is a town in eastern Bosnia, which during most of the 1992-95 conflict was an enclave under the control of Bosnian Army, housing thousands of Bosnian Muslims from surrounding areas. Over a period of years, Bosnia Serbs besieged the enclave, frequently shelling it, while Bosnian forces operating from the enclave attacked surrounding Serb villages. … Srebrenica was declared a 'safe area' in 1993, a demilitarised zone under the protection UNPROFOR. In July 1995 Srebrenica was overrun by Serb forces. In the days following the take-over, members of Bosnian Serb Army and Police implemented a plan to kill more than 7,000 men and boys and expel the women and children from the enclave. The Tribunal found that the mass executions of Bosnian Muslim men and boys from Srebrenica constituted genocide.[3]

Within this setting, Dutchbat was deployed to demilitarize and protect the 'safe area'. In July 1995, when the situation on the ground escalated and the enclave was ran over by the Bosnian Serb Army, Dutchbat withdrew to its compound in Potočari at the outskirts of Srebrenica. A large number of the inhabitants of Srebrenica fled to the compound, some of them being allowed into the premises for shelter.

10.2.1 Nuhanović and Mustafić v. the Netherlands

The first string of judicial decisions belongs to two separate cases, which for all intents and purposes are the same and will be considered as one. The cases *Nuhanović* and *Mustafić* against the Netherlands relate to the death of three individuals, Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović. At the time, Mustafić was employed as an electrician by Dutchbat, while Ibro and Muhamed Nuhanović were respectively the father and brother of Hasan Nuhanović,

[3] ICTY, http://www.icty.org/sid/10913. (All websites last accessed 23 November 2012, unless stated otherwise).

a Dutchbat employed interpreter. Together with a selected group of people, these three individuals were allowed into the premises of the Dutch compound in Potočari when Srebrenica was taken over by the Bosnian Serb Army. Once the situation became unmanageable, it was decided to evacuate the compound. Under slightly different circumstances, Dutchbat compelled the three individuals to leave the compound which resulted in their subsequent deportation and death. Surviving relatives brought claims against the Netherlands, arguing that the state committed a wrongful act by compelling the individuals to leave the compound and that therefore the state should be held liable for their ensuing death.

In 2008, the District Court in The Hague denied these claims in first instance on the ground that the acts of Dutchbat are attributable to the UN rather than to the state of the Netherlands.[4] In 2011, the Court of Appeal in The Hague quashed both judgments. In the watershed appeals judgments, the Court of Appeal attributed the actions of Dutchbat to the Netherlands and found that they were wrongful under Bosnian law.[5] These judgments were not final as an incidental procedure was ongoing in which the appellants claimed that their fair trial rights were breached by the replacement of a District Court judge.[6] In 2012, the Court of Appeal in The Hague rendered its final judgment.[7] It dismissed the claims relating to the alleged breach of fair trial rights and ruled that the state is liable for the damages resulting from the established wrongful acts. The 2012 judgment finalized this stage of the proceedings and opened the door for the state to institute an appeal in cassation with the Dutch Supreme Court. In June 2012, the Dutch Ministry of Defense confirmed that it will be filing for appeal in cassation, arguing that Dutchbat was part of the UN Forces in Bosnia (UNPROFOR) and that the acts of Dutchbat should be attributed to the UN.[8]

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[4] District Court in The Hague, *H.N. v. the Netherlands*, (265615/HA ZA 06-1671, LJN: BF0181), Civil Law Section, Judgment, 10 September 2008 (*Nuhanović*); District Court in The Hague, *M.M.-M., D.M. and A.M. v. the Netherlands,* (265618/HA ZA 06-1672, LJN: BF0182), Civil Law Section, Judgment, 10 September 2008 (*Mustafić*). English translations available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0181 and http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0182 respectively.

[5] Court of Appeal in The Hague, *Hasan Nuhanović v. the Netherlands,* (200.020.174/01, LJN: BR5388), Civil Law Section, Judgment, 5 July 2011 (*Nuhanović appeal*) and Court of Appeal in The Hague, *Mehida Mustafić-Mujić, Damir Mustafić and Alma Mustafić v. the Netherlands,* (200.020.173/01, LJN: BR5386), Civil Law Section, Judgment, 5 July 2011 (*Mustafić appeal*). English translations available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388 and http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386 respectively.

[6] *Nuhanović appeal*, paras. 8.1-8.5.

[7] *Mustafić incidental*.

[8] NRC, *Staat in cassatie tegen uitspraak Srebrenica-zaak* (State appeals in cassation against Srebrenica-case judgment), 26 June 2012, at http://www.nrc.nl/nieuws/2012/06/26/staat-in-cassatie-tegen-uitspraak-srebrenica-zaak/.

10.2.2 *Mothers of Srebrenica Association et al. v. the Netherlands and the United Nations*

In the second case, the association 'Mothers of Srebrenica' and ten individuals brought a claim against the Netherlands and the UN. Compared to the *Mustafić/Nuhanović* proceedings, this claim is broader as it alleges responsibility on the side of the Netherlands *and* the United Nations – jointly and severally – and as it relates to the overall mandate of Dutchbat and the failure to prevent genocide rather than the relationship between Dutchbat and particular individuals.

In 2008, the District Court in The Hague rejected the claims against the UN finding that it lacked jurisdiction.[9] The Court of Appeal upheld the judgment of the District Court.[10] In 2012, the Supreme Court of the Netherlands dismissed the appeal in cassation, and restated that in the current proceedings the Dutch judiciary has no jurisdiction *vis-à-vis* the UN.[11] At the time of writing, a first instance judgment regarding the claims against the Netherlands was still pending.

10.3 Two Srebrenica Proceedings: Points of Overlap and Divergence

The two parallel Srebrenica proceedings are jointly part of at least three distinct endeavours. First, from a Dutch politico-historical perspective, the proceedings play a crucial role in completing what is generally considered a stain on contemporary Dutch history. Political responsibility was accepted in 2002 when the Dutch government resigned[12] following the publication of a government commissioned report (NIOD Report) partially blaming the Dutch government for the fate of the Srebrenica 'safe area'.[13] However, as is illustrated by the refusal of two cabinet ministers to offer apologies after the *Mustafić/Nuhanović* appeals judgment

[9] District Court in The Hague, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*, (2995247/HA ZA 07-2973, LJN: BD6796), Civil Law Section, Judgment in the incidental proceedings, 10 July 2008 (*Mothers of Srebrenica*). English translation available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BD6796.

[10] Court of Appeal in The Hague, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* (200.022.151/01, LJN: BL8979), Commerce Section, Judgment, 30 March 2010 (*Mothers of Srebrenica appeal).* English translation available at http://www.asser.nl/upload/documents/20120420T023804-Decision%20Court%20of%20Appeal%2030%20March%202010%20%28English%29.pdf.

[11] *Mothers of Srebrenica cassation.*

[12] The Guardian, *Dutch cabinet resigns over Srebrenica massacre*, 17 April 2002, at http://www.guardian.co.uk/world/2002/apr/17/warcrimes.andrewosborn.

[13] Netherlands Institute for War Documentation, *Srebrenica, a 'safe' area – Reconstruction, background, consequences and analyses of the fall of a safe area,* Report, 10 April 2002, at http://www.srebrenica.nl/Pages/OOR/23/379.bGFuZz1OTA.html.

as long as the matter continues to be subject of ongoing legal proceedings, there is a need for further legal qualification of the relationship between Dutchbat and the Srebrenica events.[14] Second, the two Dutch cases are amongst the numerous legal proceedings before international and domestic legal bodies through which justice is sought for the Srebrenica victims. Serbian and Bosnian courts and the ICTY have, in terms of criminal law, rendered various judgments through which they have individualized criminal responsibility for the massacres in Bosnia, while the ICJ considered the responsibilities of neighboring Serbia and Montenegro.[15] Finally, the Srebrenica proceedings illustrate the debate on and further the development of several international legal issues. These issues include the overall question of accountability of international organizations, especially in a conflict-related context, the allocation of responsibilities between international organizations and states and the friction between human rights and immunities enjoyed by international organizations.[16]

These abstract issues translate into the following two questions in terms of the Srebrenica cases: can the acts of Dutchbat be attributed to the Netherlands, the UN or both, and what is the extent of the immunities enjoyed by the UN before Dutch courts? The former question is central to the *Mustafić/Nuhanović* litigation, while the latter is tackled in the *Mothers of Srebrenica* proceedings. The following sections revisit the main considerations by the Dutch lower instance courts and look at the significance of the 2012 judgments rendered by the Court of Appeal and the Supreme Court in The Hague.

10.3.1 Attribution

In 2012, the Court of Appeal confirmed that under the circumstances of the *Mustafić/Nuhanović* case, certain acts of Dutchbat were wrongful and attributable to the Netherlands.[17] The 2012 judgment as such does not provide any new insights into the matter; its significance is more of a procedural nature as it opened the door for cassation. The judgment upholds the reasoning of the 2011 Court of Appeal judgments, which some authors have labeled as potentially 'ground-breaking rulings'.[18] Overall, however, the upheld reasoning rests on certain case-

[14] NRC, *Staat in cassatie tegen uitspraak Srebrenica-zaak* (State appeals in cassation against Srebrenica-case judgment), 26 June 2012, at http://www.nrc.nl/nieuws/2012/06/26/staat-in-cassatie-tegen-uitspraak-srebrenica-zaak/.

[15] For an overview of several proceedings before Serbian and Bosnian courts relating to Srebrenica, see for example http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39956. See further ICJ, *Genocide case*.

[16] See Momirov 2011; Zwanenburg 2005.

[17] *Mustafić incidental*, para. 2.1.

[18] Nollkaemper 2011, at 1144. For a discussion on the *Mustafić/Nuhanović* proceedings, see also Bouting 2012.

specific factors, limiting the possible application of this reasoning to other cases, most notably the second leg of the *Mothers of Srebrenica* litigation which concerns the Netherlands, where the question of attribution is bound to resurface.

First, the claims underlying *Mustafić/Nuhanović* relate to the very specific relationship which existed between Dutchbat and the individuals who were compelled to leave the premises of Dutchbat. This relationship emanates from acts of Dutchbat by which the individuals were essentially handed over to the Bosnian Serb Army.[19] In fact, the Court explicitly clarified that it 'does not need to give an opinion on the position of the refugees that were staying outside the compound or the other refugees inside the compound'.[20] These conditions allowed the Court to avoid an assessment of the overall extent of responsibilities of Dutchbat as a peacekeeping mission *vis-à-vis* Srebrenica and its population.[21]

Secondly, the specific claims enabled the Court to consider the fundamentally changed nature of Dutchbat's mission once Srebrenica had fallen. As of the moment the enclave was taken over, the main purpose of the peacekeeping mission's mandate had become obsolete and Dutchbat's main task shifted to evacuation.[22] As the Court pointed out, it 'attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate'.[23] The distinction made by the Court also limits the possible implications of this judgment with respect to any other proceedings dealing with a 'situation in which troops placed under the command of the UN normally operate'.[24]

Finally, the allegations of the plaintiffs were based on international and domestic law.[25] The Court held that 'it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina.'[26] Consequently, the Court primarily looked at the Act

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[19] *Nuhanović appeal*, para. 3.1: '(i) the State (Franken) refused to place Muhamed Nuhanovic on the list of local personnel, (ii) the State sent Muhamed Nuhanovic and consequently Ibro Nuhanovic away from the compound'.

[20] Ibid., para. 6.11.

[21] Ibid., paras. 6.1. and 6.3.

[22] Ibid., paras. 5.11-5.18. See also Nollkaemper 2011, at 1150.

[23] *Nuhanović appeal*, para. 5.11.

[24] Ibid.

[25] Ibid., para. 6.2. 'According to Nuhanovic, the State acted contrary to the following standards: articles 154, 173, 157 and 182 Act on Obligations of Bosnia and Herzegovina; articles 2, 3 and 8 ECHR and (as the Court understands: in particular) articles 6 and 7 of the ICCPR; art. 1 Genocide Convention; – common article 1 of the Geneva Conventions; the specific instruction by General Gobillard to Dutchbat [to] "take all reasonable measures to protect refugees and civilians in your care"; – the Resolution of the Security Council that ordered Dutchbat "to deter by presence"(the Court assumes this refers to: Resolution 836) and Standing Operating Procedure 206 and 208.'

[26] Ibid., para. 6.3, related to the relevant Dutch law, namely 'Wet van 11 april 2001 houdende regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad' (Bill on Conflicts of Law in Tort), Stb 2001, 190, Art. 3(1).

on Obligations of Bosnia and Herzegovina in determining the wrongfulness of the acts and in establishing the liability 'for immaterial damage which Nuhanovic has suffered consequently and will possibly yet suffer'.[27] Furthermore, the Court held that based on Article 3 of the Constitution of Bosnia and Herzegovina, the International Covenant on Civil and Political Rights (ICCPR) has direct effect.[28] In so doing, it did not have to address the complexities of applying these international legal instruments to UN peacekeeping missions where no such direct effect is envisaged, or to tackle legal hurdles such as extraterritorial application of human rights norms.

Recalling these specific circumstances, the Court of Appeal held that 'effective control' should be the criterion on the basis of which attribution should be decided. The Court invoked the International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO), in particular Article 6 (current Article 7) thereof, as the basis of its judgment.[29] The Court thereby dismissed the 'command and control' standard as applied by the District Court, and concluded that

> Dutchbat was placed under the command of the United Nations. Whether this also implies that 'command and control' had been transferred to the UN, and what this actually means, can remain an open question because, as will appear hereafter, Nuhanovic is right in asserting that the decisive criterion for attribution is not who exercised 'command and control', but who actually was in possession of 'effective control'.[30]

The Court went on to establish that under the given conditions, based on various 'decisions and instructions' of the Dutch Government, the Netherlands indeed had effective control.[31] In interpreting the range of the 'effective control' standard, the Court added that significance should not only

> be given to the question whether [particular] conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned.[32]

Thus, the Court engages in allocating the appropriate responsibility to the appropriate entity. In so doing, it places an emphasis on the actual conduct of an

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[27] *Nuhanović appeal*, para. 6.20.

[28] Ibid., para. 6.4. The Court also looked at the European Convention on Human Rights (ECHR) and the ICCPR on the basis of their customary law status. For a commentary on the implications thereof, see Dannenbaum 2011.

[29] International Law Commission, Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission on the Work of its Sixty-third Session, UN Doc. A/66/10, 26 April-3 June and 4 July-12 August 2011.

[30] *Nuhanović appeal*, paras. 5.7-5.8.

[31] Ibid., paras. 5.19-5.20.

[32] Ibid., para. 5.9.

entity in a given situation – in this case, the state – rather than the existence of a legal basis upon which a certain entity could possibly act.[33] The Court points out, 'it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.'[34] This possibility of dual (and mutually independent) attribution is in sharp contrast to the dismissed reasoning of the District Court, where it was held that '[a]ttribution of acts and omissions by Dutchbat to the United Nations … *excludes* attribution of the same conduct to the State.'[35]

As a matter of comparison, the issue of attribution was left untouched *in toto* under similar circumstances in the 2004 UK landmark case *Bici v. Ministry of Defence*.[36] In this case, a British Court was asked to decide on civil claims concerning the conduct of UK military personnel serving in Kosovo under UN flag. The claims were made by Mohamet and Skender Bici, one of whom suffered physical injury, while the other suffered psychiatric illness as a consequence of the events. It was the first time that claims for compensation had been made with regard to British peacekeepers. On the basis of Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, the parties had agreed that

[33] See also Nollkaemper 2011, at 1149 and 1152. A similar reasoning was applied recently by the European Court of Human Rights (ECtHR) in *Nada v. Switzerland* where the question was whether certain acts of Switzerland pursuant to a UN Security Council Resolution should be attributed to the state or the UN, see *Nada v. Switzerland,* ECtHR, No. 10593/08, 12 September 2012 (*Nada*). For a sharp analysis of the attribution-related issues that the Strasbourg Court faced in *Nada*, see Sarvarian 2012.

[34] *Nuhanović appeal,* para. 5.9. 'The question whether the State had "effective control" over the conduct of Dutchbat which Nuhanovic considers to be the basis for his claim, must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned. Moreover, the Court adopts as a starting point that the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised "effective control" over the alleged conduct and will not answer the question whether the UN also had "effective control". When it comes to shared responsibilities amongst states and the issue of attribution, see for example European Commission on Human Rights, *Ilse Hess v. United Kingdom*, No. 6231/73, Decision on Admissibility, 28 May 1975. The illustrative case concerns the detention of former "deputy Führer" Rudolf Hess in the jointly administered Allied Military Prison in Berlin. A claim was filed against the United Kingdom alleging a violation of Articles 3 and 8 European Convention on Human Rights. In this particular case it was concluded, on page 74, that the administration of the prison was "*at all times quadripartite*". Ultimately, the Commission held that "*the United Kingdom acts only as a partner in the joint responsibility*" and that "the joint authority cannot be divided into four separate jurisdictions".' (Emphasis added).

[35] *Nuhanović*, para. 4.13 (emphasis added). With respect to 'dual attribution', see Nollkaemper 2011, para. C.

[36] The United Kingdom, Court of Appeal – Queen's Bench Division, *Bici & Anor v. Ministry of Defence*, [2004] EWHC 786 (QB), 7 April 2004.

English law should be applied to determine liability. As the judgment explicitly stated, 'the defendant … conceded that it is vicariously liable for any wrongs committed by any of the soldiers. The Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N.'[37] Instead of invoking the attribution-argument, the UK presented 'combat immunity' as the primary defense. The Court dismissed that argument and found that the British Ministry of Defence was liable for negligence and trespass after British soldiers shot and killed two men while injuring two other persons.

In sum, in 2012 the Court of Appeal in The Hague upheld a groundbreaking, yet very context-determined judgment in the *Mustafić/Nuhanović* proceedings by which acts of Dutchbat soldiers were at least attributable to the Netherlands. Dutchbat was found to have acted wrongfully under Bosnian civil law, and the Netherlands was found liable for immaterial damage.[38] By attributing at least some acts to the Netherlands, the Dutch Court indirectly pierced the veil of immunity which generally coats activities of UN peacekeeping troops, and which proved to be crucial in the *Mothers of Srebrenica* case as discussed below.

10.3.2 Immunity of the UN

The second issue central to the Srebrenica proceedings relates to the immunity of the UN, one of the respondents in the *Mothers of Srebrenica* case. In this two-tiered case, the Dutch Supreme Court rendered its judgment in 2012 with respect to the UN, whereas a first instance judgment concerning the second respondent, the Netherlands, remains pending. The Supreme Court reaffirmed the UN's immunity before Dutch courts by applying a reasoning which goes beyond the dismissed Appeal Court ruling. This section considers, chronologically, the way in which the Dutch judiciary has interpreted the extent of UN immunity through the *Mothers of Srebrenica* case. The 2012 judgment does not reverse in any significant manner the appeal judgment; all relevant judgments uphold the immunity of the UN, albeit for different reasons.

At the core of the litigation lies the discussion whether, and if so under which conditions, UN immunity before national courts is subject to limitations. This immunity is in principle governed by the Convention on Privileges and Immunities of the United Nations (General Convention), which builds on the immunity provided to the UN by Article 105 of the Charter. Article II, Section 2 of the General Convention grants the UN 'immunity from every form of legal process'.[39]

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[37] Ibid., para. 2.

[38] *Nuhanović appeal*, para. 6.20.

[39] 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15 (General Convention) Article II, Section 2. Article 105 of the UN Charter states in pertinent part that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.'

The rationale behind UN immunity rests on the need for an indispensable shield against 'unilateral interference by individual governments'.[40] Although this jurisdictional immunity is grounded in functional necessity, that is granting the organization 'such privileges and immunities as are necessary for the fulfillment of its purposes', the provisions in the General Convention are generally interpreted widely so as to confer absolute immunity on the UN and its subsidiary bodies.[41] The General Convention does provide for immunity to be waived under certain conditions[42] and, when waiver is not granted by the Secretary-General, calls in Section 29 for alternative dispute settlement mechanisms to be established.[43]

In 2008, the District Court ruled that it lacks jurisdiction to hear the claims against the UN. The Court pointed out that the UN, through a letter sent to the Dutch permanent representative to the UN, explicitly invoked immunity in this case and that Article 105 of the UN Charter leaves no space for domestic courts to restrict this immunity.[44] The Court also dismissed the plaintiffs' argument that, as no alternative mechanisms pursuant to Section 29 of the General Convention have been established, such an all-encompassing understanding of immunity would be incompatible with the right to an effective remedy, as part of the broader family of fair trial rights protected by the ICCPR (Art. 14) as well as regional documents such as the American Convention on Human Rights (Art. 8) and the ECHR (Art. 6).[45] The Court acknowledged that such a human rights-based approach has incidentally resulted in the limitation of immunities of international organizations by international courts, as for example by the ECtHR in *Waite and Kennedy v. Germany,* but ruled that this test did not apply in case of the UN.[46]

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[40] *Waite and Kennedy v. Germany*, ECtHR No. 26083/94, 18 February 1999, para. 63 (*Waite and Kennedy*).

[41] General Convention, preamble. See also Reinisch and Weber 2004, at 60, footnote 5.

[42] Ibid., Article II, Section 2. The decision on whether immunity should be waived is taken, on a case-by-case basis, by the Secretary-General who has the 'right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice', see General Convention, Article V, Sections 20 and 23.

[43] General Convention, Article VIII, Section 29. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion, 29 April 1999, paras. 50-61 (*Cumaraswamy*).

[44] *Mothers of Srebrenica*, para. 5.14 and 5.16.

[45] The right to access to court is implied in these documents and has been recognized by the ECtHR as implicit to Art. 6 ECHR in *Waite and Kennedy*, para. 50, upholding the court's previous case law. Although ECtHR case law recognizes that these rights can be restricted by immunity, this restriction needs to pursue a legitimate aim and has to be proportionate. See, *Al-Adsani v. the United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, paras. 52-67 (*Al-Adsani*).

[46] *Mothers of Srebrenica*, para. 23. The ECtHR in *Waite and Kennedy* ruled in para. 68 that 'a material factor in determining whether granting [the European Space Agency] immunity from German jurisdiction is permissible under the [ECHR] is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'. In two other decisions, the ECtHR and the European Court of Justice, respectively, embraced similar lines of reasoning. See, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v.*

The Court of Appeal in 2010 upheld the judgment, and restated its basic tenet, namely that 'article 105 of the Charter, does not allow any other interpretation than that the UN has been granted the most far-reaching immunity'.[47] However, the Court of Appeal dismissed the District Court's reasoning that criteria such as the ones established in *Waite and Kennedy* – for immunity to be permissible it should serve a legitimate goal, be proportionate and that adversely affected parties should have access to reasonable alternative mechanisms – do not apply in relation to the UN. Rather, 'the Court of Appeal believes that article 103 of the Charter does *not* preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR.'[48] The Court went on to apply these standards and found that in this particular context, immunity 'is closely connected to the public interest pertaining to keeping peace and safety in the world [and] that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.'[49] The Court found that the failure to prevent genocide – the pertinent claim in this respect – is 'insufficient in principle to waive [immunity] from prosecution.'[50] In allowing, at least in principle, for the *Waite and Kennedy* criteria to be applied to the immunity of the UN, the Court of Appeal expanded the reach of these criteria to the UN; an expansion of the criteria which the Supreme Court would later dismiss.

With respect to the last factor, namely whether or not alternative mechanisms exist, the Court somewhat unconvincingly argued that numerous alternatives are at the disposal of the plaintiffs. It pointed out that the Mothers of Srebrenica have access to courts with respect to 'what happened in Srebrenica', but only in relation to entities other than the UN, namely the state and the perpetrators of genocide.[51] This reasoning only partially holds water. It suggests that, for example, the criminal legal proceedings against individual perpetrators before a domestic court could in some way inform the decision on whether or not to uphold or limit the immunity of the UN in a particular case relating to the same events. It disregards the fact that the General Convention links the privileges and immunities of the UN with an obligation for the UN itself to establish alternative mechanisms, which would address the possible wrongdoings of the UN, rather than any other actors. A similar sentiment was reflected in the Advocate General's advisory opinion in the subsequent cassation proceedings. Here the Advocate General, in relation to Section 29 of the General Convention, referred to several mechanisms established by the UN and *vis-à-vis* the UN in the context of peacekeeping, while leaving out

(Footnote 46 continued)
Ireland, ECtHR, No. 45036/98, 30 June 2005 and Joined Cases C-402 and 415/05P, *Kadi & Al Barakaat International Found. v. Council of the European Union & Commission of the European Communities* [2008], ECR I-6351.

47 *Mothers of Srebrenica appeal*, para. 4.2.

48 Ibid., para. 5.2-5.5 (emphasis added).

49 Ibid., para. 5.7.

50 Ibid., para. 5.10.

51 Ibid., para. 5.11-5.13.

all other possible avenues of recourse which the Court of Appeal seemed to rely on.[52] *En passant*, the Court did add that 'it regrets' the UN itself has not provided for alternative mechanisms in accordance with the obligations set forth in Section 29 of the General Convention.[53] Ultimately, the Court upheld the first instance ruling in terms of the final outcome, but based on its own reasoning as to the issue of immunity, which includes the application of the criteria as developed by the ECtHR.[54]

In 2012, the Dutch Supreme Court did not only uphold the immunity of the UN, it seemingly reinforced the quasi-absolute nature of the immunity by dismissing the Appeal Court's reasoning as described above. Owing to the special nature of the UN, the prevalence of UN Charter-based obligations pursuant to Article 103 of the UN Charter and referring to the *Behrami* decision of the ECtHR, the Supreme Court dismissed the notion that UN immunity should be subjected to the *Waite and Kennedy* test by holding unequivocally that UN 'immunity is absolute'.[55] In so doing, the Court opted not to engage in the increasingly accepted balancing act in which upholding immunity of an international organization is made dependent on certain human rights factors, in particular on the right to access to court.[56] The gravity of the underlying claims is also dismissed as a possible limitation to immunity. Here, the Court first generously cites the Mothers of Srebrenica's writ of summons in cassation.

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[52] Advocate General's advisory opinion, para. 2.12-2.16.

[53] *Mothers of Srebrenica appeal*, para. 5.11-5.13. At the UN level, various options have been considered in order to establish an organization-wide alternative mechanism, amongst others the establishment of a UN Ombudsperson.

[54] See also Brockman-Hawe 2010 and Henquet 2010.

[55] *Mothers of Srebrenica cassation*, paras. 4.3.4-4.3.6. See also, *Behrami and Behrami v. France,* ECtHR, No. 71412/02, 2 May 2007.

[56] The existence of alternative mechanisms – or lack thereof – has been the driving force behind a developing line of reasoning used by courts and tribunals to deal with the immunity of international organizations. According to this approach, courts have jurisdiction over international organizations in the field of human rights protection as long as these organizations do not provide for a level of human rights protection equivalent to that of the legal order within which the court dealing with the case operates. This means that the validity of the immunity-defense will depend on the availability of alternative mechanisms through which disputes can be resolved i.e. human rights can be protected, see e.g. Germany, Federal Constitutional Court, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 37 BVerfGE 271, 29 May 1974 in 2 *Common Market Law Review* 540 (*Solange I*); *Re application of Wünsche Handelsgesellschaft*, 73 BVerfGE 339, 22 October 1986 in 3 *Common Market Law Review 225* (*Solange II*) and *Brunner et al. v. The European Union Treaty*, 89 BVerfGE 155, 12 October 1993 in 1 *Common Market Law Review* 57 (*Solange III*). See also Belgium, Brussels Court of Appeal, *Lutchmaya v. Secrétariat général du Groupe des États d'Afrique, des Caraïbes et du Pacifique*, Journal des Tribunaux 2003, 684, 4 March 2003. This line of argument was subsequently mirrored by *e.g.* Switzerland, Federal Supreme Court, *Consortium X v. Switzerland*, BGE 130 I 312, 2 July 2004 and France, Court of Cassation, *La Banque Africaine de Développement v. Mr X*, 04-41012, 25 January 2005.

> There is no higher norm in international law than the prohibition of genocide. This norm in any event takes precedence over the other norms at issue in this legal dispute. The enforcement of this norm is one of the main reasons for the existence of international law and for the most important international organisation, the UN. This means that in cases of failure to prevent genocide, international organisations are not entitled to immunity, or in any event the prohibition should prevail over such immunity. The view that the UN's immunity weighs more heavily in this instance would mean de facto that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by the appeal court is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights.[57]

By referring to *Al-Adsani* where the claims underlying the case related to a violation of the prohibition of torture, also a norm of *ius cogens,* the Court dismissed this ground of appeal.[58] Also, the Supreme Court judgment is probably amongst the first to embrace the 2012 ICJ judgment in *Jurisdictional Immunities of the State* in this respect. As referred to by the Supreme Court, the ICJ considered the breach of *ius cogens* norms and reasoned that

> there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. 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. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[59]

Thus, in accepting this dichotomy between the two categories of norms, the Dutch Supreme Court endorsed the outcome of the appealed judgment while reversing the reasoning behind it.

10.4 Concluding Remarks

In 2012, the Dutch Supreme Court embraced an absolute understanding of the scope of immunity enjoyed by the UN, thereby definitively dismissing the claims of the Mothers of Srebrenica association against the UN before Dutch courts. In a parallel proceeding, the Court of Appeal ruled that certain acts of Dutchbat, wrongful under Bosnian law, were attributable to the Netherlands. Whereas the unequivocal Supreme Court judgment brought an end to the longstanding *Mothers of Srebrenica* litigation, the Court of Appeal judgment opened the door for the final stage of the *Mustafić/Nuhanović* proceedings.

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[57] Ibid., para. 4.3.7.

[58] Ibid., paras. 4.3.8-4.3.9.

[59] *Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening), ICJ, Judgment of 3 February 2012, para. 93 (*Jurisdictional immunities*).

Both proceedings deal with the tragic events in Srebrenica. In terms of law, they reflect the legal complexities surrounding the attempts of Srebrenica-survivors to legally frame the relationship between what happened in Srebrenica and the acts and omissions of the Dutch UN battalion. From the perspective of holding the UN and/or the Netherlands accountable, the proceedings fit the broader debate on how and to what extent notions related to the rule of law are applicable to activities of the UN. The courts address the usual hurdles in this respect, pertaining to the issues of attribution and immunities. In terms of effect, the ramifications of both judgments are limited at best. In the *Mothers of Srebrenica* proceedings, the Supreme Court seems to be loyal to a fault to a rigid understanding of immunity by dismissing the possibility which was left open by the second instance judgment by which the immunity of the UN could be curbed under very specific circumstances. The Supreme Court judgment proved that the Court of Appeal overreached when it argued for the limitation of UN immunity. Considering this judgment, and with little to no alternative mechanisms at hand, it can be argued that the accountability system surrounding the UN remains troublesome – especially in the light of the relevant provisions of the General Convention which mandate the establishment of mechanisms for recourse and redress. In *Mustafić/Nuhanović*, the attribution of Dutchbat acts to the Netherlands, unless overruled on appeal in cassation, may be considered a groundbreaking development, the effects of which, however, are not likely to spread far due to the extremely narrow context-determined reasoning underlying the judgment.[60] At the same time, accepting the possibility that attribution to one entity does not necessarily exclude attribution of the same acts to another entity might prove to be a window of opportunity for subsequent cases dealing with multiple actors exercising public powers at the international level.

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[60] Already with respect to the remaining leg of the Mothers of Srebrenica litigation, where the possible liability of the Netherlands is still to be determined in first instance, the Mustafić/Nuhanović reasoning will not be applicable due to the differing nature of the claims. However, the possibility of prosecuting Thom Karremans, Dutchbat commander in 1995, by the Dutch Prosecution Service has been announced as a possible adjunct effect of the ruling, *see* ANP, *Vervolging Karremans dichterbij* (Prosecution Karremans closer), 9 May 2012.

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