HR (Netherlands Judicial Decisions Involving Questions of Private International Law: Can the United Nations be Sued for its Role in the Srebrenica Massacre? Mothers of Srebrenica Foundation v. the State of the Netherlands and the United Nations)

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NETHERLANDS JUDICIAL DECISIONS INVOLVING QUESTIONS OF PRIVATE INTERNATIONAL LAW

CAN THE UNITED NATIONS BE SUED FOR ITS ROLE IN THE SREBRENICA MASSACRE?

Supreme Court, 13 April 2012, *Mothers of Srebrenica Foundation* v. *the State of the Netherlands and the United Nations*

The facts

In July 1995, some 8,000 Bosnian men and boys, trapped in the enclave of Srebrenica, were killed by units of the Army of Republika Srpska under the command of General Ratko Madlić. The enclave had been declared a 'safe area' by the United Nations (UN) Security Council, under the protection of a UN peacekeeping force, which at the time consisted of a 400-strong Dutch army unit. The Dutch contingent proved unable to prevent the massacre, which has been called the largest act of mass murder in Europe since World War II. In his report on the fall of Srebrenica, submitted to the General Assembly in 1999, UN Secretary-General Kofi Annan acknowledged that '[t]hrough error, misjudgment and an inability to recognize the scope of the evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder'.[1] In 2002, following the publication of a report by the Netherlands Institute on War Documentation, the Dutch government accepted responsibility for 'peacekeeping failures' in Srebrenica, and resigned. The International Criminal Tribunal for the former Yugoslavia (ICTY) ruled in 2004 that the massacre in Srebrenica constituted genocide[2] and indicted Radovan Karadžić (the former President of Republika Srpska) and General Mladić for genocide and other war crimes committed in Srebrenica and other districts of Bosnia. They are now on trial before the ICTY in The Hague.

The 'Mothers of Srebrenica Foundation' represents some 6,000 relatives of the victims of the massacre. On 4 June 2007, together with ten individual plaintiffs, the Foundation filed a civil suit in the District Court of The Hague against the United Nations and the State of the Netherlands. The complaint stated that both defendants should be held liable for the fall of Srebrenica and its consequences,

1. Report of the Secretary-General pursuant to General Assembly resolution 53/35, A/54/549, § 503.
2. ICTY (Appeals Chamber) 19 April 2004, Case IT-98-33-A (*Prosecutor* v. *Radislav Krstić*).

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as they failed to meet promises made to the inhabitants and acted wrongfully by violating their obligation to prevent genocide. The plaintiffs sought a declaratory judgment that defendants had acted unlawfully, and an order to pay (an advance on the) compensation for the loss suffered by them, to be assessed and settled in accordance with the law.

The UN failed to enter an appearance and was declared to be in default. In a letter to the UN's Permanent Representative of the Netherlands, the organization declared it refused to waive its immunity from jurisdiction to which it claimed to be entitled under the UN Charter and the 1946 Convention on the Privileges and Immunities of the United Nations. In interim proceedings, the State then moved for a dismissal of the action against the UN for lack of jurisdiction, or, alternatively, to be allowed as an intervening party or as a party joining the UN in the principal case between the plaintiffs and the UN, as it claimed to have an interest of its own in invoking the UN's immunity.[3] The District Court considered that in international law practice the immunity of the UN is the standard, and that the interpretation of Article 105 of the UN Charter offers no basis for restrictions. The Court then addressed the issue of whether the absolute immunity of the UN is in conflict with other standards of international law, such as the Genocide Convention or the European Convention on Human Rights (ECHR). It concluded that no grounds could be derived from these instruments for an exception to the standard of absolute immunity to which the UN is entitled. It held, therefore, that it had no jurisdiction to hear the case against the UN.[4]

The Appellate Court of The Hague reached the same conclusion, albeit on different grounds.[5] While acknowledging that under the UN Charter and the 1946 UN Immunities Convention, the UN was entitled to immunity from jurisdiction, the Court raised the question of whether the UN's right to immunity could be restricted by the plaintiffs' right of access to a court of law, as guaranteed by treaties and/or by rules of customary law. Reference was made to the case law of the European Court of Human Rights (ECtHR), notably its rulings in *Beer & Regan* v. *Germany*[6] and *Waite & Kennedy* v. *Germany*.[7] The Court of Appeal distinguished these cases from the ECtHR's decision in *Behrami* v. *France* and *Saramati* v. *France, Germany and Norway*[8] on the ground that the latter ruling neither addressed the issue of UN immunity nor the relationship between immunity and access to

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3. As pointed out by Guido den Dekker in a comment on the District Court's decision ('Immunity for the United Nations before the Dutch Courts', www.asser.nl > cases > Mothers of Srebrenica v. The Netherlands & the UN, p. 2), it may well be that the State's motion was meant to prevent the court from ignoring the immunity issue. See, *infra*, case note, para. 3.

4. District Court The Hague 10 July 2008, *LJN* BD6795 (in Dutch; translation in English: http://zoeken.rechtspraak.nl > *LJN* BD6796; 55 *NILR* (2008) pp. 428-439; website T.M.C. Asser Institute, *supra* n. 3).

5. Court of Appeal The Hague 30 March 2010, *LJN* BL8979 (in Dutch; translation in English: website T.M.C. Asser Institute, *supra* n. 3).

6. ECtHR 18 February 1999, 28934/95.

7. ECtHR 18 February 1999, 26083/94.

8. ECtHR 2 May 2007, 71412/01 and 78166/01.

justice. Guided by the criteria laid down in *Beer* and *Waite*, the Court concluded that UN immunity serves a legitimate goal, and that there are no compelling reasons to accept the proposition that in this case the invocation of immunity would not be proportional to the purpose it serves. While the loss the plaintiffs suffered may have been caused by a crime as heinous as genocide, it was not the UN that committed genocide, nor did it knowingly assist in committing genocide. With regard to the second compelling reason advanced by the plaintiffs – the absence of other forms of judicial redress – the Court considered that they *do* have access to some courts, notably in proceedings against the perpetrators themselves, or in an action against the State they reproach for the same unlawful conduct as the UN, viz. the Netherlands. This line of reasoning is not very convincing, as it may be next to impossible to sue individual perpetrators in a civil court either in Serbia or Bosnia and Herzegovina, and, second, because it is as yet unclear whether the Dutch Supreme Court will reject the State's defense that the allegedly wrongful conduct of the Dutch peacekeeping force in Bosnia should be attributed to the organization under whose command it operated.[9] However that may be, the Court of Appeal upheld the lower court's ruling that the UN was entitled to immunity.

The decision of the Supreme Court

In an extensive opinion, the Dutch Supreme Court came to the conclusion that the UN enjoys absolute immunity from jurisdiction and that, in view of the case law of both the ECtHR and the International Court of Justice (ICJ), possible violations of human rights and international humanitarian law do not warrant an exception.[10] The opinion starts with a listing of the relevant provisions in the UN Charter (Arts. 103 and 105), the Convention on the Privileges and Immunities of the UN (Art. II(2)) and the Genocide Convention (Art. I), which is followed by a summary of the Appellate Court's decision. The Supreme Court endorsed the lower court's view that under the UN Immunities Convention the UN 'has been granted the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law in the countries that are a party to the Convention'. The granting of immunity to the UN is meant to guarantee its independent functioning, and it therefore serves a legitimate purpose. The Supreme Court then addressed the central issue of whether a plea of immunity is compatible with the right of

9. Cf. G. den Dekker and J. Schechinger, 'The Immunity of the United Nations before the Dutch Courts Revisited', www.asser.nl > cases > Mothers of Srebrenica v. The Netherlands & the UN, at p. 8. In the meantime, however, the Hague Court of Appeal has ruled that, apart from the question of whether the UN could be held accountable, 'the State possessed "effective control" over the alleged conduct of Dutchbat … and that this conduct can be attributed to the State': Court of Appeal The Hague 5 July 2011, *LJN* BR0132 (in Dutch); *LJN* BR5386 (in English) (*Mustafic* v. *State of the Netherlands*) and *LJN* BR0133 (in Dutch); *LJN* BR5388 (in English) (*Nuhanovic* v. *State of the Netherlands*); see also: website T.M.C. Asser Institute, *supra* n. 3 > Nuhanovic/Mustafic. An appeal in cassation has been brought in both cases.

10. Supreme Court of the Netherlands 13 April 2012, *LJN* BW1999 (in Dutch; in English: website T.M.C. Asser Institute, *supra* n. 3).

access to justice. First, it concluded that the Appellate Court erred in applying the criteria derived from the ECtHR's decisions in *Beer* and *Waite*, since those cases focused on the immunity of the European Space Agency, and it cannot be assumed that the ECtHR, when referring to 'international organizations', meant to include the UN, an organization whose principal aim is the maintenance of international peace and security. More relevant, therefore, is the ECtHR's decision in *Behrami* and *Saramati*, in which it was held that acts of States carried out on behalf of the UN pursuant to Chapter VII of its Charter are not subject to review under the ECHR. Thus, the UN's right to immunity is absolute and it is not limited by obligations which the Member States may have under other international agreements, such as the obligation imposed by Article 6 ECHR.

In the second part of its opinion, the Supreme Court discussed plaintiffs' argument that UN immunity should give way to the right of access to justice on account of the UN's failure to prevent genocide and other war crimes. In this context, the plaintiffs relied on the dissenting opinion in *Al-Adsani* v. *United Kingdom*,[11] in which it was argued that the *jus cogens* nature of the prohibition of torture precludes the respondent State from invoking 'hierarchically lower rules', in this case the rule on State immunity. This argument was also rejected, not only on the ground that the majority in *Al-Adsani* had decided differently, but also, 'more importantly', because of a recent decision by the ICJ, in which it was held 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' or other rules of *jus cogens*.[12] With regard to the right of access to justice, the ICJ found '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 on the existence of alternative means of securing redress'. The Supreme Court did note that a distinction should be made between State immunity and the immunity of international organizations, but, with regard to the present issue, the distinction does not warrant a departure from the ICJ's ruling. Thus, even if some of the grounds for cassation were not unfounded (in that the Appellate Court erred in its reliance on *Beer* and *Waite*), the appeal was dismissed on different grounds.

Note

(1) It is not difficult to imagine how dissatisfied the Mothers of Srebrenica must be with the outcome of the proceedings before the Dutch Supreme Court. Considering the grounds of their complaint, one cannot help but feel that they should be entitled to some form of legal redress against the organization they hold accountable for the massacre in which they lost their loved ones. From a rational perspective, however, I do not think the Supreme Court could have properly ruled

11. ECtHR 1 March 2000, 35763/97.

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

in favor of the plaintiffs. Not only would a different outcome be difficult to square with the recent ICJ ruling on State immunity *vis-à-vis* human rights violations, it would also undermine the effectiveness of the UN in the exercise of its basic function, which is the maintenance of international peace and security.[13] A refusal to grant immunity to the UN would subject (the consequences of) a Security Council resolution to judicial scrutiny in any State in which it was, or was meant to be, effected,[14] including States that were opposed to the resolution in the first place. It will be clear that the UN's immunity in a case like this is based on a 'functional necessity' for the fulfillment of its objectives, and that a national court would be hard put to find grounds for an exception.

(2) One may wonder why the UN, apart from a plea of immunity, would be subject to the jurisdiction of a Dutch court anyhow, considering that there was nothing to link the organization and its operations to the Netherlands. Normally, under the rules of Dutch civil procedure, foreign defendants cannot be haled into a Dutch court unless they are bound by a (tacit) choice-of-forum agreement, or – if the cause of action sounds in tort – the place of wrongful conduct or injury can be located in the Netherlands. An additional ground for jurisdiction can be found in Article 7(1) of the Dutch Code of Civil Procedure, providing that a foreign defendant can be sued in a Dutch court if he is one of a number of defendants one of whom is subject to the court's jurisdiction and the claims against either of them are so closely connected that it is expedient to hear and determine them together.[15] Thus, the UN could only be sued in the Netherlands as a co-defendant of the Dutch State on basically the same causes of action.

(3) Since the UN did not enter an appearance, the next question to be answered pertains to the immunity issue in default proceedings. If the State had not intervened, the court of first instance might just have granted leave to proceed against the UN, without addressing the immunity issue. In proceedings against the Republic of Chile, the Rotterdam District Court declared the defendant to be in default, and decided the case on the merits in favor of the plaintiff, without considering the immunity issue of its own motion.[16] On appeal, the judgment was reversed

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13. Cf. I.F. Dekker and C. Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals', *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (Announcements of the Netherlands Society of International Law) (2011) no. 138, pp. 83-109 at p. 108: '… allowing suits against an international organisation in relation to wrongful acts committed in the context of peace operations may weaken the willingness of its Member States to contribute troops to these operations, and ultimately weaken the world's peace and security structures'. A report (in English) of the debate on their paper at the annual meeting of the Royal Netherlands Society of International Law on 4 November 2011 can be found at www.knvir.org > documenten > preadviezen.

14. In civil litigation, the fact that a harmful event occurred, or may occur, within the territory of the forum State (cf. Art. 5(3) Brussels I Regulation) is now a virtually universal ground for jurisdiction.

15. Cf. Art. 6(1) Brussels I Regulation.

16. Rb. Rotterdam 5 December 1984, cited in Rb. Rotterdam 10 August 2005, *Nederlands Internationaal Privaatrecht (NIPR)* (Netherlands Journal of Private International Law) 2006, no. 62,

(according to the Hague Court of Appeal, immunity from jurisdiction is a public policy issue, therefore to be addressed *ex officio*), but this judgment was quashed by the Supreme Court. Its decision in *Azeta* v. *Republic of Chile*[17] implies that the immunity issue need not be addressed in default proceedings: if the defendant does not object to the default judgment within the period prescribed, the right to invoke immunity is forfeited and can no longer be a ground for appeal. It follows that, contrary to the Appellate Court's opinion, State immunity does not touch upon public policy and must be invoked in a defended action.[18] That could have motivated the State to intervene on behalf of the UN in the *Srebrenica* case, even if it had not been urged to do so by the UN itself.[19] The court was therefore obliged to rule on the immunity issue, even if the UN was declared to be in default.[20]

(4) The main issue in this case, however, concerns the tension between two precepts of international law. On the one hand, to ensure their independent functioning, international organizations should be entitled to immunity from legal process. On the other hand, individuals have a right to a fair trial, which includes the right to bring any claim relating to their rights and obligations before a court or tribunal. Both the international organization's right to jurisdictional immunity and the individual's right to a fair trial have found expression in various treaties, but it could be argued that access to justice is a universal right under customary international law.[21] As noted by the Hague Court of Appeal in the present case, it is therefore irrelevant whether or not the Mothers of Srebrenica, as non-citizens and non-residents, could be considered as individuals 'within the jurisdiction' of the Netherlands, as required by Article 1 ECHR, or 'within its territory and subject

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in which Chile's objections against the default judgment were rejected for being submitted after the objection period had expired.

17. HR 26 March 2010, *LJN* BK9154; *NJ* 2010, 526, annot. Th.M. de Boer.

18. It is doubtful whether the reference to Art. 13(a) of the General Provisions Act (*Wet Algemene Bepalingen*), which was inserted by an amendment to Art. 1 Code of Civil Procedure in 2011, will compel the courts to consider the immunity issue in default proceedings. Art. 13(a) stipulates that the jurisdiction of Dutch courts is restricted 'by exceptions recognized by international law'. However, the provision has no bearing on the issue of whether such restrictions must be applied *ex officio*. Cf. A.A.H. van Hoek, 'Staatsimmuniteit in het privaatrecht' (State immunity in private law), *Mededelingen van de Nederlandse Vereniging voor Internationaal recht* (2011) no. 138, pp. 1-35 at pp. 30-31.

19. Cf. the advisory opinion by Attorney-General Vlas, *LJN* BW1999, no. 2.25, footnote 36: in its letter to the Dutch Permanent Representative, the UN not only declared that it refused to waive immunity from jurisdiction but it also requested the State of the Netherlands to take 'appropriate action'.

20. Under Art. 6 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, national courts would be bound to rule on the immunity issue 'on their own initiative'. However, the Dutch courts were free to ignore the Convention for various reasons: (1) ratification by the Netherlands is still pending, (2) the Convention has not entered into force; (3) its scope is restricted to State immunity and does not extend to international organizations.

21. Cf. A. Reinisch and 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', *International Organizations Law Review* (2004) pp. 59-110 at p. 67.

to its jurisdiction' as required by Article 2 of the International Covenant on Civil and Political Rights.[22]

Generally speaking, immunity is not absolute. Even under the once-prevailing doctrine of absolute State immunity, there were exceptions allowing national courts to exercise jurisdiction over foreign States.[23] Since the emergence of the doctrine of restrictive immunity in the second half of the 20th century, States only enjoy immunity from suit with respect to sovereign or governmental acts (*acta jure imperii*), as opposed to commercial or private acts (*acta jure gestionis*).[24] As far as international organizations are concerned, restrictions to their functional immunity are more difficult to define: 'Since international organizations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity is denied',[25] which implies that in the absence of treaty restrictions their immunity is virtually absolute.[26] Yet, since the 1970s there is a judicial tendency to apply stricter functional immunity standards, as demonstrated by various decisions in which the immunity of an international organization was tested against rule-of-law tenets, in particular the right of access to justice. As already noted, the ECtHR in *Beer & Regan* and *Waite & Kennedy* endorsed the view that limitations of the right of access to the courts are unacceptable if they impair 'the very essence of the right', if they do not pursue 'a legitimate aim' and if there is not 'a reasonable relationship between the means employed and the aim sought to be achieved'. National courts as well have considered the availability of alternative means of redress to be a relevant factor in the adjudication of an international organization's claim of immunity.[27] In this light, the

22. The Supreme Court did not discuss the scope of either Convention. Art. 1 ECHR provides that '[t]he High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention', while Art. 2 International Covenant on Civil and Political Rights requires each Contracting State 'to ensure to all *individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [emphasis added, dB]'. It should be noted that the Mothers of Srebrenica Foundation, while created under Dutch law and domiciled in the Netherlands, probably does not qualify as an individual within the meaning of the conventions. The individual plaintiffs were citizens and residents of Bosnia Herzegovina.

23. Cf. Xiaodong Yang, *State Immunity in International Law* (Cambridge, Cambridge University Press 2012) p. 10, referring to voluntary submission (waiver) on the one hand and an immovable property exception on the other.

24. Cf. M.N. Shaw, *International Law*, 6th edn. (Cambridge, Cambridge University Press 2008) pp. 697 et seq.; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. edn. (London, Routledge 1997) pp. 118 et seq.; Judith Spiegel, *Vreemde staten voor de Nederlandse rechter* (Foreign states before the Dutch courts) (Zwolle, W.E.J. Tjeenk Willink 2001) pp. 35 et seq. and *passim*; Yang, *supra* n. 23, pp. 75 et seq. See also: Part III of the UN Convention on Jurisdictional Immunities of States and Their Property (2004), Arts. 10 et seq., regarding 'proceedings in which State immunity cannot be invoked'.

25. Reinisch and Weber, *supra* n. 21, p. 63.

26. See also: Dekker and Ryngaert, *supra* n. 13, p. 93.

27. For an extensive survey, see: Reinisch and Weber, *supra* n. 21, pp. 76 et seq.; Dekker and Ryngaert, *supra* n. 13, *passim*.

appellate decision in the present case is in line with the modern trend of balancing functional immunity against the protection of human rights.[28]

(5) However, the Dutch Supreme Court rejected a balancing test on the ground that the 'UN (Security Council) occupies a special place in the international legal community'. Citing the ECtHR in *Behrami* and *Saramati*, the Court decided that the UN's immunity is absolute and that UN Members are bound to respect it, regardless of conflicting obligations imposed by other treaties: the UN Charter (Art. 103) expressly provides that, in the event of a conflict, 'their obligations under the present Charter shall prevail'. The Court then went on to consider plaintiffs' assertion that a conflict between rules of international law should be resolved by hierarchical reasoning, in which human rights obligations have a higher status than those regarding the jurisdictional immunity of international organizations, including the UN. According to the plaintiffs, '[t]here is no higher norm in international law than the prohibition of genocide. … The view that the UN's immunity weighs more heavily in this case would mean *de facto* that the UN has absolute power … and would not be accountable to anyone, not being subject to the rule of law…'. As we have seen, the Supreme Court rejected this argument on the ground that the majority in the ECtHR's *Al-Adsani* decision had refused to accept the proposition that under current international law a foreign State is not entitled to immunity in civil actions based on an allegation of torture committed in its territory. Obviously, the Supreme Court was aware of the fact that this judgment had been reached by the narrowest possible majority of nine votes to eight, which suggests the possibility of a different outcome if the ECtHR may have to rule again on the hierarchical status of conflicting norms of international law. As luck would have it, just a few weeks before the Supreme Court's ruling the ICJ rendered a decision that corroborated the *Al-Adsani* argument: the proposition that *jus cogens* displaces the law of State immunity 'has been rejected by the national courts of the United Kingdom, Canada, Slovenia, Poland, New Zealand and Greece [citations omitted, dB] as well as by the European Court of Human Rights in Al-Adsani v. United Kingdom and Kalogeropoulou and others v. Greece and Germany … Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens*, the applicability of the customary law on State immunity was not affected.'[29]

(6) The case before the ICJ concerned a dispute between Germany and Italy over Italy's failure to respect Germany's jurisdictional immunity by allowing civil claims to be brought in Italian courts in which the claimants sought reparation for war crimes committed by the German *Reich* during the Second World War. Italy argued that, considering the subject matter and the circumstances of the claims,[30]

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28. Cf. the title of the report by Dekker and Ryngaert, *supra* n. 13, as well as their propositions 4 and 5, ibid., at p. 108.

29. ICJ 3 February 2012, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, paras. 96-97.

30. Another argument Italy advanced was based on the *territorial tort principle*: 'a State is not entitled to immunity in respect of acts occasioning death, personal injury or damage to property on

a denial of immunity was justified on three grounds: (1) international law restricts a State's right to immunity when that State has committed serious violations of the law of armed conflict; (2) to the extent that the law of armed conflict consists of rules of *jus cogens*, it must prevail over the rules that do not have that status, including the rule of immunity; and (3) international law makes the entitlement of a State to immunity dependent on the existence of effective alternative means of securing redress.

With regard to the first argument, the ICJ first observed that it presents a 'logical problem', in that it would require a court either to hold an inquiry into the merits before it can rule on the preliminary immunity issue, or to accept the mere allegation that the State had committed such serious violations as to deprive it of its immunity. The Court then went on to establish that under customary international law 'as it presently stands' 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.

The second argument, as already mentioned, was also rejected, not only on the ground that there is no basis in State practice supporting the proposition that *jus cogens* prevails over the rule of immunity, but also for dogmatic reasons. As the ICJ sees it, there is no conflict between the rules of armed conflict and the rule on State immunity: 'The two sets of rules address different matters.' The rules determining the scope and extent of jurisdiction are procedural in character and have no bearing on the (un)lawfulness of a State's conduct. They 'do not derogate from those substantive rules which possess *jus cogens* status', hence there can be no friction between them.

The ICJ also made short shrift of Italy's 'last resort' argument. While aware of the fact that jurisdictional immunity may deprive the plaintiff of any form of adjudication, it could find no basis in State practice, nor in national legislation, nor in the jurisprudence of national courts, nor in the ECHR, nor in the UN Convention on Jurisdictional Immunities of States and their Property (2004) that entitlement to immunity is preconditioned on the availability of alternative means of securing judicial redress.

It is interesting to note that the ICJ also refused to consider the combined effect of the three arguments. Again, it could find no basis in State practice to support the proposition that the concurrent presence of two or even all three elements would justify a refusal to accord a respondent State the immunity to which it would otherwise be entitled. It added that a balancing test, in which the various circumstances that might justify the exercise of jurisdiction are weighed against the interests protected by the law of immunity, 'would disregard the very nature of State immunity'. Since questions of immunity must be determined at the outset of the proceedings, before consideration of the merits, 'immunity cannot be made

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the territory of the forum State, even if the act in question was performed *jure imperii*'. The ICJ found no support for this proposition in State practice.

dependent upon the outcome of a balancing exercise of the specific circumstances of each case'.

(7) It should be reiterated that the ICJ addressed a question of *State* immunity, but I do not see why its reasoning with regard to the (combined effect of the) arguments advanced by Italy would not apply to the immunity of an international organization. If this is true, the ICJ's unconditional endorsement of the immunity principle is in sharp contrast with the 'balancing exercise' in which the ECtHR engaged in *Beer & Regan* and *Waite & Kennedy*. Even if it could be argued that a distinction should be made between the immunity of international organizations such as the European Space Agency in an employment dispute and the immunity of the UN in an action arising from alleged violations of international humanitarian law, the ICJ made it clear that, with respect to State immunity, neither the gravity of the unlawful act that gave rise to the action nor the peremptory nature of the rule allegedly violated has any bearing on the immunity issue, and in my view there is no compelling reason why this holding would not equally apply to the immunity of international organizations, as long as their activities meet the requirement of functional necessity.

On the other hand, reliance on the ICJ judgment in cases involving organizational immunity would seem to run counter to the recent trend towards a restrictive approach. There is a growing demand to hold international organizations accountable for unlawful acts, and an analysis of recent case law shows that the courts are looking for ways to lift the immunity barrier, particularly in situations in which an individual has no other means of judicial redress. It remains to be seen how the ECtHR will respond to the Dutch Supreme Court's approach to organizational immunity in the present case.[31] The allegation of the Mothers of Srebrenica that the UN would not be subject to the rule of law if it cannot be held accountable for its wrongful acts in any court or tribunal – an issue the ICJ did not need to discuss – may call for a different line of reasoning to resolve immunity claims by the UN than the one adopted by the ICJ and the Supreme Court.

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31. According to a press release by their counsel, the Mothers of Srebrenica lodged a complaint with the ECtHR on 11 October 2012. Its tenor can be grasped from the following quotation: 'The decision of the Dutch Supreme Court grants uncontrolled absolute power to the UN and makes human rights subordinate to this absolute power. That is unacceptable from a political, legal and moral perspective. The Mothers of Srebrenica trust that the ECHR shall not abandon them in their fight for justice.' The full text of the application can be found at: <www.vandiepen.com/en/srebrenica/detail/142-1)-application-to-the-ecthr-of-11-october-2012.html>.