WRIT OF SUMMONS
DISTRICT COURT, THE HAGUE

This day, the _____ TWO THOUSAND AND EIGHT,

Upon the application of:

1. Aleksandar Bozic; ul.Maršala Tita,75430 Srebrenica, BH
2. Gordana Zekic; ul.Rudarska, 75430 Srebrenica, BH
3. Milena Bibic; Dugo polje, 75430 Srebrenica, BH
4. Miloje Grujicic; naselje Moštanica,75420 Bratunac, BH
5. Milojka Bibic; ul.Vase Jovanovića,75430,Srebrenica, BH
6. Novak Balcakovic; Brezani,75430,Srebrenica. BH
7. Stanimir Dimitrovski; Kalemarska 11 J, 11000 Beograd, Serbia
8. Stichting Srebrenica Historical Project, Usselincxstraat 60, 2593 VM Den Haag, The Netherlands

The Plaintiffs have elected a domicile in Den Haag at Usselincxstraat 60.

I have,

SUMMONED:

1. the **State of the Netherlands (Ministry of General Afairs)**, having its seat at The Hague, there at the public prosecutor's office of the Procurator-General to the Supreme Court (in Dutch 'Hoge Raad') having delivered my

writ and having left a copy of this document and of the Exhibits to be further specified:

2. an organisation with legal personality **The United Nations**, having its seat in New York City (NY 10017), New York, United States of America, on First Avenue at 46th Street, not having a recognised seat in The Netherlands, there at the public prosecutor's office of the Procurator-General to the Supreme Court (in Dutch 'Hoge Raad')

IN ORDER:

on

not in person but represented by a procurator, to appear at the

hearing of the District Court, The Hague, The Netherlands, which then and in that place will be held in the court building at Prins Clauslaan 60;

EXPLICITLY STATING:

that should Defendants not appear in the proceedings on the first date specified on the roll or on another date to be set down by the court or fail to appoint a procurator, the prescribed periods and formalities being complied with, the court will grant leave to proceed in default of appearance against Defendants and award the claim by default, unless the court finds the claim unlawful or unfounded; that should one of the Defendants appear and the other not and in respect of the Defendant who appears the prescribed periods and formalities being complied with, the court will grant leave to proceed in default of appearance against the Defendant who does not appear, proceedings will continue between the Defendant who appears and Plaintiff

and between all parties a judgment will be delivered that is to be considered a judgment in a defended action;

IN ORDER TO:
in that case and at that place hear the following being claimed and moved:

Introduction

1. Defendants failed, as specified in the body of this Writ, to honour their obligation to undertake everything reasonably within their power to extend equal protection to all endangered non-combatants in the region of Srebrenica during the conflict between 1992 and 1995, and specifically they failed to implement the contractually mandated demilitarization of the Moslem controlled enclave of Srebrenica beginning in April of 1993. As a result of that failure, material conditions were allowed and/or created by the Defendants which made possible the murder of the persons on behalf of whose survivors this Writ is being brought.
Plaintiffs 1 through 7 (hereafter referred to in the interests of readability as: 'Plaintiffs') and Plaintiff under 8 [hereinafter referred to as: the Project]
hold the Defendants, hereafter referred to as: 'the State of the Netherlands' and 'the UN', jointly responsible for the damages suffered by them. The Project is a legal entity [„Stichting"] under Dutch law.

2. In these proceedings Plaintiff and the Foundation seek a judicial declaration that the State of the Netherlands and the UN, due to a failure to perform their solemn undertakings and inherent obligations, acted unlawfully with respect to Plaintiffs and the murdered members of their

families. Plaintiffs (under 1 through 7) further claims an advance of EUR 1 [one] per person for the loss and injury suffered and yet to be suffered by them, as well as damages yet to be determined by the court.

3. The claims of Plaintiffs and of the Project rest upon the actions, or at least the omissions, of the State of the Netherlands and the UN, within the framework of relevant international and domestic laws, to be discussed in detail in Section II of the body of this Writ, to protect all the inhabitants of the enclave and wider war-affected zone of Srebrenica declared by the UN as a 'Safe Area', that obligation being applicable to all non-combatants without regard to ethnicity or religion;

In this the following matters – in a nutshell – are relevant:

- The United Nations is a supranational organization devoted to the maintenance of peace and the settling of international conflicts through the use of mediation and, where necessary, peacekeeping. It is not authorized to act as a party in any conflict, to take sides, to favor one party over another, or to promote the geopolitical interests of any particular grouping of its member states. As Plaintiffs will specify in their Writ, in the micro conflict which during the wider Bosnian war raged in the region of Srebrenica between 1992 and 1995, the United Nations failed in its mission to treat impartially and evenhandedly all parties in that conflict. In the particular case which is the subject of this Writ, that failure was to the detriment of the Serbian and non-Moslem population of the region of Srebrenica, of whom up to a thousand were brutally murdered or have disappeared, more than three dozen villages were razed and local communities were destroyed,[1]

[1] The Plaintiffs are currently in a position to document at least 650 murders of non-combatants of Serb and non-Moslem ethnicity committed by Moslem forces operating out of the Srebrenica enclave.

private property and cultural and religious facilities [see Annex I-6] belonging to them were pillaged and/or demolished; and up to 15,000 were expelled by force or threat of imminent harm from their homes;

- The State of the Netherlands agreed to assist the United Nations, of which it is a member, in the implementation of its mission in Bosnia, specifically in the region of Srebrenica, when a safe area was established there by agreement of all the parties, including the UN, in April of 1993;

- By integrating itself within the mission undertaken by the UN in the region of Srebrenica, the State of the Netherlands assented to and assumed all obligations that were legally or inherently attributable to the UN within the scope of that mission;

- In reaction to the persistent, murderous, and destructive attacks of Moslem armed forces within the enclave of Srebrenica upon the surrounding areas, which consisted of villages and settlements populated by Serbs and other non-Moslems, including a military offensive in the Spring of 1993 aiming to expand the zone under their control, a counter-attack was mounted by Serbian forces. That counter-attack by April of 1993 greatly reduced the area under the control of Moslem armed forces and, indeed, raised the specter of their definitive military defeat. It is only at that point that the Defendant United Nations indicated a public awareness of the humanitarian implications of the situation, but only in relation to the Moslem inhabitants of the Srebrenica enclave;

- On April 17, 1993, an agreement [supplemented and expanded by another one signed on May 8, 1993] was reached by the parties, including the United Nations. It provided for the Serbian counter-attack to be halted along demarcation lines in existence at the time of signing, and in return—and as a guarantee that conduct which provoked the Serbian counter-attack shall not

be repeated—that a demilitarized safe area should be established under the control and supervision of the United Nations, and with a UN military contingent overseeing its implementation, including the safe area demilitarization clause;

- The United Nations, and its surrogate in the field between February 1994 and July 1995, the State of the Netherlands with its military contingent known as Dutchbat, did not take any steps, as they were required to, to demilitarize the Moslem enclave or to effectively impede the flow of arms and military equipment to it which continued unabated throughout the period of existence of the "safe zone";

- As a result of the availability of armaments and military equipment, and their integration within the overall structure of Moslem armed forces commanded and controlled by the government based in Sarajevo, Moslem armed forces in Srebrenica neither demilitarized nor dissolved. Instead, by early 1995 they had reorganized themselves into the 28th Division, a formidable military unit ready to take part in broader military operations on behalf of the Moslem party in the Bosnian war;

- Fully armed and aggressive Moslem armed forces within the enclave of Srebrenica continued to use the "safe zone" as a platform for military operations against the Serbian side and for uninterrupted attacks on Serbian settlements within their reach, resulting in the death of inhabitants on behalf of whose relatives this Writ is being filed for damages.

4. Plaintiffs wish to raise the following matters before moving to the formulation of their claims:

I. Introduction

A. Synopsis of the general factual background

[1] In the period between April 1992 and November 1995 [the Dayton Peace Agreement concluding the war was signed in November of 1995] a frightful civil war raged on the territory of Bosnia and Hercegovina [hereinafter: BH], formerly a republic of Socialist Federal Republic of Yugoslavia [hereinafter: SFRJ]. The protagonists of that war were the armed units of the three principal ethnic groups in BH, that is to say Moslems, Serbs, and Croats. The political background and causes of that conflict are not central for the purposes of this Writ which focuses on specific crimes facilitated by the Defendants. Those crimes occurred in the Srebrenica region of BH and they took place in the context of the general conflict referred to above. As a result, the direct victims and their survivors, who are bringing on this Writ, suffered grave injury.

[2] However, the background continues to be important for a thorough understanding of the context in which these specific crimes took place, and were facilitated by the Defendants. The background in question comprises two distinct aspects, but they are part of an integral whole. Both aspects of that whole are essential for the proper contextualisation of the tragic details with which this Writ is concerned. In the first place, a series of highly problematic policy decisions were made on the international level which had a very negative impact on all ethnic groups living in BH, and in particular on the fate of innocent Serbian and non-Moslem victims on whose behalf this

Writ is being filed. Not only now, with the benefit of fifteen years of hindsight, but also at the time they were made and implemented, it would seem that those policies did not seek to resolve the deep systemic and ethnic crisis that was shaking SFRJ to its foundations, and which threatened to plunge it into a merciless civil war, but quite the contrary. The powers which offered to mediate SFRJ's internal crisis, countries of the so-called "international community," which in practice meant a few of the leading states of the then European Union [Germany, Great Britain, France, Holland] later to be joined as an influential actor in crisis resolution by the US, at first claimed to support the integrity of SFRJ as a federal state. However, very soon they changed their position and began lending support to secessionist movements. An illustrative, although far from only, example of such policies is the conduct of the then US ambassador to SFRJ, Warren Zimmermann. In April 1992 he suggested to the secessionist inclined president of the presidency of BH, Alija Izetbegovic, that he should feel free to withdraw his signature from the just concluded agreement for peaceful power sharing in BH known as the *Cutilheiro Plan*, if it no longer suited him. Izetbegovic took this unsubtle signal from the ambassador of the most powerful country in the world at that time as tacit approval to reject the compromise agreement with the remaining two constituent ethnic groups in BH [Serbs and Croats], and to again openly embrace his maximalist position of a unitary BH under the domination of Izetbegovic's own fundamentalist Moslem faction. That particular "solution" was completely unacceptable to the other communities, and therefore it directly and predictably led to war. This, and numerous other similar examples, offers glaring proof of the harmful impact of the so-called "international community's" interference as it became involved first in the political prelude, and later in the actual

conduct of the war in BH. Their engagement on the whole was quite injurious to the peace, security, and even the lives of innocent citizens of that republic, regardless of ethnicity and religious faith. That negative engagement lasted continuously throughout the conflict and it was reflected in numerous specific examples of biased political behavior. Or—in relation to the events which are the subject of this Writ—not only behavior, but also in deliberate and unjustified failure on the part of the Defendants, UN and State of the Netherlands, to act appropriately when they were required to. Their failure to act in this case had fatal consequences for the direct victims, and it caused long-lasting pain and suffering, and other forms of irreparable damage, to their survivors.

[3] Policy decisions made by powerful and influential foreign actors, which on the whole chose not to take into account the arguments and legitimate interests of the Serbian side in relation to the disputed issues in BH, greatly complicated the task of reaching a peaceful compromise solution between the warring ethnic communities. But in addition to that, there was also another prong to what can only be described as a deliberate strategy to inflict the greatest possible degree of damage to legitimate Serbian interests, while benefiting others. That was the use of the crudest propaganda devices in order to systematically distort the reality on the ground. The main protagonists of this propaganda strategy were the government in Sarajevo, which was subject to the religious ideology and political objectives of the Izetbegovic faction, public relations companies in leading Western countries which were on the payroll of that Sarajevo government and its sponsors among the extremist states of the Moslem world, as well as the most important international media outlets which for the most part uncritically,

without verification, and often with the utmost enthusiasm, disseminated a deluge of fabrications designed to discredit the Serbian side. In that professionally created atmosphere of single-mindedness, where international public opinion was indoctrinated with a primitive and simplified view of the causes and the progress of the conflict in BH, the Serbian side almost without exception was portrayed as the personification of evil and its goals as obviously unreasonable and unjustified. Annex A-1 cites specific facts and examples of how this combined political and propaganda strategy worked not only to damage the interests of the Serbs, but just as effectively to undermine lasting and just peace in BH. In the opinion of the Plaintiffs, significant harm resulted from the setting aside of objective criteria in assessing the causes and underlying issues of this conflict, both in the international forums where relevant decisions were being taken, and in the international media where public perceptions were being shaped according to a distorted picture of what was happening in BH. *Inter alia*, that created a climate where innocent Serbian victims, only because of their Serbian ethnicity, remained unnoticed and in fact ignored. This Writ is being submitted in great part not merely so that Serbian victims' survivors would receive due material compensation, but more importantly in order that the victims themselves could obtain the moral rest and satisfaction to which they are unconditionally entitled. But it should be noted that regardless of the appearance of favoring only one side in the BH conflict, to the extent that it subverted the climate necessary to agree on a lasting and just peace, that propaganda harmed in equal measure all peaceful BH citizens, regardless of nationality. That is because its practical effect was to inflame the war and to further destabilize not only BH, but the region as a whole. Therefore, in the final analysis it suited only the selfish interests of powerful international

actors whose goal was to secure for themselves the utmost degree of control over the sovereignty, political life, and resources of until recently free and equal nations.

[4] In addition to the direct causes, which led to the tragic human consequences at the core of this Writ, not only on the Serbian but also on the Moslem side, and which will be dealt with in detail further on, it is important to point out that this perfidious political scheming and skillfully cultivated propaganda climate, in terms of its effects represented a crime against the peace. The protagonists of that crime are not the explicit target of this Writ, but their responsibility nevertheless stands in the background of all the specific occurrences which this Writ highlights. They are the ultimate cause of the undeserved human suffering experienced by Serbs, Croats, and Moslems alike, although only one particular segment of Serbian suffering is the subject of this Writ against the UN and the State of the Netherlands. The contours of that crime are portrayed in Annex I-1 only illustratively, in order to assist the Honorable Court in acquiring a more comprehensive picture of the relevant events so that it could assess with greater precision the issues which form the *meritum* of this case. But even based on the very general account presented in that Annex, it is clear that this was calculated political conduct, including deliberate misrepresentations of reality, with the aim of inciting war and spreading its effects. It is for such activities precisely that upon the conclusion of World War II, in Nuremberg, the leadership of the aggressive Nazi state was condemned. By limiting the circle of the accused in this Writ only to the UN and to the State of the Netherlands, the Plaintiffs not only do not renounce in advance the right to pursue other potential

participants in this enterprise by all available legal means, but—on the contrary—they explicitly reserve that right.

B. Brief discussion of the basic grounds of the liability of the Defendants

[1] This Writ is directed against the United Nations Organization and the State of the Netherlands. They are held liable for the death of a certain number of persons during the period of existence of the Srebrenica protected zone, between April 17, 1993, and end of June 1995.

[2] The liability of the Defendants is based on the fact that, during the indicated period, or in various segments of that period, they failed to take action to prevent the commission of crimes against citizens of Serbian [and other non-Moslem] ethnicity, although that was not only an implicit task of their peacekeeping mission, but was also an express and essential obligation arising from agreements reached at the local level, into which the Defendants entered together with the warring parties.

[3] One of the specific grounds for the liability of the Defendants, although it is not the exclusive one nor does it diminish the significance of other grounds, is the failure of the Defendants during the existence of the protected zone to implement the demilitarization of the Moslem side in the enclave of Srebrenica. By refusing to implement that obligation, the Defendants materially facilitated the commission of crimes against citizens of Serbian and non-Moslem ethnicity, which crimes are the subject matter of this Writ, thereby contributing substantively to the infliction of harm

suffered by the direct victims and their survivors. Although it was neither the only nor the exclusive one, in the opinion of the Plaintiffs this is in itself a sufficient ground to impute liability to the Defendants and to create a corresponding obligation to compensate for the resulting damage.

[4] Failure to implement unequivocal obligations in relation to the Srebrenica enclave starting on April 17, 1993, is certainly sufficient to impute the entire range of applicable legal liabilities to the Defendants, but it is also the position of the Plaintiffs—to which they call particular attention of the Honourable Court—that the degree of responsibility of the Defendants is enormously augmented by the following circumstance. In the region of Srebrenica, hostilities broke out in April 1992, culminating in the Spring of 1993 in the passing of a UN Security Council Resolution which provided for the establishment of a protected zone. Parallel with the Resolution and in concert with it, a trilateral agreement was concluded between the representatives of the Republic of Srpska [the official designation of the Serbian side], the BH authorities in Sarajevo and their armed forces, and of UNPROFOR [armed peace-keeping forces under the command of the UN]. [2] In the period intervening between April 1992 and the conclusion of the above agreements in April and May of 1993, a long series of unprovoked attacks on Serbian villages and communities in the region of Srebrenica took place, involving the commission of horrific crimes against the Serbian population [See Annex I-2: map of Serbian villages subjected to attack and a

[2] According to the agreements, the Serb side undertook to halt its military advance and all combat activities against Moslem forces in the Srebrenica enclave in return for the demilitarization of the zone under the supervision of the UN and its military contingent. The first such contingent was Canadian, and from February 1994 to July 11, 1995, it was Dutch.

list of those villages and statements given by survivors]. Those attacks were carried out by Moslem armed forces from Srebrenica under the command of Brigadier Naser Oric, who was directly linked through the chain of command to the Main Staff of the Moslem army in Sarajevo [See Annex I-3: reports and orders which document the link of Oric's unit in Srebrenica and the superior military and political authorities under Moslem command in Sarajevo]. The scope and brutality of these attacks, which targeted primarily the civilian population, which is to say women, children, and the elderly, surpasses the power of words to adequately describe. As part of those attacks, human beings were murdered in bestial fashion not only with firearms, but also by throat slashing, the use of dull objects, live immolation, etc. and these acts were often accompanied by indescribable tortures. [See Annex I-4: statements of survivors]. These bestialities lasted for a full year before the Srebrenica protected zone was established by UN resolution. These unspeakable atrocities were, or should have been, obvious to UNPROFOR forces which were deployed throughout BH, including the region of Srebrenica, and to their political and intelligence agencies, which were kept regularly informed. The Serbian side on numerous occasions drew the attention of UN organs to those facts and forwarded material evidence concerning them. An example of such a report is the Memorandum submitted by the ambassador of the Federal Republic of Yugoslavia to the UN, Radomir Djokic, dated June 2, 1993 [Annex I-5] entitled "*Memorandum on war crimes and crimes and genocide in East Bosnia (communes of Bratunac, Skelani, Srebrenica) committed against the Serbian population from April 1992 to April 1993*". This and other similar documented evidence clearly points to the conclusion that prior to the establishment of the protected zone citizens of Serb ethnicity in Srebrenica

and the environs were in mortal danger from attacks by Srebrenica Moslem forces because Moslem forces not only had refused to respect international norms which govern the treatment of non-combatants during hostilities, but had failed also to honour some of the basic rules of humane conduct which were incumbent upon them as much by their position as neighbours and fellow citizens as by the moral imperatives of their Islamic faith.

[5] The Plaintiffs believe that the foregoing considerations, which will be articulated in greater detail further on, act in great measure as an aggravating factor when assessing the degree of the Defendants' liability. The obligations arising from the agreements signed by the three interested parties, including the UN, on April 17 and May 8, 1993, are absolutely binding and their non-fulfillment is sufficient to support the conclusion of the Defendants' liability for legal and material consequences thereof. However, the fact that the Defendants were on notice in relation to the events which were taking place between April 1992 and April 1993, and which clearly pointed to the lethal danger which threatened Serbian non-combatants and their property, whether that knowledge was derived from the observations of their personnel in the field, from information gathered by their own intelligence agencies, or from the incessant protests and warnings of the Serb side, enhances their liability to a significant degree. The Defendants are barred from arguing that their failure to demilitarize Moslem forces in the Srebrenica protected zone may technically be a source of liability, but that it is mitigated by the Defendants' inability to foresee and take into account its likely consequences. The cited facts deprive that excuse of both legal and moral effect. The course of events prior to the establishment of Srebrenica protected zone in April of 1993, which the

Defendants not only could not avoid noticing, but which could not even be concealed considering the widespread nature, frequency, and cruelty of the conduct in question, and concerning which the Defendants were in any event being constantly informed by the Serb side, dictates only one possible conclusion. The Defendants, UN and the State of the Netherlands, based on the previous years' experience, were fully cognizant of the probable fatal consequences of non-fulfillment of that part of their assumed obligations which referred to the demilitarization of Srebrenica protected zone and the disarming of Moslem forces within it. When after the entry into effect of the Srebrenica protected zone agreement the Defendants decided not to carry out those obligations, they willfully took upon themselves full responsibility for all the resulting consequences, which were no longer a matter for speculation but were entirely foreseeable.

II. LEGAL SECTION

II.1. Jurisdiction and legal personality

II.1.1. Jurisdiction

Article 2 of the Code of Civil Procedure (hereinafter: 'CCPr.') provides that:

"In zaken die bij dagvaarding moeten worden ingeleid, heeft de Nederlandse rechter rechtsmacht indien de gedaagde in Nederland zijn woonplaats of gewone verblijfplaats heeft"

By virtue of this article and the general principle of *par in parem non habet iurisdictionem* (states are equal and no not sit in judgment over another state), it is submitted that the Dutch courts are competent to hear the present case against the State of the Netherlands (*see*, e.g., K. Ipsen, Völkerrecht, C.H. Beck 2004, 5th ed., page 373).

Article 99 CCPr. regulates the territorial competence of the Dutch courts and provides that:

"1. Tenzij de wet anders bepaalt, is bevoegd de rechter van de woonplaats van de gedaagde.

2. Bij gebreke van een bekende woonplaats van de gedaagde in Nederland is bevoegd de rechter van zijn werkelijk verblijf"

It follows from this article that the District Court of The Hague is territorially competent to hear the present case against the State of the Netherlands.

Article 7, para. 1 CCPr. provides that:

"Indien in zaken die bij dagvaarding moeten worden ingeleid de Nederlandse rechter ten aanzien van een van de gedaagden rechtsmacht heeft, komt hem deze ook toe ten aanzien van in hetzelfde geding betrokken andere gedaagden, mits tussen de vorderingen tegen de onderscheiden gedaagden een zodanige samenhang bestaat, dat redenen van doelmatigheid een gezamenlijke behandeling rechtvaardigen"

By virtue of this article, it is clear that the Dutch courts have jurisdiction in respect of the United Nations as well, because of the close connection that exists between the claims against both Defendants, to the extent that grounds of expediency justify a combined hearing on this matter.

Article 107 CCPr. regulates the territorial jurisdiction in cases of close connection between more than one Defendant, and states that:

"Indien een rechter ten aanzien van een van de gezamenlijk in het geding betrokken gedaagden bevoegd is, is die rechter ook ten aanzien van de overige gedaagden bevoegd, mits tussen de vorderingen tegen de onderscheiden gedaagden een zodanige samenhang bestaat, dat redenen van doelmatigheid een gezamenlijke behandeling rechtvaardigen."

It follows from this article and the applicability of Article 7, para. 1 CCPr., that the District Court of The Hague is territorially competent to hear the claim against the United Nations, for such a close connection exists between the claims against both Defendants that a combined hearing on this matter is justified for reasons of expedience.

II.1.2. Legal personality

Article 104 of the Charter of the United Nations provides that:

"*The organization [of the United Nations] shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of*

its functions and the fulfillment of its purposes"

Further, Article I, Section 1 of the Convention on Privileges and Immunities of the United Nations (hereinafter: 'Immunities Convention'), adopted by the General Assembly on February 13, 1946 in order to further clarify, *inter alia*, the issue of the legal personality of the UN, states that:

"The United Nations shall possess juridical personality. It shall have the capacity: (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings"

It is submitted that Article I, Section 1 of the Immunities Convention is not exhaustive. More specifically, according to the literature and case law on this point, the UN also has the required legal capacity to appear before the court as Defendant (*see*, *inter alia*, Seidl-Hohenveldern/Rudolph, "Article 104" in B. Simma, *The Charter of the United Nations, A Commentary*, second edition, volume II, number 10).

The legal personality of the UN has also been established by the International Court of Justice in its opinion on *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory opinion, 11 April 1949, ICJ Rep. 1949, page 174).

Furthermore, the UN's legal personality has also been confirmed by domestic case law (*see*, e.g., Tribunal Brussels, Manderlier/UN, 11 May 1966, 45 International Law Reports 446) and literature (*see*, e.g., M. Zwanenburg, *Accountability of Peace Support Operations*, 2005, page 66).

For the above reasons, it is submitted that the United Nations can, in the current proceedings, appear as Defendant before the present Court.

II.2. United Nations immunity

II.2.1. Applicable law

Article 105 of the Charter of the United Nations provides that:

"1. 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.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

In accordance with paragraph 3 of Article 105, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of

the United Nations (hereinafter: 'Immunities Convention') on February 13, 1946. Article II, Section 2 of this Convention expressly provides that:

"The United Nations [...] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."

Further, Article VIII, Section 29 of said Immunities Convention states that:

"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 [...]"

It will be shown that, should the UN decide to invoke its immunity without providing for an express waiver thereof, the Court should nevertheless deny this immunity, based on the following.

II.2.2. Balancing interests

II.2.2.1. General

In the quest for an appropriate immunity standard for international organizations, one has to keep in mind that the paramount underlying rationale of functional immunity, *i.e.* the protection of the independent functioning of the organization, should be balanced against the equally cogent demand of protecting the interests of potential litigants in having a possibility to pursue their claims against an international organization before

an independent judicial or quasi-judicial body.

These competing interests have been clearly spelled out by the Dutch Supreme Court in *A.S.* v. *Iran – United States Claims Tribunal* (Supreme Court (Hoge Raad) of the Netherlands, 20 December 1985, (1994) ILR 327, 329). The Court held that "[o]n the one hand there is the interest of the international organization having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances; on the other there is the interest of the other party in having its dispute with an international organization dealt with and decided by an independent and impartial judicial body."

Furthermore, Judges Higgins, Kooijmans and Buergenthal of the International Court of Justice have expressly stressed the importance of such a balancing of interests when dealing with immunity issues, especially in regards to internationally recognized crimes (*see* Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 71-75). The ICJ Judges observed that one should always keep in mind when balancing the right to a court and immunities, that immunity has no value *per se*, but is merely "an exception to a normative rule which would otherwise apply" (para. 71).

This has been confirmed by the District Court in its decision regarding the immunity of the United Nations in the civil case brought by the Association 'Mothers of Srebrenica' and ten individual plaintiffs, dated July 10, 2008 (hereinafter: 'Decision'). The Court, referring to the UN immunity, held that

it “will have to take into consideration the international-law exceptions to normal procedural rules” (Decision, para. 5.10). It is a generally accepted rule of interpretation that exceptions have to be construed restrictively.

One also has to take into account that the case at hand concerns the responsibility of a State and an international organization for crimes which over time have increasingly been denounced as inhuman. In this respect, the aforementioned ICJ Judges noted that “the weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited” (para. 75 of the Joint Separate Opinion).

In the course of the following paragraphs, it shall be demonstrated that the District Court should carefully balance the interests at stake, and should ultimately find in favor of dismissing the UN claim of immunity.

II.2.2.2. Right to court

Article 14, para. 1 of the International Covenant on Civil and Political Rights (hereinafter: ‘ICCPR’) states that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by

law (...).”

Similarly, Article 6, para. 1 of the European Convention of Human Rights (hereinafter: ‘ECHR’) provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Finally, Article 10 of the Universal Declaration of Human Rights (hereinafter: ‘UDHR’):

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

It should be noted that the State of the Netherlands is a Contracting State to the EECHR and to the ICCPR, and has ratified these conventions.

It is clear from the interpretation of these human rights instruments texts and others that the fair trial guarantees contained in the aforementioned articles include a right of access to court.

In a number of Judgments, the European Court of Human Rights (hereinafter: ‘ECtHR’ or ‘Strasbourg Court’) expressly acknowledged that Article 6, para. 1 ECHR “embodie[d] the right to a court” because it

"secure[d] to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (*Waite and Kennedy* v. *Germany*, European Court of Human Rights, Application No. 26083/94, European Court of Human Rights, February 18, 1999, para. 50 (relying on *Golder* v. *United Kingdom*, Application No. 4451/70, 21 February 1975, Series A No. 18, [1975] ECHR 1, para. 36, and *Osman* v. *United Kingdom*, European Court of Human Rights, European Court of Human Rights, Application No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 136).

In addition to various human rights instruments, there is a strong argument in favor of the existence of unwritten international law, be it a general principle of law or a customary rule, which demands the availability of judicial or quasi-judicial remedies. With particular reference to international organizations it was argued already in the 1970s that the "availability of a legal remedy – as a guarantee of respect for the law – may now be considered a general principle of law in the sense of Article 38 of the Statute of the International Court. This is so by virtue of a customary international rule that is tending to assert itself more and more, that international organizations today appear bound to establish legal remedies" (Bastid, "Have the U.N. Administrative Tribunals Contributed to the Development of International Law?" in Friedmann et al. (eds.), *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup* (1972), p. 309).

It has thus been established that the right to court is a pivotal human right which cannot be limited but for extremely cogent reasons. It shall be shown that the jurisdictional immunity of international organizations, even that of the United Nations, is currently no longer considered to be absolute and can

therefore not justify a breach of Plaintiff's right of access to court.

Indeed, Plaintiff wishes to note here, as shall be demonstrated below, that, should the District Court decide to grant the UN to potentially invoke its immunity, his right to court, as guaranteed by various international human rights instruments, would be violated since no other judicial or quasi-judicial remedies would then be open to Plaintiff to instigate proceedings against the United Nations.

II.2.2.3. Limitations to the jurisdictional immunity of international organizations

Since the mid-20th century the jurisdictional immunity of states has been severely restricted on the grounds of the abovementioned human rights rationale of providing access to justice to private parties. It cannot be denied that this rationale is equally cogent in the context of the immunity of international organizations: the relevant human rights instruments clearly phrase the underlying fair trial rights as rights of individuals entitling them to have a fair third-party adjudication of their claims against anyone else, regardless of whether the opponent might be another private party, a foreign state or an international organization.

In fact, the necessity for the availability of dispute settlement mechanisms may be even more relevant in the case of international organizations than of states since states can (almost) always be sued before their own domestic courts whereas international organizations usually do not have any comparable internal courts.

Since international organizations do not possess their own domestic courts, the availability of alternative dispute-settlement mechanism will therefore be crucial. If claims are brought against international organizations before national courts and if they are dismissed as a result of the defendant organization's immunity, the forum state will violate the claimant's right of access to court unless it ensures that there is an alternative adequate dispute-settlement mechanism available (Reinisch and Weber, "In the Shadow of Waite and Kennedy", *International Organisations Law Review* (2004), p. 68).

Indeed, the dominant theory in both jurisprudence and literature, is that it is solely the existence of alternative means of settling disputes between international organizations and third parties that justifies maintaining the absolute character of their immunity, for the reason that they neutralize this absolute character (Gailliard and Pingel-Lenuzza, "International Organisations and Immunity from Jurisdiction: to Restrict of to Bypass?", *ICLQ* (2002), 1, 3 and cited jurisprudence and literature).

The International Law Association (ILA) has developed a set of basic authoritative principles reflecting customary international law that govern the right to court of individuals and other third-party victims of damage caused by international organizations.

The principles are as follows (ILA Final Report, p. 207):

"1. As a general principle of law and as a basic international human rights

standard, the right to a remedy also applies to [international organisations] in their dealings with states and non-state parties. Remedies include, as appropriate, both legal and non-legal remedies.

2. Remedies should be adequate, effective, and, in the case of legal remedies, enforceable.

3. A total lack of remedies would amount to a denial of justice, giving rise to a separate ground for responsibility on the part of the [international organisation].

4. [International organisations] should establish the institutional framework to respect and to guarantee the right to a remedy for States and non-state parties who are affected in their interests or rights by actions or omissions of an organ of an [international organization] or one of its agents."

Indeed, there is no reason why the imperative of the protection of human rights should not permeate both primary and secondary rules for international organizations.

The ILA further stressed that the two fundamental principles underlying the proportionality test of immunity vs. right to court are "that the right to a remedy is widely considered to be a general principle of law" and that "the right to adequate means of redress, in case of violation of rights, is a basic international human rights standard, *which should always prevail over the functional needs of an [international organisation]*" (ILA Final Report, p. 208-209 – emphasis added).

The ILA rightly observed that a successful claim to jurisdictional immunity combined with the absence of adequate alternative methods of protection could easily amount to denial of justice. This state of affairs should therefore "be remedied by the availability of adequate alternative remedial protection mechanisms" (ILA Final Report, p. 219).

In this respect, it has been noted in the literature that "the urge on the part of [international organizations] for a narrow definition of waivers is hardly reconcilable with reasonable and legitimate expectations of parties that deal with them (M. Singer, "Jurisdictional immunity of International Organisations: human rights and functional necessity concerns", *Virginia journal of international Law,* 1995, p. 73). The principle of fairness towards parties dealing with international organizations and to other third parties affected by their activities therefore calls for limited immunity, in the same way as that principle underpins restricted state immunity (A. Reinisch, *International Organisations before national courts*, 2000, p. 261-262).

The ILA therefore laid down the following principles on how the immunity of international organizations should be interpreted, to which Plaintiff fully subscribes (ILA Final Report, p. 228):

"1. Executive Heads of [international organisations] should waive the immunity of the Organisation if such a waiver is required by the proper administration of justice and would not prejudice the interests of the Organisation. In this connection, Executive Heads of [international organisations] should follow a restrictive interpretation of the situations

where such waiver would prejudice the interests of the [organisation].

2. In cases which can not be decided by domestic courts because there has been no waiver of immunity, the [international organisation] remains bound by its obligation to provide adequate alternative procedures for settling the dispute, and should faithfully comply with this obligation."

In this regard, the ILA further stressed that (p. 228 of the Report):

"The margin of appreciation left to Executive Heads of [international organisations] in deciding whether or not to waive the immunity of the Organisation or of one of its agents should be restricted to the non-impediment of the proper administration of justice."

Finally, the ILA noted specifically in regards to the United Nations that (p. 228 of the Report – emphasis added):

"Two considerations should be duly taken into account when assessing the potential role of domestic courts. There is an obligation for [international organisations] to make provision for appropriate methods of settlement under Section 29 of the 1946 (General) Convention on Privileges and Immunities of the UN and its equivalents; and there is an obligation for states under human rights instruments to provide access to court in certain situations. States may violate their own human rights obligations by granting immunity to an [international organisation] in the absence of adequate alternative remedial mechanisms. <u>This human rights imperative may result in a limitation or rejection (even by domestic courts) of</u>

jurisdictional immunity claimed by [international organisations], and the actual exercise of adjudicatory jurisdiction, as it can never be considered functionally necessary for [international organisations] to deprive parties dealing with them of all forms of judicial protection."

These findings have been confirmed by several prominent scholars (A. Muller, *International Organisations and their Host-states: Aspects of their legal relationship*, The Hague, London, Kluwer Law International, 1995, p. 271 and M. Singer, *o.c.*, p. 91-95).

It therefore clearly follows from the findings of the International Law Association, as confirmed by the literature, that, in the present case, the essential task of the District Court is to verify whether alternative dispute-settling mechanisms exist and whether they are effective. If this is not the case, the Court should dismiss the United Nations' potential claim of immunity. Otherwise, Plaintiff's right of access to court would be violated, thus incurring the liability of the State of the Netherlands for breach of one of the most fundamental human rights principles.

II.2.3. Alternative remedies as a precondition for immunity

II.2.3.1. Introduction

It has previously been noted that the main reason for granting immunity claims of States is that it is (almost) always possible to instigate proceedings against the State before its own courts, thereby providing an alternative-dispute settlement mechanism. The existence of such alternative remedies is

therefore construed as a precondition for immunity. Since no alternative remedies are open to Plaintiff in the present case, the District Court should dismiss the potential immunity claim of the UN.

The requirement of an adequate dispute-settlement mechanism as a precondition for immunity claims of international organizations flows from a forceful combination of: immunity instruments calling for the establishment of dispute-settlement mechanisms (III.2.); decisions of international courts and tribunals upholding a direct obligation of international organizations to provide for adequate dispute-settlement mechanisms (III.3.); and case law indicating that States would violate the human right of access to right when granting immunity if no alternative remedies exist (III.4.).

II.2.3.2. Immunity instruments

The idea that immunity should be granted to international organizations only upon the condition that adequate alternative redress mechanisms are available to third parties finds a clear legal expression in the Immunities Convention which, as indicated previously, provides in Section 29 that "the United Nations shall make provisions for appropriate modes of settlement of [...] disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."

In the *Curamaswamy Case* (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, [1999] ICJ Rep. 62), the ICJ stressed that the United Nations itself may

become liable for acts performed by their agents in an official capacity. It may thus have to respond to claims brought by third parties, which, in the ICJ's view, are excluded from the jurisdiction of national courts. Instead, they should be settled in accordance with the "appropriate modes of settlement" provided for in the Immunities Convention.

The *Curamaswamy* case, however, has been heavily criticized for not investigating whether actual adequate and effective alternative dispute-settlement mechanisms were open to the private parties concerned, the existence of which the European Court of Human Rights has, on multiple occasions, held to be crucial (*infra*).

In this respect, it should be noted that the mere fact that the United Nations has obliged itself to organize alternative modes of settlement according to Section 29 of the Immunities Convention, is irrelevant, since to this date, more than 60 years later, it has still not done so and there are no indications that it will do so in the near future.

One can hardly justify the absolute character of immunity of an international organization by reference to the existence of alternative means of dispute resolution and, at the same time, allow the organization to not effectively provide such means of redress. For the ECtHR has stressed on many occasions that "the Convention is intended to guarantee *not theoretical or illusory rights, but rights that are practical and effective*. *This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial*" (*Waite and Kennedy* v *Germany*, *supra*, para. 67 – emphasis added). Allowing the United Nations

to invoke its immunity even though there is no real and effective alternative dispute-settlement mechanism, solely because of the fact that there exists a text in which the UN has, a long time ago, stated it would provide such mechanism, even though it still hasn't done so, would make the universally recognised right to access just that: illusory.

It is therefore submitted that one cannot rely on the *Curamaswamy* case to justify the (questionable) finding that no legal grounds exist for the assertion that the lack of an adequate provision within the meaning of article VIII, paragraph 29 of the Immunities Convention warrants a infringement of the principal rule of article 105, subsection 1 of the UN Charter. Such a finding does not take into account that the provision in Section 29 is currently widely accepted by jurisprudence and literature as being the *precondition* for the immunity of the UN. The ICJ has purposefully neglected to investigate the existence of such a precondition and should therefore not be viewed as an authority for the present case.

Additionally, the fact that the ICJ in the *Curamaswamy* case in the end found in favor of the UN, should not be interpreted as compelling the District Court to grant the UN claim of immunity in the present case, for the ICJ case can be distinguished from the case at hand.

The central legal question in the *Curamaswamy* case was not whether the United Nations could rely on its immunity in proceedings before domestic courts, but dealt with the quite different issue of a state's failure to comply with its obligation under international law of informing its domestic courts of the position the UN had taken regarding its immunity and the question of

whether Cumaraswamy had acted in his official capacity of Special Rapporteur of the UN Commission on Human Rights. This is clear from the ultimate finding of the ICJ that Malaysia had violated its obligations under international law by not deciding in *limine litis* on the issue of UN immunity (para. 63 of the Judgment).

Finally, it should be noted that the ICJ in the *Curamaswamy* case only delivered an advisory opinion. The Court expressly held that Section 30 of the Immunities Convention, which states that the opinion given by the Court when interpreting the Convention shall be accepted as decisive by the parties, "*does not change the advisory nature of the Court's function*, which is governed by the terms of the Charter and of the Statute" (para. 25 of the *Curamaswamy* case – emphasis added). The District Court should keep this in mind when judging the authority of the opinion.

For the above reasons, it is submitted that the District Court in the present case should not rely on the *Curamaswamy* case.

The inter-relationship between immunity and the availability of alternative dispute settlement mechanisms has also been acknowledged in the concern that domestic courts might disregard their immunity unless they provided for alternative dispute settlement mechanisms for their staff members (Amerasinghe, *The Law of the International Civil Service* (2d rev. ed., 1994), p. 45). Studies performed by the United Nations itself have viewed the relationship in a similar way when they assert that the availability of such alternatives excludes a violation of human rights or constitutional standards and should thus lead national courts to uphold the immunity

enjoyed by the organization. Indeed, two UN studies dating from 1967 and 1985 clearly indicate that only insofar as "alternative means of legal recourse are at the claimant's disposal, neither Article 10 Universal Declaration of Human Rights nor constitutional guarantees by States compel national courts to deny immunity and to start legal proceedings against the UN" (Gerster and Rotenberg, Article 105, in: Simma (ed.), *The Charter of the United Nations: A Commentary* (2d ed., 2002), p. 1318).

II.2.3.3. Case law establishing obligation to provide alternative remedies

The fourth UN report on relations between States and international organizations expressly stated that, as a corollary of jurisdictional immunity, international organizations are under an "obligation […] to institute a judicial system for the settlement of conflicts or disputes in which they may become involved" (*Díaz-González*, Fourth report on relations between States and international organizations (second part of the topic), UN Doc. A/CN.4/424, YBILC (1989), vol. II (Part One), pp. 153-168, 161).

In the *Effect of Awards Case*, the ICJ even went beyond the direct implication of the Immunities Convention and found a more general obligation to provide for alternative dispute settlement by asserting that it would "[...] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals [...] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them" (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] ICJ Rep. 57). Indeed, it has been noted that "[i]t would be quite ironic to

negate the rights of individuals on the assumption that they might be incompatible with the functions of International Organisations" (M. Arsanjai, “Claims against International Organisations: Quis Custodiet Ipsos Custodes?”, *Yale Journal of World Public Order*, 1980, p. 175, note 172). Some international organizations have in fact justified the establishment of administrative tribunals as the fulfillment of an international legal obligation (*see*, e.g., Memorandum to the Executive Directors from the President of the World Bank, 14 January 1980, Doc. R80-8, 1 *et seq*.).

While the Judgment of the ICJ in the *Effect of Awards Case* focused on staff disputes, the wording of Article VIII, section 29 of the Immunities Convention makes it clear that the obligation to provide for alternative dispute settlement mechanisms is not limited to staff disputes but also extends to private law disputes between organizations and third parties. Further, an arbitration panel expressly held that an international organization’s immunity from suit entailed its duty to arbitrate (*see A (organisation internationale)* v. *B (société)*, ICC Arbitration Award, 14 May 1972, Case No. 2091, Revue de l’Arbitrage (1975) 252).

II.2.3.4. Violation of human rights

There is also a clearly discernible trend in recent immunity decisions, both concerning foreign states and international organizations, to consider the availability of alternative fora when deciding whether to grant or deny immunity. This development is supported by a number of scholars who point out that the grant of immunity might entail a denial of justice if not accompanied by possibilities for alternative dispute settlement (e.g. Ruzié,

"Diversité des Juridictions Administratives Internationales et Finalité Commune. Rapport Général" in Société Française pour le Droit International (ed.), *Le Contentieux de la Fonction Publique International. Paris* (1996), pp. 11, 13; Seidl-Hohenveldern, "Jurisdiction over Employment Disputes in International Organizations" in *Colección de Estudios Jurídicos en Homenaje al Prof.Dr. D. José Pérez Montero. Vol. III. Oviedo* (1988), pp. 359, 368). This danger was also judicially acknowledged by, for example, the French Cour de Cassation, which held in its annual report of 1995 that "[l]es immunités de juridiction des organisations internationales [...] ont, pour conséquence, lorsque n'est pas organisé au sein de chaque organisation un mode de règlement arbitral ou juridictionnel des litiges, de créer un déni de justice [...]" (Cour de Cassation, Rapport annuel (1995), 418). It is in relation to practices such as the aforementioned that the ECtHR has been quoted as stating that "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice" (*Golder*, ECtHR, 21 February 1975, Ser. A, No. 18, para. 35).

Over time, the idea of an effective alternative forum requirement, developed in the context of protecting against fundamental rights violations by international organizations, gained ground in immunity cases where private parties faced this jurisdictional obstacle when they tried to pursue their contractual, delictual or other claims against international organizations. It resulted from a gradual acknowledgement that sweeping immunity provisions exempting international organizations from the jurisdiction of national courts might conflict with the forum states' human rights obligation

to provide access to court.

That the immunity from jurisdiction enjoyed by international organizations must not lead to a deprivation of judicial protection for potential claimants against such international organizations has clearly been expressed in recent judgments by various national courts. The Swiss Supreme Court firmly held that the obligation to provide for alternative dispute settlement mechanisms is a "counterpart" to the jurisdictional immunity enjoyed by them (*Groupement d'Entreprises Fougerolle et consorts c/ CERN*, 1ère Cour civile du tribunal fédéral Suisse, 21 décembre 1992, ATF 118 Ib 562). Similar observations can be found in case law of, *inter alia*, the Italian (*FAO* v. *Colagrossi*, Corte di Cassazione, 18 May 1992, No. 5942, [1992] RivDI 407), Austrian (*W. (individual)* v. *J.(H).A. F.v.L. (Head of State)*, Austrian Supreme Court (Oberster Gerichtshof), 14 February 2001, No. 7 Ob 316/00xx, Austrian Review of International and European Law (2001), pp. 350, 355) and American courts. For example, in the *People* v. *Mark S. Weiner* case, the New York Criminal Court balanced the UN's right to immunity and the constitutional right of American citizens of access to court and made it clear that it would not simply allow immunity to override the "right of every citizen to petition for redress in [American] courts" (*People* v. *Mark S. Weiner*, 378 N.Y.S.2d 966, 975, Criminal Court of the City of New York, N.Y. County, 19 January, 1976; [1979] UNJYB 249).

Further, a German administrative court found an implicit acceptance of the jurisdiction of national courts (and thus waiver of immunity) refusing to assume that the problem of alternative dispute settlement has not been seen or was intentionally unresolved by the legislator (*X. et al.* v. *European*

School Munich II, Bayerisches Verwaltungsgericht (Administrative Court) München, 29 June 1992, M 3 K 90.4137-4141 (unpublished)).

Also a Greek court found its denial of immunity to an international organization "reinforced by the fact that in the opposite case, for the largest part of disputes of private law concerning the international organisations, nowhere on earth would there be jurisdiction" (*International Centre for Superior Mediterranean Agricultural Studies*, Court of Appeals of Crete, 191/1991).

Finally, in *UNESCO* v. *Boulois* a French appellate court rejected a plea of immunity by directly invoking the ECHR. The court thought that granting immunity "would inevitably lead to preventing [Mr. Boulois] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Art. 6 (1) of the [ECHR]" (*UNESCO* v. *Boulois*, Tribunal de grande instance de Paris (ord. Réf.), 20 October 1997, Rev. Arb. (1997) 575; Cour d'Appel Paris (14e Ch. A), 1 Commercial Arbitration (1999) 294; Rev. Arb (1999) 343).

II.2.4. Case law of the ECtHR

II.2.4.1. International organizations: Beer and Regan and Waite and Kennedy

In the two landmark-decisions of *Beer and Regan* (Application No. 28934/95, European Court of Human Rights, 18 February 1999, [1999] ECHR 6) and *Waite and Kennedy* (Application No. 26083/94, European

Court of Human Rights, 18 February 1999, [1999] ECHR 13), both cited by the Disctrict Court in its July 10, 2008 decision, the ECtHR indicated that the immunity granted to an international organization will only be compatible with an individual's right of access to court if it is mitigated by the availability of adequate and effective alternative means of redress.

According to the ECtHR, a limitation to the right of access to court would not be compatible with Article 6 if (1) it did not pursue a legitimate aim, and (2) there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Concerning the second element, the required proportionality, the Court stressed that "*a material factor* in determining whether granting [...] immunity from [...] jurisdiction is permissible is whether the applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention" (*Waite and Kennedy* Judgment, *supra*, para. 68 – emphasis added).

Further, the ECtHR in its final observations held that "*[i]n view of all these circumstances*, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. *Taking into account in particular the alternative means of legal process available to the applicants*, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention" (*Waite and Kennedy*, para. 73 – emphasis added).

Admittedly, the factual circumstances underlying the two aforementioned Judgments of the Strasbourg Court both pertained to the European Space Agency (ESA) and not to the United Nations. The wording of the Judgments, however, makes it very clear that the general underlying principle, *i.e.* that immunities of international organizations in disputes with private parties should only be accepted when adequate alternative dispute-settling mechanisms exist, should apply regardless of the organization involved. In any case, there is no indication that the *Beer and Regan* and *Waite and Kennedy* Judgments were inspired by the fact that the ESA was established after the ECHR came into force or that it had a limited membership, as opposed to the United Nations.

Indeed, the legal questions central to these two Judgments are in all respects distinguishable from the issues the Strasbourg Court dealt with in its *Matthews* Judgment (*Matthews v. the United Kingdom*, 18 February 1999, Application no. 24833/94, ECHR 1999-I), delivered on the same day as the *Beer* and *Waite* Judgments, in which the Court expressly discussed whether the transfer of competences to international organizations could exempt States Parties from responsibility under the Convention. This legal question is completely different from the one at hand in the current case, *i.e.* whether an international organization can rely on its immunity when there are no alternative dispute-settling mechanisms available, and it is therefore submitted that the District Court cannot rely on the reasoning applied in this Judgment or any Judgments inspired by it.

Also, it must be noted that the ECHR confers on civilians a direct right of

access to the court, which means that the court before which a claim is brought must allow access. In so doing, the District Court would in the current case not be imposing the ECHR on the UN, but rather offering protection to the universally recognized human right of access to court, as it is compelled to do under the ECHR.

Finally, it should be stressed that the European Space Agency is governed by the same rules regarding immunity as the United Nations (*see Waite and Kennedy*, para. 38). There is therefore no reason to distinguish the *Beer* and *Waite* cases from the one at hand and to reach a different conclusion. The only distinguishing feature of these two cases when compared to the one at hand, is that the cases of *Beer* and *Waite* only concerned minor labor disputes, whereas the factual circumstances of the current case concern the responsibility of the United Nations for war crimes. This added weight should have a definite effect on the proportionality test proposed by the ECtHR and should, if anything, encourage the District Court in finding in favor of the right of access to court of the plaintiff.

It is further submitted that it is hardly relevant that the *Beer* and *Waite* Judgments of the ECtHR concerned the immunity of an organization with limited, European membership. Similar, heavily contested reasoning was applied by the Civil Tribunal of Brussels to grant the UN immunity claim in the *Manderlier* case (*Manderlier* v. *Organisation des Nations Unies and État Belge (Ministre des Affairs Étrangers),* Civil Tribunal of Brussels, 11 May 1966, J.T. 10-12-1966, No. 4553, 121, Pasicrisie Belge (1966), III, 103, 45 ILR (1972), 446). The courts held that the fundamental right "to a public hearing by an independent and impartial tribunal in the determination of his

rights and obligations" as embodied in Article 10 of the Universal Declaration of Human Rights was not legally binding because it regarded the Universal Declaration as a non-binding "mere [...] collection of recommendations" without the force of law (p. 451). With regard to the clearly binding ECHR the court rather unconvincingly avoided the issue by reasoning that the Convention "was concluded between fourteen European states only, and cannot be applied to and imposed upon the United Nations" (p. 452).

It has been clearly indicated previously that any assertion that the right of access to court would only be hortatory is untenable today. Equally, the argument that an obligation imposed on European states to provide access to court could not apply in civil proceedings brought before such national courts only because the defendant in such proceedings is an international organization whose membership comprises also non-European states, has been severely criticized by various authors and is currently viewed as equally untenable (*see*, e.g., Reinisch, *supra*, 77).

Furthermore, the appellate court in the *Manderlier* case expressly stated that "in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations" and that this situation "does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights" (*Manderlier* v. *Organisation des Nations Unies and État Belge,* Brussels Appeals Court, 15.9.1969, [1969] UNJYB 236, 237). As indicated previously, no change in circumstances has since been observed as regards the possibility for a third party to submit his dispute with the UN to an alternative dispute-settlement

mechanism and there is therefore no reason to find that the reasoning of the ECtHR in *Beer* and *Waite* should not be applied to the United Nations.

It is furthermore submitted that the fact that the UN is currently seen as the most prominent and strong international organization should, if anything, support the claim that it should tolerate exceptions to its immunity, especially in the light of such vital interests as the right of access to court and the prohibition of war crimes. Indeed, international organizations in general, and the UN in particular, have become essential elements of the international legal order, as institutionalized cooperation has spread to virtually every field. As a counterpart to this power, the independence of international organizations would hardly be threatened either by a restriction of their immunity from jurisdiction or by the guarantee, for those with whom they come into contact, of access to justice in accordance with the standards of a state observing the rule of law (Gaillard and Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, ICLQ (2002), pp. 1, 15).

Finally, plaintiff wishes to react specifically to the argument brought forth by the District Court of The Hague in its Decision, where it stated that "[i]t deserves special mention that if [the *Beer* and *Waite* cases did apply to the present proceedings,] under the ECHR primarily that state would be liable for not allowing access to a court of law as a result of the primacy of international-law immunities within whose territory the institution in question has its seat or the asserted wrongful act was committed. In the present case this is certainly not the Netherlands" (para. 5.24 of the Decision). It is respectfully submitted that this argument disregards the fact,

compellingly argued previously, that due to the close connection between the claims against both Defendants, plaintiff should have the opportunity to bring his case against the United Nations before the same court as his case against the Dutch State, for reasons of expediency and good administration of justice (*see* para. …).

It has therefore been shown that there is no reason why the District Court in the present should not follow the settled jurisprudence of the ECtHR regarding immunities of international organizations. Furthermore, it has been compellingly argued that the Court cannot rely on the severely criticised and isolated *Manderlier* case.

II.2.5. States: *Al-Adsani*, *Fogarty* and *McElhinney*

The idea to make the granting of immunity dependent upon the availability of an alternative forum can also be found in a number of state immunity and related immunity decisions, such as the ECtHR Judgments in *Al-Adsani* v. *UK* (*Al-Adsani* v. *UK*, Appl. No. 35753/97, 1 March 2000 (Admissibility), 21 November 2001 (Judgment)), *Fogarty* v. *UK* (*Fogarty* v. *UK*, Appl. No. 37112/97, 1 March 2000 (Admissibility), 21 November 2001 (Judgment), 34 EHRR 302) and *McElhinney* v. *Ireland and UK* (*McElhinney* v. *Ireland and UK*, Appl. No. 31253/96, 9 February 2000 (Admissibility), 21 November 2001 (Judgment)). While it is conceded that the Strasbourg court in these cases saw no violations of Article 6 ECHR, it is important to note, however, that the ECtHR found that Art. 6 was applicable and could therefore, in principle, be violated by grants of immunity.

It should be stressed, however, that the District Court should be weary of relying on the *Al-Adsani* Judgment, rendered by a mere 9/8 majority, since it should be clearly distinguished from the case at hand. Furthermore, the *Al-Adsani* Judgment has been subject to heavy criticism from both ECtHR Judges and authors alike.

In *Al-Adsani* v *UK*, the Strasbourg Court expressly relied on its two-part test of justifying a limitation of the right of access to court as developed in *Waite and Kennedy*, and held that "a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (*Al-Adsani*, *supra*, para. 53). While the Court found the legitimate aim of restricting access to court in the perceived international obligation to grant immunity, it has been observed that it failed to seriously question whether the proportionality requirement had been complied with (*see*, e.g., Voyiakis, *Access to Court* v. *State Immunity*, ICLQ (2003), pp. 297, 311; Orakhelashvili, *State Immunity and International Public Order*, GYIL (2002), p. 227).

Instead of looking for alternative dispute-settlement mechanisms along the lines expressed in *Waite and Kennedy*, it had recourse to a debatable interpretation technique trying to avoid inconsistencies between ECHR demands and other rules of international law. Ultimately, this led the ECtHR to conclude that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1" (para. 56).

Clearly the interests of private claimants in having access to court are out of sight and thus a balancing against the interests of the beneficiaries of immunity does not take place. Instead the Strasbourg court focused in the remainder of its proportionality discussion on the additional argument about the implication of a possible *jus cogens* character of the torture prohibition on immunity in civil compensation suits.

This refusal to balance the interests at stake is clearly at odds with the Strasbourg Court's own settled jurisprudence and has been rightly condemned by, among others, Judge Loucaides. In a Dissenting Opinion attached to the *Al-Adsani* Judgment, the Judge defended the same approach he adopted in *McElhinney* v. *Ireland* and *Fogarty* v. *the United Kingdom*, "which can be summed up as follows. Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1 of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings" (para. 2 of the Dissenting Opinion).

It has been observed that the lack of any serious discussion of the proportionality in the *Al-Adsani*, *Fogarty* and *McElhinney* cases flows from

the fact that in state immunity cases there is always a natural alternative forum in the defendant state (Reinisch and Weber, *supra*, p. 85-86). This follows clearly from the ECtHR's observation in *McElhinney* that "in the circumstances of the present case it would have been open to the applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence" (para. 39). It has been clearly established, however, that such alternative remedy does not exist in the present case.

The *Al-Adsani*, *Fogarty* and *McElhinney* cases therefore clearly demonstrate that state immunity decisions must be distinguished from cases involving the immunity of international organizations in an important way (*see*, in this respect, also *A.A. (individual)* v. *Germany (state)*, Constitutional Court of the Republic of Slovenia, 8 March 2001, Up-13/99-24, Official Journal of the Republic of Slovenia, No. 28/01). In all these cases immunity did not totally deprive the private claimant of dispute settlement mechanisms.

Indeed, it has been noted that, in state immunity cases there is almost always, though sometimes rather inconveniently, the option of suing the foreign state before its own domestic courts. For most types of claims against international organizations, however, this is not the case. The only exceptions are staff disputes where a functional equivalent to a domestic court, an internal board or an administrative tribunal, is usually available. Even in these situations, however, it is clear from the mandate in the *Waite and Kennedy Case* that the mere existence of such alternatives would not suffice to justify immunity. Rather, these alternative ways of redress must afford a protection equivalent to the one states are obligated to provide under their fair trial obligations.

It is therefore submitted that the District Court cannot rely upon the *Al-Adsani*, *Fogarty* and *McElhinney* cases regarding state immunity in order to grant the UN immunity claim in the present case.

Furthermore, it should be noted that the Strasbourg Court's majority in the *Al-Adsani* case unequivocally accepted that the rule on the prohibition of torture had achieved at the material time the status of a peremptory rule of international law (*jus cogens*) (*see* the authorities cited in paragraphs 59-60 of the *Al-Adsani* Judgment). By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.

It is beyond discussion that the rules on immunity of states and international organisations do not form part of the limited category of norms with *jus cogens* status, for states and organizations have the authority to unilaterally waive their immunity. The fact that the United Nations has in cases such as the one at hand, never done so, is irrelevant, as the Immunities Convention expressly mentions the possibility for the organization to waive its immunity. This clearly demonstrates that the international rules on immunity

do not enjoy a higher status, since *jus cogens* rules, protecting as they do the "ordre public", that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.

The acceptance therefore of the *jus cogens* nature of the prohibition of serious human rights violations such as war crimes, entails that a State or organisation violating it cannot invoke hierarchically lower rules such as those on immunity, to avoid the consequences of the illegality of its actions. In the circumstances of the case at hand, the UN and the Netherlands can therefore not validly hide behind immunity rules in order to avoid proceedings for serious claims of war crimes (*see* the Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, attached to the *Al-Adsani* Judgment, para. 1-3. *See* also the Dissenting Opinions of Judges Ferrari Bravo and Loucaides, attached to the same Judgment).

The District Court has proven to be open to such reasoning, as indicated by the observation in its Decision that "[an] inquiry into conflicting standards is necessary because there are insufficient grounds for accepting a full and unconditional prevailing of international-law obligations of the State under the UN Charter over other international-law obligations of the State. The rule of article 103 of the UN Charter invoked by the State 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" (para. 5.16 of the Decision).

The District Court, however, invoking the *Al-Adsani* case, ultimately held

that “no grounds can be derived for an exception to the standard referred to above of the UN’s absolute immunity. This means that the Court does not get to a prioritizing of conflicting international-law standards” (para. 5.21 of the Decision).

It is respectfully submitted, however, that the Court, by allowing the immunity of the UN to prevail over the prohibition of genocide, *did* get to a prioritizing of conflicting international-law standards. It is further submitted, respectfully, that the Court has, in doing so, prioritized the wrong rule. Since it is not disputed that the prohibition of torture has currently reached *jus cogens* status, it cannot be held that the same does not apply for the prohibition of genocide – or for the prohibition of crimes against humanity, war crimes and grave breaches of the Geneva Conventions for that matter. For it is clear that the latter three categories of internationally recognised crimes can comprise a multitude of acts and omissions, including torture and other acts of a similarly serious or even graver nature (*see*, *inter alia*, the Statutes of the International Criminal Tribunal for the former Yugoslavia (Articles 2, 3 and 5), the International Criminal Tribunal for Rwanda (Articles 3 and 4) and the International Criminal Court (Articles 7 and 8)). The District Court should therefore in the present case find in favor of denying the UN claim to immunity.

In this regard, reference should also be made to the findings of the International Law Commission (ILC) in its 1999 Report on Jurisdictional Immunities of States and their Property. The ILC noted a recent trend that supported the argument that a State could not plead immunity in respect of gross human rights violations. The Commission specifically referred to,

inter alia, the House of Lords' Judgment in the landmark *Pinochet* case, also concerning crimes of torture. In this case, the House of Lords expressly held that torture was an international crime and prohibited by *jus cogens* and that States Parties to the UN Torture Convention could not have intended that an immunity of torture would survive their ratification of the UN Convention.

Keeping in mind the observation of the ICJ Judges Higgins, Kooijmans and Buergenthal, that the interests of immunity vs. right to court are not set for all eternity, and the aforementioned evolution of state immunities from absolute to restrictive, it is submitted that the District Court should be very mindful of this growing trend observed by the International Law Commission. One should particularly keep this observation in mind, as well as the fact that the international condemnation of war crimes is even more universal than for torture, when reading the penultimate paragraph in the *Al-Adsani* Judgment, where the Strasbourg Court expressly held that "[t]he Court, *while noting the growing recognition of the overriding importance of the prohibition of torture*, does *not* accordingly find it established that there is *yet* acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State" (para. 66 of the Judgment. *See* also para. 38 of the *McElhinney* Judgment).

The only reason why the (very limited) majority in *Al-Adsani* refused to accept the consequences of their findings, was because they argued that a distinction should be made between criminal proceedings, where apparently they did accept that a *jus cogens* rule has the overriding force to deprive the rules of sovereign immunity from their legal effects, and civil proceedings,

where, in the absence of authority, they considered that the same conclusion cannot be drawn. It is clear that this distinction – the only real distinction the ECtHR could observe when comparing the *Al-Adsani* case and the cases cited by the ILC such as the *Pinochet* case – is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule (*see* the Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, attached to the *Al-Adsani* Judgment, para. 4. *See* also the Dissenting Opinions of Judges Ferrari Bravo and Loucaides, attached to the same Judgment).

In any case and without resorting to the concept of *jus cogens*, it is submitted that, as a matter of policy, a conflict between the interests of persons enjoying immunity and those seeking access to court should be decided in favor of the latter. For there is sufficient reason to argue that the interests of the international organization as the *ratio legis* of the immunities granted should be subordinated to the promotion of good administration of justice (Wellens, *Remedies against International Organisations*, p. 209).

For the above reasons, it is respectfully submitted that the District Court, when deciding upon the issue of UN immunity, cannot rely on the heavily contested findings of a very limited majority of 9/8 of the ECtHR in a single case, which furthermore can be distinguished from the present case on pivotal points (*i.e.* immunity of the State vs. international organizations and corresponding presence vs. absence of alternative remedies). Indeed, the

case law mentioned earlier in para. … rather indicates that the Court should reach the opposite conclusion in the case at hand and dismiss the UN claim of immunity.

II.2.6. *Behrami* and *Saramati*

Finally, plaintiff would like to stress that the District Court in the present case can also not rely on the *Behrami* (*Behrami* v *France*, Application no. 71412/01) and *Saramati* (*Saramati* v *France, Germany and Norway*, Application no. 78166/01) cases of the European Court of Human Rights (both declared inadmissible on May 2, 2007).

As indicated by the ECtHR itself, these cases dealt with the admissibility question of "whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo" (para. 71). The *Behrami* and *Saramati* cases are therefore both clearly distinguishable from the present case, since they deal with the question of the responsibility of the States of France and Norway as nations contributing troops to a UN mission. This can be compared to the situation of the State of the Netherlands in the current case, but not to the question of immunity of the United Nations and can therefore not be cited as authority for deciding upon this issue.

If anything, it is submitted that the *Behrami* and *Saramati* should support the finding that the UN should not be excluded from the current proceedings by virtue of its immunity. The ECtHR in those cases held that the acts performed in the course of the UN missions in Kosovo could only be

attributed to the United Nations, and not to the troop-contributing nations. This makes it all the more important, in light of the fundamental human right of access to court, that the private parties in the present case should have recourse to a remedy against the United Nations.

Furthermore, it should be noted that the provisions regulating the immunity of the UN mission and its personnel (Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, adopted August 18, 2000 by the SRSG) in the *Behrami* and *Saramati* cases were clearly different from the ones regulating the immunity of the United Nations itself. Regulation No. 2000/47 stated that KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo and such personnel were to be "*subject to the exclusive jurisdiction of their respective sending States*" (section 2 of the Regulation – emphasis added). This provision makes it very clear that an alternative dispute-settling mechanism was at hand in the *Behrami* and *Saramati* cases and goes to show that these Strasbourg cases should also for this reason be distinguished from the present case.

Plaintiff further submits in this regard that due consideration should be given to the findings of the European Commission for Democracy through Law or 'Venice Commission' on the issue of the applicability of the European Convention on Human Rights on UN peace keeping operations.

II.2.7. The Venice Commission and the Establishment of ad hoc UN Review Boards

In an attempt to comply with its obligation under Section 29 of the Immunities Convention, the United Nations has undertaken to settle claims of a private-law character to which the UN peacekeeping operation or any of its members is a party, by means of a Standing Claims Commission (*see* Exchange of Letters Constituting an Agreement concerning the Status of the United Nations Emergency Force in Egypt, February 9, 1957, UN-Egypt, Art. 38, 260 *UNTS* 61 and Report A/51/389 of the Secretary-General, paragraph 7). A standard clause to that effect is inserted in paragraph 51 of the Model Status of Forces Agreement (UN Doc. A/45/594).

It should be noted, however, that such a Commission has never been created (Secretary-General Report A/51/903). Therefore, various *ad hoc* UN-based claims review boards have been established over the years, in almost every peacekeeping operation to settle third-party claims for tortuous conduct of UN forces entailing personal injury, property loss or damage attributable to members of said forces (Secretary-General Report A/51/389, paragraph 22; *see* also M. Zwanenburg, *o.c.*, p. 88).

The fact that the UN has established such boards in the past but has failed to do so in the present case, clearly shows that the UN has violated its obligation to provide for alternative redress mechanisms by not complying with its obligations under international law as laid down in the Immunities Convention. This practice also shows that the UN itself concedes that its mere written promise to establish alternative dispute-settling mechanisms in Section 29 of the Convention is not sufficient to guarantee private parties' right to court.

The same conclusion was reached by the Venice Commission, a highly authoritative institution in the field of human rights established by the Council of Europe, which gives opinions on (draft) legislation, including (draft) constitutions of member states of the Council of Europe, on (draft) conventions of the Council and on any other legal question within its mandate, put before it by a competent body or institution. It has recently rendered two separate Opinions on the applicability of the ECHR on situations such as the one at hand in the present case.

In its first Opinion regarding the situation of human rights violations in Kosovo by UNMIK and KFOR troops, the Venice Commission expressed deep concern for the lack of domestic and international remedies available to the victims, because of the alleged immunity of the United Nations. The Commission held that immunity from jurisdiction forms a restriction on the human rights of the claimants and that such restriction "must not effect *[sic]* the rule or principle in its essence, and the application must meet the requirements of necessity and proportionality. One of the most important elements of proportionality is the availability of alternative possibilities of review and/or redress" (P. Van Dijk, "The Venice Commission on the Application of the European Convention on Human Rights *ratione personae* in case of peace keeping and the fight against terrorism" in *The Rule of Law in Peace Operations*, 2006, p. 424). It should be noted that the Commission in this regard referred to the *Al-Adsani* case of the ECtHr.

The findings of the Commission in its Opinion eventually brought it to propose the establishment by UNMIK regulation of an independent advisory

panel to examine complaints about violations of fundamental rights by UNMIK. After some evident reluctance in United Nations circles to accept the Opinion of the Venice Commission, the Special Rapporteur of the Secretary-General of the United Nations in Bosnia and Herzegovina promulgated on 23 March 2006, Regulation no. 2006/12 on the Establishment of the Human Rights Advisory Panel, which reflects the Opinion of the Venice Commission for this part. The members of the Panel have been nominated by the President of the European Court of Human Rights (P. Van Dijk, *l.c.*, p. 424).

Plaintiff would like to point out that the fact that (1) the Venice Commission had to encourage the United Nations to establishing an *ad hoc* alternative mechanism of redress and that (2) the United Nations eventually obliged with said request, both serve to show that:

> (a) the mere promise on the part of the United Nations to provide for an alternative remedy as laid down in Section 29 of the Immunities Convention is not sufficient to live up to its obligations under international law; and
> (b) the United Nations and the State of the Netherlands would therefore violate the human rights of Plaintiff by invoking resp. granting the claim of immunity based on Article 105 of the UN Charter.

The Venice Commission rendered a similar Opinion in the case of the decertification of police officers in Bosnia and Herzegovina. The Commission in this case noted that once again, due to the UN's claim of immunity, there was no domestic or international means of redress for the

victims and argued that the "compatibility of [the immunity of international organizations] with the right of access to court depends, *inter alia*, on the existence of adequate alternative means for determining the claims concerned" (P. Van Dijk, *l.c.*, p. 425). The Commission therefore stressed that the United Nations should establish a Review Body of Independent Experts to examine the complaints.

Both Opinions of the European Commission for Democracy through Law clearly show that the ECHR should play a role in situations of peace keeping such as the one at hand, "even in situations where […] the European Court of Human Rights does not have jurisdiction, *vis-à-vis* the State(s) or international organization(s) that are the main actors in the area concerned" (P. Van Dijk, *l.c.*, p. 426).

Finally, Plaintiff would like to submit that even in the situations where the UN has established local *ad hoc* review boards, such boards would not necessarily be sufficient for the Organization to fulfil its international human rights obligations.

It is recalled that the right of access to court entails the right of individuals to have their claims heard by way of an effective and independent alternative remedy. However, serious questions arise as to the independence and effectiveness of the aforementioned Standing Claims Commission and local *ad hoc* review boards.

In contrast to a court, the bodies created by claims settlement procedures are not *per se* independent. It has been noted that the fact that local claims

review boards are composed exclusively of United Nations staff members raises concerns over the boards' independence and the objectivity of their rulings (M. Zwanenburg, *o.c.*, p. 286). The lack of any obligation to make their decisions public also contributes to the assessment that these claims settlement procedures do not function as proper mechanisms of accountability.

The UN Secretary-General himself has admitted that "[t]he local claims review boards […] are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case" (UN Doc. A/51/903, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations. Report of the Secretary-General*, para. 10.).

The possible lack of effectiveness of the Standing Claims Commission provided for in Article 51 of the Model Status of Forces Agreement has also been recognized by the UN Advisory Committee on Administrative and Budgetary Questions (UN Doc. A/51/491, *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters. Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations. Financing of the United Nations peacekeeping operations. Report of the Advisory Committee on Administrative and Budgetary Questions*, para. 9).

Since the local review boards are modeled after the Standing Claims

Commission, the same questions of effectiveness and independence also arise in that context. Furthermore, the ineffectiveness of the Standing Claims Commission is evidenced by the fact that it has never been established. Finally, the fact that the local review boards are mere *ad hoc* bodies, is further proof of their lack of independence and effectiveness.

It is therefore submitted that the aforementioned institutions allegedly established to satisfy the United Nations' obligations pursuant to Section 29 of the Immunities Convention lack the necessary qualities and guarantees for a proper right of access to court. In any event, the issue of the level of effectiveness and independence of alternative dispute-settling mechanisms do not arise in this case since no such mechanisms exist in the present proceedings.

II.2.8. Conclusion

Based on the above, Plaintiff submits that the District Court should dismiss the UN claim of immunity, should the organization decided to invoke it. Since it has clearly been established, by reference to international instruments, human rights bodies and international and domestic case law and literature, that the existence of actual, effective alternative dispute-settlement mechanisms is currently widely regarded as a precondition for the immunity of international organizations, the State of the Netherlands would be liable for the violation of one of the most fundamental human rights, i.e. Plaintiff's right of access to court, should the District Court in the present case allow the United Nations to invoke its immunity, even though no (effective) alternative remedies exist.

II.3. Contract and tort liability

Plaintiff firstly submits that Defendants are responsible for breaches of their contractual obligations and for tortious conduct during the implementation of the peacekeeping operation in Bosnia and Herzegovina.

II.3.1. Introduction

Ever since the mid-20th century, it has been widely accepted that States can be held liable towards third-party individuals on grounds of contractual breach or unlawful conduct. In the same way, it is now considered natural that the implementation of programmes of international organizations can entail valid claims from third-party victims against the organization for violations of either its contractual or non-contractual obligations.

As noted by M Hirsch (*o.c.*, p. 6):

"Among the numerous fields of activities of international organizations, the following […] are the most likely to lead to the establishment of the international responsibility of those organizations: […] (b) International military and peace-keeping operations […]"

It can safely be stated that the fact that international organizations may be held internationally responsible for their contractual breaches and unlawful conduct, is nowadays part of international customary law (ILA Final Report, p. 196 and M. Hirsch, *o.c.*, p. 9).

II.3.2. Contractual liability

II.3.2.1. Applicable law

Regarding the issue of which law is applicable to the contractual arrangements relevant to the case at hand, the International Law Association has concluded that (p. 190 of the report):

"The contractual relations between an [international organization] and third parties are governed by the contract and applicable principles of private international law. […] In situations other than those arising under a treaty, when the third party consents to the relationship with the [international organisation], this relationship is governed by the law applicable to the contract in question. This could be a national law or a mix of national law and international law."

In the present case, the law applicable to the relevant contracts concluded by the United Nations and the State of the Netherlands, is governed by the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980, which entered into force on April 1, 1991 (hereinafter: 'Rome Convention').

Article 1 of the Rome Convention states that:

"The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries."

Article 2 of the Convention further provides that:

"Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State."

The Rome Convention therefore has universal force and is applicable regardless of the contracting parties' nationality or place of residence. The Convention should thus be applied by the District Court in the present case, regardless of the fact that Serbia, Bosnia and Herzegovina and the United Nations are not a party to the Convention.

Article 4 of the Rome Convention, regulating the law applicable in the absence of any explicit or implicit choice of law expressed by the parties to the contract, as is the case in the present proceedings, states that:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration […]."

Finally, Article 8, paragraph 1 of the Convention states that:

"The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid."

The contractual liability of the State of the Netherlands and the United Nations flows from the failed implementation of the obligations of Defendants as laid down in the demilitarization agreements concluded between the ABiH and the VRS on 18 April and 9 May 1993. It is submitted that Dutch law is applicable to these contracts, since the implementation thereof is, in accordance with the principles laid down in the Rome Convention, more closely connected with the State of the Netherlands than with that of the other parties involved in the 1993 agreements.

The characteristic performance of an agreement of demilitarization is, it is submitted, the contractual obligation to oversee and implement the disarmament of the warring fraction inside the area to be demilitarized. Dutchbat was stationed in the entire area of Srebrenica after the conclusion of the demilitarization agreements, and was there for a longer period of time than any of the other national contingents. Given the area and duration of the deployment of Dutchbat, it is therefore submitted that this battalion was chiefly responsible for overseeing the correct implementation of the demilitarization, and that for this reason, Dutch law is applicable.

Should the Court find that this is not the case, Plaintiff would like to request for additional time to prepare its case pursuant to the law found to be applicable.

II.3.2.2. Failed demilitarization

It is submitted that the United Nations and the State of the Netherlands incur contractual liability on the grounds of failure to enforce the demilitarization agreements of 18 April and 8 May 1993 concluded between the VRS and the ABiH.

II.3.2.2.1. Demilitarization agreements

II.3.2.2.1.1. 18 April 1993 agreement

The text of the first demilitarization agreement was negotiated in Sarajevo on 17 April 1993 and was signed by general Halilovic of the Army of Bosnia and Herzegovina (hereinafter: 'ABiH') and General Mladic of the Army of the Republika Srpska (hereinafter: 'VRS') early in the morning of 18 April. Force Commander Wahlgren witnessed the agreement on behalf of UNPROFOR. The agreement laid down the terms under which Srebrenica would be demilitarized.

The relevant provisions of the demilitarization agreement of 18 April 1993 were as follows:

"4. The demilitarization of Srebrenica will be complete within 72 hours of the arrival of the UNPROFOR company in Srebrenica (1100 hours 18 April 1993; if they arrive later this will be changed). All weapons, ammunition, mines, explosives and combat supplies (except medicines) inside Srebrenica will be submitted/handed over to UNPROFOR under the supervision of three officers from each side with control carried out by UNPROFOR. No armed persons or units except UNPROFOR will remain within the city once the demilitarization process is complete. Responsibility for the demilitarization process remains with UNPROFOR.

5. A working group will be established to decide the details of the demilitarization of Srebrenica. This group will study in particular: the action to be taken if the demilitarization is not complete within 72 hours; the correct treatment for any personnel who hand over/submit their weapons to UNPROFOR. The working group will report to Lt.-Gen. Wahlgren, Lt.-Gen. Ratko Mladic and Gen. Sefer Halilovic. The first report will be made at a meeting to be held at Sarajevo airport on Monday, 19 April 1993, at 1200."

It follows from Article 4 of the agreement that UNPROFOR had the contractual obligation and responsibility to oversee and implement the demilitarization process. Furthermore, as party to the negotiations, the UN is responsible for failure to negotiate better and clearer terms of demilitarization.

The contractual responsibility of the United Nations is further confirmed by the NIOD-report (Chapter II.3.2):

"UNPROFOR was responsible for carrying out the central agreements (monitoring of compliance to the ceasefire, collection and storage of the weapons within 72 hours, evacuation of the wounded and sick, and monitoring of the implementation of demilitarization)."

It has been noted that the demilitarization of the Srebrenica area was one of the most important responsibilities of UNPROFOR (NIOD-report, Chapter II.6.5):

"[T]he main task [of UNPROFOR] was […] the demilitarization process."

II.3.2.2.1.2. 8 May 1993 agreement

The agreement witnessed by the Force Commander on 18 April was followed by a more comprehensive agreement on 8 May, in which General Halilovic and General Mladic agreed on measures covering the whole of the Srebrenica enclave. Under the terms of the new agreement, Bosniac forces within the enclave would hand over their weapons, ammunition and mines to UNPROFOR, after which Serb "heavy weapons and units that constitute a menace to the demilitarized zones which will have been established in Zepa and Srebrenica will be withdrawn".

Unlike the earlier agreement, the agreement of 8 May stated specifically that Srebrenica was to be considered a "demilitarized zone", as referred to in article 60 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International

Armed Conflicts (Protocol I) (UN Doc. A/54/549, *The Fall of Srebrenica*, paragraph 65).

Chapter II.3.4 of the NIOD-report further clarifies that:

"The agreement provided for demilitarization by the withdrawal of military units from the enclave and the handing over of weapons and ammunition to UNPROFOR. On 10 May at 17:00 pm representatives of both parties in Srebrenica would establish whether the process had been completed and set that forth in a joint statement. UNPROFOR would supervise the demilitarized zone with at least one company and supporting units. […] Non-belligerent parties were not allowed to bring weapons or ammunition into the demilitarized zone or to loiter inside the area. The agreement also determined that all stipulations of the additional protocol concerning the protection of civilians were applicable. Finally, it included agreements about […] the withdrawal of heavy artillery in concentration areas and of infantry units to one and a half kilometres from the ceasefire line after demilitarization had been completed"

The agreement concluded on 8 May 1993 therefore differed very little from the one signed on 18 April 1993, and basically entailed the same responsibility for UNPROFOR as the latter (NIOD-report, Chapter II.3.4):

"In actual fact, the agreement of 8 May set out the same method for realizing demilitarization as that of 18 April. The main difference was that the preamble now explicitly coupled the status of Srebrenica and Zepa to

Resolution 824, and the demilitarization to the provisions of article 60 of the Additional Protocol of the Geneva Convention. […]

Core elements of the agreement remained the surrender of all weapons or the withdrawal of military units from the enclaves of Srebrenica and Zepa, verification of the demilitarization by both belligerent parties and then withdrawal of VRS units from the ceasefire line as border to the demilitarized area."

Plaintiff concedes that the demilitarization agreements were concluded when the Canadian Battalion was stationed in the Srebrenica enclave. This, however, does not exempt Dutchbat and the State of the Netherlands from responsibility for the failed demilitarization, since in their hands rested the continued obligation to ensure implementation of and adherence to the demilitarization agreements.

It will be shown in the following paragraphs that the enclave was never actually demilitarized and that the responsibility for this, and for the ensuing crimes committed by the Bosnian Moslems from the enclave, lies with the UN and the State of the Netherlands.

II.3.2.2.2. Failed implementation of agreements by UNPROFOR

II.3.2.2.2.1. Inadequate preparations and negotiations

By negotiating and concluding the demilitarization agreement of 18 April 1993, UNPROFOR had taken upon itself the critical responsibility to

implement the process of disarming the Bosnian Moslems. It is evident, however, that the UN had not prepared itself sufficiently in order to efficiently carry out the demilitarization (NIOD-report, Chapter II.3.3):

"By taking on a central role in demilitarization, UNPROFOR had put itself in a difficult position, for which there appeared no solution at the moment."

The NIOD-report further states that (Chapters II.3.2 and II.3.3):

"The [18 April 1993] agreement included a number of risky arrangements for UNPROFOR. The question was whether it would be possible to complete the demilitarization within 72 hours, whether it would be possible to maintain the demilitarized zone with a single Canadian company, whether it would be possible to establish the borders of the demilitarized zone […]"

"Without any specific preparation and almost totally unfamiliar with the area, the ceasefire line and the local conditions, the company of Major Poirier had the difficult task of demilitarizing Srebrenica."

"Demilitarization progressed with difficulty. No arrangements had been made in Sarajevo about implementation and CanBat had not received detailed instructions. The unit was too small to take charge itself of systematic collection of weapons and ammunition."

"UNPROFOR's position was strengthened so as to make [the implementation of the 18 April 1993 agreement] possible: its presence in Srebrenica would be increased, even though a company of 150 was

insufficient for the extensive task of demilitarization in the required short time period."

Despite the obvious shortage of manpower to implement the demilitarization agreement, UPROFOR Commander Wahlgren nevertheless inexplicably rejected an offer to strengthen the Canadian troops with 70 additional French soldiers (NIOD-report, Chapter II.3.3):

"Wahlgren for his part did not appreciate having New York interfere with operational matters. A French offer to station 70 UNPROFOR soldiers in Srebrenica - made after the Canadian government expressed its concern about the situation of CanBat and had pressed for making the UN presence in the enclave more multi-national - was rejected straightaway by Wahlgren. After the Canadian company had been reinforced with two platoons and an engineering section on 27 April, Wahlgren made it known that the commanding officer of CanBat was against a 'mixed command' and that the present forces were sufficient."

The failure of the demilitarization of the Srebrenica enclave and its surrounding area was further exacerbated by the fact that UNPROFOR, during the negotiations for the first agreement of 18 April 1993, neglected to accurately define the area to be demilitarized (*The Fall of Srebrenica*, paragraph 60):

"[The demilitarization agreement of 18 April 1993] laid down the terms under which Srebrenica would be demilitarized, though it did not define the area to be demilitarized."

This glaring oversight obviously invited the parties to the contract to misconstrue it, thereby laying the groundwork for its failed implementation (*The Fall of Srebrenica*, paragraph 221):

"There was […] constant friction between the Bosniacs and the Bosnian Serbs as to the exact borders of the enclave, which had been exacerbated by the fact that UNPROFOR had apparently misplaced a map that had been agreed between the parties on 8 May 1993."

The VRS maintained that the entire enclave, including its surrounding area, were to be demilitarized, whereas the Moslems argued that only the town of Srebrenica should be demilitarized, excluding the rural areas surrounding it.

This difference in opinion between the two warring fractions was further complicated by the fact that, apparently due to miscommunication, similar interpretation problems existed between UNPROFOR and the UN Headquarters in New York. A report from UNPROFOR Commander Wahlgren indicated that UNPROFOR, like the VRS, was convinced that the entire enclave should be demilitarized, while the Secretariat apparently thought that only the Bosnian Moslems within the urban area of Srebrenica should de disarmed (NIOD-report, Chapter II.3.3):

"Thus, the danger existed that demilitarization would fail due to lack of clarity in the agreement and differences of opinion about the size of the demilitarized zone and the number of weapons to be handed over. In the talks of the Mixed Military Working Group in Sarajevo on 19 April 1993 a

great deal of time was spent without result on the definition of 'the Srebrenica area'. The ABiH maintained that it was not responsible for demilitarization of the town - Wahlgren would later say to NIOD that this was a 'typical Muslim way of acting'. Wahlgren's report to New York indicates that the VRS and UNPROFOR - contrary to what is found in the report of the Secretary-General of the UN of November 1999 [see The Fall of Srebrenica*, paragraph 60] - maintained that it meant that the whole area was inside the ceasefire line. This difference in opinion concerning the exact position of the border of the Safe Area would continue for a long time."*

Furthermore (NIOD-report, Chapter II.3.5):

"UNPROFOR's discussion about the borders of the Safe Area and moving them was fed by the fact that there had never been an official marking of the area since there had never been official agreement about completing demilitarization."

Despite these obvious flaws in the preparation for and negotiation of the first demilitarization agreement, UNPROFOR proceeded only to oversee the demilitarization of the town of Srebrenica, not of the surrounding area (*The fall of Srebrenica*, paragraph 61).

UNPROFOR, in apparent recognition of its own faults in negotiating the first demilitarization agreement, mainly intended the second agreement of 8 May 1993 to eliminate misunderstandings about the area of the demilitarized zone (NIOD-report, Chapter II.3.4):

"Agreements were set forth in the various articles of the document of 8 May more precisely than in the one of 18 April. The demilitarized zone would include the whole area within the ceasefire line and UNPROFOR would mark it with signs on which the following message would be given in English and Serbian: 'Demilitarized zone. Any military operation is strictly forbidden (article 66 Protocol 1 additional to the Geneva Convention)'."

The agreement nevertheless suffered from the same ambiguities as the one signed on 18 April and UNPROFOR once again failed to take the necessary preparations (NIOD-report II.3.4):

"[O]nly three days were set aside for the demilitarization of this large, virtually inaccessible area. It is not clear why this was."

The NIOD-report therefore rightly concluded that (Chapter II.3.5):

"[T]he ABiH did not have to worry about any large-scale UNPROFOR attempt to force demilitarization."

Indeed, the actual implementation of the demilitarization agreements was never fully carried out by UNPROFOR, due to political unwillingness of the UN Secretariat, military unwillingness and incapacity of the Dutch troops on the ground, and miscommunication as well as misrepresentation of the actual situation between both.

II.3.2.2.2.2. Political unwillingness

The political unwillingness on the part of the United Nations Secretariat is evidenced by the fact that UNPROFOR was informed not to be too zealous when trying to disarm the Moslems, leaving open ample opportunity for the Bosniacs to thwart the already feeble attempts at demilitarization (*The Fall of Srebrenica*, paragraph 62):

"The Secretariat informed the Force Commander that, in the light of the views of the Security Council members, he should not pursue the demilitarization process in Srebrenica with undue zeal, ruling out, for example, house-to-house searches for weapons."

This was later confirmed by NIOD (Chapter I.10.10 of the report):

"On 23 April Kofi Annan, […] as head of the DPKO, directed Wahlgren not to commence demilitarization too energetically. This was because he understood disarmament to mean that, 'UNPROFOR takes on a moral responsibility for the safety of the disarmed that it clearly does not have the military resources to honour beyond a point.' He advised against searching homes for weapons: 'You will undoubtedly be made aware by the visiting Security Council delegation (of Diego Arria, the Permanent Representative of Venezuela) of the strong feeling amongst several members that UNPROFOR should not participate too actively in "disarming the victims".'"

This approach by the UN predictably led to a complete lack of cooperation by the Bosnian Moslems to demilitarize, since they correctly assessed that

no retaliation should be expected in case of failure to disarm (*The Fall of Srebrenica*, paragraph 61):

"Halilovic has stated that he ordered the Bosniacs in Srebrenica not to hand over any serviceable weapons or ammunition. The Bosniacs accordingly handed over approximately 300 weapons, a large number of which were non-serviceable; they also handed over a small number of heavy weapons, for which there was no significant amount of ammunition. A large number of light weapons were removed to areas outside the town."

Further (NIOD-report, Chapter II.3.3):

"To keep from affecting its own defence capacity in the enclave and still go along with the demilitarization, the ABiH decided to give its own interpretation. It used the discrepancies in terminology in the agreement. The agreement of 18 April did not include a precise description of the demilitarized zone around Srebrenica. It spoke of the 'demilitarization of Srebrenica' and of the ceasefire in 'the Srebrenica area'. The ABiH concluded from this that only the town had to be demilitarized and not the whole area in the 'achieved lines of confrontation'. In concrete terms, this meant that the ABiH took all modern and usable weapons and ammunition out of the town into the surrounding areas and turned over to CanBat only old and unusable weapons for which there was little or no ammunition."

The same tactics were applied by the Bosnian Moslems after the conclusion of the second demilitarization agreement of 8 May 1993 (NIOD-report, Chapter II.3.5):

"Once again, the ABiH surrendered to the Weapons Collection Point old weapons or ones that did not function due to a lack of ammunition. Two T-55 tanks, which were out of petrol and ammunition, were turned over. Later, 4 anti-aircraft systems were added."

"On 19 May, CanBat destroyed a portion of the surrendered ammunition. Usable guns, mostly hand guns were not surrendered on order of ABiH general Halilovic, rather carefully hidden in the enclave."

The United Nations was divided as to what course of action should be taken in order to implement the demilitarization, and ultimately settled for a mere press statement (NIOD-report, Chapter III.8.3):

"On 10 July the Security Council discussed the situation in Srebrenica informally. The Council could only agree on issuing a 'statement of concern' to the press, the weakest instrument at its disposal. France would have liked a stronger response in the form of an official statement by the President of the Security Council, but the Americans and the Russians were unable to agree on the wording: the Russians wanted a reference to the demilitarization agreement of 1993, the Americans did not. Only after the fall of Srebrenica did the Security Council take a stronger line."

Furthermore (NIOD-report, Chapter III.1.12):

"The Security Council encouraged the UN Secretary-General to intensify his efforts to reach an agreement with parties on demilitarization and called

upon parties to cooperate. That was all. However, Boutros-Ghali did not make an effort in this respect […].”

II.3.2.2.2.3. Military incapacity and unwillingness

The political unwillingness on the part of the UN to live up to its contractual obligations to effectively disarm the Bosnian Moslems in the entire enclave of Srebrenica, including the surrounding area, was further exacerbated by the military incapacity and disinclination of Dutchbat to implement the agreements of 18 April and 8 May 1993.

Plaintiff finds the following extract from the NIOD-report to be exemplary in this regard and deems it opportune to cite it in its entirety (Chapter II.8.10):

“According to Commander Vermeulen [of Dutchbat I]:

‘if you saw a man with a weapon, you could shout ‘stani pucam’ [‘stand or I will shoot!’], but you were not permitted to shoot, because the Rules of Engagement did not allow it. If that man ran home fast enough and threw the weapon inside, you could put up a cordon around the house. You then had to call the local police, and they would say: ‘I would have to be crazy, because then we would all be punished by Naser Oric.’ You would then ask the UN police, who then said that they had had no mandate for it. It was a warped regulation.’

The regulations did indeed require Dutchbat members to make a report if they found armed men in the enclave. Under no circumstances should they go off in pursuit. If the opportunity to make an arrest presented itself, they should do so, and subsequently indeed call in the UnCivPol. Frisking was forbidden, as was the searching of houses. They were allowed to 'secure' a house, which meant that they could set up a cordon around the house to await the arrival of UnCivPol. If such a situation should become 'threatening', then Dutchbat was to withdraw.

Dutchbat was therefore not authorized to enter houses, and so the men who carried weapons, as Vermeulen described, could escape being disarmed by fleeing into a house. Sometimes, the blue helmets saw women leaving with shopping bags, in which they were probably taking the dismantled weapons to safety. UnCivPol and local police were allowed to enter the houses, but according to a number of Dutchbat members it was sometimes took hours for them to arrive. Furthermore, the probability was indeed extraordinarily small that the local police would find much, because of the reprisals to be expected from ABiH soldiers. Many ABiH soldiers had more respect for their own commanders than for the agreements that had been made with the UN and had to be executed by Dutchbat. They feared reprisals if they were to surrender their weapon, which was sometimes so abundantly clear that the Dutch offered to mediate: if 'Dutchbat could just have those weapons, then the liaison officer would talk with the Muslim commander, to avoid punishment'.

[…] According to patrol coordinator Captain Rutten, he did decide to pursue armed Muslims in a few situations. But:

'you can go after them on the risk that they know the terrain much better than you and, of course, disarming was not of much use. This gradually became clear to everyone. You took a weapon and you drew a certain risk to yourself. Because if you were to go into the same area later with a patrol, you ran the risk of being fired on by Muslims. I tried not to sidestep that, but in the orders I said: 'If you come across them [weapons], collect them. If you don't come across them, don't go looking for them! Is not worthwhile.'

The regulations were so unclear that neither did the battalion leaders know whether the ban on searching houses was an unwritten rule or a UN rule. To prevent escalation of the confrontation between the ABiH and Dutchbat, Lieutenant Colonel Karremans decided, towards the end of the deployment, to leave large groups, who were walking around openly with weapons, undisturbed.

In brief, it is not surprising that Karremans remarked to the NIOD that in his opinion nothing ever came of demilitarization. During Dutchbat III especially, the execution of demilitarization measures formed an acute security problem, because the Dutch had little or nothing else to offer the population.

For the Dutch battalions, there was no doubt that the ABiH had weapons at their disposal in the enclave."

The military disinclination to actually disarm the Moslems is further evidenced by the fact the various UNPROFOR commanders actively argued

for restraint in the process of demilitarization (NIOD-report, Chapter II.9.10):

"Battalion leaders saw enforcing the demand for demilitarization to the letter as extremely risky and frequently tried to correct Groen and to ask him to act with more restraint."

It is recalled that the first demilitarization agreement of 18 April 1993 called for the establishment of a Joint Demilitarization Commission, "to decide the details of the demilitarization of Srebrenica" (Article 5 of the agreement). Plaintiff wishes to note in this regard that said Commission was indeed established, but, after several failed attempts at arranging a meeting, "there were no steps towards reactivation" (NIOD-report, Chapter II.6.10) and the Joint Commission "remained dormant" (Chapter II.6.11). One of the tasks of the Commission was to decide upon "the action to be taken if the demilitarization is not complete within 72 hours". No meetings were called, however, and no course of action was therefore decided to achieve actual demilitarization.

UNPROFOR further decided, incomprehensibly, that the ABiH was allowed to maintain the (limited amount of) weapons surrendered to UNPROFOR. It comes as no surprise that the Moslem soldiers tried to take advantage of this situation (NIOD-report, Chapter II.8.10):

"Several incidents took place during the maintenance sessions. For instance, on 21 March 1995 an ABiH soldier attempted to take away a

dismantled Kalashnikov after a maintenance session in the Weapon Collection Point."

In spite of all these clear indications that the ABiH would not voluntarily surrender its weapons, UNPROFOR nevertheless remained passive, trusting that the Moslems could be taken at their word (NIOD-report, Chapter II.3.4):

"Morillon seemingly trusted that the assent of the ABiH commander of Srebrenica was sufficient basis for implementation of the agreement."

It is further submitted that Dutchbat not only failed to disarm the Moslem soldiers, the troops also actively took several measures that violated their obligations under the 1993 demilitarization agreements (*The Fall of Srebrenica*, paragraph 223):

"[…] Dutchbat agreed to certain measures which seemed to acknowledge that the demilitarization agreements of 1993 were no longer functioning. They agreed that the Bosniacs could carry weapons openly between the UNPROFOR observation posts […]. It appears that these decisions were taken locally, unbeknown to UNPF headquarters."

II.3.2.2.2.4. Failed demilitarization and ensuing misrepresentation of the situation on the ground

As is clear from the previous paragraphs, it can be safely concluded that the demilitarization of the Srebrenica enclave and its surroundings had failed

and that UNPROFOR had thus violated its contractual obligation to disarm the Bosnian Moslems in Srebrenica (Chapter III.4.9):

"[I]t was clear that the demilitarization of the enclave had failed, in view of the large number of men that were openly walking around with a weapon […]"

Indeed, due to the political and military unwillingness of the UN and the Dutch troops, the only effect the demilitarization agreements had was that the ABiH tried to conduct its operations less openly (NIOD-report, Chapter II.6.6):

"The demilitarization agreements of April and May 1993 [merely] brought an official end to the existence of Muslim units in the enclave Srebrenica. Armed men disappeared from the streets and in reports of the Canadian battalion and Dutchbat the correct official designation was the 'former Muslim warring faction' and its Commander Naser Oric. But, in point of fact, the military organization continued to exist; until April 1994, its headquarters was even located above the headquarters of the Canadian battalion, on the first floor of the post office. In May 1994, the Muslim guerrillas reorganized. The brigades in the enclave Srebrenica were attached as 8th Operational Group to the 2nd Corps of the ABiH in Tuzla. Oric set up new headquarters in the former hunting lodge near the Turkish Fort. According to Dutchbat, the lodge was well-equipped, with workspaces for Oric and the members of his staff […]. Oric formed four light brigades within the enclave […]. The strength of these units varied between 500 and 1500 men. According to 1993 UNPROFOR estimates, the total strength of

the ABiH in Srebrenica amounted to between 3000 and 4000 men; the assessment of Dutchbat I put the figure at between 2000 and 3000."

"[T]he ABiH in Srebrenica retained its own character, which went together in part with the unclear position of the Bosnian Government army: officially the brigades no longer existed, but their presence was unmistakable. After the failure of demilitarization in May/June 1993 UNPROFOR did not overly concern itself with the brigades: it seized any weapons it discovered but did not actively search for them; UNPROFOR, because of its unclear mandate, allowed training without weapons and other military exercises. Setting up positions within the enclave was permitted to a limited degree."

Further (Chapter II.8.10):

"Dutchbat III increasingly often observed large armed groups of ABiH, which it could not act against. At the end of January 1995, approximately 400 Muslims armed with rifles and bazookas even gathered in front of the gate of the compound in Srebrenica. An hour later they departed again to the south […].

The situation on the ground was thus that no actual demilitarisation had taken place. UNPROFOR nevertheless issued a press statement on 21 April, declaring the demilitarization of Srebrenica "a success" (*The Fall of Srebrenica*, paragraph 62):

"On 21 April UNPROFOR released a press statement entitled "Demilitarization of Srebrenica a success". That document stated that

"UNPROFOR troops, civilian police and military observers had been deployed in Srebrenica since 18 April to collect weapons, ammunitions, mines, explosives and combat supplies and that by noon today they had completed the task of demilitarizing the town". […] The Force Commander of UNPROFOR was quoted as saying, "I can confirm that from noon today the town has been demilitarized …. The [UNPROFOR] team prepared a final inventory of all the collected weapons and munitions, which were then destroyed by UNPROFOR"."

Even later on in the conflict, "[UNPROFOR Commander] Wahlgren maintained that the demilitarization of Srebrenica was proceeding in accordance with the agreement" (NIOD-report, Chapter II.3.3).[3]

Furthermore, a special Security Council mission led by the then Special Representative of Venezuela, Diego Arria, even confirmed the demilitarization and congratulated UNPROFOR for the swift course of action (*The Fall of Srebrenica*, paragraph 63).

---

[3] The complete disingeniousness of these assurances was later laid bare in UN Secretary-General's report on Srebrenica: "61 …The Canadian force then proceeded to oversee the demilitarization of the town of Srebrenica, though not of the surrounding area. Halilovic has stated that he ordered the Bosniacs in Srebrenica not to hand over any serviceable weapons or ammunition. The Bosniacs accordingly handed over approximately 300 weapons, a large number of which were non-serviceable; they also handed over a small number of heavy weapons, for which there was no significant amount of ammunition. A large number of light weapons were removed to areas outside the town. 62 The Secretariat informed the Force Commander that, in light of the views of several Council members, he should not pursue the demilitarization process in Srebrenica with undue zeal, ruling out, for example, house-to-house searches for weapons. On 21 April UNPROFOR released a press statement entitled "Demilitarization of Srebrenica a success". [REPORT OF THE SECRETARY-GENERAL PURSUANT TO GENERALASSEMBLY RESOLUTION 53/35 (1998), par. 61 and 62]

These wilful misrepresentations of the situation on the ground by UNPROFOR, apparently confirmed by the mission led by Diego Arria, effectively halted any additional measures for demilitarization that might otherwise have been taken at the United Nations Headquarters.

In an effort to explain the reluctance on the part of the UN to actively lobby for demilitarization, the Secretary-General has been noted as saying that (*The Fall of Srebrenica*, paragraph 69):

"Noting the discrepancy between the agreement of 8 May 1993 that had been negotiated on the ground by UNPROFOR and the resolution concurrently adopted by the Security Council, the Secretariat explained to UNPROFOR that the Council had laid great emphasis in resolution 824 (1993) on the withdrawal of the Bosnian Serbs from their positions threatening the "safe areas". The Secretariat believed that it was essential that UNPROFOR reiterate its determination to ensure the implementation of those parts of the agreement concerning the Serb withdrawal from around the safe area. The Secretariat added that the implied sequence in the agreement – Government forces disarming first, followed by a Serb withdrawal later – would be unacceptable to the Security Council."

UNSC Resolution 836 (1993) confirms this approach (OP 5 of the resolution):

"Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993) […] to

promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina […]"

The United Nations Headquarters thus unilaterally and without regard for the situation on the ground invalidated the demilitarization agreements concluded between the ABiH, the VRS and UNPROFOR. This only added to the unwillingness of UNPROFOR to live up to its contractual obligations to disarm the Moslems.

Indeed, the Safe Area model developed by the UN in New York differed in many respects from what had been agreed to by UNPROFOR and the warring parties on the ground in the demilitarization agreements (NIOD-report, Chapter II.3.3):

"First of all, UNPROFOR was not responsible for the protection of civilians in the Safe Area, but only in the surrounding Limited Forces Area. No collection or destruction of weapons would take place in the Safe Area. Soldiers were allowed to continue to carry weapons, and heavy artillery would be stored under UNPROFOR supervision."

UNPROFOR never discussed or negotiated those changes implied by the safe area model with the VRS or ABiH, and certainly never reached an alternative agreement to that effect, and thus remained bound by its contractual obligation to oversee and implement the demilitarization stipulated in the 1993 agreements.

UNPROFOR on its part also failed to adequately relay its plans for demilitarization to the UN Headquarters. Such lack of clear communication quickly fed a climate of distrust, and further mortgaged the implementation of the demilitarization agreements (NIOD-report, Chapter II.3.3):

"It is also important to note that the opinion existed in New York that Wahlgren had followed his own course in concluding the 18 April agreement. There was no reference in the agreement to Resolution 819 of the Security Council. That aroused some distrust in the Secretariat or the Department of Peacekeeping Operations."

Further (Chapter II.3.3):

"[Wahlgren] and his staff trusted that their arguments were understood, but later he told NIOD that the UN leadership lacked the necessary military insight."

"In fact, Wahlgren and his staff carried out a rearguard action with the Security Council through the Secretariat. They could never win the discussion, despite the fact that their analysis might be militarily correct since they had taken into account the reality of the conflict and the viewpoints of the belligerents."

The implementation of the demilitarization agreements by UNPROFOR was thus severely troubled by a complete lack of adequate communication on the subject between New York and the troops in Bosnia and Herzegovina (NIOD-report, Chapter II.3.3):

"[Complaints were made by] Under Secretary-General Kofi Annan about insufficient information on the development of negotiations: Wahlgren had only sent the text of the agreement of 18 April. Information to New York concerning verification of the demilitarization agreement was therefore incomplete."

II.3.2.2.3. Indications of consequences in case of failed demilitarization

Finally, Plaintiff would like to note that the lack of political and military will on the part of the United Nations and Dutchbat to carry out their contractual obligations under the 1993 demilitarization agreements, is all the more baffling since clear indications existed of the consequences if the Moslems were not to be disarmed (NIOD-report, Chapter I.10.10):

"If [the deadline of demilitarization within 72 hours] was not met, 'all the obligations of the (Bosnian-) Serb army towards the Muslims' would cease to apply, according to Mladic."

Furthermore (Chapter II.6.19):

"[T]he VRS continued to blame UNPROFOR for the failure of demilitarization, as well as for allowing the build-up of ABiH units in the enclave to a strength of 6000 men. According to VRS chief of staff Milovanovic, this had been the reason for moving the positions forward on the west side of the enclave."

The following extract pertaining to the experiences of Colonel Thomas Karremans of Dutchbat is exemplary in this regard (Chapter IV.4.27):

"[…] Karremans asked Mladic two questions. One question concerned the equipment that had been taken by the VRS, and the other concerned what would have happened in the event of a true full demilitarization of the Safe Area, and if the Bosnian Muslims had not embarked on the excursions out of the enclave. Mladic answered that, in this case, he would not have considered attacking the enclave; this was the standard story that VRS General Gvero, for example, had already presented to the press a few days earlier in the VRS Press Office."

Plaintiff finds it incomprehensible that Defendants, in the light of the obvious importance of an adequate demilitarization, would nevertheless breach their contractual obligations in a way as was shown in the previous paragraphs.

II.3.2.2.4. Conclusion

Plaintiff submits that ample evidence has been brought forth to support the charge that Defendants violated their contractual obligations under the demilitarization agreements dated 18 April and 8 May 1993 to disarm the Bosnian Moslems in the Srebrenica enclave and the surrounding area, due to political unwillingness, military disinclination and incapacity and wilful misrepresentation as well as miscommunication.

II.3.3. Tortious liability (unlawful conduct)

II.3.3.1. Applicable law

Regarding the issue of non-contractual or tortious liability of an international organization for its wrongful acts and omissions toward third parties, the ILA in its Final Report noted that:

"Where acts of an [international organisation] cause personal injury to a non-state party or damage to such a party's property, local law will govern the tortious liability of the [organization] unless in the circumstances the activity causing the injury or damage constitutes a breach by the Organisation of an applicable rule of international law."

Plaintiff submits that, pursuant to the *Wet Conflictenrecht Onrechtmatige Daad* (hereinafter: 'WCOD'), Dutch law is applicable to the unlawful conduct of Defendants. While it is true that the WCOD entered into force in 2001, it is nevertheless generally accepted that the Act is a codification of the law already in force during the conflict in Bosnia and Herzegovina, and is therefore applicable to the conduct of Defendants at that time (*see* Hoge Raad, 12 November 2005, *NJ* 2005, 552).

Article 3 WCOD provides that:

"1. Verbintenissen uit onrechtmatige daad worden beheerst door het recht van de Staat op welks grondgebied de daad plaatsvindt.

2. In afwijking van het eerste lid wordt, wanneer een daad schadelijk inwerkt op een persoon, een goed of het natuurlijke milieu elders dan in de Staat op welks grondgebied die daad plaatsvindt, het recht toegepast van de Staat op welks grondgebied die inwerking geschiedt, tenzij de dader de inwerking aldaar redelijkerwijs niet heeft kunnen voorzien."

To the extent that the unlawful conduct of Defendants as described in the following paragraphs can be attributed to the inadequate training on Dutch territory (*see* paragraphs …) or other decisions taken in the State of the Netherlands, Plaintiff submits that Dutch law is applicable pursuant to Article 3, para. 1 WCOD. Should the Court, however, decide that the law of another country is applicable to the tortious acts and omissions of Defendants, Plaintiff requests for additional time in order to prepare his case pursuant to that body of law.

II.3.3.2. Tortious liability UN

It has been noted in the literature that, originally, the number and value of third-party claims for tortious conduct of UN forces remained relatively low and the procedure for settlement of disputes functioned to the satisfaction of both the UN and third-party claimants (D. Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", *AJIL* 2000, 409). However, as peacekeeping operations expanded in scope and size, the scope of interaction between the UN and the civilian population has grown correspondingly, and with it the risk of damage to the person or property of third-party individuals (*see* Secretary-General Report A/51/389, para. 26-

29). Since the UN at that time was overstretched and underfunded, the General Assembly called upon the Secretary-General to devise means for limiting the third-party liability of the Organization (D. Shraga, *l.c.*, 410).

D. Shraga, notes in this regard that (*l.c.*, p. 410 – emphasis added):

"What triggered the call to limit UN liability was an undocumented joint claim by Bosnia and Herzegovina against the United Nations in the amount of $70 million […]. In receiving notice of this claim, the Advisory Committee on Administrative and Budgetary Questions noted: "This sort of information is, in the view of the Committee, compelling evidence of the need for the United Nations to develop, as quickly as possible, effective measures which could limit its liability."

The established practice of the United Nations in previous decades, as confirmed by the Secretary-General (A/51/389, paragraph 7), clearly shows that the Organization accepted it was liable for the tortious acts and omissions of its forces causing damage to third-party individuals. The UN cannot ignore this clear international responsibility, which, it is stressed, the UN recognized itself, merely because of purely budgetary reasons.

Indeed, the International Law Commission in its Commentary to Article 34 on the Responsibility of International Organizations, which provides that:

"The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act. […]",

has expressly stated that (p. 204 of the 2007 Report – emphasis added):

"It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally given to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law."

II.3.3.3. Principles guiding lawful conduct

A person, State, organization or any other entity logically conducts itself in an unlawful manner and should therefore be held responsible on grounds of tort, if said entity does not act according to the principles that regulate appropriate conduct. The International Law Association has held that among those pivotal principles are the principles of impartiality and the prevention of damage.

II.3.3.3.1. Impartiality

Regarding the principle of objectivity and impartiality, the ILA has stated the following (p. 182 of the report):

"1. An [international organisation] should conduct its institutional and operational activities in a manner which is objective and impartial and can be seen to be so.

2. Officers of an organ of an [international organisation] should perform their functions in a fair and impartial manner.

The principle of acting objectively and impartially is of a fundamental nature for the proper functioning of an 10 both with respect to its institutional and operational activities."

The principle of impartiality is commonly regarded as pivotal to the implementation of all UN peacekeeping operations and was, in the case of the war in Bosnia-Herzegovina, stressed in a number of UN orders. The Secretary-General of the UN further confirmed that the principle of impartiality is "normally considered to be the bedrock of successful peacekeeping operations" (UN Doc. A/54/549, *The Fall of Srebrenica*, para. 129). Nevertheless, it has been noted, *inter alia* by NIOD, that the UN forces, and Dutchbat in particular, did not observe this most important principle guiding lawful conduct during peacekeeping operations (Chapter II.8.10 of the NIOD Report):

"The UN order stated clearly that the Dutch battalions must act in a 'neutral' and 'impartial' way. The views on the practical meaning of these concepts diverged somewhat, however, because they were not translated into clear rules. The consequence was that each (company) commander interpreted 'neutrality' and 'impartiality' in their own way.

[Captain] Groen understood from the accounts that Dutchbat I arrived in the enclave very pro-Muslim, on the assumption that they were there 'to help the Muslims against those bastard Serbs'.

According to his own account, his view was different:

'I think that as part of the UN you have to be impartial. This was also officially the intention. To be a third party in the middle. But they clearly very openly took the side of the Muslim population […]'"

The State of the Netherlands incurs direct responsibility for the lack of training the members of Dutchbat received on the importance of impartiality in peacekeeping operations:

"[T]he training paid no attention to how neutrality and impartiality were to be interpreted […]. What was problematic in this line of conduct was that Dutchbat actually assumed that it was there for the benefit of the population in the enclave."

Furthermore, it has been stressed that (Chapter II.8.13 of the NIOD-report):

"It is […] particularly important for soldiers to know exactly what task derives from their mission, what position they have to take as a third party and how they are to interpret concepts such as neutrality, impartiality and humanity. It was therefore risky that there was no clear vision in the Netherlands Army during Dutchbat's mission on the question of how Dutchbat was to deal with situations that could occur in practice, and that much would depend on improvisation. This was partly because the Rules of Engagement did not contribute to clarity on the way in which Dutchbat was to position itself in the enclave. This again created the opportunity for

different commanders to interpret the position of the battalion in different ways: the result was confusion among Dutchbat members regarding how they understood their duties […].”

In Chapter II.8.11 of the NIOD-report, it was noted that:

“Moreover, the position of impartiality was also brought into the discussion, because an anti-Serbian attitude started to arise. This was also the reason that Karremans even indicated in a report that Dutchbat was ‘no longer willing, able and in a position to consider itself impartial due to the imputing policy of the Bosnian-Serb Government and the BSA [VRS].’

In this context, Karremans went on to state that (UN Doc. A/54/549, *The Fall of Srebrenica*, para. 235):

“Therefore, it is my strongest opinion that this Bosnian-Serb government should be lamed for it in the full extent as well as for the consequences in the future.”

Colonel Smith of UNPROFOR confirmed that (Directive 2/95, 29/05/95):

“UNPROFOR could hardly be called impartial anymore and they were not far from the point that in fact they were allies of the Bosnian Muslims.”

Furthermore (Chapter II.3.3 of the NIOD-report):

"[T]he Security Council mission led by the Venezuelan Ambassador to the United Nations, D. Arria, […] was ill-informed about the situation in Srebrenica and seemed to be looking for confirmation of preconceptions about military intervention in favour of the Bosnian Muslims."

The concept of impartiality was particularly important with respect to the implementation of the demilitarization agreements. It is clear, however, that the UN forces did not observe impartiality in this respect either (Chapter III.2.2 of the NIOD-report):

"[I]mpartiality meant that if the Bosnian Muslims had weapons in the [Heavy Weapon Exclusion Zones], they would also have to be attacked. However, the latter was unlikely to happen because the United States would not accept it."

Further extracts from the NIOD-report confirm that the forces of the United Nations and Dutchbat in particular could not be considered as conducting themselves impartially in the conflict surrounding Srebrenica (Chapter IV.9.13):

"UNPROFOR was gradually losing its impartiality but Janvier also now saw this as inevitable and felt that it should no longer be considered a problem."

"NATO, in fact, had already marched ahead of Janvier: strict impartiality of UNPROFOR was no longer a first requirement."

The lack of impartiality has also been confirmed by the UN Secretary-General as being a crucial fault on the part of the UN (UN Doc. A/54/549, *The Fall of Srebrenica*, para. 129):

"Several of the newer tasks [assigned to UNPROFOR] have placed UNPROFOR in a position of thwarting the military objectives of one party and therefore compromising its impartiality, which remains the key to its effectiveness in fulfilling its humanitarian responsibilities […]"

The Secretary-General nevertheless advised against redefining the mandate of UNPROFOR "commensurate with the resources the international community is prepared to make available to UNPROFOR" (*The Fall of Srebrenica,* para. 130).

II.3.3.3.2. Prevention of damage and risk analysis

Another principle commonly regarded as essential to the lawful nature of conduct of forces during UN peacekeeping operations is that of the prevention of damage. In this regard, the International Law Association in its Final Report held that the following principles apply to operations undertaken by international organizations and their member states (p. 191):

"1. Prior to engaging in operational activities, [international organisations] should assess the potential damage which these activities may cause. This assessment should be kept under review as the activity proceeds.

2. [International organisations] should take appropriate precautionary measures to prevent the occurrence of unnecessary damage caused by their operational activities or at any event to minimise the risk thereof

3. [International organisations] should co-operate in good faith and, as necessary, seek the assistance of other [international organisations] or States in preventing unnecessary damage or at any event in minimising the risk thereof

4. In accordance with the precautionary principle, [international organisations] should not undertake operational activities involving a risk of causing significant harm to the environment unless:

(a) an impact assessment has been carried out;

(b) those likely to be affected have been provided with timely notification of the risk and the assessment and

(c) the [international organisations] has entered into consultations with those entities concerned, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant harm or at any rate to minimise the risk thereof, while the operational activity is being carried out, the [international organisations] should continue the exchange of information with all the parties that might be affected."

The principle of damage prevention is commonly accepted as a general

principle of international law. The obligation of States to act according to this principle is regulated by the ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (adopted by the ILC in 2001 and published in *Yearbook of the International Law Commission, 2001*, vol. II, Part Two). It is further emphasized by Principle 2 of the Rio Declaration on Environment and Development (Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I), and has been confirmed by the ICJ in its advisory opinion on the *Legality of the threat or use of nuclear weapons* as now forming part of the *corpus* of international law (ICJ, 8 July 1996, para. 29).

It is abundantly clear from the facts surrounding the present case that the United Nations and the State of the Netherlands did not conduct themselves lawfully in trying to prevent as much damage as possible to, *inter alia*, the Serbian civilian population when preparing for the operational activities of peacekeeping in Srebrenica and the surrounding area. This has been confirmed by NIOD, which explicitly stated in its report that no risk analysis – key to the prevention of damage as indicated by the ILA – was carried out by Dutchbat and the UN (Chapter I.15.1 of the report):

"There was no separate risk analysis of Srebrenica and Zepa as a deployment area carried out by the Military Intelligence Service. As Minister Ter Beek said, 'There was no independent report. Never an independent report from Intelligence. As I said, there were these mini-reports.'

Conversely, Intelligence was never asked for a risk analysis. Asked whether it had drawn up a risk analysis before Dutchbat was sent out, Intelligence itself told the NIOD:

'On the basis of the information available, in particular weighing up the military power balance on the spot, it was possible to describe the security environment, from which it could be concluded that the enclave was indefensible from a military point of view.'

There is no indication that the higher echelons were informed of this conclusion."

For the reasons stated above, Plaintiff submits that the United Nations and the State of the Netherlands are liable for unlawful conduct carried out during the peacekeeping operation in Bosnia and Herzegovina. Finally, is it submitted that the conduct described in the paragraphs concerning the responsibility of States and international organizations under international law and their contractual liability, should, in the event and to the extent the District Court would not consider it a violation of said rules, nevertheless be considered unlawful.

II.4. Responsibility under international law

Apart from their responsibility under national law for breaches of contract and tortious conduct, Defendants are also liable under international law for their conduct in relation to the damage Plaintiff suffered.

II.4.1. Introduction

The international liability of states for wrongful acts is widely accepted and has been confirmed by the International Court of Justice. In the *Gabčikovo-Nagymaros* case, the Court held that (Gabčikovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ Reports 7, para. 47):

"It is […] well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."

Similarly, the international responsibility of international organizations is by now generally accepted as well. The International Law Association (ILA) for example, commonly regarded as one of the most influential and authoritative bodies for the development and codification of international law, has studied the issue of the accountability of international organizations from 1996 to 2004.

In 1996, a special ILA Committee on the Accountability of International Organizations was established, composed of 24 renowned experts on international public law representing all the legal systems of the world, including, *inter alia*, ICJ Judges Kooijmans and Fleischhauer and Professor August Reinisch.

The Committee had the mandate "to consider what measures (legal,

administrative or otherwise) should be adopted to ensure the accountability of public international Organisations to their members and to third parties, and of members and third parties to such Organisations." In particular, the Committee considered such issues as: "(a) the relations between member states, third parties and international Organisations; (b) redress by and against international Organisations, including access to the International Court of Justice and other courts and tribunals, and related issues of procedure […]" (Final Report of the Seventy-First ILA Conference (Berlin 2004), p. 167 – hereinafter: 'ILA Final Report').

After eight years of intense study and discussion, the Committee presented its Final Report at the occasion of the 71st Conference of the ILA, held in Berlin in 2004. The Report is highly relevant for the case at hand, for it includes specific findings and recommendations regarding the responsibility of international organizations for acts causing damage to third parties in the course of peace keeping operations. Furthermore, the ILA Report also focuses specifically on the issue of the attribution of said wrongful acts to international organizations and troop-contributing countries.

The main principles on the responsibility of international organizations have also recently been laid down by the International Law Commission (ILC), commonly seen as one of the most authoritative institutions for the codification of international law along with the ILA. The findings of the ILC are almost identical to those of the ILA Committee and can be regarded as such for the purposes of this case.

The main principles on the international responsibility of international

organizations as codified by the ILC are laid down in its Articles on the Responsibility of International Organizations, the most recent version of which can be found in the 2007 Report of the ILC. The draft is not yet complete and ratification has not yet taken place. Nevertheless, it is generally accepted that the articles already drafted are a reflection of the law in force.

Similarly, the ILC has also codified the main principles of State responsibility under international law, which can be found in its Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly Resolution 56/83, December 12, 2001 – hereinafter: 'the ILC Articles for State Responsibility'). The draft has not yet been ratified by States but there is general acknowledgment in the literature that the ILC Articles for State Responsibility are a reflection of the law in force (see, M. Zwanenburg, *Accountability of Peace Support Operations*, 2005, page 51). The International Court of Justice also confirmed the application and high authority of the ILC Articles for State Responsibility in its recent Judgment of February 26, 2007 (Bosnia-Herzegovina/Serbia and Montenegro) by reviewing against those articles (see, legal considerations 173, 385 and 420 of the Judgment).

It is widely accepted that the principles of state responsibility are applicable, by analogy, to international organizations (ILA Final Report, p. 198; Report A/51/389 of the Secretary-General, paragraph 6; M. Hirsch, *The Responsibility of International Organizations toward Third Parties*, 1995, p. 11 and cited scholars and M. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic*

Treaty Organization Peace Support Operations, p. 70 and cited scholars). Due to the strong correspondence between the ILC Articles on the Responsibility of States and the main principles on the accountability of international organizations codified by the ILC and the ILA (*see*, e.g. para. 332 of the ILC 2007 Report), there is no reason to assume that any less authority should be attributed to the articles on international organizations than to those on States.

II.4.2. Applicable rules

Part Three, Section One of the ILA Final Report on the Accountability of International Organizations provides that:

"1. Every internationally wrongful act of an [international organisation] entails the international responsibility of that [organisation].

2. There is an internationally wrongful act of an [international organisation] when conduct consisting of an action or omission is attributable to the [organisation] under international law and constitutes a breach of an applicable international obligation."

This provision corresponds almost *verbatim* with Article 3 of the ILC Articles on the Responsibility of International Organizations and Articles 1 and 2 of the ILC Articles on State Responsibility. The same principles have also been confirmed by several scholars (*see*, *inter alia*, M. Hirsch, *o.c.*, p. 12-13).

Part Three, Section Two of the ILA Final Report states that:

"1. The conduct of organs, officials, or agents of an [international organisation] shall be considered an act of that [organisation] under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (ultra vires).

2. An [international organisation] is responsible for the conduct of its organs or officials acting in their official capacity regardless of the place where the conduct occurs.

3. An [international organisation] is responsible for internationally wrongful acts committed by an organ of a State placed at the disposal of an Organisation provided the Organisation has the authority to exercise effective control (operational command and control) over the activities of that organ.

4. The responsibility of an [international organisation] does not preclude any separate or concurrent responsibility of a State or of another [international organisation] which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act. There is also an internationally wrongful act of an [international organisation] when it aids or assists a State or another [international organisation] in the commission of an internationally wrongful act by that State or other [international

organisation].

5. A State is responsible for wrongful acts committed by one of its organs which has been placed at the disposal of an [international organisation] and over which the State has retained effective control (operational command and control).”

Likewise, Articles 4-6 of the ILC Articles on the Responsibility of International Organizations provide that:

“1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization […]” (Art. 4);

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct” (Art. 5); and

“The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions” (Art. 6).

Correspondingly, Articles 4, 6 and 7 of the ILC Articles on State

Responsibility state that:

"*1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State […]*" (Art. 4);

"The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed" (Art. 6); and

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions" (Art. 7).

The aforementioned rules have been confirmed by the literature on this point (M. Hirsch, *o.c.*, p. 16).

II.4.3. Attribution in peacekeeping operations

It follows from the rules laid down by the ILA and the ILC that, for a state or an international organization to be internationally responsible for a certain act or omission, it has to be established that the conduct can be attributed to

the respective entity. In the present case, it shall be demonstrated that the conduct that caused damage to Plaintiff is attributable to the United Nations and the State of the Netherlands.

The ILA Final Report specifically discusses the attribution of wrongful acts causing damage to third parties including individuals and private entities in the course of peacekeeping missions carried out jointly by the United Nations and member states contributing troops.

The ILA notes as a preliminary observation and specifically in relation to UN peacekeeping operations, that the place where the conduct by an organ of an international organizations takes place, has no influence on the issue of attribution of such conduct to the organization (p. 201 of the Final Report).

The ILA further stresses that "[t]raditional peacekeeping operations are organs of the UN and normal principles of attribution apply." The UN will therefore be responsible for "wrongful acts by peacekeeping forces operating under its effective control (operational command and control)", even if they were "committed upon instructions of national authorities or which were in any other way contrary to or going beyond instructions given by the Organisation." Furthermore, "[t]he [international organisation will be responsible for damage caused in breach of obligations under applicable international law by forces under its effective control (operational command and control) and which is attributable to the Organisation. In addition, the [international organization] may also be responsible for damage which results from its failure to exercise sufficient control" (p. 202 of the Final Report).

In its Commentary on Article 5 of the Articles on the Responsibility of International Organizations, the ILC stated that "Article 5 deals with the […] situation in which the [organ or agent lent by a State] still acts to a certain extent as organ of the lending State […]. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent" (International Law Commission, *Text of the draft articles with commentaries thereto: Attribution of conduct to an international organization*, A/CN.4/L.654/Add.1, p. 11 – hereinafter: 'ILC Commentary'). The applicability of the corresponding Article 6 on State Responsibility to peacekeeping operations has also been confirmed by the ILC and several scholars (*see* M. Zwanenburg, *o.c.*, p. 109)

In the case of UN peacekeeping operations, the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State. This problem of attribution is usually remedied in the agreement that the United Nations concludes with the contributing State. According to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or willful misconduct of the personnel provided by the Government". (Model Contribution Agreement, A/50/995, annex and A/51/967, annex, Article 9).

The ILC stresses, however, that, "[a]t any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules" (p. 12 of the Commentary).

In the absence of formal arrangements between the UN and the State providing troops, the UN Secretary-General has held that (A/51/389, paragraph 18):

"[…] responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."

It follows from the aforementioned provisions, articles and commentaries that *effective control* over organs and individuals by a subject of law is the basis for attribution of acts or omissions by such organs and individuals to the subject of law exercising such control, even if the agreement concluded between the United Nations and the troop-contributing country would provide that the troops are placed under the control of the organization. This has been confirmed by the International Law Commission (p. 12 of the commentary), the Institut de Droit International (Preliminary Report, *Annuaire IDI* 54-I, p. 48-49) and by several scholars (J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de Droit international*, vol. 8 (1962), p. 427 at p. 442; R.

Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at pp. 62-63 and 73-79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981-1982), p. 117 at pp. 123-125 and 134-135; M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", *Revue générale de Droit international public*, vol. 99 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64-67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996), pp. 241-143; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 79-380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129).

The test of effective control is not to be generally applied to all acts of a certain international organ; rather each individual case must be examined as to whether the specific act or omission was performed under the control of

the organization or the sending state. If a member of such a force performs an act under the direction of its national government, that government will be the proper addressee of any claim arising from that act or omission. This conclusion will not be altered even in cases where the contingent to which that member belongs is generally under the operational control of the organization (M. Hirsch, *o.c.*, p. 65).

The presumption of attribution to the United Nations can therefore be rebutted if it is established that the troops were in fact acting on behalf of a troop contributing state (M. Zwanenburg, *o.c.*, p. 113). It is not necessary that the sending state gave express instructions in this regard, because it is sufficient that troops in question acted under the direction and contro of the state (M. Zwanenburg, *o.c.*, p. 131). The ordinary status of the force merely serves as a subsidiary test, when the facts concerning the actual control over a particular act are not clear. Only in such a case will the entity which regularly retains control over the activities of the wrongdoer be held responsible for the latter's act (M. Hirsch, *o.c.*, p. 65).

This is confirmed by the ILC, which notes that, for instance, it would have been difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the Commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel (S/1994/653, paras. 243-244, p. 45):

"The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces

Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."

The ILA and the ILC Special Rapporteur on State Responsibility have both stressed that there is no requirement for detailed instructions or authorization of a particular act in order for that act to be attributable to, *in casu*, the UN or the State of the Netherlands (ILA Final Report, p. 201 and Report of the ILC on the Work of its Fiftieth Session (1998), UN Doc. A/53/10 and corr. 1, paras. 395 and 422). One merely has to establish whether the troops in question acted under the effective and factual control of the State or the international organization.

This has been confirmed by, *inter alia*, the ICJ in its Judgment of February 26, 2007 (legal consideration no. 400) and by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, which held in the *Tadić* that overall control suffices for the purpose of attribution (*Prosecutor v. Duško Tadić*, Judgment, Case No. IT-94-1, Appeals Chamber, 15 July 1999, para. 117).

The ILC confirms that the United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state (Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division):

"As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."

This statement sums up United Nations practice relating to the United Nations Operations in the Congo (ONUC), the United Nations Peacekeeping Force in Cyprus (UNFICYP) and later peacekeeping forces **(**p. 13 of the Commentary. *See* Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), paras. 7-8, p. 4).

The UN Secretary-General has expressly confirmed this, by stating that (Report A/51/389, paragraph 8):

"The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims […] evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization."

The Secretary-General further held that the criterion of the "degree of effective control" was decisive with regard to joint operations (paragraphs 17-18 of the Report):

"The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the

operation in question is under the exclusive command and control of the United Nations [...]. In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."

The ILC has confirmed that, "[w]hat has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion" (p. 14-16 of the Commentary). This has to be decided on a case-by-case basis.

It follows from these concluding remarks of the ILC that, where it is impossible to distinguish areas of effective control in a given situation, dual or concurrent attribution to the United Nations and the relevant troop-contributing countries of certain acts and omissions during peacekeeping operations can occur. Indeed, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be

attributed to a State, nor does *vice versa* attribution of conduct to a State rule out attribution of the same conduct to an international organization (p. 2-3 of the Commentary). This has been confirmed by several scholars (*see*, e.g., see, R. Hofmann, in R. Hofmann et al, *Die Rechtskontrolle von Organen der Staatengemeinschaft*, 2007, p. 29 and M. Zwanenburg, *o.c.*, p. 131). Specifically referring to the context of peacekeeping operations, M. Hirsch stated that (*o.c.*, p. 65):

"The criterion of effective control will not inevitably lead to a single entity. There may well be cases in which both the international organization and the contributing state will assume legal responsibility jointly, e.g. where both of them share the command and control over the organ that committed the wrongful act."

For the above reasons, Plaintiff submits that both the United Nations and the State of the Netherlands are accountable under international law for failure to observe the applicable rules and guiding principles of international law in peacekeeping operations.

II.4.4. Internationally wrongful acts

It follows from the ILA and ILC rules referenced above that a State or international organization can only be held responsible under international law if the relevant entity has committed an internationally wrongful act, which consists of an act or omission constituting a breach of an applicable international obligation.

It should be recalled that the International Court of Justice, among others, has confirmed that such a responsibility exists, irrespective of the nature of the violated international obligation (*supra*, paragraph…).

Plaintiff submits that the United Nations and the State of the Netherlands are internationally responsible for breaches of, first and foremost, the UNPROFOR mandate and international humanitarian law.

II.4.4.1. UNPROFOR mandate

The mandate of UNPROFOR, as developed by the United Nations Secretariat and Security Council, was to "create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis" (*Concept for a United Nations peace-keeping operation in Yugoslavia, as discussed with Yugoslav leaders by the Honourable Cyrus R. Vance, Personal Envoy of the Secretary-General and Marrack Goulding, Under-Secretary-General for Special Political Affairs*, Annex III to *Report of the Secretary-General pursuant to Security Council Resolution 721 (1991)*, UN. Doc. S/23280, para. 1 and UNSC Resolution 743 (1992), 21 February 1992, OP 5). Vital for achieving this goal was the demilitarization of several explosive areas in the former Yugoslavia and the delivery of effective humanitarian relief to civilians affected by the war. Furthermore, it was essential that UNPROFOR were to carry out these tasks in an impartial manner.

Plaintiff submits that Defendants breached the UNPROFOR mandate by their failure to demilitarize the area of Srebrenica in accordance with the

demilitarization agreements concluded on 18 April and 8 May 1993, by neglecting the humanitarian needs of the Serbian victims of war crimes carried out by the Bosnian Moslems, and by failure to respect the impartial nature of the mandate.

II.4.4.1.1. Impartiality

The imperative of impartiality is generally considered to be one of the most important principles of and preconditions for the deployment of a peacekeeping or peace-enforcement operation. Indeed, it is recalled that the Secretary-General in his report *The Fall of Srebrenica* at various points stressed the importance of impartiality, "which is normally considered to be the bedrock of successful peacekeeping operations" and which was considered "the key to [UNPROFOR's] effectiveness in fulfilling its humanitarian responsibilities" (UN Doc. A/54/549, para. 129).

The principle of impartiality was also stressed in the basic outline of UNPROFOR's mandate, developed by Cyrus Vance and the UN Under-Secretary-General for Special Political Affairs (*Concept for a United Nations peace-keeping operation in Yugoslavia, as discussed with Yugoslav leaders by the Honourable Cyrus R. Vance, Special Envoy of the Secretary-General and Marrack Goulding, Under-Secretary-General for Special Political Affairs*, Annex III to UN Doc. S/23280, para. 4 (hereinafter: '*Concept for a UN peace-keeping operation in Yugoslavia*')):

"All members of the peace-keeping operation [...] would be required to be completely impartial between the various parties to the conflict."

Plaintiff submits, however, that the United Nations, UNPROFOR and the State of the Netherlands solely focused on the wrongdoings of one party to the conflict, *i.e.* the Bosnian Serbs, thus minimizing and neglecting the responsibility of the Bosnian Moslems and thereby violating the imperative of impartiality. The consequence of this most serious breach of one of the pivotal principles underlying UNPROFOR's mandate was an ultimate failure on the part of the UN and the State of the Netherlands to prevent and remedy the suffering of the Bosnian Serb civilian population in Srebrenica and the surrounding area. In this regard, Plaintiff wishes to point the District Court to the paragraphs dealing with the tortious responsibility of the UN and the Netherlands (*see* paragraphs …). In addition, Plaintiff would like to draw the attention of the Court to the following.

UNPROFOR's mandate as initially outlined in the *Concept for a UN peace-keeping operation in Yugoslavia* was further elaborated on and clarified by the UN Secretary-General and the Security Council in several reports and resolutions in 1992 and 1993. Most important for the mandate of UNPROFOR in Bosnia and Herzegovina were UNSC Resolutions 819 (1993), 824 (1993) and 836 (1993).

As has been recognized by the UN Secretary-General in his report *The Fall of Srebrenica*, all of these resolutions focused solely on the responsibility of the Bosnian Serbs.

The following paragraphs, both preambular (PP) and operative (OP), of UNSC Resolution 819 (1993), adopted on April 16, 1993, focus on the responsibility of the Bosnian Serbs:

PP 6: *"Concerned by the pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia [...];"*

PP 7: *"Deeply alarmed at the information provided by the Secretary-General to the Security Council on 16 April 1993 on the rapid deterioration of the situation in Srebrenica and its surrounding areas, as a result of the continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units;"*

PP 8: *"Strongly condemning the deliberate interdiction by Bosnian Serb paramilitary units of humanitarian assistance convoys;"*

PP 9: *"Also strongly condemning the actions taken by Bosnian Serb paramilitary units against UNPROFOR, in particular, their refusal to guarantee the safety and freedom of movement of UNPROFOR personnel;"*

PP 10: *"Aware that a tragic humanitarian emergency has already developed in Srebrenica and its surrounding areas as a direct consequence of the brutal actions of Bosnian Serb paramilitary units, forcing the large-scale displacement of civilians, in particular women, children and the elderly;"*

OP 2: *"Demands also to that effect the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica;"*

OP 3: *"Demands that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina;"*

OP 6: *"Condemns and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of 'ethnic cleansing'"*

In apparent recognition of the violation of the principle of impartiality by the one-sidedness of the actions undertaken by the United Nations, the Secretary-General in *The Fall of Srebrenica* expressly noted that (para. 55):

"However, no specific restrictions were put on the activities of the Army of the Republic of Bosnia and Herzegovina [in Resolution 819 (1993)]."

The text of UNSC Resolution 824 (1993), adopted on May 6, 1993, shows a similar approach:

PP 7: *"Deeply concerned at the continuing armed hostilities by Bosnian Serb paramilitary units against several towns in the Republic of Bosnia and*

Herzegovina and determined to ensure peace and stability throughout the country, most immediately in the towns of Sarajevo, Tuzla, Zepa, Gorazde, Bihac, as well as Srebrenica;"

OP 4: *"Further declares that in these safe areas the following should be observed:*

1. The immediate cessation of armed attacks or any hostile act against these safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they cease to constitute a menace to their security and that of their inhabitants to be monitored by United Nations military observers […]"

The Secretary-General once again admitted that (*The Fall of Srebrenica*, para. 68):

"As in resolution 819 (1993), all of the Security Council's demands in resolution 824 (1993) were directed at the Bosnian Serbs."

Finally, UNSC Resolution 836 (1993), adopted on June 4, 1993, also focused solely on the Bosnian Serbs as aggressors to the conflict, thus apparently exempting the Bosnian Moslems and minimizing their crimes:

OP 5: *"Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), […] to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina […]"*

It can be noted in this regard that the cited paragraph formed a clear and inexcusable violation of the obligation of UNPROFOR to demilitarize the area of Srebrenica and disarm the Bosnian army. Plaintiff shall later further elaborate on this breach of UNPROFOR's mandate (*see* paragraphs …).

It is clear from the text of the cited resolutions that the United Nations in its attempts at defusing the conflict in Bosnia and Herzegovina in general, and the explosive situation in Srebrenica and its surroundings in particular, had adopted an approach that ran counter to the imperative of impartiality as stressed in the initial outline of UNPROFOR's mandate.

The responsibility of the United Nations in this regard has been confirmed and accepted by the Secretary-General on several occasions (*The Fall of Srebrenica*, para. 129, citing from UN Doc. S/1994/300, *Report of the Secretary-General pursuant to Resolution 871 (1993)*, para. 34):

"The Secretary-General was particularly concerned about the problem of impartiality, which is normally considered to be the bedrock of successful peacekeeping operations. He argued as follows:

"The steady accretion of mandates from the Security Council has transformed the nature of UNPROFOR's mission in Bosnia and Herzegovina and highlighted certain implicit contradictions. For a long while, UNPROFOR's primary mandate in Bosnia and Herzegovina was seen as assistance in the delivery of humanitarian assistance, an objective that could be attained only with the active cooperation of the parties. The

increased tasks assigned to UNPROFOR in later resolutions have inevitably strained its ability to carry out that basic mandate. The principal consequences have been the following:

" (a) Several of the newer tasks have placed UNPROFOR in a position of thwarting the military objectives of one party and therefore compromising its impartiality, which remains the key to its effectiveness in fulfilling its humanitarian responsibilities [...]."

The Secretary-General also noted that (*The Fall of Srebrenica*, para. 150, citing from UN Doc. S/1994/555, *Report of the Secretary-General pursuant to Resolution 844 (1993)*, para. 15):

"UNPROFOR found itself in a situation where many safe areas were not safe, where their existence appeared to thwart only one army in the conflict, thus jeopardizing its impartiality."

Remarkably, the Secretary-General nevertheless "advised against redefining the mandates" (*The Fall of Srebrenica,* para. 130), thereby failing to remedy the breaches of impartiality and adding to the general attitude of inculpating the Bosnian Serbs and exempting the Moslem side.

This anti-Serb attitude is clearly demonstrated by the following quote taken from Dutchbat Commander Thomas Karremans (*The Fall of Srebrenica*, para. 235):

"My battalion is no longer willing, able and in the position to consider itself as being impartial [...] [I]t is my strongest opinion that this Bosnian-Serb government should be blamed for it in the full extent as well as for the consequences in the future."

Plaintiff therefore submits that it has been shown sufficiently that UNPROFOR and the United Nations have failed to uphold the principle of impartiality in the course of the peacekeeping operation in Srebrenica, thereby breaching the mandate of UNPROFOR.

In this regard, Plaintiff wishes to note that one of the most clear indications and severe consequences of the breach of impartiality by the Defendants is the complete lack of humanitarian relief or assistance directed towards the Bosnian Serb civilian population that suffered severely as a result from war crimes committed by the Bosnian Moslems of Srebrenica.

II.4.4.1.2. Humanitarian relief

From the outset it was clear that the most basic aspect of UNPROFOR's mandate was to provide humanitarian assistance and relief to all the civilians affected by the war in Bosnia and Herzegovina and elsewhere in the former Yugoslavia.

The UN Secretary-General deemed the humanitarian support to be UNPROFOR's "basic" and "primary" mandate (*The Fall of Srebrenica,* para. 129), as well as the "overriding objective of the safe areas" (para, 172).

This aspect of UNPROFOR's mandate was stressed in several resolutions of the UN Security Council.

Resolution 819 (1993) provided the following in this respect (OP 8 and 9 of the resolution):

"Demands the unimpeded delivery of humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina, in particular to the civilian population of Srebrenica and its surrounding areas and recalls that such impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law;

Urges the Secretary-General and the United Nations High Commissioner for Refugees to use all the resources at their disposal within the scope of the relevant resolutions of the Council to reinforce the existing humanitarian operations in the Republic of Bosnia and Herzegovina in particular Srebrenica and its surroundings"

Resolution 836 (1993) contained, *inter alia*, the following paragraph stressing the importance of humanitarian relief to the mandate of UNPROFOR (OP 5 of the resolution):

"Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), [to participate] in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992"

Furthermore, the United Nations issued several other resolutions that specifically dealt with the issue of humanitarian assistance, indicating that this was to be seen as the core of UNPROFOR's mandate (*see*, *inter alia*, UNSC Resolutions 764 (1992), 770 (1992), and 776 (1992)).

It is clear that the task of UNPROFOR to provide humanitarian assistance to the civilians affected by the war in Bosnia and Herzegovina, was, in line with the overriding objective of impartiality, to be carried out irrespective of the ethnicity of the civilian population. Indeed, several official UN instruments confirm that the humanitarian relief as one of the pillars of UNPROFOR's mandate, was to be delivered to civilians in need in the entire Republic of Bosnia and Herzegovina:

"UNPROFOR's humanitarian and monitoring tasks in Bosnia and Herzegovina are not restricted solely to the safe areas. They apply equally throughout the Republic" (UN Doc. S/1994/555, para. 13);

"UNPROFOR is determined to continue its efforts to ensure delivery of humanitarian assistance to civilians in need anywhere in Bosnia and Herzegovina" (UN Doc. S/1994/555, para. 20);

"UNPROFOR's task, under its enlarged mandate, would be to support UNHCR's efforts to deliver humanitarian relief throughout Bosnia and Herzegovina […]" (UN Doc. S/24540, *Report of the Secretary-General on the Situation in Bosnia and Herzegovina*, para. 3);

"Deeply disturbed by the situation that now prevails in Sarajevo, which has severely complicated UNPROFOR's efforts to fulfil its mandate to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance in Sarajevo and other parts of Bosnia and Herzegovina pursuant to resolutions 743 (1992), 749 (1992), 761 (1992) and 764 (1992) and the reports of the Secretary-General cited therein" (UNSC Resolution 770 (1992), PP 7);

"Determined to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Bosnia and Herzegovina, in conformity with resolution 764 (1992)" (UNSC Resolution 770 (1992), PP 10);

"Calls upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina" (UNSC Resolution 770 (1992), OP2).

In this respect, Plaintiff would like to note that the United Nations is also responsible for the acts and omissions of its organs and officials, including the United Nations High Commissioner for Refugees (hereinafter: 'UNHCR').

The UNHCR had, during the conflict in Bosnia and Herzegovina, the responsibility "to determine the priorities and schedules for the delivery of

[humanitarian] relief, to organize the relief convoys, to negotiate safe passage along the intended routes […]".

In spite of clear indications that the Bosnian Serb civilian population in the surrounding area of Srebrenica was under constant attack from the Bosnian Moslems inside the safe area, due to the failure on the part of UNPROFOR to adequately demilitarize this area, no humanitarian relief was offered to this population, which nevertheless suffered severely from the crimes committed by the Moslems. The Bosnian Moslem population of the same area, however, did receive such relief.

Plaintiff submits that this is not only a clear sign of failure on the part of the UN, UNPROFOR and the UNHCR, to uphold the principle of impartiality, as well as a consequence thereof, but also a manifest breach of the mandate of UNPROFOR, which called for impartial and immediate humanitarian relief for civilians in need, irrespective of their ethnicity.

II.4.4.1.3. Demilitarization

Along with the delivery of humanitarian assistance, the UN Secretary-General in his *Report pursuant to Resolution 844 (1993)* referred to the demilitarization of the warring parties in Bosnia and Herzegovina as forming the original mandate of UNPROFOR in that area (UN Doc. S/1994/555, para. 24):

"UNPROFOR's original mandates in Bosnia and Herzegovina [are] supporting humanitarian assistance operations and contributing to the

overall peace process through the implementation of cease-fires and local disengagements."

Furthermore, the Secretary-General considered the "[d]emilitarization of the safe areas" and the taking of "[i]nterim measures towards complete demilitarization" to be crucial "in order to achieve the overriding objective of the safe areas, i.e., protection of the civilian population and delivery of humanitarian assistance" (*The Fall of Srebrenica*, para, 172).

It is therefore submitted that the implementation of the demilitarization agreements concluded between the ABiH and the VRS on 18 April and 8 May 1993 was not only a contractual obligation of Defendants, it also formed a crucial part of UNPROFOR's mandate in Bosnia and Herzegovina. In this regard, Plaintiff would like to refer the Court to the paragraphs pertaining to the failure of Defendants to uphold their contractual obligations to disarm the Moslems (*see* paragraphs …), in order to show that the United Nations and the State of the Netherlands in so doing also breached UNPROFOR's mandate.

II.4.4.2. Violations of international humanitarian law

II.4.4.2.1. Applicability

Since the United Nations is not a party to the basic international instruments commonly regarded as forming the body of international humanitarian law (*inter alia*, the four 1949 Geneva Conventions and two additional protocols, as well as the 1907 Hague Convention), Plaintiff shall first deal with the

issue of whether the actions of UN forces during peacekeeping operations are regulated by international humanitarian law.

Plaintiff shall show that the United Nations and the State of the Netherlands in its capacity of troop-contributing nation were bound by the basic rules and principles of international humanitarian law by virtue of the United Nations' international legal personality, the UN and state practice of peacekeeping operations and various international legal instruments. Defendants should therefore be held accountable under international law for breaches of said guiding rules and principles.

Legal personality

As indicated previously, it is not disputed that the United Nations possesses legal personality. Thus, it is clear that the UN in that capacity is bound by customary international humanitarian law (*see* G. Moritz, "The Common Application of the Laws od War within the NATO-Forces", *13 Military Law Review*, p. 5; M. Zwanenburg, *o.c.*, p. 162 and R. Hofmann, in R. Hofmann et. al., *Die Rechtskontrolle von Organen der Staatengemeinschaft*, 2007, p. 15).

In this respect, it should be noted that the International Court of Justice in the *Namibia (South West Africa)* case already applied general international law to the United Nations (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, 16). There is no reason to assume why the same rationale would not apply to

general principles of international humanitarian law.

Article 1, paragraph 3 UN Charter

Respect for international humanitarian law by the UN would also be consistent with the organization's purpose of promoting respect for human rights and achieving international cooperation in resolving international problems of a humanitarian character (Article 1, paragraph 3 of the UN Charter).

UN Practice

Present practice by the United Nations and states regarding peacekeeping operations further confirms that the laws of war and other rules of international humanitarian law as laid down in the 1907 Hague Conventions and the 1949 Geneva Conventions, apply to peacekeeping operations jointly undertaken by the UN and its Member States (*see* M. Zwanenburg, *o.c.*, p. 170 and M. Hirsch, *o.c.*, p. 33).

During the Korean War, the UN claimed no exemption from any rules of the laws of war and the entire operation was conducted on the basis of the forces' full subjection to these rules (*see* Higgins, *The UN Forces in Asia*, p. 192). The organization's commitment to comply with the customary laws of war was reaffirmed in the agreements concluded between the UN and third states following the operation in Congo. That operation caused considerable injuries to third-party individuals and many of them lodged claims with the UN. In a series of lump-sum agreements, the organization accepted the

responsibility for damages inflicted by its forces "not arising from military necessity" (*Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals*, New York, 20 February 1965, 535, *U.N.T.S.* 191). Further, in a letter to the Representative of the Soviet Union, the UN Secretary-General explained that "[c]laims of damage which were found to be solely due to military operations or military necessity were excluded" (Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Representative of the Union of Soviet Socialist Republics", 1965 *United Nations Yearbook* 41).

In 1978, the Secretary-General stated that the principles of humanitarian law "must, should the need arise, be applied within the framework of the operations carried out by United Nations forces" (Letter of 23 October 1978, cited in U. Palwankar, "Applicability of International Humanitarian Law to United Nations Peacekeeping Forces", *International Review of the Red Cross* 1993, p. 232).

Article 28 of the 1991 Model Participating State Agreement confirms that:

"[The United Nations peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The participating state shall therefore ensure that the members of

its national contingent serving with [the United Nations peacekeeping operation] be fully acquainted with the principles and spirit of these Conventions."

This provision was repeated in the 1993 *Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda* (November 5, 1993, UN-Rwanda, Art. 7, 1748 *UNTS*). An identical provision was subsequently inserted in the agreements on the status of the United Nations missions in Haiti, Angola, Croatia, Lebanon, Morocco, Algeria and Mauritania.

The UN Secretary-General in his *Report on the Financial and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations* (A/51/389) expressly confirmed the applicability of international humanitarian law to actions of UN forces in the course of peacekeeping operations and has held that violations thereof shall entail the responsibility of the Organization (paragraph 16 of the Report):

"The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces."

Bulletin on the Observance by UN Forces of International Humanitarian Law

In 1999, the UN Secretary-General laid down "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control" in his *Bulletin on the Observance by United Nations Forces of International Humanitarian Law* (ST/SGB/1999/13, 6 August 1999, reprinted in *ILM*, 1999, 1656.). This document reflects a core of principles otherwise found in the Geneva Conventions and thus confirms that international humanitarian law is applicable to UN peacekeeping operations.

The Bulletin expressly provides that (Section 1.1 – emphasis added):

"The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."

It follows from Resolution 836 (1993), paragraph 9, that the UNPROFOR forces in Bosnia and Herzegovina were indeed authorized to use force in self-defence ("Authorizes UNPROFOR, […] acting in self-defence, to take the necessary measures, including the use of force […]"). The rules as laid down by the Secretary-General in his 1999 Bulletin are therefore applicable to the acts and omissions in the present case.

Furthermore, it is currently generally accepted in the literature that international humanitarian law is also applicable in cases where UN forces

are normatively not allowed to use force, but nevertheless engage in fighting on a factual level. It has been amply established in the factual part of this writ that there was constant fighting in and around Srebrenica from 1992 to 1995. It is therefore clear that international humanitarian law was applicable to the Dutch and other UN forces in Srebrenica.

Section 3 of the Bulletin further states that:

"In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement."

The 1999 Bulletin includes several rules which are generally not considered to be of a customary law character and, on the other hand, excludes a lot of rules which are. Indeed, it has been noted that the Secretary-General, when drafting the 1999 Bulletin, did not consider himself constrained by the customary international law provisions of the Hague and Geneva Conventions and Protocols as the lowest common denominator by which all national contingents would otherwise be bound. The Bulletin rather amounts to an undertaking by the Secretary-General for the UN forces to abide by the

highest standard of conduct within the general consensus of states (D. Shraga, *l.c.*, p. 408).

In this respect, attention should be drawn to Section 2 of the Secretary-General's Bulletin, which states that:

"The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel. […]"

The brief survey above leads to the conclusion that peacekeeping forces are legally bound to comply with the relevant rules of the customary laws of war (M. Hirsch, *o.c.*, p. 35). Indeed, the principles of the laws of war were designed to apply to any international armed conflict in order to minimize as much as possible human suffering resulting from hostilities, and hostilities in which UN forces are involved are no exception in that respect (*see*, in this respect, H. Lauterpacht, "The limits of the operation of the law of war", 30 *British Year Book of International Law* 206, p. 242-243 and R. Baxter, "The role of law in modern war", *Proceedings of the American Society of International Law at its Forty-Seventh Annual Meeting*, 90, p. 95-96).

The applicability of international humanitarian law to peacekeeping operations has been confirmed by reports and resolutions of various authoritative international law institutions, such as the Institut de Droit International (Article 2 of its Resolution on the Conditions of Applicability of Humanitarian Rules of Armed Conflicts to Hostilities in which United Nations Forces may be Engaged, 54 (II) *Annuaire de l'Institut de Droit*

International, 1971, 467), La Ligue Belge pour la Défense des Droits de l'Homme (Article 1 of its Resolution published in *Revue de Droit International et de Droit Comparé*, 1963, 176) and the International Law Association. In this regard, the ILA in its final Report on the Accountability of International Organisations noted that (p. 193):

"When taking and implementing decisions such as those concerning the use of force, [...] launching of peacekeeping or peace-enforcement operations, [international organisations] should observe basic human rights obligations and applicable principles and rules of international humanitarian law."

An overwhelming majority of respected scholars further confirm that UN forces participating in military operations, are bound to comply with international humanitarian law (D. Schindler, "United Nations Forces and International Humanitarian Law" in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, 1984, 527; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried out by UN Peace-Keeping Forces", *Revue Egyptienne de Droit International*, 1976, 71; Y. Sandoz, "The Application of Humanitarian Law by the Armed Forces of the United Nations Organization", *International Review of the Red Cross*, 1978, 283; Simmonds, *The UN Forces in Congo*, 178-180 and Higgins, *The UN Forces in Asia*, 190).

It can therefore be held that the UN practice, combined with the resolutions and reports of various international legal institutions and the literature on this point, testifies to the existence of an international customary principle

that UN peacekeeping forces are bound by international humanitarian law (M. Hirsch, *o.c.*, p. 36).

Furthermore, in the present case, the preamble of the 8 May 1993 demilitarization agreement brokered by UNPROFOR between the VRS and the ABiH explicitly confirmed that the Geneva Conventions and Protocols of 12 August 1949 concerning the protection of victims of international armed conflicts were applicable to the conflict in Bosnia.

It is thus clear the United Nations forces in the present case had the obligation to act in accordance with the general rules of international humanitarian law. This does not mean, however, that the State of the Netherlands could not be held accountable for breaches of the same rules.

II.4.4.2.2. Concurrent obligation

The United Nations and the troop-contributing countries have a concurrent obligation to ensure that the rules of international humanitarian law are respected in the course of peacekeeping operations.

In this regard, the ILA in its Final Report noted that (p. 202):

"[International organisations] may wish to consider recognising the concurrent responsibility of the State of nationality for violations of International Humanitarian Law by members of its national contingent and its responsibility to provide compensation in case of insufficient guarantees that the principles of International Humanitarian Law would be respected."

This principle is confirmed by M. Hirsch, who argues in regard to international humanitarian law obligations of the United Nations that (*o.c.*, p. 37):

"[When the UN] conducts operations which involve risks to violations of rights of third parties, and when the organization does not have the necessary means (either legal or factual) as required by law to preserve the rights of third parties, the organization is bound to ensure that another appropriate entity [i.e. the States participating in the operation] will take the necessary steps."

The ILA further held that the obligation to abide by international humanitarian law in principle rests on the State when the armed forces remain under its command and control, while the international organization has the special responsibility to ensure respect for international humanitarian law by the State. If, on the other hand, operational command rests with the international organization, its responsibility will result from non-observance of the same rules, while States have the special responsibility to ensure respect for international humanitarian law by the organization. In cases where strategic control formally rests with the international organization but where in practice national commanders choose the targets, both the State and the organization share responsibility for a violation of international humanitarian law (*see* also R. Kolb, *Droit humanitaire et operations de paix internationales*, 2002, p. 23-25).

Finally, it is uncontested that the obligation for States, under Common

Article 1 of the 1949 Geneva Conventions, to respect and ensure respect for international humanitarian law, is unconditional and applies in all circumstances, whether States are acting individually, collectively or contribute troops to peacekeeping or peace enforcement operations, including those conducted under the auspices of, or under a mandate or authorization from an international organization (L. Boisson de Chazournes and L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective Interests", *Revue internationale de la Croix Rouge*, 2000, p. 70).

II.4.4.2.3. International humanitarian law rules applicable to UN forces in peacekeeping operations

It has been established that the United Nations and troop contributing countries are bound by, at the very least, the rules of international humanitarian law which have been recognized as forming part of international customary law.

The International Military Tribunal of Nuremberg stated that the 1907 Hague Regulations by 1939 were "recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war" (*Trial of the Major War Criminals before the International Military Tribunal* 1947, vol. I, p. 267). The Hague Convention should therefore be considered as customary international humanitarian law.

Further, the UN Secretary-General stated in his report on the establishment of the International Criminal Tribunal for the former Yugoslavia that

(*Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) of 3 May 1993*, UN Doc. S/25704, para. 35):

"The part of conventional International Humanitarian Law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907."

The International Court of Justice in its Advisory Opinion in the *Nuclear Weapons* case confirmed that the Hague and Geneva Conventions are part of customary international law (*Legality of the Threat or Use of Nuclear Weapons*, para. 79):

"It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

Finally, it has been confirmed in the literature that many of the rules contained in the Additional Protocol I to the Geneva Conventions are of a customary international law character (G. Aldrich, "Prospects for United

States Ratification of Additional Protocol I to the Geneva Conventions", *AJIL* 1991, p. 19 and M. Zwanenburg, *o.c.*, p. 212).

Plaintiff already noted that the UN Secretary-General's 1999 *Bulletin on the Observance by United Nations Forces of International Humanitarian Law* should not be considered an exhaustive list of principles of customary international law applicable to UN forces. M. Zwanenburg (*o.c.*, p. 215) in this respect provides an illustrative list of rules of customary international humanitarian law not included in the Bulletin, listing, *inter alia*, Article 70 of Additional Protocol I on relief actions for the civilian population.

Having thus established that the Geneva Conventions and Additional Protocols are applicable to both the United Nations and the State of the Netherlands in the present context, Plaintiff shall now proceed to identify the provisions of customary international humanitarian law violated by Defendants.

II.4.4.2.4. General

The United Nations and the State of the Netherlands are liable for breaches of several provisions of the 12 August 1949 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (hereinafter: 'Fourth Geneva Convention') and the 8 June 1977 *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (hereinafter: 'Additional Protocol I').

Preliminary, Plaintiff wishes to note in this regard that the Bosnian Serb victims of the continuous attacks by Bosnian Moslems from the Srebrenica enclave on the surrounding villages were civilians pursuant to article 50 of Additional Protocol I, which states that:

"1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third [Geneva] Convention [prisoners of war] and in Article 43 of this Protocol [members of armed forces]. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

The Fourth Convention and Additional Protocol I are thus applicable to the Bosnian Serb civilian population.

II.4.4.2.4.1. Sufficient preparation and assurances

Plaintiff firstly submits that the United Nations and the State of the Netherlands are responsible for their failure to take the necessary precautions and preparations so as to satisfactorily fulfil their humanitarian and other obligations towards the civilian population of Bosnia and Herzegovina.

Indeed, the responsibility of the State of the Netherlands under international humanitarian law in the present case derives first and foremost from the transfer of command and control over its national contingent to the United Nations without having taken the necessary steps to ensure respect for the provisions of the Geneva Conventions by adequately training the contingent in question in this regard.

Common Article 1 of the 1949 Geneva Conventions provides that:

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

A similar provision can be found in Article 1 of Additional Protocol I to the Geneva Conventions.

The ICJ confirmed in its Advisory Opinion on the *Legal Consequenses of a Wall in Occupied Palestinian Territory* of 9 July 2004 that common Article 1 of the Geneva Conventions obliges the Contracting States to ensure that the obligations that arise from the Conventions are fulfilled, irrespective of whether that State is party to the conflict in question:

"*It follows from the provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."*

In a 1961 memorandum, the International Committee of the Red Cross clearly indicated that common Article 1 requires troop contributing countries to ensure that the peace support operation respect humanitarian law (M. Zwanenburg, *o.c.*, p. 118, citing *International Review of the Red Cross* 1961, p. 592):

"[L]e Comité international se permet de rappeler aux Etats qui pourraient fournir des contingents à une force d'urgence des Nations Unies qu'aux termes de l'article 1er commun aux quatre Conventions de Genève, les Hautes Parties contractantes se sont engagées non seulement à respecter, mais encore à 'faire respecter' les dispositions de ces Conventions. Il exprime donc l'espoir qu'ils voudront bien, chacun, en case de besoin, user de leur influence pour que les dispositions du droit humanitaire sont appliquées par l'ensemble des contingents engagés, comme par le commandement unifié."

Therefore, a state's transfer of powers over part of its armed forces to an international organization without adequate guarantees that the organization will respect international humanitarian law breaches the state's obligation under common Article 1 of the Geneva Conventions (M. Zwanenburg, *o.c.*, p. 121).

Similarly, the Advisory Committee on Issues of Public International Law to the government of the Netherlands (Commissie van Advies inzake Volkenrechtelijke Vraagstukken, hereinafter: 'CAVV'), has stated that troop contributing states are responsible for violations of international humanitarian law in case they have transferred competences without

guarantees that the Geneva Conventions will be respected (CAVV, *Aansprakelijkheid voor onrechtmatige daden tijdens VN Vredesoperaties*, Advies no. 13, 14 February 2002, para. 4.3).

The case law of the European Court of Human Rights confirms that states cannot exempt themselves from responsibility by transferring competences to an international organization (*see*, e.g., *M. et al.* v. *Germany*, 9 February 1990, *Yearbook ECHR* 33, p. 46 and *Matthews* v. *United Kingdom*, Application no. 24833/94, 29 October 1997). In this regard, it should be noted that the ECRM does not contain a provision obliging states to ensure respect for the rights guaranteed by the Convention. Since common Article 1 of the Geneva Conventions and Additional Protocol I does contain such a provision, it is clear that the High Contracting Parties to those instruments should, *a fortiori*, be responsible for the transfer of powers to an international organization (M. Zwanenburg, *o.c.*, p. 128).

It is submitted that the State of the Netherlands when preparing its troops for participation in UNPROFOR's peacekeeping operation failed to observe the requisite training guidelines and principles. Plaintiff wishes to note in this regard that the question under consideration is not so much whether the troops contributed by the State of the Netherlands were adequately trained from a military perspective, but whether they received appropriate training so as to fulfil their crucial humanitarian tasks, with sufficient theoretical background information so as to ensure respect for the Geneva Conventions and other norms of customary international humanitarian law.

The NIOD report confirms that many Dutchbat soldiers received inadequate or even no lessons in the laws of war when preparing for their deployment in Bosnia and Herzegovina (see page 2656 of the NIOD report). In this respect, the report mainly stressed the distinction between military peacekeeping operations (‘green’) and peacekeeping of the second generation, where more attention is paid to the humanitarian aspects of the deployment (‘blue’).

Said distinction is particularly important when it comes to the preparation of the troops. The NIOD report concluded that the training of the three Dutchbat battalions was inadequate since it focused almost solely on the military aspects of the operation, and disregarded the humanitarian, ‘peacekeeping’ aspects thereof (Chapters II.8.1 and II.8.2 of the report):

“The difference identified here between 'green' and 'blue' action imposes particularly stringent requirements on the training and preparation of the units. Combat units and individual soldiers must be 'retrained' from professional combat soldiers into peacekeepers […].

The deployment to Bosnia was unmistakably a peace mission of the ‘second generation’ [‘blue’]. In the light of the specific requirements that this deployment imposed on the participants, it was of great importance for the composition of the Dutch battalions to be matched to the task. […]

With hindsight, Lieutenant Colonel Karremans thought that the majority of the battalion, in view of the 'blue' duties, were far too young and inexperienced […].

The additional training period in the Netherlands was distinctly 'green' in nature, in accordance with the prevailing idea that the Airmobile Brigade would regularly be involved in military action. A strict distinction was also drawn between soldiers and civilians. This emphasis on 'green' was also endorsed by some of the battalion leaders. […]

Such scepticism about the non-green elements of the training, which were considered to be 'theoretical', was also shared, or at least perceived, by others within the Defence organization. […]

The nature of the preparation meant that they arrived on site with few clear ideas on the nature and background of the conflict, and with stereotypes and images of the local population that could seriously undermine their performance as peacekeeper."

The report therefore concluded that (Chapter II.5.6):

"With hindsight it is somewhat surprising that the dispatch of Dutchbat was seen as a purely military operation and did not address what the battalion would actually encounter in Srebrenica and how to deal with it."

It is thus submitted that the State of the Netherlands in the present case incurs liability under common Article 1 of the Geneva Conventions and Additional Protocol I for contributing troops to the United Nations peacekeeping force without adequately training them in order to ensure respect for the principles of international humanitarian law as enshrined in the Geneva Conventions and Protocols thereto.

As regards the responsibility of the United Nations, Article 11 (4) of the Fourth Geneva Convention provides that (emphasis added):

"Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially."

In this regard, it is noted that UNPROFOR is to be considered a neutral Power in the sense of Article 11 (4) of the Convention. Indeed, Bosnia and Herzegovina accepted the offer of the United Nations to act as a mediating party to provide humanitarian assistance in the conflict (*The Fall of Srebrenica*, para. 25):

"The Secretary-General noted […] that President Alija Izetbegović and Fikret Abdić (both Bosnian Moslems) and Mariofil Ljubić (a Bosnian Croat) has supported an immediate United Nations intervention."

The problems with the deployment of UNPROFOR are well documented: the United Nations and its troop-contributing nations had sent in an underequipped and badly trained peacekeeping force in a situation where there was no peace to keep and only a more bold and forceful approach with a much more numerous force could have assured that UNPROFOR was "in a position to undertake the appropriate functions", *i.e.* provide for

humanitarian assistance and prevent civilian losses on both sides: (*The Fall of Srebrenica*, para. 492):

"None of the conditions for the deployment of peacekeepers had been met: there was no peace agreement – not even a functioning ceasefire – there was no clear will to peace and there was no clear consent by the belligerents. Nevertheless, faute de mieux*, the Security Council decided that a United Nations peacekeeping force would be deployed. Lightly armed, highly visible in their white vehicles, scattered across the country in numerous indefensible observation posts, they were able to confirm the obvious: there was no peace to keep."*

The Secretary-General on several occasions admitted that deploying a peacekeeping force in situations that do not call for it can undermine the viability of the entire operation (UN Doc. S/1995/444, *Report of the Secretary-General pursuant to Security Council Resolutions 982 (1995) and 987 (1995)*, para. 62, citing UN Doc. S/1995/1, paras. 35 and 36):

"[N]othing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel ... Peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not

as adjacent points on a continuum, permitting easy transition from one to the other"

The United Nations was divided as to the action to be undertaken with regard to the deployment of a force in Bosnia and Herzegovina. This indecision ultimately resulted in the deployment of a limited number of troops "largely configured and equipped for traditional peacekeeping duties rather than enforcement action" (*The Fall of Srebrenica*, para. 43). The Secretary-General admitted that the Security Council in its resolutions often acted under Chapter VII of the UN Charter, but "provided no resources or mandate for UNPROFOR to impose its demands on the parties" (para. 56).

UNPROFOR further endemically struggled with securing additional troops and remained undermanned and underequipped throughout its deployment.

The Secretary-General on numerous occasions stressed that approximately 34,000 troops would have to be deployed in order to ensure that UNPROFOR could adequately implement its mandate of aiding and protecting the civilian population through humanitarian assistance and disarmament (*see*, *inter alia*, UN Doc. S/25939, *Report of the Secretary-General pursuant to Security Council Resolution 836 (1993)*, para. 5).

The troop-contributing nations, however, were not willing to provide any additional troops (*The Fall of Srebrenica*, para. 95) and the Security Council in OP 10 of its Resolution 844 (1993) merely authorized the deployment of an additional 7,600 troops. Seven months later, in January 1994, fewer than 3,000 of these troops had arrived and problems remained with the

deployment of troops from Pakistan and Bangladesh, since the Governments concerned had declared their inability to equip their soldiers adequately for the required tasks (UN Doc. A/48/847, *The Situation in Bosnia and Herzegovina. Report of the Secretary-General submitted pursuant to paragraph 29 of General Assembly resolution 48/88*, para. 9). The Secretary-General ultimately admitted that the so-called 'light option' was not sufficient to assure the adequate implementation of UNPROFOR's mandate (UN Doc. S/1994/1389, *Report of the Secretary-General pursuant to Security Council Resolution 959 (1994)*, para. 27).

Dutchbat, as part of UNPROFOR, was subject to the same criticisms: the contingent was considered too lightly armed and not prepared for war (*The Fall of Srebrenica*, para. 230). Further, the Dutch troops suffered a lot of problems when preparing for their deployment.

The NIOD report stressed that the State of the Netherlands had not sent in troops to assist a peacekeeping operation in more than 10 years and that the time to prepare for the deployment was very limited (Chapter II.5.1 of the report):

"This was not a routine operation: the last time that Dutch 'combat units' had participated in a peacekeeping operation was in the 1980s as part of the UN peacekeeping force in Lebanon (UNIFIL). Moreover, there was very little time: a mere seven months lay between the issue of the 'warning order' on 22 June 1993 and the target deployment date of 1 January 1994."

NIOD concluded that, "[a]ll things considered, the operational training for dispatch of Dutchbat to Bosnia was a rush job (Chapter II.5.6 of the report).

The biggest problems were encountered when preparing Dutchbat III for deployment in the area of Srebrenica:

"It was hard to find professionals to fill the positions. […] In actual fact, the Dutchbat NCOs were assigned. The average age was higher than normal and people over the age of forty were hard pushed to obtain the red beret. Eventually, almost everyone did. […]

The greatest problem was personnel. This was nothing new: it had also confronted Dutchbat I and II. But it was extra complicated in the case of Dutchbat III. […] In September 1994, five months before the dispatch, it transpired that, because of incontinuity in the training, 48 soldiers were still at the Training Battalion and would not join Dutchbat III until mid-November. Moreover, there were still 31 vacancies in supplementary detachment of 120. Candidates were sought primarily among conscripts. [...] Both factors caused interruptions in the training programme for the peace operation.

The evaluation of the dispatch of Dutchbat I concluded that some of the personnel recruitment problems were structural and could not be solved in the short term. As the Army Corps was unable to provide suitable candidates, personnel had to be found in other sections of the Army. A delaying factor was the absence of a good central overview of the training

level of all Royal Netherlands Army personnel; hence, the need for additional training only became clear during the recruitment procedure.

Dutchbat III was hard hit by these problems. Seventy positions were still vacant at the start of the work-up programme on 10 October 1994. Various circumstances had prevented some of the current personnel from receiving specific job-related training. They had been absent for short or longer periods in order to follow a course and could not participate in the work-up programme. […]

The fact that these problems lay primarily with personnel and were – as already mentioned – of a structural nature explains why they emerged again in the case of Dutchbat III. The consequences of this were a shortage of skills in the use of personal weapons and in first aid in the field.

As was remarked earlier, the problems were greater in the case of Dutchbat III and, in the opinion of the battalion staff, seriously disrupted the training of the unit."

Plaintiff therefore submits that the United Nations and the State of the Netherlands are liable for violations of customary international humanitarian law by virtue of their failure to dispatch a peace support operation with sufficient assurances that it was in a position to undertake the appropriate functions, *i.e.*, protecting the civilian population of, *inter alia*, the Bosnian Serbs in the surrounding villages of Srebrenica, through impartial humanitarian assistance and disarmament.

II.4.4.2.4.2. Imperative of impartiality

Plaintiff has already discussed the breach of the imperative of impartiality by the United Nations and the State of the Netherlands in the sections dealing with the responsibility of Defendants for wrongful conduct and violations of the UNPROFOR mandate. It should be noted, however, that the failure to observe impartiality also constitutes a violation of customary international humanitarian law.

Article 11 (4) of the Fourth Geneva Convention, cited previously, provides that (emphasis added):

"Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially."

Article 13 of the Convention further stresses the importance of the principle of impartiality, particularly in relation to the dealings with the civilian population of the area of deployment:

"The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."

Furthermore, the principle of impartiality is also to be observed specifically in relation to the delivery of humanitarian relief to civilians affected by the war. Article 70 (1) of Additional Protocol I specifies that:

"If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. […]"

It is thus clear that Defendants by breaching the imperative of impartiality as elaborated upon in paragraphs …, also violated their obligations under customary international humanitarian law, as codified in the provisions cited previously.

II.4.4.2.4.3. Protection of civilians and humanitarian relief

The imperative that permeates all of the Fourth Geneva Convention and Additional Protocol I, is that of the protection of civilians in times of war, irrespective of their ethnicity.

Articles 11 (4), cited previously, and 27 (1) of the Fourth Geneva Convention are exemplary in this regard (emphasis added):

"Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially."

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

These Articles form the crux of the Fourth Geneva Convention, are as such part of customary international humanitarian law and should thus be respected by both the UN and the Netherlands during peacekeeping operations.

A further specification of the imperative to protect the civilian population is found in Article 70 of Additional Protocol I regarding impartial humanitarian assistance, the relevant paragraph of which has already been cited in the previous section of this writ.

Further, Article 85 (3) of Additional Protocol I provides that:

"[T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii); […]"

This Article should be read in conjunction with Article 86 of the same Convention, which states that:

"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."

It is submitted that UNPROFOR, either as party to the conflict or as neutral Power, is bound by the humanitarian obligation codified in Article 86 of Additional Protocol I.

It is not disputed that the Bosnian Moslems from Srebrenica, by carrying out incessant violent attacks on the Bosnian Serb civilians in the surrounding villages, committed grave breaches of the Geneva Conventions as indicated

in Article 85 of Additional Protocol I. The UN and the Netherlands as a troop-contributing country should therefore have suppressed these breaches, pursuant to Article 86. Their failure to do so clearly follows from the continuous and systematic nature of the attacks carried out by the Bosnian Moslems against the Bosnian Serb civilian population and the failure of Defendants to remedy the suffering of the population by providing any form of humanitarian assistance. This is further evidenced by the complete lack of condemnation of the Moslem attacks in the various resolutions of the UN Security Council and the reports of the Secretariat (*see* paragraphs …).

II.4.4.2.4.4. Demilitarization

The second demilitarization agreement concluded between the ABiH and the VRS through UNPROFOR on 8 May 1993, referred, it is recalled, expressly to Article 60 of Additional Protocol I to the Geneva Conventions. This Article states that:

"1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as

possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4. […]

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status. […]"

Furthermore, the terms of Article 60 make it clear that the first agreement, concluded between the same parties on 18 April 1993, is also to be construed as a demilitarization agreement pursuant to Additional Protocol I, despite the lack of any clear reference to the Geneva Conventions. The same rules therefore apply.

Article 85 of Additional Protocol I, cited previously, expressly refers to violations of demilitarization agreements as grave breaches of the Geneva Conventions:

"3. [T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: […]

(d) making non-defended localities and demilitarized zones the object of attack; […]"

It is submitted that Defendants, through their failure to implement the demilitarization agreements of 1993, have failed to prevent grave breaches as mentioned in Article 85 of Additional protocol I and are as such liable for these violations of international humanitarian law. Furthermore, the UN and the Netherlands are liable for not having suppressed said violations, pursuant to Article 86 of the same Protocol, also cited previously.

Finally, it follows from Article 60 of Additional Protocol I, that UNPROFOR, as principal negotiating party to the demilitarization agreements, has violated the applicable norms of customary international humanitarian law by failing to accurately specify the terms of the agreements in accordance with the Geneva Conventions.

Specifically, UNPROFOR failed to observe paragraph 3 of Article 60, which provides that "[t]he Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4." Furthermore, paragraph 5 of Article 60 expressly provides that "[t]he Party which is in control" of the demilitarized zone shall accurately delineate said zone by means of clearly visible signs. It is submitted that UNPROFOR was factually in control of the Srebrenica enclave and its surroundings, but failed to adequately mark the territory to be demilitarized, as was clearly demonstrated in paragraphs … of this writ. It was not until the second demilitarization agreement that it was agreed to mark the borders of the demilitarized area with signs, pursuant to the rules of international humanitarian law. However, it has been shown that this measure was not sufficient to end the discussion surrounding the exact contours of the demilitarized area.

II.5. Causal relationship

It is submitted that the United Nations and the State of the Netherlands, by breaching the UNPROFOR mandate and their contractual obligations, as

well as by conducting themselves unlawfully in the course of the peacekeeping operation, have caused significant harm to Plaintiff.

The Bosnian Serb community in the villages surrounding Srebrenica has suffered tremendously as a result of the acts and omissions of Defendants. There exists a direct causal relationship between the complete failure on the part of the United Nations and the State of the Netherlands to demilitarize the entire Srebrenica enclave on the one hand, and the loss of human lives and property by the Bosnian Serbs in the surrounding villages, on the other. Furthermore, the utter lack of remedial measures taken by Defendants, both politically and militarily, against the perpetrators of these heinous crimes, and the ensuing breaches of the imperative of impartiality, has created an atmosphere of total impunity for the Bosnian Moslems operating from Srebrenica, encouraging them to continue their attacks against the Serbian civilian population unabated. The consequences of these actions were further exacerbated by the failure to provide for any kind of humanitarian assistance to the Bosnian Serb victims of the Moslem actions.

It is therefore submitted that it has been proven that the damage suffered by Plaintiff is directly and causally linked to the acts and omissions of Defendants. Plaintiff therefore moves that the Court find the United Nations and the State of the Netherlands responsible to pay the punitive damages of …$.

II.6. Right of individuals to bring claims based on breaches of international law

The right of individuals and other private third parties in the present context to bring claims against the United Nations and the State of the Netherlands based on breaches of international law follows, *inter alia*, from the principles of customary international law as laid down by the International Law Association in its 2004 Final Report on the Accountability of International Organizations.

Said principles explicitly refer to the rights of third parties under public international law, noting that "[t]he term "third parties" is considered to cover victims or wrongdoers who are not members of the [international organisation] concerned: states, other [international organisations], individuals or legal persons, including private entities" (ILA Final Report, p. 189). The ILA further held that international organizations "may incur international legal responsibility to States, other [international organisations] and individuals for conduct that is not in conformity with their operational policies, procedures and practices - to the extent that these incorporate existing norms and rules of public international law" (p. 200).

The relevant literature on this point confirms the applicability of the ILA principles to third parties including individuals (I. Dekker, "Making sense of accountability in international institutional law", *Netherlands Yearbook of International Law*, 2005, p. 93-94).

Furthermore, it is not contested that serious breaches of certain norms of international law that directly confer rights to individuals entail that these individuals can directly bring claims against the perpetrators of said breaches before domestic courts. This has been confirmed by the United

Nations in its *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter: 'Basic Principles').

It should be stressed that these Basic Principles "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms" (Preambular Paragraph (PP) 7 of the Basic Principles).

The Basic Principles adopted by the General Assembly reflect "the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court" (PP 1 of the Basic Principles).

Operative Paragraph (OP) I.2. of the Basic Principles provides that States shall ensure that their domestic law is consistent with their international legal obligations by:

"[…] (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations"

Furthermore, OP II.3. provides that States have the obligation to:

"[…] (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation;
and
(d) Provide effective remedies to victims, including reparation […]"

OP V.8. of the Basic Principles defines "victims" as "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their

fundamental rights, through acts or omission that constitute gross violations of international human rights law, or serious violations if international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victims" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

Plaintiff is therefore a "victim" as defined by the Basic Principles.

OP VII.11. states that:

"Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; [...]"

The Basic Principles provide that individuals who are the victims of a gross violation of their human rights or international humanitarian law, can enforce their rights under international law like a state. Member States must ensure that victims have available to them all appropriate legal means in order to be able to exercise their rights. OP VIII of the Basic Principles provides that:

"A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. (...)

Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

[…]

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law."

Plaintiff further refers to point 3.5 of the *Advisory Opinion on the Responsibility for Wrongful Acts during UN Peace Operations* of the Advisory Commission on Issues arising under Public International Law Of the Dutch Foreign Ministry, which confirms that individuals can enforce their rights like a state in case of violations of norms of public international law that directly confer rights on individuals, such as, *inter alia*, human rights norms.

OP I.2. of the Basic Principles provides that States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

"(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system […]"

This provision corresponds with Article 93 of the Dutch Constitution, which states that:

"Provisions of conventions and of decisions of international law organisations, whose content can be universally binding, shall have binding force following publication."

This self-executing character of international conventions should be assessed by the District Court on a case-by-case basis. In this regard, Plaintiff notes that, in the present context, the Geneva Conventions and the ECHR, among other international conventions, contain universally binding provisions and have been incorporated into Dutch domestic law according to Article 93 of the Dutch Constitution. The provisions contained therein and discussed in this writ should therefore be given direct applicability for Plaintiff to rely upon in the current case.

Plaintiff further wishes to note in relation to international humanitarian law, that this branch of international law is generally considered as conferring rights on individuals (L. Zegveld, "Remedies for victims of violations of international humanitarian law", *International Review of the Red Cross* 2003, 497; G. Aldrich, "Individuals as subjects of international humanitarian law" in J. Makrczyk (ed.), *Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski*, 1996 and R. Teitel, "Humanity's Law: Rule of law for the new global politics", *Cornell International Law Journal* 2002, p. 362-363).

Of particular interest in this regard is common Article 7 (8 in the Fourth

Convention) of the 1949 Geneva Conventions. This Article provides that the protected persons may in no circumstances renounce, in part or in entirety, the rights secured to them by the Conventions, and by the special agreements provided for therein. It thus clarifies that the rights referred to are granted to individuals instead of governments, since only the holder of a right is entitled to renounce it (M. Zwanenburg, *o.c.*, p. 274).

It is self-evident that "where there is a right, there must be a remedy" (J. Kleffner and L. Zegveld, "Establishing an individual complaints procedure for violations of international humanitarian law", *Yearbook of International Humanitarian Law* 2000, 384 and J. Kleffner, "Improving compliance with international humanitarian law through the establishment of an individual complaints procedure", *LJIL* 2002, p. 237).

In the light of this dictum, the Sub-Commission on the Promotion and Protection of Human Rights in 1996 drafted a set of basic principles concerning the right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms. Principle 4 of this draft provides that (UN Doc. E/CN.4/Sub.2/1996/17, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117 of 24 May 1996*, principle 4):

"Every State shall ensure that adequate legal or appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian

norms includes the right of access to national and international procedures for their protection."

In 1998, Cherif Bassiouni was appointed by the Commission on Human Rights to prepare a revised version of said principles. Bassiouni presented his final report in 2000. Principle 11 provides that (UN Doc. E/CN.4/2000/62, *Basic principle and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law. Annex to the Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms of 18 January 2000*, principle 11):

"Remedies for violations of international human rights and humanitarian law include the victim's right to: access justice; reparation for harm suffered; […]."

Finally, the United Nations High Commissioner for Human Rights confirmed the principle that the victim of a serious violation of humanitarian law has the right to "reparation for harm suffered or other appropriate remedy", as well as "access to justice" (*Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, rev. 23 October 2003, para, 12 (b), cited in M. Zwanenburg, *o.c.*, p. 283).

It is further recalled that the right of access to court is one of the most

fundamental human rights, to be honored by both governments and international organizations (*see* section on UN immunity).

It is therefore submitted that Plaintiff in the present case can invoke the violations of various norms of international law by the United Nations and the State of the Netherlands, based on the rights directly conferred to him by, *inter alia*, international human rights and humanitarian law.

II.7. Legal consequences of international responsibility

II.7.1. Applicable law

The legal consequences of an internationally wrongful act or omission of a State or international organization are governed by the respective codifications of the International Law Association and the International Law Commission.

The principle of reparation is laid down in ILC Article 31 on State Responsibility:

"1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

The same principle applies to international organizations (ILC Article 34).

The International Law Commission in its commentary clarified what should be understood under the term 'moral' or 'non-material' damage, which should also be compensated for (*Explanatory Memorandum to Article 36*, p. 252):

"Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation […]."

Article 34 of the ILC Articles on State Responsibility and Article 37 of the ILC Articles on the Responsibility of International Organizations provide that:

"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

This is a codification of a principle found in the *Chorzow-Factory* case of the Permanent Court of International Justice (Factory at Chorzow (Germany v. Poland), Indemnity, 1928 PCIJ Series A, no. 17, at 47):

"[R]eparation must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principle which should serve to determine the amount of compensation due for an act contrary to international law."

The ICJ continues to apply the same rationale, as is evidenced by, for example, the *Arrest Warrant (Yerodia)* case (para. 76 of the Judgment) and the Judgment in *Bosnia* v. *Serbia and Montenegro* (para. 460).

Restitution in kind is therefore seen as the principal form of reparation. This is confirmed by ILC Article 35 on State Responsibility:

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which

existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

The same principle can be found in ILC Article 38 on the Responsibility of International Organizations.

It is clear that in the present case, which concerns, *inter alia*, the loss of human lives, reparation by means of restitution in kind is not possible. Plaintiff therefore moves for reparation by virtue of compensation, as laid down in ILC Article 36 on State Responsibility (Article 39 on the Responsibility of International Organizations):

"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

Finally, Article 37 of the ILC Articles on State Responsibility (Article 40 on International Organizations) provides for possible reparation through satisfaction:

"1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

The ILC commentary gives a number of other examples of satisfaction, including due inquiry into the causes of an accident resulting in harm or injury and disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act, but in theory the forms satisfaction may take are unlimited (M. Zwanenburg, *o.c.*, 234).

The International Law Association has confirmed the principles codified in the ILC Articles on State Responsibility as being applicable to international organizations (ILA Final Report, p. 222).

In this regard, it should be noted that, if a State or international organization takes measures to meet the secondary obligations arising from responsibility, this implies that conduct is attributed to that entity (M. Zwanenburg, *o.c.*, 252). The investigations carried out on behalf or by Defendants in the present case in order to establish the responsibility of the actors involved in the deployment of UNPROFOR, the resulting acceptance of responsibility

and the resignation of the Dutch government as a consequence thereof, can be interpreted as forms of satisfaction. The conduct of UNPROFOR can therefore be attributed to Defendants.

However, it is submitted that this form of satisfaction is not a sufficient means of reparation since the damages arisen from the peacekeeping operation in Bosnia and Herzegovina can "be made good by restitution or compensation" (Article 37/40, para. 1, cited above), as is evidenced by the claims submitted by Plaintiff. Specifically, Plaintiff moves for financial compensation for the significant loss of human lives and property as a result of the acts and omissions of the State of the Netherlands and the United Nations.

II.7.2. Compensation

Plaintiff has asked the Court to hold the State of the Netherlands and the United Nations jointly liable to pay compensation for the loss of human lives and property. In this regard, Plaintiff wishes to note the following.

During the 1996 and 1997 General Assembly meetings, the Secretary-General presented a two-stage report in which the principles and scope of UN liability for both combat-related and ordinary operational activities of UN forces were established (Reports of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/389 and A/51/903). The General

Assembly adopted the Secretary-General's recommendations in these report in its Resolution 52/247 dated June 22, 1998.

It should be recalled that the recommendations of the Secretary-General as adopted by the General Assembly are exceptions to the general principles of tortious liability and should therefore be, as a general rule of interpretation, be construed restrictively.

Indeed, paragraph 37 of Report 51/903 of the Secretary-General confirms that:

"Financial limitations on the liability of the Organization, though justified on economic, financial and policy grounds, constitute an exception to the general principle that when tortious liability is engaged compensation should be paid with a view to redressing the situation and restoring it to what it had been prior to the occurrence of the damage."

The limitations on the UN's tortious liability for damage caused by peacekeeping forces apply to those types of damage most commonly encountered in the practice of UN operations, such as personal injury and property loss and damage as result of negligence, not otherwise warranted or justified by operational necessity (Operative Paragraph (OP) 5 of A/RES/52/247 and paragraph 13 of Secretary-General report A/51/903).

It is vital to note, however, that the Secretary-General in his 1997 Report (A/51/903) stressed that no limitations were to be imposed "with regard to claims arising as a result of *gross negligence or willful misconduct*"

(paragraph 14 – emphasis added). This recommendation was adopted by the General Assembly in OP 7 of Resolution 52/247 and is therefore binding in the relationship between the UN and third-party claimants.

It has been shown in the present case that the limitations proposed by the Secretary-General do not apply to the tortious conduct of the UN forces in Srebrenica since they are the result of gross negligence and willful misconduct on their part. It therefore follows from Resolution 52/247 that the UN, as well as the State of the Netherlands, is held to repair the personal injury and damages to property suffered by Plaintiff.

Pursuant to the financial limitations imposed by the General Assembly in Resolution 52/247 regarding third-party claims against the Organization for personal injury, illness or death resulting from peacekeeping operations, (OP 9 of the Resolution):

"(a) Compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses; […]

(d) The amount of compensation payable for injury, illness or death of any individual […] shall not exceed a maximum of 50,000 United States dollars […];

(e) In exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50,000 dollars

provided for in subparagraph (d) above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation."

Operative Paragraph 10 of the Resolution regarding third-party claims against the United Nations for property loss or damage resulting from peacekeeping operations, further provides that:

"[…] (b) Compensation for loss or damage to premises shall either: (i) be calculated on the basis of the equivalent of a number of months of the rental value, or a fixed percentage of the rental amount payable for the period of United Nations occupancy; or (ii) be set at a fixed percentage of the cost of repair; the Secretary-General will decide on the appropriate method for calculating compensation payable for loss or damage to premises at the conclusion of the pre-mission technical survey […]"

Finally, OP 11 of Resolution A/52/247 states that:

"(a) Compensation for loss or damage to personal property of third parties arising from the activities of the operation or in connection with the performance of official duties by its members shall cover the reasonable costs of repair or replacement […]"

Plaintiff wishes to stress that the aforementioned financial modalities apply only in the case where the requirements for financial limitations are found to be met. It is recalled, however, that in the present case, as will be shown, these limitations to not apply since the damage suffered by Plaintiff resulted

from gross negligence and willful misconduct by the UN forces, attributable to both the UN and the State of the Netherlands. The limitations set out in OP 9 through 11 of Resolution A/52/247 have therefore only been reproduced in this context so as to provide the District Court with a set of *minimum guidelines* in order to accurately determine the actual scope of reparation to be paid to Plaintiff by Defendants. It is submitted that the ultimate compensation to be awarded in this case should at the very least cover the parameters set out in the Resolution.

Furthermore, it is submitted that the limitations as set out in Resolution A/52/247 are not binding upon the Plaintiff in the present case. Indeed, paragraph 41 of Report A/51/903 of the Secretary-General notes that for the limitations to be binding upon third-party claimants, they should be "included in the terms of reference of the local claims review boards as a basis for their jurisdiction." Since no such review board has been established in the current case and in any case, the present proceedings are not conducted before such a review body, it is submitted that the limitations cannot be held against Plaintiff.

III. Factual background

A. Demilitarisation

[1] As pointed out already in the Introduction [Section I] and in the Legal argument [Section II], the issue of demilitarization of the Srebrenica

protected zone is essential to a proper assessment of the Defendants' liability.[4]

Their general duty to intervene on behalf of unprotected Serbian and other non-Moslem non-combatants is established in any event based on the prevailing norms of international humanitarian law. In this particular case, that duty is especially pronounced because—in addition to general provisions—it is also based on specific obligations arising from formal demilitarization agreements to which the Defendants, UN and the State of the Netherlands, are contracting parties. [5] The complete failure to implement the demilitarization process for Moslem armed forces in Srebrenica enclave created the key material condition which allowed Moslem forces to continue to conduct their military operations. Those military operations resulted in the human casualties to which this Writ refers.

[2] Two demilitarization agreements were signed, with little of essence to distinguish them. The first agreement was signed by the warring parties and witnessed by an UNPROFOR representative on April 17, 1993; the second agreement which, in addition to Srebrenica, applied also to the enclave of Zepa, was signed on May 8, 1993. On that occasion, the UN was represented personally by Gen. Morillon. [See Annex III-1]

---

[4] That liability is, of course, a function of the Defendants' assumed or reasonably attributable unfulfilled duties. The UN Secretary-General's understanding of the UNPROFOR mission sets useful parameters in this regard: "*To protect the civilian populations of the designated safe areas against armed attacks and other hostile acts, through the presence of its troops and, if necessary, through the application of air power, in accordance with agreed procedure."*[U.N. Security Council, "Report of the Secretary-General Pursuant to Resolution 844 (1993)," S/1994/555, May 9, 1994, p. 5.] What "civilian populations," in the plural, could he have been referring to unless Serb civilians were also to be regarded as within the ambit of UN protection?

[5] The Netherlands joined de facto the agreements which mandated demilitarization by agreeing in February 1995 to place its military contingent at the disposal of the United Nations and to thus become involved in the enforcement of those agreements in the Srebrenica region.

[3] In the relevant portion of the April 17, 1993, demilitarization agreement, in par. 4, it is stated: "The demilitarization of Srebrenica will be complete within 72 hours of the arrival of an UNPROFOR company to Srebrenica (1100 hours 18 April 1993, if they arrive later this will be changed). All weapons, ammunition, mines, explosives, and combat supplies (except medicines) inside Srebrenica will be submitted/handed over to UNPROFOR under the supervision of three officers from each side with control being carried out by UNPROFOR. No armed persons or units except for UNPROFOR will remain within the city once the demilitarization process is complete. Responsibility for the demilitarization process remains with UNPROFOR."[6]

[4] This provision is significant, *inter alia*, because according to it the UN, through its armed forces on the ground, expressly assume "responsibility" for the implementation of the demilitarization process.

[5] The demilitarization agreement of May 8, 1993, whose range is expanded to cover the nearby enclave of Zepa, provides in par. 3 that all "military and para-military units must withdraw from the demilitarized zone or turn over their weapons"; that "UNPROFOR…will place the weapons and ammunition so collected under its supervision" [par. 4]; the position of

[6] This was a commitment that was slated to remain a dead letter almost from the start. As we learn from Moslem negotiator Gen. Sefer Halilovic's memoir, *The Cunning Strategy* [Lukava Strategija: Sarajevo, 1997] "…when I returned to the Command [from Sarajevo airport, where the negotiations were held—op. ed.] I sent an order to Srebrenica and Zepa that they were not to turn over one functioning weapon or a one whole bullet." (pp. 105-110) Not that the UN were to ever insist too forcefully that they do so, as we saw, footnote 3, *supra*. Later, as a chamber witness in the trial of Gen Radoslav Krstic, *Prosecutor v. Krstic* [ICTY, April 5, 2001], Halilovic eagerly confirmed this order for the judicial record, adding that he used the same opportunity to instruct his subordinates in Srebrenica to "hide heavy weaponry." Halilovic also admitted sending 8 helicopters with arms and ammunition to the "demilitarized zone," taunting the chamber that he would have sent "180 helicopters" had he been able to do so.

UNPROFOR is defined so that it shall "control the demilitarized zone so as to facilitate the implementation of this agreement and UNPROFOR units of sufficient strength to control the demilitarized area shall remain in the demilitarized zone until the contracting parties should agree otherwise" [par. 5]; furthermore, no one "except for UNPROFOR personnel shall have the right to possess any weapons, munitions, or explosives. Weapons, munitions, and explosives in their possession shall be removed by UNPROFOR. Combatants shall not be allowed entry into the demilitarized zone" [par. 5]; finally, "at the beginning of the demilitarization process, UN civilian police shall oversee the maintenance of law and order within the demilitarized zone" [par. 7].

[6] This new agreement, it may be supposed, was concluded at the insistence of the Serbian side, dissatisfied by the practical fiasco of the preceding one, signed on April 17, 1993. On that occasion, it will be recalled, UN officers in the field were advised from New York not to go too far in their efforts to find and seize Moslem arms. It contains several very interesting elements. First of all, "military and para-military" units within the enclaves are given a choice, either to turn over their weapons to the UN or to withdraw. In other words, this agreement announces a policy of Zero tolerance for the existence of any military formations in Srebrenica, except for those belonging to the UN. Then, UN forces are charged with "controlling" the demilitarized zone "so as to facilitate the implementation of this agreement", which logically includes the demilitarization provision, and that means in practical terms that after the weapons had been collected the UN will not allow any armed persons to enter the zone. Finally, "UN civilian police" assumes supervision over the maintenance of law and order in the demilitarized zone. That can

only mean that the UN shall be responsible for: [a] the security of citizens within the zone, and [b] that it will not permit any organizing within the zone for operations to be carried out beyond it that are contrary to the principles of law and order. This agreement, therefore, prohibits in the enclave of Srebrenica any planning or carrying out of attacks the goal or the consequence of which would be the killing of non-combatants in the surrounding communities.

[7] As a result of the expansion of this agreement relative to the preceding one, Plaintiffs wish to emphasize that the supervisory role of the UN is defined here with greater clarity and that the UN is endowed with additional authority for the implementation of assigned goals. The personal presence of the commander of UN forces in Sarajevo, General Morillon, highlights the gravity of this agreement and the obligatory nature of the responsibilities assumed by the United Nations under it.

[8] The correctness of these conclusions was confirmed by Gen. Morillon himself when he testified on February 12, 2004, before the International Criminal Tribunal for the Former Yugoslavia in the trial of Slobodan Milosevic: "The agreement provided that all those who were not ready to lay down their arms would have to leave the enclave…" [7]

[9] Regardless of subsequent linguistic debates concerning the precise meaning of the English phrase "safe zone," and how best to render it into the Serbo-Croatian language, [8] it remains an undisputed fact that by its

[7] Page 32045, lines 22-24.
[8] Translation difficulties are discussed by analyst Chuck Sudetic in his book "Blood and Revenge," p. 290.

Resolution 824 of May 6, 1993, the UN Security Council did declare that Srebrenica "safe zone" was to be "demilitarized," i.e. it accepted the concept that in return for cessation of military operations by the Serbian side all weapons and military equipment in the possession of Moslem armed forces within the enclave should be collected and placed in UN custody. The word "safe", or "*bezbedan*" in Serbo-Croatian, may be the subject of various interpretations, but the concept of "demilitarization" is crystal clear. In case of any doubts, paragraph 4 of the agreement of April 17, 1993, and paragraphs 3, 4, 5 and 7 of the agreement of May 8, 1993, put those doubts to rest.

How the "demilitarization" process was coming along can be followed in numerous reports that were submitted by the Srebrenica Moslem army command [initially known as 8th Tactical Group, and from October 24, 1994, as 28th Division] to their superiors in Tuzla and Sarajevo, and the responses received from there. For illustrative purposes, the following report of armed forces staff in Srebrenica [no. 35/93 of July 28, 1993] to the 2nd Corps command of the Moslem army in Tuzla is highly indicative. The superior command is informed that in July of 1993, which means at a time when the "safe" and "demilitarized" zone was fully operational, the Srebrenica Operational Group had the following resources:

- Potocari brigade, three battalions,
- Suceska brigade, three battalions
- Kragljivoda brigade, three battalions
- Five independent battalions and autonomous units

Also, by order of the Srebrenica civil authorities, no. 124/92, of December 8, 1993, unit commanders were appointed. How is it possible that the existence of such significant and regularly organized military units could escape the attention of the UN contingent which was deployed in the safe zone precisely to make sure something like that did not happen?

[10] As time went by, if we review the available files of the Moslem command, it will become obvious that contrary to signed commitments, and in spite of the presence of UN forces in the enclave, first of the Canadian and then the Dutch battalion, the organizational complexity and battle readiness of the illegal Moslem forces were growing continuously.

On February 8, 1994, the Municipal National defence Secretariat in Srebrenica forwarded dispatch no. 03-2/94 to the District Defence Secretariat in Tuzla, i.e. to the seat of the 2nd Corps of BH Army, where it reports on the current state of preparedness in the enclave as of January 1994:

-Armed forces [Army and Interior ministry] consist of 5271 personnel
-Labor obligation service, 1221 personnel
-Civil defence, 939 personnel
-Serving the needs of the armed forces: 28 motor vehicles and 174 horses
-Unassigned: 3247 personnel, including wounded and invalids

On February 12, 1994, the command of Operational Group Srebrenica forwarded to 2nd Corps command in Tuzla a "*Report on personnel losses and replenishment in 8th OG units as of February 2, 1994*". [9]

[9] Dispatch of 8th OG Srebrenica command, 42/94, of February 12, 1994

According to this dispatch, 8th OG units were up to 98,8% of their planned manpower level, i.e. that out of 5193 personnel slots, 5133 were filled.

Second Corps command forwarded the following order to the command of 8th Srebrenica OG, no. 02/2-356-1, on February 12, 1994, entitled "*Activities plan and measures for enhancing combat preparedness, Order*".

In the preamble to the Order, it is said: "*Based on reports forwarded to the OG command in relation to combat preparedness and 2nd Corps plan for the correction of battle preparedness deficiencies within the 2nd Corps, and in order to raise the total battle preparedness of 2nd Corps, it is ordered: ….(1) unit reorganization to be completed as soon as practicable; …(6) all units to send in officer promotion nominations; …(10) personnel replenishment in units to be conducted through district and municipal secretariats up to mandated levels; (11) situation summaries and combat reporting to be conducted in accordance with the most recent order of the supreme command.*"

[11] A logical question arises: what unit reorganization and combat reporting could possibly be taking place here, when in that period and in that general area no military units of any sort were allowed, save for those of the United Nations, and least of all non-UN units equipped for carrying out combat operations? As if wanting to dramatize the farce of "demilitarization," Srebrenica Moslem military commander Naser Oric, by dispatch no. 130-29-25/94 of June 4, 1994, informs 2nd Corps command [Office of recruitment and personnel affairs] as follows: "*In relation to your Order, strictly confidential, no. 03/96-53 of March 14, 1994, we are*

forwarding to you information about personnel levels in OG units. The data are listed on the RP-1 form, with all changes indicated."

According to this report, personnel levels for 8th OG were as follows on June 4, 1994: officers, 429; non-commissioned officers, 562; soldiers, 4535, for a total of 5526 military personnel in 8th OG Srebrenica.

It is important to note that the manpower levels of Srebrenica 8th OG were constantly increasing, by about 100 new personnel per month. On February 12, 1994, Srebrenica 8th OG units had a total of 5133 personnel; on March 9, 1994, there were 5254 personnel; and on June 4, 1994, there were 5526. This manpower increase was occurring at a time when Srebrenica enclave was allegedly "demilitarized" and it was taking place in the presence and full view of UN forces.

[12] Considering that Moslem units were organized according to professional military standards, it may be assumed that they were not meant simply to remain in place and act as unarmed observers. Not only were those armed forces not asked in April or May of 1993 to turn their weapons and equipment over to the UN, as required by signed commitments, but they were constantly provided with new supplies of military equipment which were arriving by a variety of channels. By failing to react in order to interdict this weapons flow, and by not confiscating the weapons that were already there, the Defendants UN and its surrogate on the ground, the State of the Netherlands, seriously compromised their obligations under the relevant agreements and they must be held liable and answer for the consequences.

The next example is a request forwarded on July 26, 1994, by the Srebrenica command of Moslem forces to the member of Srebrenica war

presidency in Sarajevo, Efendic Murat, and to the commander of 2nd Corps in Tuzla. It speaks eloquently of the scope of this supply pipeline and of the gravity of the Defendants' failure to fulfill their solemnly undertaken commitments:

"With reference to the conversation with the member of Srebrenica municipality war presidency on July 21, 1994, we forward to you a list of indispensable materiel and technical supplies and ask you to procure them and have them delivered to the free territory of the municipality of Srebrenica:

a) Guns, sub-machineguns, and machineguns 4000 pieces

b) Ammunition for the above weapons

c) mortars 60 mm 60 pieces

d) mortars 82 mm 36 pieces

e) recoilless cannon 82 mm 20 pieces

f) Ammunition suitable for the above weapons

g) Artillery pieces: howitzers, MB 120 mm and others in similar quantities

h) Ammunition for existing weapons:

- Bullet 7,62 mm for AP, PAP and PM 500,000 pieces

- Bullet 7,9 mm for P and PM 300,000 pieces

- Bullet 7,62 mm for machinegun M-84 1,000,000 pieces

- Bullet 9 mm long 5000 pieces

- Bullet 12,7 mm for PAM 100,000 pieces

- Bullet 20 mm for Pat 20/3 1,000,000 pieces

- Bullet for Pat 20/4 1,000,000 pieces

- Mines for MB 60 mm 10,000 pieces

- Mines for MB 82 mm 10,000 pieces

- Projectile 76 mm for cannon B-1 3,000 pieces

- RBR "Wasp" [Zolja] *5,000 pieces*

- RBR "OSA" with filling *100 pieces*

- Hand held mortar *100 pieces*

- Mine for RB *1000 pieces*

We request that you procure the listed supplies, that you see to it that they are delivered to the free territory of Srebrenica municipality, and that you keep us informed of it.

Until final victory,

Commander,

Oric Naser"

The same commander, Naser Oric, forwarded on November 3, 1994, the following report, no. 01/130-204, to the chief of staff of the BH [Moslem] Army, Gen. Hadzihasanovic:

"Reference: your letter no. 02-1/1347-1

In relation to your letter no. 02-1/1347-1 of November 1, 1994, we inform you that we also are working intensely on preparations for the forthcoming operation. Earlier, we communicated to you our proposals as to how to execute the task...To facilitate execution and in order to familiarise you with our resources, I have authorised and I have decided to send to you again Suljic Kasim who will orally and in detail inform you of our resources and intentions."

What conceivable „tasks" could have been planned by a military unit that formally did not even have the right to exist, much less to dispose of material resources necessary for the execution of military tasks? Against whom were those „tasks" being planned while UN and Dutch forces, which

were in place to exercise control over the enclave and to guarantee its demilitarization, were looking in another direction?

[13] Numerous reports and orders illustrate the complete contempt of the Moslem leadership in Srebrenica for the control regime which should have been established in Srebrenica if the commitments discussed in paragraphs 2—8 of this section had been carried out. It serves the purpose to read the regular "*Report for the month of October 1994 on the state of combat morale*" which was forwarded to the 2nd Corps command by 8th OG Srebrenica assistant to the commander for morale, Nijaz Masic, on November 7, 1994, no. 13-28-169/94. It is said there that "*there is an intense desire among the soldiers of 8th OG to take part in combat activity to liberate the area which separates the free territory of Srebrenica from the free territory of the district of Tuzla. Reconnaissance activities against the enemy have been conducted for that purpose. Personnel have been selected for combat and the necessary psychological and physical preparations have been made.*" The clear reference here is to planned combat operations beyond the limits of Srebrenica enclave. That means that such operations were to be directed against nearby Serbian controlled territory, targeting its inhabitants.

[14] But there is one more conclusion which follows from this and it aggravates the Defendants' liability in this case: it turns out that Moslem forces in Srebrenica had a place and role in the strategic planning of the supreme command of the BH Army. The documents referred to suggest that those combat activities were being planned and carried out without regard for the UN or the Dutch battalion, and without any apparent hindrance from

them, although their mission was precisely to prevent such things from happening. Regardless of the motive—negligence on the part of the Defendants or tacit strategic collaboration with one party in the conflict against the other—the same conclusion follows: the Defendants are liable for the consequences of their inaction. In this specific situation, that inaction comes down to passively permitting the Moslem side to mortally endanger innocent Serbian non-combatants in the vicinity of Srebrenica, who stood in the way of the execution of those „combat operations."

[15] In his book "Planned chaos," *op. cit*., Moslem politician and local SDA party functionary in Srebrenica both before and during the conflict, offers additional information on this subject and by his eyewitness evidence corroborates the conclusion that the Defendants took no steps to disarm Moslem forces in the enclave or to implement the agreed upon demilitarization. Thus, on p. 342 Mustafic says that it was precisely around the time of the Dutch battalion's arrival that the Moslem army in Srebrenica began more visibly to acquire the characteristics of a serious and well organized military formation. Further, on p. 346, Mustafic mentions what he thought was a strange digging of embankments in mid-1995, something that should have been quite unnecessary in a demilitarized zone, but which he interpreted as preparation for imminent military operations. "*Embankments were not being dug during the war*," Mustafic says, "*and even trenches were a rarity, and now all of a sudden embankments were being dug to encircle the entire protected zone. What could have been the meaning of that? Young and old were required to lend a hand in the digging. It is interesting that this did not bother the Dutch at all. After coming up to our army's lines and expressing disapproval, they turned increasingly tolerant, so that in the end*

they were just observing the digging of the embankments." Mustafic interprets the Dutch soldiers' passivity as follows: "*Obviously, they were keen to rid themselves of some of the responsibility for the defense of Srebrenica and to shift it onto us.*"

[16] These activities, which were rather awkward for a "demilitarized zone," and which, according to Mustafic, were proceeding under the observant eye of Dutchbat personnel, reached their point of culmination when "*at more or less the same time…helicopters began to fly into Srebrenica. All those flights had Zepa as their ultimate destination, and some of our units would afterwards trek to Zepa and then to Srebrenica on foot and would return with a variety of cargo, uniforms, and arms*" [p. 349].

[17] It is plain that the activities reported in his book by "insider" Mustafic who, as a Moslem and a member of Alija Izetbegovic's ruling party SDA, is in some sense testifying against interest and therefore deserves greater credibility, cannot be reconciled with the concept of a demilitarized zone under the supervision of the United Nations, or the State of the Netherlands, which in this particular time period should have been exercising supervision and control on behalf of the UN. Numerous other documents originating from Moslem armed forces, which are cited by the Plaintiffs in this section, *supra*, are equally irreconcilable with the notion that Moslem forces in Srebrenica had been disarmed and that a "demilitarized zone" under the Defendants' supervision and control really existed, as binding commitments required. The following conclusion would therefore appear reasonable: between April 18, 1993, until the end of June 1995, Srebrenica was not demilitarized; Moslem military units did not withdraw from it; Defendants

not only failed to take away and place under custody Moslem forces' weapons, but over time they established a pattern of passivity in their conduct and assumed an attitude of indifference. That encouraged the Moslem side within the protected zone to reorganize their forces and to equip them for an even wider spectrum of combat activities and strategic assignments. The direct victims of such conduct of the Defendants were Serbian and other non-Muslim citizens who perished from the hand of armed and, due to the benevolence shown them by the Defendants, greatly emboldened Moslem forces.

B. Defendants' knowledge of the consequences of non-fulfillment of their obligations

[1] Had the Defendants and their sponsors made the slightest attempt to maintain a balanced position vis-à-vis the warring parties in Bosnia and Hercegovina, it is probable that their legal and moral situation today would be incomparably better. But instead of offering their services as honest brokers and peacekeepers, they disingenuously chastised one side, while perfidiously overlooking and rationalizing the crimes of the other. The untenability and perniciousness of that approach by the political authorities of the UN and the Netherlands, as well as other leading countries which during the BH war had pretended to act as the "international community," was noticed by General Satish Nambiar, who commanded UNPROFOR forces at the very beginning of the conflict:

"Portraying the Serbs as evil and everybody else as good was not only counter-productive but also dishonest. According to my experience, all sides were guilty but only the Serbs would admit that they were no angels, while the others would insist that they were. With 28.000 forces under me and with constant contacts with UNHCR and the International Red Cross officials, we did not witness any genocide beyond killings and massacres on all sides that are typical of such conflict conditions" [10]

It should be stressed here that General Nambiar was but the first from a long line of UNPROFOR commanders who drew upon their experiences in the field to eventually form an objective picture of the parties in the conflict. Quite a few among them, such as General Michael Rose, General Lewis MacKenzie, and even General Philippe Morillon himself, would take up their duties plainly under the influence of the virtually monolithic anti-Serbian political and media campaign which marked the prelude and the entire period of duration of the war, only to yield later to the irresistible effects of empirical evidence and to gradually move toward a more objective standpoint. That was probably the main reason why their political superiors kept replacing them, one after another, as unsuitable.

[2] General Philippe Morillon, who commanded UNPROFOR in the critical period in 1993 when the protected zone was established, is a typical example of this sort of ambivalence. [11] He understood quite well the real character of the Moslem commander in Srebrenica, Naser Oric, and he had no illusions about Oric's capacity to commit the most gruesome atrocities:

[10] Testimony of General Morillon, Prosecutor v. Milosevic, 12 February 2004, p. 32042, lines 11-18.
[11] It is worth noting that Morillon's theatrical media performance in Srebrenica in the Spring of 1993 was the trigger for the political process which in April of that year culminated in the UN Security Council resolution by which Srebrenica protected zone was established.

"I think you will find this in other testimony, not just mine. Naser Oric was a warlord who reigned by terror in his area and over the population itself. I think that he realised that those were the rules of this horrific war, that he could not allow himself to take prisoners. According to my recollection, he didn't even look for an excuse. It was simply a statement: One can't be bothered with prisoners."[12]

"I wasn't surprised when the Serbs took me to a village to show me the evacuation of the bodies of the inhabitants that had been thrown into a hole, a village close to Bratunac. And this made me understand the degree to which this infernal situation of blood and vengeance…… led to a situation when I personally feared that the worst would happen if the Serbs of Bosnia managed to enter the enclaves and Srebrenica."[13]

In the opinion of General Morillon, whose competence as an observer is beyond doubt, the bestialities committed by Srebrenica Moslem forces under the command of Naser Oric were precisely the factor which—on the regional level at least—activated the cycle of insatiable hatred which culminated in July of 1995 with the tragic massacre of Moslem prisoners:

"I feared that the Serbs, the local Serbs, the Serbs of Bratunac, these militiamen, they wanted to take their revenge for everything that they attributed to Naser Oric. It wasn't just Naser Oric that they wanted to… take their revenge on, they wanted to avenge their dead on Orthodox Christmas. They were in this hellish circle of revenge. It was more than revenge that animated them all. Not only the men. The women, the entire population was imbued with this … [I]t was pure hatred…[S]uch hatred cannot be worse than it is towards neighbours and brothers."[14]

[12] Ibid., p. 31966, lines 5-10.
[13] Ibid., p. 31966, lines 12-19.
[14] Ibid., p. 31975, lines 8-18.

Asked by Judge Robinson whether he thought that the massacre of Moslem prisoners in July of 1995 was in direct reaction to what Naser Oric was doing to the Serbs during the preceding years, General Morillon responded:

"Yes, Your Honour. I am convinced of that. This doesn't mean to pardon or diminish the responsibility of the people who committed that crime, but I am convinced of that, yes."[15]

While testifying before the Hague tribunal, Morillon confirmed his response on another occasion to Pierre Brane, a member of the French parliament, about the causes of the Srebrenica massacre in 1995:

Accumulated hatred. There were heads that rolled. There were terrible massacres committed by the forces of Naser Oric in all the surrounding villages. And when I went to Bratunac at the time when I intervened, I felt that."[16]

Morillon continues that in personal contacts Oric had admitted to him that he was killing Serbs[17], rationalizing it as "the rules of the game because in this sort of guerrilla warfare no prisoners are taken." [18]

Asked whether he could confirm the view that was attributed to him in paragraph 3 of his statement to the International Tribunal at the Hague, that "it appeared that [Oric] was implementing political instructions which he was receiving from the Presidency" ,[19] Morillon did so without hesitation:

[15] Ibid., p. 31975, lines 22-25.
[16] Ibid., p. 32031-2, lines 22-1.
[17] Ibid., p. 32044, lines 5-9.
[18] Ibid., p. 32044, lines 17-20.
[19] Ibid., p. 32044, lines 23-24.

"Yes… Naser Oric obeyed. He was head of a band. He was waging guerilla war in the enclave, but he himself considered himself to be a combatant in the service of the Presidency."[20]

Here, it would be useful to clarify what kind of "Presidency" that was whose directives, according to General Morillon's information. Naser Oric and Moslem armed forces in Srebrenica were implementing in the field in the manner which General Morillon was describing. That was the Sarajevo "government" of Alija Izetbegovic which at that time enjoyed international recognition regardless of the bloody hands of its field representatives. General Morillon was obligated by the nature of his position to have official dealings with that group. For the duration of the war, the Defendants and their international sponsors maintained with it relations which were mostly cordial, but never less than correct.

[3] If another blood curdling example is needed of the style of "guerrilla warfare" which Naser Oric and his forces applied when raiding Serbian villages around Srebrenica, the following will surely suffice.
In an article he published in *Washington Post* on February 16, 1994, correspondent John Pomfret conveys the following impressions from a séance with the local Srebrenica "warlord," Naser Oric:

"Nasir Oric's war trophies don't line the wall of his comfortable apartment-- one of the few with electricity in this besieged Muslim enclave stuck in the forbidding mountains of eastern Bosnia. They're on a videocassette tape: burned Serb houses and headless Serb men, their bodies crumpled in a pathetic heap.

"We had to use cold weapons that night," Oric explains as scenes of dead men sliced by knives

[20] Ibid., p. 32045, lines 1-4.

roll over his 21-inch Sony. "This is the house of a Serb named Ratso," he offers as the camera cuts to a burned-out ruin. "He killed two of my men, so we torched it. Tough luck."[21]

On the occasion of this visit, Pomfret was accompanied by the correspondent for the Canadian *Toronto Star*, Bill Schiller, whose report rather picturesquely supplements the impressions of his American colleague:

"Oric is a fearsome man, and proud of it.
I met him in January, 1994, in his own home in Serb-surrounded Srebrenica.
On a cold and snowy night, I sat in his living room watching a shocking video version of what might have been called Nasir Oric's Greatest Hits.
There were burning houses, dead bodies, severed heads, and people fleeing.
Oric grinned throughout, admiring his handiwork.
"We ambushed them," he said when a number of dead Serbs appeared on the screen.
The next sequence of dead bodies had been done in by explosives: "We launched those guys to the moon," he boasted.
When footage of a bullet-marked ghost town appeared without any visible bodies, Oric hastened to announce: "We killed 114 Serbs there."
Later there were celebrations, with singers with wobbly voices chanting his praises."[22]

These observations are very troubling for the Defendants because they leave them with no coherent answer to the question why, contrary to their express obligations, and after the establishment of the safe zone, they left weapons deliberately in the hands of Moslem forces in Srebrenica, although they were in a position to know that this would leave intact Moslem forces' war making ability and would therefore lead to the continuation of their unspeakable atrocities. Based on these reports alone it is clear that the Defendants knew, or—which is the same thing—had the facilities to find

[21] John Pomfret, *Washington Post*, 12 February 1994.
[22] Bill Schiller, *Toronto Star*, 16 July 1995.

out, the gravity of the consequences of their conduct. Plaintiffs are, therefore, of the opinion that imputation of liability to the Defendants, the UN and the State of the Netherlands, is entirely justified.

[4] The facts outlined above were so flagrant that the possibility that the Defendants were unaware of them at the time of their occurrence can safely be excluded. The NIOD Report [published by the Dutch Institute for War Research] presents an excellent summary of conditions in the UN "protected zone" in Srebrenica and reveals the real purpose that zone actually served:

"...the [Srebrenica] enclave increasingly acquired the status of a 'protected area' for the ABiH, from which the ABiH could carry out hit and run operations against, often civilian, targets. These operations probably contributed to the fact that at the end of June the VRS was prepared to take no more, after which they decided to intervene: the VRS decided shortly after to capture the enclave. In this respect, the [illegal US sponsored] Black Flights to Tuzla and the sustained arms supplies to the ABiH in the eastern enclaves did perhaps contribute to the ultimate decision to attack the enclave. In this connection it is not surprising that Mladic and other Bosnian Serbs constantly complained about this, but usually received no response to their complaints..."[23]

C. Neglected Serbian victims during the UN protected safe area

[1] It was the biased attitude of international players who became involved in the war in Bosnia and Hercegovina, as much the activities of the Defendants who were working in the field, which generated harm on a broad scale. The interference of the so-called "international community," which from the background managed these tragic events and manipulated conflict perception through the media, had one very significant consequence. That was to perpetuate a climate of immunity and impunity which protected those

[23] Srebrenica - A Safe Area? Appendix II - Intelligence and the war in Bosnia 1992 – 1995: The role of the intelligence and security services, Chapter 4, Secret arms supplies and other covert actions

who were guilty of war crimes as long as they were on the Moslem side. Their crimes, and their victims, were barely mentioned; the latter in particular were kept strictly anonymous. The existence of that climate encouraged the commission of new crimes and made possible the perpetrators' rejection of the obligation to respect the norms of international conflict and humanitarian law. In practice, the cumulative effect of strong political support and uncritical media reporting in relation to the Moslem side was that its protagonists did not feel constrained in what they could do, no matter how gruesome their conduct, because they did not have any reason to fear that they would ever be called to account.

That is how—deliberately and consciously, or not—Western countries and institutions cooperated with perpetrators of crimes on the Moslem side. But they did even more than that. By pursuing a policy of non-punishing, and not even condemning, the Moslem side, they as it were deleted Moslem victims and made them invisible, deprived them of their human dignity and identity, and reduced those innocent human beings to the role of a devalued currency in political deal making. The role played by the Defendants, which unfortunately fits perfectly in that scenario, deserves not merely moral opprobrium but also a fitting legal sanction. That is because the Defendants, the United Nations and the State of the Netherlands, as the UN surrogate in the field in Srebrenica in 1994—1995, had a formal obligation to act in tune with the noble peacemaking mission conferred upon them through the UN Charter. That means that their task in the midst of a merciless ethnic conflict called for behavior that was strictly impartial, to champion values which stood above everyday politics and particular geostrategic interests. In other words, the preservation of peace and respect for the integrity of the human person regardless of religion or ethnic affiliation. The thesis, that UN and

Dutch forces were deployed in the region of Srebrenica in order to protect the innocent members of only one community, and that their responsibility is confined to their failure to do so in July of 1995, is not merely scandalous and therefore completely wrong. It is a cynical mockery of the basic principles of humanitarian conduct. It is unforgivably tolerant of grave violations of recognized norms of international law in relation to the members of the Serbian community because those norms require equal treatment for all endangered persons, and for all victims, without distinction.

[2] It so happens that at least one of the Defendants, the State of the Netherlands, has accepted in principle the concept of responsibility for its failure to act in extending protection to persons entrusted to it through UN mandate. That occurred when the Dutch cabinet, with the prime minister at its head, resigned on April 16, 2002 [24], after the Dutch Institute for War Research [NIOD] published its comprehensive study of events in and around Srebrenica in July 1995, in which it imputed to the Dutch government responsibility for making insufficient efforts to protect the Moslem population of Srebrenica. [25] In this way [irrespective of the motives] the Defendant State of the Netherlands did after all accept a key principle: the agreements by which, through the United Nations, the Srebrenica protected and demilitarized zone was established, and which the Netherlands joined in February of 1994 when it dispatched its military contingent to Srebrenica in order to implement those agreements on the ground, create a legal obligation to protect the entrusted population. *Mutatis mutandis*, that same principle

[24] BBC News, 16 April 2003; http://news.bbc.co.uk/2/hi/europe/1933144.stm

[25] The theatricality of that resignation is reflected in the fact that the same cabinet received a renewed mandate already the following day, see *supra*. But regardless of the moral frivolity of the public gesture, the fact of the resignation signifies at least the acceptance of political responsibility.

extends to the Serbian population which was located on the other side of the demarcation line separating Moslem from Serbian controlled territory.

Such a conclusion is implicit in the condition that the Moslem side was to be demilitarized. If weapons were meant to be taken away from the Moslem side, there must have been a reason for that. The reason was that these weapons might continue to be misused [as they were up until then] in order to carry on the campaign of mass murder and terror against the Serbian population in nearby communities. In other words, the armed Moslem side was a threat which demilitarization was designed to remove, and that threat was aimed at the Serbs in the surrounding areas. Not just based on the agreements by which the protected demilitarized zone was established, but also on the basis of generally known facts on the ground, it was clear to everyone that the Serbian side had significant reasons for insisting on demilitarization. It was in order to make sure their population in the vicinity of Srebrenica would be protected. When the Defendants accepted that condition, they also accepted the obligation to extend protection not just to the Moslem population in Srebrenica, but also to the Serbian population in the surrounding area. The State of the Netherlands did not fulfill its obligation, just as the United Nations did not in the time period which is relevant to this Writ.

If the political authorities of the Netherlands had had a correct awareness of their legal and moral responsibilities, they would have noticed the obvious fact that those obligations necessarily extend to all human beings in the region of Srebrenica, and not to members of just one religious or ethic group. But then, the Netherlands would have to face a very awkward choice: either to use its military unit in the field to act decisively to prevent attacks emanating from the protected zone and to place the Moslem side

under control and demilitarize it, or plunge the Dutch government into a continuous theatrical crisis because otherwise it would have to resign every time a Serbian community was destroyed and its inhabitants slaughtered.

[3] The frequency and gravity of those attacks from the supposedly "demilitarized" zone of Srebrenica is illustrated by the following Moslem military document:

Acting commander of the 8th Operational Group, soon to be renamed 28th Division [nota bene: these are the official designations of the Moslem unit under Naser Oric's command in Srebrenica], Major Becirevic, wrote as follows to the *Morale Department* of 2nd Corps Command in Tuzla on June 30, 1995, in his "Operational Report" no. 04-114/95. There is a note on the report that it is "For internal use only." The report states:

„1.Soldiers of the 28th Division, deployed in the enclaves of Srebrenica and Zepa, in spite of enormous problems involving food supplies and the obligation to preserve the free territory under their control, have decided to contribute as much as possible to the BH Army in its struggle against the aggressor and they have, therefore, increased their activities deep in the territory under the aggressor's temporary control. While conducting reconnaissance, 28th Division units on several occasions have had to exchange fire with aggressor units and as a result have achieved the following results:

- 13 Chetniks liquidated
- 2 PM M-72s captured
- 8 APs captured
- 2 pistols captured
- Several dozen Chetniks were wounded

Our losses were 2 dead and 3 wounded soldiers.

2. In order to prevent enemy forces from repositioning additional troops from the Srebrenica and Zepa to the Sarajevo theater, two sabotage operations were conducted in the vicinity of Srebrenica. That took place on 23/6/1995 in Osmaci and on 23/6/1995 in Bijelo Stenje near Koprivno, with the following results:

- 7 Chetniks liquidated
- one PM M-72 captured
- two AP captured
- one pistol captured
- one passenger vehicle „Kombi" completely destroyed

There were no losses on our side.

3. In order to draw enemy forces away from the Sarajevo theater in the direction of Srebrenica and Zepa, on 26/6/1995 several successful sabotage operations were conducted 20 – 40 km deep in territory under the temporary control of the aggressor, in Han Pijesak and Vlasenica municipalities in the following locations:

- Village of Visnica and fortified point Bajte
- Locality of Crna Rijeka [monument near the crossroads]
- Locality of Crna Rijeka [Bojcino Brdo]
- Locality of Vrani kamen

In all those localities successful sabotage activities were conducted targeting exclusively enemy manpower, with the following results:

- We estimate that more than 40 Chetniks were liquidated, although we have unverified reports that the aggressor lost 71 soldiers
- One enemy soldier was captured
- Two radio stations were captured
- One carbine was captured
- About 5000 bullets were captured
- Several dozen head of cattle, large and small, were captured

In the village of Visnica large quantities of ammunition were obtained but, due to the exhaustion of our soldiers, more could not be carried away so the remainder was destroyed as well as all significant facilities which the aggressor could use for war waging purposes."

It should be noted that the attacks listed here took place in June of 1995, which is immediately before Serbian forces started their operation which culminated in the takeover of Srebrenica and Zepa in July of that year.

This report is testimony not only to events in the field, but also a striking depiction of the conditions which led to the exhaustion of the Serb side's patience.

[4] In 1995 alone, Moslem forces from Srebrenica, which were completely unimpeded in reorganizing themselves into a powerful division-size unit, and whose armaments nobody had bothered to remove from their custody,

conducted the following attacks or attempted raids outside of the protected zone:

-On 8/2/1995 a Reconnaissance and Sabotage Group [further on: RSG] of the 283rd Brigade waded into a mine field while reconnoitering VRS positions in the Kriva Kaldrma zone and suffered 2 wounded;
-In the period from 18/2 to 1/3/1995, 7th detachment of the 285th Brigade blocked off and laid mines on the Bogodol—Stublic road;
-On 16/3/1995, RSG belonging to the 285th Brigade suffered 2 wounded in the Stublica zone;
-On 9/4/1995, RSG belonging to the 281st Brigade waded into a mine field and suffered 2 wounded;
- On 10/4/1995, RSG belonging to the 281st Brigade waded into a mine field in the Stedar zone and suffered 1 killed;
-In the period from 7/5/ to 16/5/1995, 217 members of the 283rd Brigade were deployed to patrol the Zepa—Srebrenica corridor outside of the „demilitarized zones";
-On 16/5/1995, RSG belonging to the 285th Brigade killed two VRS soldiers in the Sadikov Cair zone;
-In mid-May 1995, a group of soldiers from the 284th Brigade and the 28th Independent Battalion carried away 110 sheep from the vicinity of the village of Lukic Poloje [2 km from Milici];
-Between May 19 and 25, 1995, 28th Division RSGs occupied points known as Slivovo and Borovo Brdo, which are located outside the „demilitarized zone;"
-On 27/5/1995 an RSG in the Rupovo Brdo area liquidated 5 VRS soldiers and captured one PM M-72, 1 AP, and 1 pistol;
-On 29/5/1995, in the Podravanje area, two 28th Division soldiers waded into a mine field and were wounded;
-On 29/5/1995, in front of the UN observation post in Zeleni Jadar, a 28th Division RSG killed 2 VRS soldiers;
-On 31/5/1995, a VRS reconnaissance patrol wounded two soldiers of the 282nd Brigade near the locality of Opres, outside the Srebrenica enclave;
On 31/5/1995, near the locality of Opres, a 282nd Brigade RSG killed 2 VRS soldiers in Zeleni Jadar area, in front of the UN observation post;
-On 1/6/1995. in the Podravanje area, VRS killed 2 civilians, while 1 civilian got away;
-On 1/6/1995, in the Podravanje area, VRS killed 1, and wounded 3, soldiers of the 285th Brigade;
-Between June 5 and 10, 1995, a 28th Division RSG, Acting on orders of Major Becirevic, reconnoitered the Podravanje—Kragljivoda—Jezero region;
-On 7/6/1995, members of an RSG unit opened fire on VRS in the Jasenovo area, VRS losses unknown, while 1 RSG soldier was wounded on the way back through the mine field;
On 8/6/1995, a Srebrenica MUP [interior ministry] patrol waded into a mine field in the Jasenova area, leaving 1 dead and 3 wounded;

-On 10/6/1995, a group of 285th Brigade soldiers carried away a herd of cattle from the area of Han Pijesak;
-On 11/6/1995, a group of armed soldiers and civilians from the enclave made their way to Kladanj from the direction of Srebrenica and Zepa;
-On 12/6/1995, a group of soldiers from Srebrenica carried away cattle from the village of Djile;
-On 15/6/1995, 28th Division soldiers in the Zutica area killed 2 VRS soldiers and captured personal firearms;
-On 17/6/1995, a group of about 15 soldiers made its way to Kladanj from Srebrenica and Zepa;
-In mid-June, three groups of soldiers from Srebrenica, numbering 44 in total, made their way to Kladanj from Srebrenica and Zepa;
-On 19/6/1995, in the Zeleni Jadar area, a VRS jeep was destroyed, and the personnel inside were most likely killed;
-On 19/6/1995, a member of an RSG was wounded in the Zeleni Jadar area while going through a mine field;
-Between 19 and 21 June, 1995, a 28th Division RSG consisting of 5 men reconnoitered the terrain east of Srebrenica enclave;
-Between 20 and 25 June, 1995, a 28th Division RSG consisting of 5 men reconnoitered the terrain west of Srebrenica enclave;
-On 22/6/1995, under orders from Major Becirevic from Srebrenica, Major Tursunovic, Major Mandzic, and Captain Salihovic were directed to Zepa with the personnel of RSGs belonging to the 280th, 281st, and 284th Brigades, and the 28th Independent battalion;
-On 22/6/1995, in the Han Pogled area, along the Srebrenica—Kladanj corridor, VRS thwarted an attempt by about 20 28th Division soldiers to reach Kladanj;
-On 23/6/1995, in the Kragljivode area, a VRS vehicle was destroyed. There is no information on VRS losses;
-On 23/6/1995, a 28th Division RSG unit killed 4 VRS soldiers in the vicinity of the village of Simici;
-On 26/6/1995, a 28th Division RSG attacked and burned down the village of Visnica and killed its civilian population.
-On 3/7/1995, a 28th Division RSG killed 4 VRS soldiers in an ambush.

These facts show clearly the dimensions and the intensity of military activities which originated from the zone which was under the protection and demilitarization guarantee of UN forces, and during that particular time period under the protection of the Dutch contingent.

[5] UNPROFOR correspondence, concretely between Brigadier Ridderstadt and Moslem commanders Naser Oric and Rasim Delic, offers

incontrovertible evidence that Dutch military authorities, and thus necessarily the UN of which they were an integral part, were well aware that Srebrenica protected zone was not demilitarized, as the agreements had required. Two messages that are very indicative in this regard will be quoted [See Annex III-1].

In a letter directed to Oric on February 1, 1995, and which may be viewed in its entirety in Annex III-2, Ridderstadt says:

> "I should add that the subject of the enclave is always at the top of my priority list. We are fully aware that the demilitarization of the area has not been realized."[26]

In his letter to Rasim Delic, chief of the general staff of the Moslem BH Army, Ridderstadt addresses him as follows: [27]

You will be well aware of the background. Srebrenica was declared a Safe area by UN Security Council Resolution 819 of 16 April 1993. The UN initiative to develop the Srebrenca Enclave as a UN "Safe Area" has been thwarted. The Articles of the "Agreement on the Demilitairization of Srebrenica" dated 8 May 1993, have never been fulfilled by the either of the warring parties. Military activity and ceasefire violations by both the BSA, externally, and the BIH, internally, continue unabated; even with a Cessation of Hostilities Agreement in force. UNPROFOR is subjected continually to restrictions of movement, threats, intimidation by firing close, and actual attack. The civilian population inside the Enclave is suffering great hardship. Since the signature of the Demilitarization Agreement on the 8th May 1993 both parties have steadfastly refused to co-operate with UNPROFOR forces, all this despite the best endeavours of UNPROFOR.

For some inexplicable reason, the Dutch general uses rather subdued tones in his correspondence with Delic. He implores Delic rather humbly for the liberation of his soldiers, and merely warns his Moslem addressee of the penalty of bad publicity that the Moslem side might possibly suffer should it persist in its insolence:

[26] ICTY document, EDS no. 01837510.
[27] ICTY document, EDS no. 01837512

There can be no possible justification for this action by soldiers under your direct command. I appeal to you to issue the necessary instructions for the immediate release of my soldiers forthwith. I am preparing a Press Release to the media and I am sure the news of this unacceptable action will shortly be published in Holland. The DUTCH are very sensitive to this and its publication will not do the image of the BIH any good at all.

Based on this correspondence, we can draw several significant conclusions:

First, that UN forces and their highest representatives, in this case the Dutch General Ridderstadt, were fully cognizant of the fact that a Moslem army was in existence in Srebrenica and that it had the official designation of 8th Operational Group, and that they did not react in any way whatsoever in relation to that fact, although it was unacceptable according to relevant agreements;

Second, that they also failed to undertake effective steps to see to it that the demilitarization agreement was carried out. By that failure, deliberately or not, they had not exposed just the surrounding Serbian population to marauding attacks, but—as evidenced by the theme of the letters—they had made possible for their own soldiers' in Srebrenica to be taken hostage by the Moslems. That is precisely the subject of the letter to Delic, where Ridderstadt complains that forces under Oric's command in "demilitarized" Srebrenica had taken captive ninety-nine soldiers of the Dutch battalion; and

Third, regardless of the evident tensions, the personal and almost friendly tone of General Ridderstadt's letters to Oric and Delic, especially to Oric, is astonishing. In view of the circumstances which caused those letters to be written, it borders on the absurd.

[6] It is necessary here to pose the following logical question: if the general reacted so diffidently to the illegal blockade of his own troops, whom he had an absolute duty to protect by any and all available means, what could be expected from the Dutch military unit, or from UN forces in general, in relation to the fulfillment of their duties toward others, to be specific, their duty to protect the Serbian population in and around Srebrenica?

[7] The subject of this Writ are Serbian losses which occurred during the period of existence of the protected and „demilitarized" zone between April 17, 1993, and the end of June of 1995.[28] Victims from the preceding period, that is to say from the outbreak of hostilities in April 1992 to the establishment of the protected and „demilitarized" zone are treated in a separate section [see Section III-D]. Victims in the latter category not only are not of a lesser importance in the moral sense, but in the legal sense as well they are crucial in relation to the determination of the degree of responsibility of the Defendants. That is because the massacres of the Serbian population during that preceding period were of sufficient scope and gravity to serve as a reasonable warning to the Defendants of what would continue to occur in the event of their failure to carry out their obligation to disarm the Moslem army in Srebrenica.

There are many more victims than individuals who have associated themselves with this Writ in an attempt to secure a small portion of justice for their murdered loved ones. The loses of each of the Plaintiffs will be presented separately, by quoting their own words from statements signed by them:

[28] The Plaintiffs consider the end of June of 1995 as the effective termination date because already in the first days of July 1995 military operations by the Serbian army commenced, leading to the takeover of Srebrenica on July 11, 1995.

[8] **Aleksandar Bozic,** born on 4/10/1975, in Zvornik: „My father Ostoja was an inspector at the Interior Ministry of the Republic of Srpska. Ostoja Bozic's official task was oversight of government property in Zeleni Jadar. Acting on orders from police commander Milan Bogdanovic, on the fatal morning of June 23, 1995, a replacement crew was sent up to Zeleni Jadar to relieve my father Ostoja and his colleagues who were performing their assigned tasks in Zeleni Jadar. On their way back from Zeleni Jadar, near the locality of Podosmace, Moslem forces had set up an ambush and they shot up the passenger vehicle with my father and his colleagues inside. In addition to my father, in the vehicle were policeman Dragisa Pavlovic, who was similarly on official duty, and two workers of the „Drina" forestry enterprise. After the shooting, the vehicle ended up in a nearby ditch. Moslem soldiers then approached each victim, shot him in the head, and carried away my father's service revolver, which he had on him."

[9] **Gordana Zekic,** born on 27/9/1950, in Bratunac: „On April 17, 1992, I left Srebrenica fearing for my safety, and on the same day I took my children to the city of Nis, in Serbia. My husband was unable to join me because he had to care for his bedridden mother. My husband was an invalid himself, having lost his entire left hand, but for the thumb. Because telephone links had been cut, I was unable to communicate with my husband. The only possibility I had of obtaining some information about him was through ham radio operators, and I found out at one point that my husband and mother-in-law were well. After that contact, I had no further information about them. In June of 1993, I decided to contact the Red Cross in Nis to try to obtain additional information. On July 8, 1993, the Red Cross responded that my husband and mother-in-law had been murdered. My husband had no weapons, being an invalid he had not taken any part in the fighting, and he had not crossed anyone in Srebrenica. That makes his murder even more heinous. The only conclusion that I can draw is that my husband was murdered because he was not Moslem. My husband and mother-in-law were buried in the town cemetery in March of 1993. They were placed in a collective grave with 5 other persons. Their remains were exhumed in 1995. and were then reburied in the Orthodox cemetery in Srebrenica. An investigation which was conducted later uncovered the fact that my husband and mother-in-law were murdered by Emir Halilovic, a military police officer. Halilovic was eventually taken to Tuzla for medical treatment, and after a time he passed away there."

[10] Milena Bibic, born on March 22, 1965, in Srebrenica: „On April 1, 1992, I fled from Dugo Polje to Valjevo, Serbia, because I feared for my own safety and that of my children. My husband remained behind in Srebrenica, and later he moved to Podravanje, and ultimately to Milici. In 1993, I returned to Bratunac, where I lived with my in-laws. On January 1, 1994, I moved to Skelane, where I was living with my husband. My husband at that time was a chauffer and his task, together with several other colleagues, was to assist in guarding factory facilities in Zeleni Jadar. Those facilities were being guarded 24 hours, and my husband's job was to drive the guards there and back. On some occasions he would return home the same say, on others he would remain in Zeleni Jadar for several days. The last time he came home and stayed for a couple of days was on June 20, 1995. On June 23, 1995, he received instructions to go to Zeleni Jadar again, and he was scheduled to return home the same day. When the entire night passed, and he was not back, I had a premonition that something bad had happened. The following day, I received news that he was killed in an ambush together with three other persons while driving the vehicle. The next time I saw my husband was when he was brought in a casket and I noticed that he had a wound in the nape of the neck, probably caused by a bullet."

[11] Miloje Grujcic, born on December 19, 1971, in Radosevici, Srebrenica: „My father, Zivorad Grujicic, born on March 3, 1950, was living in the village of Lubnice, municipality of Srebrenica, until Moslems attacked that village in May of 1992. He remained in the village of Podravanje until September of 1992, later moving to Skelane, where he lived until June of 1995. Since he worked as a manager, he was assigned the task of guarding property in Zeleni Jadar. He made daily trips from Skelani to Zeleni Jadar. On June 23, 1995, he was being driven in a vehicle from Zeleni Jadar with three other men. Moslem soldiers were waiting for them in ambush and they shot at them. After the vehicle ended up in a ditch, they approached and threw several hand grenades inside. They shot each victim in the head, to be sure that he was dead. In addition to gunshot wounds which could be seen in the head and other parts of the body, there were numerous wounds in the lower extremities which were most likely caused by shrapnel when hand grenades were thrown into the vehicle."

12] Milojka Bibic, born on December 11, 1968, in Podravanje: „As the war was spreading throughout the region, most inhabitants, mainly women and children, left the village and went to Serbia. My village was located 6 or 7 km from the front line. Although there were some Moslem villages very

close by, I did not fear for my safety because I could not bring myself to believe that my Moslem neighbors might be capable of killing me. I was living with my father, my mother, and two older brothers. There were about 80 other people in the village, in addition to us. My father and brothers, and other men from the village, would stand guard by the road during the night to make sure that nobody attacked our village. During that period there was nothing to indicate to us that a Moslem attack might be forthcoming. However, on September 24, 1992, an attack did nevertheless occur. The attack was planned and organized in advance, and it started early, around 8 in the morning. At that time, I was in the house with my mother and I did not know the whereabouts of my father and brothers. I heard continuous gunfire coming from many directions. When the shooting abated somewhat, I went out to look for my father and brothers. Not far from the house, at a distance of about 60 meters, I came across my dead older brother. His arms were broken in several places and his head was smashed. Not far from there, I found my younger brother who was wounded and was shot through the hips. With the help of some men, we put him on a tractor and drove him to the schoolhouse. There, they put my brother and mother into a transport vehicle, while I and several other persons started running away through the forest. We spent that night in the forest. The next day, we were placed in the care of the command in Milici and were taken there. I later learned that my mother and wounded brother were murdered in the transport vehicle. Fifty-five days later, my brother's decapitated head and my mother's body were located in Jasici, about 50 to 60 meters from the schoolhouse. On that day, 53 people were murdered in the village. On that fateful day, I lost my two brothers, Milovan Marinkovic, born in 1955, and Rade Marinkovic, born in 1961. I also lost my father, Milos Marinkovic, born in 1935, and mother, Dikosava Marinkovic, born in 1937. I never heard anything of the fate that had befallen my father and I do not know where he is buried to this day. Moslem forces that attacked our village consisted mainly of the local population. Their aim was clearly to ethnically cleanse the village because they killed everybody in their path, regardless of age or gender. They were obviously successful because today there are only a few families living in the village, which is practically deserted and without any hope left for the future.

[13] Novak Balcakovic, born on13/1/1972, in Brezani, municipality of Srebrenica: „My father, Stanisa Balcakovic, was born in 1940, and he was murdered on September 7, 1993, on the Skelani—Krnici road. The crime occurred at a distance of 10—12 km from Skelani. My family was living in Brezani until June 30, 1992, when we were forced to leave due to attacks

that were being carried out by Moslem forces. In August of 1992, my father moved to Skelani where his job was to guard facilities that were considered significant. He did not take part in military operations, nor did he go to the front line; his job was in Skelani. Because of the difficult situation that we were in, my father left in early morning hours on an ox cart together with a younger man, Prvoslav Golic. They were headed for Krnici and their goal was to gather some plums and other fruit, as well as wood and other items that we needed in order to survive. Since they failed to return when expected, several men from Skelani went to look for them. That evening at the crime scene they found the wounded ox in a stream by the road. The following day, the lifeless bodies of my father and Prvoslav Golic were also found nearby. They both exhibited injuries inflicted by hand grenades. My father also had gunshot injuries because he probably survived the initial attack with the hand grenade."

[14] Stanimir Dimitroski, born on 20/7/1965, in Sase, municipality of Srebrenica: "After war broke out in BH, my parents continued to live in their family home in Srebrenica, Marsal Tito Street, 91. As I had left Srebrenica before that fearing for my safety, the only way I had to get in touch with them was through the Red Cross. Thanks to the Red Cross, we kept in touch throughout 1992 and into the beginning of 1993; during the same period of time, I was also able to talk to them with the help of ham radio operators. In October of 1993, I received news that my parents had been murdered. I found out later that persons unknown on May 9, 1993, came and murdered my father Krsto Dimitrovski, born in 1935, and my mother Velinka Dimitroski, born in 1940. According to the information I received, my father's was killed in the locality of Kazani while gathering humanitarian assistance that was being airdropped, while my mother was killed the same day in our family home. In addition to gunshot wounds, my father also had injuries inflicted by a knife, while my mother was killed with a firearm. Srebrenica residents who knew them buried them at the town Orthodox cemetery in Srebrenica. After the war ended, an exhumation of their remains was conducted. My mother's identity was confirmed by DNA analysis. My father's identity was established based on a protocol written by UNPROFOR which was forwarded to the missing persons commission. I wish to stress the fact that my parents were unarmed and that they were murdered as civilians. They were not even citizens of Bosnia and Hercegovina [my father was a citizen of Macedonia, my mother of the Federal Republic of Yugoslavia]. That suggests the conclusion that they were murdered only because they were not Moslem."

[15] As has already been expounded in the preceding sections of this Writ, and supported by evidence and arguments, the position of the Plaintiffs is as follows: [a] the agreements providing for a protected and demilitarized Srebrenica zone, where Defendants were parties, imposed upon the Defendants certain obligations the region in relation to extending protection to the population viewed as a whole; [b] demilitarization of the enclave of Srebrenica was the crucial component of those obligations and it was the specific responsibility of the UN and of the country which happened to be implementing the UN mission in the field, which for the purposes of this Writ is the State of the Netherlands; [c] according to objective evidence adduced in this Writ and admissions made by the Defendants themselves, the demilitarization process was not implemented; [d] based upon the previous conduct of Moslem forces from the enclave of Srebrenica, the Defendants were aware of how their failure to disarm Srebrenica Moslem military units was likely to impact the Serbian population living the area, but they took no steps to disarm those units or to extend reasonable protection to the Serbian population; [e] as was foreseeable, Moslem forces continued the same pattern of conduct as before the establishment of Srebrenica protected zone, and as a result of their attacks and ambushes a great number of Serbs and non-Moslems were murdered; [f] for not fulfilling their obligations, the Defendants, UN and the State of the Netherlands, are legally liable for the consequences of such crimes as were committed by the Moslem side during the period of existence of the protected zone, because the Defendants had the duty and the capacity to prevent them. They are therefore obligated to compensate Plaintiffs materially for their losses.

[16] Plaintiffs seek to be justly compensated for their pain and suffering, as well as for all material damages that they and their families suffered as a result of the loss of their loved ones in the attacks staged by the Moslem side. Those losses were caused directly by Moslem armed forces operating out of Srebrenica protected zone. However, that would not have occurred if Defendants UN and the State of the Netherlands had not made it possible by: [a] failing in general to act in accordance with their obligations; [b] failing to implement demilitarization of the protected zone, although relevant agreements expressly provided that this had to be done; and [c] their failure to exercise supervision and control over the protected zone in the manner provided for by obligatory agreements. Plaintiffs therefore hold the Defendants essentially liable for the resulting harm and damage, in the manner and to the extent to be determined fully by the Honourable Court.

D. Neglected Serbian victims in the period before the establishment of the UN protected zone

[1] The principal subject of this Writ are Serbian and non-Moslem victims who were murdered while Srebrenica was supposedly a safe and "demilitarized" zone, from April 17, 1993 to the end of June of 1995. That is logical because the Defendants, UN and the State of the Netherlands, had during that period an absolute legal responsibility to undertake everything that was reasonably within their power in order to protect non-combatants of all ethnicities in and around Srebrenica. Nevertheless, the killing of non-Moslems, torching of their villages and the destruction of their property and cultural facilities prior to April 17, 1993,[29] and going back to the outbreak of

[29] Plaintiffs propose to deal with the destruction of cultural and religious facilities in Annex I-6.

the conflict in the region of Srebrenica, is indeed very relevant for a proper assessment of the degree of responsibility of the Defendants.

As pointed out in the legal argument, in order to draw the correct conclusion that the Defendants were liable in principle it is not necessary to step outside the time frame and the factual circumstances of the UN protected zone. However, for a precise assessment of that liability, a consideration of prior events is highly important, perhaps even crucial. Were we to leave those events out of the picture, the Defendants would still have available to them the argument that they did not know, and had no way of imagining, what might occur as a consequence of non-implementation of the demilitarization clause in relation to the Moslem side. That argument would not annul their liability in principle, but in it could ameliorate it. However, prior to assuming their obligations in relation to the protected and demilitarized zone, the Defendants had a whole year's time at their disposal to observe the conduct of the Moslem army in relation to the nearby Serbian and non-Moslem population, to assemble statements of witnesses and intelligence data about the brutal misdeeds of the military units that were based in Srebrenica and which were under the command of Alija Izetbegovic's Sarajevo government and its general staff, and throughout that period they were flooded with warnings and protests from the Serbian authorities. Therefore, Defendants do not have any excuse to invoke ignorance or insufficient information. On the contrary, they had an abundance of detailed information about conditions in the field in and around Srebrenica. That information would have been sufficient for anyone reasonable to conclude that armed Moslem units in Srebrenica were a mortal threat to non-Moslems within their reach. That fact is relevant to this Writ because it represents a severely aggravating circumstance in relation to the

Defendants' failure to implement demilitarization, thus depriving Moslem forces of the possibility of illegitimately misusing their weapons.

[2] Plaintiffs have collected 297 statements from non-Moslem victims which relate to attacks by Srebrenica-based Moslem forces on nearby settlements, murder of inhabitants—most frequently in a cruel manner, the burning of their homes and property, and the demolition of their religious and cultural facilities. Those statements mention the violent death of up to a thousand persons, which was caused by Moslem military units from Srebrenica. Plaintiffs also have and will tender the statements of 17 Moslem military personnel from Srebrenica and the nearby enclave of Zepa, who took refuge in Serbia at the end of July and beginning of August of 1995, and were apprehended by Serbian authorities and interned in the Slivovica Camp near the town Uzice. Those statements when read in combination speak of combat operation originating from those two enclaves, with detailed accounts of time, place, manner of execution, and other details pertaining to those attacks. That evidence, which is presented as Annex III-3, coincides to an extent with the submission of the government of the Federal Republic of Yugoslavia to the UN Security Council on June 2, 1993 [see above, Section I-B, paragraph 4, and Annex I-5], but it also contains a mass of new testimonies, details, and information. The statements in question speak of up to one thousand victims of Srebrenica-based Moslem units, which Plaintiffs do not regard as a final figure, but it is sufficient to serve as the

basis for their claim of enhanced liability of the Defendants, as explained in paragraph [1] of this section, above.[30]

[3] These data are confirmed by another source which under the specific circumstances may be regarded as significant and credible for the proper consideration of this issue. The Research and Documentation Center in Sarajevo [31], [hereinafter: IDC], under the direction of Mr. Mirsad Tokaca, is a non-government organization which has been calculating human losses suffered by all sides in BH in 1992—1995. In relation to the number of Serbian victims in and around Srebrenica, IDC says that in the Podrinje region, i.e. territory which essentially overlaps with the region of Srebrenica, there were 870 Serb civilians killed and missing according to location of domicile and 849 according to location of death, so that there is no substantive difference between those two categories. This is not, according to IDC, the final figure for the number of human beings who were killed in that region. But the Plaintiffs consider it large enough to have attracted the attention of the Defendants and to have prompted them to take all necessary and prudent steps, including the demilitarization of the protected zone of Srebrenica, in order to bring that mass murder campaign to an end.

[4] But bare figures cannot come even close to portraying the mentality and the principal causes behind the inhuman conduct which characterized both sides in the merciless conflict in the region of Srebrenica, which stood out even by the standards of general cruelty which marked the Bosnian war.

[30] According to witness statements assembled by Plaintiffs, at least 650 Serb and non-Moslem non-combatants were murdered by Moslem forces prior to the establishment of the UN protected zone in Srebrenica.
[31] Istrazivacko-dokumentacioni centar, Kupreška 17, 71 000 Sarajevo, BiH

The indignation of Gen. Morillon when he testified, his stupefaction when faced with the infernal and generalized mutual hatred which had seized almost all the members of both communities, and which was motivating them to act with unspeakable ferocity, all that would be unfathomable if viewed *in abstracto* and outside of a longer range historical context. That is why the recently published memoir of Ibran Mustafic, one of the main protagonists of these events, is of great value. [32] Before the war's outbreak, Mustafic was elected deputy in BH parliament for the main Moslem political party, SDA, and he was deeply involved in organizing that party in the Srebrenica area. Throughout the conflict, Mustafic was in Srebrenica performing a variety of party and political functions. That is why his testimony is of inestimable value, being presented as much in the capacity of an observer as in the capacity of a direct participant in many of the events.

[5] Mustafic's account does not deal with war-time events only, but also with their background, frequently through the author's own upbringing and personal development in a local Moslem family. We will quote selected portions of Mustafic's book because they shed helpful light on the insularity of the community in which he was reared and also on the deep suspicion of the Other which permeates the minds of its members:

p. 11: The author glorifies the Ustashi movement from World War II, in particular the "Black Legion" death squad, and says that his grandfather fought in an Ustashi unit. He rationalizes the World War II alliance with the Ustashi against the Serbs and quotes some verses which he had learned from his grandmother: "The Croat is my half brother, the Serb can f____ his own father." Further on in the text, it is stated clearly that BH Moslems had to parallel educational systems; one was at home, where they were taught history by their parents, while the other was the official one, sponsored by the state and taught in school. He makes it clear that Moslems in the former Yugoslavia harboured great hatred toward Serbs in BH.

[32] Ibran Mustafic: Planirani haos /Planned chaos/ [Sarajevo, 2008].

p. 12, 13: A general description of Moslem attitudes toward Serbs, the favoritism of Moslem school teachers in their treatment of Moslem children, and general disparagement of Serbs.

p. 15: The Ustashi movement which collaborated with the Axis during World War II is praised. Further on, remarks to the effect that even while the former Yugoslavia was in existence BH Moslems were dreaming of an independent Bosnia with borders up to the Drina River.

p. 25: A sharp critique of mixed Serb/Moslem marriages in BH.

p. 26: Praise for Muslims from Sandzak, a region with a dense Moslem population within Serbia proper, because they do not have much to do with Serbs and hate Serbs more than even BH Moslems do.

p. 49: The author claims that many Muslims will not rest until their border is on the Drina River: "…retrospectively, I think that unless Moslems [now Bosniaks] do not go all the way to the Drina and if they are not, should that be necessary, prepared to destroy everything that exists, our long-term future in this area will be uncertain."

p. 76: The author states that in March of 1991 a meeting was held at the Srebrenica police station in order to implement some personnel changes and that he had an intense argument with Momcilo Mandic [Serb]. Mustafic opposed the appointment of a Serb as police commander. During that argument, Mustafic threatened Mandic and told him that he was not allowed to set foot in Srebrenica without asking Mustafic for permission, otherwise his safety could not be guaranteed. [Nota bene: this is happening before the official outbreak of the war.]

p. 129: A description of the disagreement between Mustafic and Izetbegovic concerning the BH independence referendum in 1992. A speech by Mustafic is quoted where, among other things, he says: "I love Novi Pazar [capital of the Srbian region of Sandzak, see p. 29 and Mustafic's reasons for admiring Moslems who are there] and Istanbul a thousand times more than Drvar and Bosansko Grahovo. Deep inside, I love BH but closest to my heart is the 43,7% of it [the percentage of Moslems in the total population of BH according to the census]."

p. 136: Ibran Mustafic recounts how Hamed Salihovic called him in to the police station in Srebrenica to tell him the following: "I received a dispatch from the police station in Zvornik stating that a café was robbed in the Sapna area and that poker playing equipment and a Jeep cabriolet were taken away. Naser Otic took part in that robbery." [Nota bene: during the conflict, Naser Oric commanded Moslem units in Srebrnica, and this incident occurred before war had officially started.]

p. 153: Description of a day in the BH parliament in Sarajevo, where Mustafic was a deputy, when together with Moslem politician Abdulah Konjicija he ran into a group female journalists from Belgrade who were waiting for the conclusion of a session in one

of the conference rooms of the BH parliament. Konjicia grabbed one of the women and threw her down a flight of stairs from the first floor.

p. 178: Mustafic describes the successes of the Srebrenica Moslem army in 1992 in expanding the area under its control while attacking surrounding Serbian territory.

[6] When legal structures collapsed in BH, which occurred at the time of the definitive disintegration of the former Yugoslav republic in the Spring of 1992, in the absence of external checks such a mentality could not but result in violence against members of other ethnic communities, in other words—in crime. That became clear already in April of 1992 when Serbian BH parliament deputy Goran Zekic was murdered in a Moslem ambush. The overwhelming majority of Serb inhabitants of Srebrenica grasped the message of that event perfectly and promptly left the town in fear. Less than 50 of them remained in Srebrenica. In the surrounding villages, residents began to keep a watch and to pay heightened attention to their safety, as they fully understood the direction in which things were moving. Many still could recall vividly the conduct of their Moslem neighbours during World War II, when members of the puppet army of the "Independent State of Croatia" were terrorizing and killing local Serbs *en masse*. Ibran Mustafic writes rapturously of that World War II alliance of Moslems and Croats, and of his admiration for the Ustashi cutthroats from that period, in particular the serial killer Jure Francetic, on p. 11 of his book.

[7] The book by Ibran Mustafic, an eyewitness and "insider" of Srebrenica events during the Bosnian war, amply documents the fact that Srebrenica under Moslem rule served as a launching pad for constant and relentless attacks on the surrounding territory where Serb-populated villages were located. Based on Mustafic's telling, it is difficult to ascribe to the majority

of those operation an exclusively or even a predominantly military purpose. Their main purpose apparently was the cleansing of areas populated by Serbs by a combination of intimidation, plunder, torching, and simply mass slaughter.[33]

[8] Examples of bestial conduct of Moslem forces abound on the pages of Mustafic's book. For instance, Mustafic recounts in "Planned chaos" that Naser Oric, commander of the BH Army 28th Division, told him of the way he personally murdered Srebrenica judge Slobodan Ilic, who happened to be a Serb. According to Mustafic, Oric first gouged out both of Ilic's eyes, then slashed his throat. It should be noted that the Hague Tribunal sentenced Oric to mere two years in prison for war crimes committed in the Srebrenica area, only to annul on appeal even that insignificant sentence.

On the pages of "Planned chaos" there is also testimony about the murder of Slobodan Zekic and his mother, Zagorka. According to Mustafic's information, they were murdered by local Moslem Emir Halilovic who smashed their heads with the butt of his gun. Mustafic also points to Halilovic as the murderer of an elderly Serb, whose name he does not give, who was hospitalized in Srebrenica. Mustafic links Srebrenica Moslem Ejub Golic to the murder of the bedridden couple of Krsta and Velinka Dimitroski, whose son Stanimir is one of the plaintiffs associated with this Writ.

[33] Of course, those operations did also have the purely military mission of drawing away from other theaters as many Serb military units as possible, but that goal could also be accomplished by legitimate military methods, without civilian massacres or the destruction of their places of residence.

Mustafic also confirms in his book that units of the Moslem BH Army from the supposedly demilitarized zone, which was under the protection of the United Nations, had been conducting systematic forays into territory which was under the control of the Army of the Republic of Srpska where they were committing attacks upon Serb soldiers and civilians. Additionally, he suggests that the fall of Srebrenica was the consequence of "betrayal" by the Moslem political and military leadership. In that regard, Mustafic's assertion on p. 388 is intriguing:

> "Interestingly, after my release from prison [Mustafic was taken captive after the entry of the Serbian army in Srebrenica in July 1995], Alija's [Izetbegovic, president of the Moslem government in Sarajevo] secret police AID, acting through its director at the time, made just a single suggestion to me, and that was not to meddle in the Srebrenica issue, or they would liquidate me."

As the case may be, Mustafic's book contains a number of comments which leave no room for doubt that the Srebrenica branch of the Moslem government in Sarajevo, notwithstanding its official mask of "multiethnicity" and "multiculturalism" [and even of "European values"] that was designed for the consumption of international public opinion, was in fact the lair of the most primitive obscurantism far closer in its external manifestations to the practices of the Middle Ages than to twentieth century European civilization:

> p. 187: A group of Serb soldiers were taken captive and then liquidated in the locality of Zalazje. Mustafic lists the names of the victims, and then comments: "Far from feeling sorry for them, on the contrary, I rejoiced at the death of every Chetnik [a derogatory term for Serbs used by the Moslems] who perished…" Mustafic goes on: "…this occurrence intrigued me because I thought that it was a bad move and not in accord with the rules of warfare, and I also thought that in the long run such behavior would boomerang on us", which is not just a premonition of Srebrenica in July of 1995, but also obliquely suggests the ferocity of the Zalazje massacre.

p. 187: “I learned in Tuzla that Kemo from Pale was showing a severed head around Srebrenica to frighten people with it. That made me realize that from the people who were running Srebrenica you could literally expect anything.”

p. 213: Attack on the Serbian village of Cumavice: “After trying to convince them for a long time, we lined up the women and children. We were beginning to loose our patience with persuasion, so Hajro pulled out of the lineup a little girl who was standing with her mother and threatened to slash her throat if they did not comply with the ultimatum to turn over their weapons.”

Evidently, this threat was in the end persuasive.

p. 214: A description of the attack on the Serbian village of Sijemovo that was carried out by Oric’s forces, the pillaging that followed, and the murder of the elderly Milos Zekic, a resident of the village who had stayed behind.

p. 214-215: Mustafic described a repeat attack on the Serbian village of Cumavice. Further on he discussed the division of spoils between Naser Oric and the imam [Moslem religious functionary] Alija Jusic, who was in charge of supplies, and later in the text he mentions the brutal treatment of captured villagers from Cumavice.

p. 217: Attack on the villages of Gniona, Viogor, and Orhovica in order to connect Moslem controlled territories: “In Gniona we did not kill anyone, while in Orahovac about 30 people were burned in the houses, mostly the elderly, while some were liquidated in brutal fashion.”

p. 218-219: An entire chapter of Mustafic’s book is entitled *Refugees, plunder, murder* and it contains a useful portrayal of the horrific conditions in Srebrenica under Moslem rule. The quote that follows refers to some specific malefactors and their crimes: “After the attack on [Serbian village] Jezestica, Kemo brought a severed head in a sack with which he frightened people in Srebrenica. He used it also to intimidate hospital personnel. I do not know this for certain, but it is said that he was involved in the liquidation of Bata from Srebrenica and of his mother. Their screams, it was said, were frightful.”

p. 229: A description of the takeover of mountainous areas around Srebrenica by Naser Oric’s army and celebrations in Srebrenica which accompanied those events.

p. 231: Takeover and plunder of the mining settlement of Sase, at a small distance from Srebrenica, where a 14th century Orthodox monastery was demolished.[34]

[34] Unfortunately, a Moslem mosque that was situated about 20 meters from the monastery was also demolished when Serb forces retook this territory. That is an appalling example of the vicious cycle of violence and revenge.

p. 243: Description of the attack carried our by Naser Oric and his army on the Serbian village of Kravice on Orthodox Christmas day, January 6, 1993 [before the demilitarized zone was established].

p. 261: Description of the attack by Naser Oric and his army on the Serbian communities of Jezero and Skelane [before the demilitarized zone was established].

p. 269: Description of the desecration of the dead body of an officer of the Yugoslav National Army: "When I dropped by Srebrenica to look around to see how things were going, the dead Yugoslav officer was loaded on top of a cart which was being pushed around Srebrenica in order to give an additional boost to army morale…"

p. 288: Dialogue between the author, Ibran Mustafic, and Naser Oric, where Oric tells him of the gruesome murder of a Serb that he had committed. The victim's name was Slobodan Ilic from Zalazje. Oric first poked his eyes with the tip of his bayonet, and then killed him.

p. 289: Description of the massacre committed by Oric's men on prisoners in Zalazje.

p. 291: On this page begins the chapter entitled *Liquidations in Srebrenica.* The author details the liquidations of the handful of Serbs who had remained in Srebrenica or were brought there as prisoners by Oric's army.

p. 295: Description of the commerce in weapons engaged in by the inhabitants of Srebrenica, in spite of the fact that it was supposed to be a demilitarized zone.

p. 315: Mustafic describes seeing on Serbian TV *Srna* two Moslem girls who asserted in front of the cameras that they had been raped in Srebrenica by members of the Srebrenica mafia; also two Moslem men who said that they had fled from Srebrenica to avoid the terror.

p. 366: Mustafic gives an example of systematic Moslem behavior: forays out of the demilitarized zone and laying of ambushes for the Serbs along the Bratunac—Skelani road in order to, as the author says, "cause grief." The same was happening along the Milici—Podravanje road.

p. 369: Musafic describes the attack of Srebrenica Moslem forces on the Serbian village of Visnjica on June 26, 1995. This chapter is very telling because it deals with the preparation and carrying out of a deliberate attack on a Serb village from the Srebrenica protected zone.

[9] In the atmosphere of hatred and primitive passions, especially under the leadership of a sadist and greedy mafioso like "brigadier" Naser Oric, the concept of war could not but quickly degenerate to where it lost every link to the conduct of military operations in the conventional sense. There followed attacks on nearby Serbian communities, villages which were close to Srebrenica or in the neighbouring municipalities, the exclusive purpose of which was pillage and mayhem. But as can be seen from around three hundred statements by survivors at the disposal of the Plaintiffs, murder without attendant cruelty was a privilege enjoyed by very few. The majority were slaughtered in bestial fashion, something that their surviving relatives and neighbours recalled vividly when in July of 1995, unfortunately, there came a moment for the settlement of accounts.

The attack that was carried out on the Serbian village of Bjelovac on December 14, 1992, when 68 of its residents were slaughtered, is emblematic not just of the ferocity of most such assaults, but also of a methodical approach in the preparation of atrocities and the keeping of tidy records about them that was almost Germanic [See Annex III-4]. The attached documents from the command of the Moslem army reflect the planning phase of the attack on Bjelovac and several neighbouring villages. In the subsequent report, detailing the results of the "operation", two things are stated matter of factly which should cause blood to curdle: [1] about 50 of the prisoners are said to have been "liquidated," which may reasonably be taken as a code word for execution, and [2] after the village was conquered, Muslim forces "took captive" and in effect abducted two women and three children. The concept of taking captive women and children in the course of conducting military operations is basically unknown in European warfare, at

least in the recent times, certainly not the kind of warfare which aspires to conform to generally accepted norms and conventions. After even a cursory review of Moslem documents relating to the attack on Bjelovac and the neighbouring villages, one is struck also by the absence of a very essential element, that one should expect to be there in some form assuming that this was a legitimate military operation and not simply an act of brigandage. There is no mention of military objectives as such nor is there any attempt to place the attack within the context of any broader strategic plan. It seems that the fact that Bjelovac and the neighbouring villages were inhabited by Serbs was a sufficient reason for them to be attacked and destroyed, and their residents slaughtered.

[10] The Plaintiffs call to the Honourable Court's attention the following list of 39 Serbian villages and locations in the district of Srebrenica and the surrounding area where prior to the establishment of the safe area Moslem forces conducted lethal attacks against the inhabitants:

1. Village of Bljeceva [2 statements]
2. Ambush on the Srebrenica—Sase road [4 statements]
3. Village of Cumavici [13 statements]
4. Village of Viogor [4 statements]
5. Village of Sjemovo [2 statements]
6. Village of Osredak [1 statement]
7. Village of Orahovica [3 statements]
8. Village of Medje [16 statements]
9. Ambush on the Srebrenica—Skelani road [1 statement]
10. Murder of Simic Vojislav [1 statement]
11. Ambush in Zutica [5 statements]
12. Ambush at Konjevic Polje [4 statements]
13. Ambush at Bakraci [3 statements]
14. Village of Oparci [7 statements]
15. Village of Crkvine [2 statements]
16. Village of Rupovo Brdo [8 statements]

17. Village of Ratkovci [15 statements]
18. Village of Loznica [7 statements]
19. Village of Brezani [8 statements]
20. Village of Krnjici [6 statements]
21. Village of Zagoni [6 statements]
22. Village of Zalazje [23 statements]
23. Village of Magasici [7 statements]
24. Village of Stanatovici [3 statements]
25. Village of Jezestica [4 statements]
26. Village of Gornji Sadici [5 statements]
27. Village of Gornja Kamenica [4 statements]
28. Village of Silovanje [2 statements]
29. Attack on Barke [4 statements]
30. Village of Podravanje [10 statements]
31. Village of Rogosija [3 statements]
32. Village of Fakovici [3 statements]
33. Village of Kamenica [62 statements]
34. Village of Bjelovci [19 statements]
35. Village of Kravica [3 statements]
36. Attack on Skelane [16 statements]
37. Village of Kalabace [1 statement]
38. Village of Metaljka [3 statements]
39. Village of Gniona [7 statements]

This list and the statements which accompany it foreclose any doubt that there had occurred in the region of Srebrenica a pattern of Moslem attacks on Serbian communities that was broad in scope. It was in fact "widespread and systematic," to use the convenient terminology of the International Criminal Tribunal for the Former Yugoslavia [ICTY], at least in indictments and judgments reserved for Serb defendants. With almost each of these attacks, and the ensuing cleansing of the Serbian population, the territory under the control of Moslem forces commanded by Naser Oric expanded steadily. At its peak, in the Spring of 1993, it was estimated to cover about 500 square kilometers, which finally convinced the Army of the Republic of

Srpska of the need to urgently take some counter-measures. It is significant that UNPROFOR, UN's military contingent in Bosnia and Hercegovina, and its superiors in the political chain of command, going up to the UN Security Council in New York, started to react to events on the ground only when in March and April of 1993 the success of the Serbian counter-offensive was threatening to crush the Moslem army in Srebrenica. They were largely unmoved throughout the preceding year as that same army, without hindrance or objection from any of those high places, was obliterating Serbian communities and mercilessly slaughtering their inhabitants.

But regardless of the moral inadequacy of this belated and one sided reaction, from a legal perspective it is nevertheless extremely significant and useful in every way to the Plaintiffs in this case. That UN reaction, undertaken under the pretext of urgent humanitarian concern and need to protect Moslems, with emphasis on civilians in Srebrenica, from the advance of the Serbian army, shows unambiguously that the Defendant UN accepts in principle the existence of an imperative obligation to react and to take all reasonable steps to offer protection to civilians during a conflict of this nature. The Plaintiffs, of course, do not dispute the existence of such an obligation, as is clearly seen from their legal arguments. But since now both the Plaintiffs and the Defendant UN obviously agree that such an obligation exists, Plaintiffs point out the following conclusion which, in a civilized legal and ethical milieu, appears inescapable: the benefits of that obligation cannot be restricted to protection for individuals belonging to only one selected ethnic or religious group. The obligation extends to all human beings, whether they be Moslems, Serbs, or others.

[11] Based on referrals by investigative and judicial organs of the Republic of Srpska, Plaintiffs direct the attention of the Honourable Court to the identity of the ringleaders of these criminal operations and persons principally responsible for the suffering of the Serbian and other non-Moslem population in the region of Srebrenica:

> Naser Oric, Zulfo Tursunovic, Hakija Meholjic, Nedzad Bektic, Ahmo Tihic, Smajo Mandzic, Mirsad Dudic, Safet Omerovic nickname: Mish], Veiz Bijelic, Kemal Mehmedovic [nadimak: Kemo], Fikret Shechic, Huso Salihovic, Emir Halilovic, Vekaz Husic, Adem Kostjerevac and Ibro Jakubovic.

These persons are responsible for the brutal murder of at least 650 and up to a thousand men, women, and children of Serbian and non-Moslem nationality in the region of Srebrenica between 1992 and 1995, as well as for the expulsion of about 15,000 non-Moslems from territory under the control of Moslem authorities.

[12] Plaintiffs consider that this evidence of the commission of crimes by Moslem forces in the period between the outbreak of hostilities and the establishment of the protected and demilitarized zone is crucial for the proper assessment of the responsibility borne by the Defendants for the consequences of their failure to implement the agreement which provided for the demilitarization of the Moslem side. Based on this evidence, the responsibility—and thus also the guilt—of the Defendants is enhanced enormously.

E. Summary of Plaintiffs' claims and prayer for relief

[1] The Plaintiffs in this case maintain that the Defendants, United Nations and the State of the Netherlands, have committed against them wrongs under principles of both domestic and international law, as argued in detail within the legal portion of this Writ above in Section II. The commission of those wrongs resulted in various forms of harm to the Plaintiffs, including but not limited to, loss of loved ones, fear and torment at the hands of attackers that it was fully within the power of the Defendants to restrain and control (and whom the Defendants indeed had a legal duty to restrain in their injurious conduct toward the Plaintiffs), forced expulsion from their homes, destruction of personal and family property, and demolition of cultural and religious facilities and institutions that were significant in the Plaintiffs' lives.

[2] As highlighted in the Introduction and as argued throughout this Writ, the Plaintiffs contend that the United Nations and the State of the Netherlands acted as the essential enablers and facilitators of the systematic and widespread massacre of the Serbian population and other non-Moslems between 1992 and 1995[35] in the Srebrenica area, infliction of various forms of physical and emotional harm, demolition of their property, and destruction of their communities.

[3] For the purposes of this Writ, and in relation to the responsibility of Defendant United Nations, Plaintiffs accept and incorporate by reference,

[35] The period of the Defendants' incontestable liability being from April 18,1993 to the end of June of 1995.

though with some necessary modifications, various contentions set forth in the Writ filed on June 4, 2007, by the Mothers of Srebrenica Foundation [hereinafter: Mothers of Srebrenica Writ] and 10 co-Plaintiffs against the same Defendants as are accused here, the UN and the State of the Netherlands, before this District Court in the Hague, specifically paragraphs 310 and 311 therein.

[4] The Plaintiffs incorporate in particular that portion of the Mothers of Srebrenica Writ wherein they say:

> The UN and the State of the Netherlands entered into obligations to ensure the protection of the Safe Area and its inhabitants. General Morillon, in his capacity as UN Commander, promised the population of Srebrenica in March 1993 that the war was over for them and that they were protected. [36]

These Plaintiffs also accept and incorporate all allegations therein and in paragraph 311 tending to show that through the intervention of General Morillon, and later of the Security Council through its resolution, the United Nations incurred an obligation to protect the population of Srebrenica. Plaintiffs explicitly distinguish their own position only to the extent that they hold that the concept "population of Srebrenica" is not confined to members of the Moslem community, but extends to all non-combatants in the general area of Srebrenica. It should be noted that in fact several thousand Serbs living on the other side of the demarcation line at the time of the UN resolution[37] and throughout the existence of the Srebrenica UN protected safe area were actually refugees who had been expelled by Moslems from the town of Srebrenica or from Serbian villages surrounding it; thus, even by a narrow interpretation they should still properly be counted within the

[36] Paragraph 310
[37] UN Security Council Resolution S/RES/819, April 16, 1993.

protected "population of Srebrenica" and their safety must be of relevant concern.

The fundamental correctness of this interpretation is borne out by the plain wording of paragraph 1 of Resolution 819 where the Security Council

> "…Demands that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act; "

It suffices to note here the following two elements. First, the establishment of a "safe area" is intended to include the "surroundings" of Srebrenica. Second, those "surroundings," as well as the town itself, are meant "to be free from any armed attack or any other hostile act."

[5] Furthermore, and in addition to legal arguments offered by the Plaintiffs demonstrating that attribution of liability to the UN is in this case reasonable,[38] which arguments Plaintiffs consider compelling and conclusive, Plaintiffs reiterate that the mobilisation by the UN of its military and political resources in the face of what it perceived in April of 1993 as the danger of imminent massacre of Srebrenica Moslems also has legal consequences. This shows that Defendant UN had a clear subjective awareness of its obligation to act to extend protection to innocent non-combatants. In fact, in the Spring of 1993 it did so, but in a form that was inherently defective because it did not intervene on behalf of all endangered non-combatants as such, but strictly for the benefit of those belonging to one ethnic and religious group. The obligation of the UN to act did not come into being only in the Spring of 1993, and only in relation to one community; it

[38] See above, Section II

existed continuously since the outbreak of hostilities in the area in 1992. That obligation was based neither on ethnic nor confessional criteria but extended to all non-combatants in the area who were similarly situated and imperiled. Defendant UN could not exclude one set of potential victims from its mantle of protection, and arbitrarily select another, which it wished to favor. Regardless of its specific motivations at the moment, by taking action when it did in April of 1993, based on the premise of protecting non-combatants under imminent threat, the UN implicitly validated the existence of a general obligation to do so, to protect all potential victims as such. In light of that admission, its failure to so act between April 1992 and April 1993, or to even acknowledge the need to act on behalf of Serbian non-combatants in and around Srebrenica, must be viewed not only as deplorable but also as a culpable act. All harm resulting from it should properly be attributed to the Defendant, United Nations, in addition to damage directly resulting, after April 1993, from its failure to demilitarize the zone.

[6] With regard to the co-Defendant, the State of the Netherlands, the Plaintiffs also accept and incorporate by reference, but with certain modifications, those aspects of the Mothers of Srebrenica Writ which deal with dual control [in concert with the UN] over the Dutchbat contingent in the protected zone[39], effective control of those forces by the Netherlands through the significant influence it insisted on retaining over the military chain of command,[40] and non-reporting by Dutch personnel of war crimes.[41]

[39] Paragraphs 362 and 363
[40] Paragraphs 364-375
[41] Paragraph 329-335. Plaintiffs incorporate this portion of the Mothers' writ not for its particulars, but for the general proposition it appears to support. Plaintiffs intend to make use of discovery procedures to compel disclosure from the Defendant State of the Netherlands whether its troops had complied with the duty of reporting war crimes and other violations being committed by the Moslem side.

Again, Plaintiffs accept only such portions of this incorporated material as are congruent with their claims, either making no comment about or rejecting the rest.

[7] The synthesis of the Plaintiffs' claim is that the Defendants had a positive legal obligation to effectuate the demilitarization of the Srebrenica safe area, that they had the means to do so, that they had ample notice based on the past behaviour of the Moslem side of the grave threat that a militarized Moslem enclave posed to surrounding Serb non-combatants and civilians,[42] but that they nevertheless failed to implement the required demilitarization process. By that failure, whether it was willful or the consequence of neglect, the Defendants committed the fundamental fault which lies at the basis of this case, and from which a substantial part of the damage suffered by the Plaintiffs is derived. Therefore, they should be held jointly and severally liable for it. It is the position of the Plaintiffs that the Defendants' legal liability is clear for the period between the establishment of the protected zone and its dissolution in July of 1995, but very probable for the preceding period, going back to the activation of the UNPROFOR mission in Bosnia in 1992.

[8] Plaintiffs will show that the harm which causally resulted from the Defendants' wrongful conduct is much broader in scope than it would have been had it caused merely their personal losses. The Defendants facilitated a rampage of terror by Moslem forces from inside Srebrenica enclave which

[42] The factual background of Moslem military depredation coming out of Srebrenica in the period prior to the establishment of the UN protected zone renders indubitable the only possible conclusion: the Defendants knew, or should have known, and could reasonably have anticipated, the consequences of the failure to demilitarize.

resulted in: [a] the violent deaths, often in the most grisly fashion, of up to a thousand Serbian and non-Moslem non-combatants at the hands of Naser Oric and his military from Srebrenica; [b] forced expulsion of up to 15,000 non-Moslem civilians from the town of Srebrenica and the villages around it which Moslem forces systematically attacked and ravaged; and [c] the destruction of the victims' homes and the widespread pillaging of their property. They failed to notice, or to react, to these outrages which were being committed against one side in the savage Bosnian conflict, while making theatrical gestures supposedly for the benefit and protection of the other--although as a neutral and peacemaking body they had an obligation to treat both sides evenhandedly. That without doubt diminishes the Defendants' moral stature, but just as certainly it enormously augments their liability and guilt.

Plaintiffs have been grievously harmed as a consequence of the failure of the UN and the State of the Netherlands to fulfill their obligations, as well as by their wrongful actions or omissions. Damage suffered by Plaintiffs was causally the result of those derelictions of duty and breaches of applicable legal principles.

[9] Plaintiffs do not contend that Defendants are the direct perpetrators of the gross and iniquitous violations of the human rights of Serbs and non-Moslems in the region of Srebrenica. But they are complicit in those appalling crimes. Responsibility for the crimes is best represented as a series of concentric circles. The innermost circle, where lies the most direct and focused responsibility, is undoubtedly occupied by the predatory army of Naser Oric and his murderous entourage, whose task was to implement locally the policies dictated by the Sarajevo government and its sectarian

leadership. However, the next concentric circle certainly did include the Defendants, because their failure to thwart those in the first circle, or even to notice the plight of the victims, facilitated and enabled the commission of the outrages which are the subject of this Writ.

[10] The circles of guilt expand from there to include additional actors whose dishonourable conduct was an indispensable ingredient of the demonic brew which absorbed hundreds, if not thousands, of blameless lives, both Moslem and Serbian, in and around Srebrenica, and whose only fault was that they happened to be in the wrong place at the wrong time and whose misplaced trust in the callous leaders of their respective communities plunged them into the murderous vortex of violence and revenge.[43]

[11] The circle that follows and envelops that of the Defendants must therefore include, at a minimum, members of the self-constituted "international community," the remote coordinators of events. Their meddlesome interventions in the Balkans seem to have been designed to raise tensions and distrust to the highest levels and to encourage the process of dependence and fragmentation which turned a once stable and prosperous country into a patchwork of insecure and competing fiefdoms.

The disappointed comments of the Portuguese foreign minister, Jose Cutilheiro, the EC negotiator who almost succeeded in arranging a negotiated settlement between the Bosnian parties in March and April of

[43] The memoirs of Ibran Mustafic, cited above, are a most useful illustration of this point.

1992, only to be unceremoniously undercut by the US[44], impressively bear on this very point:

After several rounds of talks our 'principles for future constitutional arrangements for Bosnia and Hercegovina' were agreed by all three parties (Muslim, Serb and Croat) in Sarajevo on March 18th 1992 as the basis for future negotiations. These continued, maps and all, until the summer, when the Muslims reneged on the agreement. Had they not done so, the Bosnian question might have been settled earlier, with less loss of (mainly Muslim) life and land. To be fair, President Izetbegovic and his aides were encouraged to scupper that deal and to fight for a unitary Bosnian state by well-meaning outsiders who thought they knew better".[45]

[12] Last, but not least, though this particular actor is not the subject of a formal attribution of guilt in this Writ, any more than are those immediately preceding, no fair survey of responsibility may omit the International Criminal Tribunal for the Former Yugoslavia [hereinafter: ICTY], an institution which has consistently practiced a specific form of partiality which bizarrely mirrors that of the Defendants.

[13] In contrast to the Defendants, ICTY does take great pains to notice and acknowledge the Serbs. But it does so in the most bizarre form of attributing responsibility for crimes that were committed in Bosnia almost exclusively to the Serbs, while studiously overlooking or trivializing the responsibility of other actors.[46] By this procedure, ICTY has not only diminished but, in the metaphorical sense, it has legally reburied Serbian victims, by largely refusing to take effective legal action to bring their executioners to account. It has thus essentially replicated the conduct of the Defendants who, on their

[44] Bosnian Moslem president Izetbegovic had signed on to the Cutilheiro plan which provided for cantonal structure in an independent Bosnia/Hercegovina that all local parties could accept, but US ambassador Warren Zimmerman advised him to renege on his signature. This perfidy is widely regarded as the political trigger for the ensuing war, which broke out in a matter of days.

[45] Jose Cutileiro, *The Economist*, 9—15 December, 1995.

[46] The farcical judgment in the Naser Oric case, where the defendant was charged with a few of the relatively most innocuous offences from his long catalogue of crimes, and then acquitted even of those, serves to illustrate that point.

watch, had done nothing to deprive those executioners of their weapons or to place them, as they were required to do, under effective control.

[14] Plaintiffs contend that the political selectiveness that the Defendants displayed; the failure of these fastidious human rights watchdogs to react in the Srebrenica area during the entire brutal 1992—1995 conflict, as it was their duty and wholly within their power to do; their callous refusal to protect even minimally the members of the Serbian community, and other non-Moslems; these derelictions do not merely speak ill of them, they forcefully accuse them. Therefore, the legality of their conduct must be scrutinized and a suitable legal sanction must be devised and imposed on them.

[15] This Writ, first and foremost, is a long overdue instrument of formal justice which it will do great honour to the Dutch judiciary to impartially weigh, consider, and wield appropriately. First, by validating the contentions of the Plaintiffs and issuing a judicial declaration as prayed by them, the Honourable Court will have an opportunity to influence in a positive way future peacekeeping operations in other areas of the world by making it clear that those conducting them must adhere strictly to their mission's humanitarian character and avoid becoming entangled in political games. The second important goal that the Honourable Court will accomplish is to right a specific wrong which was inflicted upon the members of the Serbian community in and around Srebrenica, who were humble, honest, and good people as much as their Moslem neighbours. Their innocent suffering, and the anguish of their survivors, needs to be noted and recognized in no smaller measure. The Honourable Court now has an opportunity to fulfill

that noble task by no more, if it so wishes, than by a finding of fact. This Writ does not seek extravagant compensation for losses and for suffering which are inestimable and irreducible to any currency; it seeks to give a voice to the voiceless and to ensure an enduring moral presence for those who, in a period of murderous frenzy, were physically made to disappear.

[16] Plaintiffs take due account of the position of the Defendants, as evidenced by their responses to the Mothers of Srebrenica Writ. The United Nations claim that they are protected by immunity, while the State of the Netherlands claims that it has not committed any fault, but that if any had been committed it is attributable to the United Nations. The Plaintiffs refer the Honorable Court to their legal arguments above for appropriate comments in relation to these claims.

[17] Plaintiffs are prepared to tender evidence in this case consisting, but not limited to, their own testimony and the testimony of several hundred other witnesses who can inform the Honourable Court of the particulars of the crimes referred to in this Writ. Plaintiffs will also tender proof of other contentions which are relevant to the merits of their case. Plaintiffs will in due course petition the Honourable Court to assist them where necessary to obtain from the Defendants, UN and the State of the Netherlands, documentary evidence which is material to their case should the latter refuse to make those files available. The Plaintiffs also notify the Honourable Court, and the parties, that they will require additional three months to submit translated versions of some of the annexes to this Writ.

[17] **THEREFORE:**

If it pleases the Court to give judgment having immediate effect:

1) to grant a judicial declaration that the United Nations and the State of the Netherlands are guilty of an attributable failing in the fulfillment of their obligations towards Plaintiffs;

2) to grant a judicial declaration that the United Nations and the State of the Netherlands acted unlawfully towards Plaintiffs, as set out in the body of this Writ of Summons;

3) to grant a judicial declaration that the United Nations and the State of the Netherlands breached their obligations [a] to implement the demilitarization of the Srebrenica enclave beginning in April 1993; [b] to endeavor to protect in the region of "Srebrenica and its surroundings" all non-combatants in general, irrespective of ethnicity or religion; and [c] to prevent the wholesale and systematic murder, despoliation, and expulsion of Serbian and other non-Moslem non-combatants from Srebrenica and its general environs between 1992 and 1995;

4) to hold the United Nations and the State of the Netherlands jointly and severally liable to pay compensation for the loss and injury suffered by Plaintiffs in the symbolic amount of 1 [one] Euro per Plaintiff, or in the form of damages yet to be determined by the court should it deem another compensatory scheme more appropriate, and to settle these according to the law;

5) to hold the United Nations and the State of the Netherlands jointly liable to pay the costs of these proceedings.

The costs of this service are borne by me, process server,