# ECLI:NL:HR:2019:1284

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| Rechtsgebieden | Civiel recht<br>Internationaal publiekrecht |
| Bijzondere kenmerken | Cassatie |
| Inhoudsindicatie | Mothers of Srebrenica. Overheidsaansprakelijkheid. Internationaal publiekrecht. Gevolgen van ter beschikking stelling Nederlandse militairen aan VN voor aansprakelijkheid Staat; art. 8 DARS; HR 6 september 2013, ECLI:NL:HR:2013:BZ9225 en BZ9228. Overdracht van 'command and control' over Dutchbat aan VN; 'effective control'; handelen 'ultra vires'. Genocideverdrag; rechtstreekse werking? Onrechtmatige overheidsdaad; maatstaf; EHRM 20 december 2011, nr. 18299/03 (Finogenov e.a./Rusland). Recht op leven en verbod op onmenselijke behandeling (art. 2 en 3 EVRM); zorgvuldigheidsnorm van art. 6:162 BW. Wetenschap Dutchbat van ernstig risico voor mannelijke vluchtelingen; redelijkerwijs te vergen maatregelen om dat risico te vermijden. Heeft Staat onrechtmatig gehandeld door bij evacuatie op 13 juli 1995 de afscheiding door Bosnische Serven van de mannelijke vluchtelingen te vergemakkelijken? Was het onrechtmatig om de 350 mannelijke vluchtelingen die op de compound verbleven niet de keuze te bieden om voorlopig daar te blijven? Was er een reële kans dat deze mannelijke vluchtelingen, als hen die keuze was geboden, uit handen van de Bosnische Serven waren gebleven? Hoge Raad doet zelf de zaak af. |
| Vindplaatsen | Rechtspraak.nl |

# Uitspraak

SUPREME COURT OF THE NETHERLANDS

CIVIL LAW DIVISION

**Number** 17/04567
**Date** 19 July 2019

JUDGMENT

In the matter of

THE STATE OF THE NETHERLANDS (Ministry of General Affairs,
Ministry of Defence and Ministry of Foreign Affairs),
with its official seat in The Hague,
APPELLANT in cassation, respondent in the cross-appeal in cassation,
hereinafter: "the State",
counsel: K. Teuben,

versus

1. [respondent 1] ,
residing in [residence] ,
Bosnia and Herzegovina,

2. [respondent 2] ,
residing in [residence] ,
Bosnia and Herzegovina,

3. [respondent 3] ,
residing in [residence] ,
Bosnia and Herzegovina,

4. [respondent 4] ,
residing in [residence] ,
Bosnia and Herzegovina,

5. [respondent 5] ,
residing in [residence] ,
Bosnia and Herzegovina,

6. [respondent 6] ,
residing in [residence] ,
Bosnia and Herzegovina,

7. [respondent 7] ,
residing in [residence] ,
Bosnia and Herzegovina,

8. the heirs of [respondent 8] ,
most recently residing in
[residence] ,
Bosnia and Herzegovina,

9. [respondent 9] ,

residing in [residence] ,

Bosnia and Herzegovina,

10. [respondent 10] ,

residing in [residence] ,

Bosnia and Herzegovina,

11. the foundation under Dutch law STICHTING MOTHERS OF SREBRENICA,

with its official seat in Amsterdam,

RESPONDENTS in cassation, appellants in the cross-appeal in cassation,

respondents 1 through 10 hereinafter: " [respondents] ", respondent 11 hereinafter: "the Foundation", and respondents 1 through 11 hereinafter: "the Foundation et al.",

counsel: J. de Bie Leuveling Tjeenk and M.J. Schenck.

**1. Course of the proceedings**

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to:

a. the judgment in the case C/09295247 / HA ZA 07-2973 of the District Court of The Hague of 16 July 2014;

b. the judgment in the cases 200.158.313/01 and 200.160.317/01 of the Court of Appeal of The Hague of 27 June 2017.

The State lodged an appeal in cassation against the judgment of the Court of Appeal. The Foundation et al. lodged a cross-appeal in cassation.

The parties each submitted a statement of defence moving that the other party's appeal be denied.

The case was explained orally and in writing on behalf of the parties by their respective counsels.

The opinion of Advocate General P. Vlas is that the case in the principal appeal should be quashed, with referral, and that the cross-appeal in cassation should be rejected.

The counsel of the Foundation et al. have responded to that opinion in writing.

**2 Starting points and facts**

*Introduction*

2.1.1 This case concerns the events that took place in 1995 with regard to the fall of the city of Srebrenica in 1995. Further to those events, the Supreme Court already delivered a judgment in two previous proceedings.

In 2012, the Supreme Court held in proceedings that were initiated by the Foundation and [respondents] against the United Nations (hereinafter also referred to as "UN") that the UN has immunity from jurisdiction.[1]The ECtHR held that this immunity does not result in a violation of Article 6 of the ECHR.[2]

In 2013, the Supreme Court held that the State acted wrongfully by sending [A] and family members of [B] away from the compound of Dutchbat on 13 July 1995, where they were staying at that time. This conduct was held to be wrongful due to the knowledge Dutchbat meanwhile had about the risks they would be exposed to.[3]

In the present case, the Foundation and [respondents] are holding the State liable for the acts and

omissions of Dutchbat in the period preceding and following the fall of the city of Srebrenica. They claim that Dutchbat did too little to stop the advance of the Bosnian Serbs and to protect the population of Bosnian Muslims. Dutchbat also acted wrongfully in their opinion by cooperating with the evacuation of the refugees who had fled to the mini safe area of Dutchbat. During that evacuation the male refugees were separated from the other refugees by the Bosnian Serbs and were deported, after which they were murdered.

The District Court held that by virtue of a wrongful act the State is liable for the damage the persons represented by the Foundation have suffered as a result of Dutchbat's cooperation in the deportation of male refugees who were deported and then killed by the Bosnian Serbs in the afternoon of 13 July 1995. The District Court denied all other claims of the Foundation et al.

The Court of Appeal held on appeal that the State acted wrongfully in two respects: (i) by facilitating the separation of the male refugees by the Bosnian Serbs on 13 July 1995, by allowing the refugees to go to the buses in groups and through a sluice, and (ii) by not giving the male refugees who were inside the compound on 13 July 1995 the choice of staying in the compound and thus denying them the 30% chance of not being exposed to the inhumane treatment and executions by the Bosnian Serbs. The Court of Appeal ordered the State to compensate the damage as a result of the acts mentioned at (ii).

Both the State and the Foundation et al. have put forward complaints in cassation against the judgment of the Court of Appeal.

Below, first the established facts (at 2.1.2) and the course of the proceedings thus far (at 2.2.1-2.2.4) are presented. The following questions will then be discussed.

Can the acts of Dutchbat that took place up until 23:00 on 11 July 1995 under the UN flag be attributed to the State? (see 3.1.1- 3.6.1)

Can the obligation to prevent genocide from Article I of the Genocide Convention be directly applied in these proceedings between civilians and the State? (see 3.7.1-3.7.3)

Which standard must be applied to assess whether the acts of Dutchbat were wrongful? (see 4.2.1-4.2.6)

Did Dutchbat's command know, or ought it reasonably have known, that there was a real risk that the rights of the male refugees to physical integrity and to life would be violated by the Bosnian Serbs? (see 4.3.1-4.4.2)

Was it wrongful for Dutchbat to continue to cooperate on 13 July 1995 in the evacuation of refugees who were staying in the mini safe area outside the compound? (see 4.5.1-4.5.5)

Was it wrongful for Dutchbat not to offer the male refugees who were in the compound the choice of staying behind in the compound? (see 4.6.1-4.6.9)

Was there a real chance that these male refugees, had they been left behind in the compound, would have escaped the Bosnian Serbs? (see 4.7.1-4.7.9)

*The established facts*

(1) Until 1991, the Socialist Federal Republic of Yugoslavia consisted of six (constituent) republics, i.e. Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. These republics were inhabited by different ethnic and religious groups (Croats, Serbs, Muslims, and others) who formed a majority or a minority in the various republics. Throughout the ages there was both peaceful coexistence and conflict. Conflict always moved along the said ethnic and religious lines.

In 1991, the constituent republics Slovenia and Croatia declared themselves independent of the Socialist Federal Republic of Yugoslavia. Subsequently, fighting erupted in both republics.

(2) The warring factions in Croatia reached an armistice agreement on 2 January 1992 and accepted a peace plan, which provided for deploying a peacekeeping force under the command of

the UN. The United Nations Security Council (hereinafter: the Security Council), by Resolution 743 of 21 February 1992, formed the *United Nations Protection Force* (hereinafter: UNPROFOR) with its headquarters in Sarajevo. The Resolution reads, *inter alia*:

"*Concerned* that the situation in Yugoslavia continues to constitute a threat to international peace and security (…),

*Recalling* its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security,

(…)

*Convinced* that the implementation of the United Nations peace-keeping plan will assist the Conference on Yugoslavia in reaching a peaceful political settlement,

1. *Approves* the further report of the Secretary-General of 15 and 19 February 1992 (…);

2. *Decides* to establish, under its authority, a United Nations Protection Force in accordance with the above-mentioned report and the United Nations peace-keeping plan, and requests the Secretary-General to take the measures necessary to ensure its earliest possible deployment;

(…)

5. *Recalls* that, in accordance with paragraph 1 of the United Nations peace-keeping plan, the Force should be an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis;

(…)

8. *Urges* all parties and others concerned to comply strictly with the cease-fire agreements signed at Geneva on 23 November 1991 and at Sarajevo on 2 January 1992, and to cooperate fully and unconditionally in the implementation of the United Nations peace-keeping plan;

9. *Demands* that all parties and others concerned take all the necessary measures to ensure the safety of the personnel sent by the United Nations (…)"

As from 1 April 1995 UNPROFOR was renamed *United Nations Peace Forces* (hereinafter: (also) UNPROFOR or UNPF).

(3) On 3 March 1992, the (constituent) republic of Bosnia and Herzegovina also declared itself independent of the Socialist Federal Republic of Yugoslavia after a referendum. On 27 March 1992, the Bosnian Serbs (the Serbs living in Bosnia) in turn declared themselves independent of the new state of Bosnia and Herzegovina and declared their own independent state. Subsequently, fighting erupted between the army of Bosnia and Herzegovina, dominated by Bosnian Muslims (*Armija Bosna I Herzegovina* (hereinafter: ABiH)) and the Bosnian Serb army (*Bosnian Serb Army* (hereinafter: BSA) or *Vojska Republijke Srpske* (hereinafter: VRS)).

(4) By Resolution 758 of 8 June 1992, the Security Council extended the UNPROFOR mandate to include Bosnia and Herzegovina.

(5) Srebrenica is a city situated in eastern Bosnia and Herzegovina (hereinafter: the city of Srebrenica). From 1992, eastern Bosnia and Herzegovina was the scene of fighting, first between Muslim fighters and Serbian militias, later between the AbiH and the VRS. As a result, Muslim enclaves developed. The enclave 'Srebrenica' was one of them. This enclave, which was controlled by the Muslim fighters and later by the ABiH, consisted of an area of almost 900 square kilometres around the city of Srebrenica in January 1993. After fights with the Bosnian Serbs, this area was reduced to approximately 150 square kilometres around the city of Srebrenica in March 1993.

(6) In early 1993, Srebrenica was surrounded and became isolated. VRS stopped relief convoys sent by the *United Nations High Commissioner for Refugees* (hereinafter: UNHCR) and fired at helicopters. A humanitarian crisis developed with lack of water, food, electricity and medication.

(7) Under the circumstances, the then Commander of UNPROFOR, the French general Ph.P.L.A. Morillon (hereinafter: Morillon), accompanied by officials from *Médecins Sans Frontières*, visited the besieged and overpopulated Srebrenica on 10 March 1993. On 14 March 1993, he addressed a crowd of Bosnian Muslims, promising them that they were under UN protection and that he would not forsake them.

(8) On 16 April 1993 the Security Council adopted Resolution 819, which included:

"1. 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;

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;

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;

4. Requests the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end; and requests the Secretary-General to report urgently thereon to the Security Council;

5. Reaffirms that any taking or acquisition of territory by the threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable;

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";

(…)

8. 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;

(…)

10. Further demands that all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel as well as members of humanitarian organizations;

11. Further requests the Secretary-General, in consultation with UNHCR and UNPROFOR, to arrange for the safe transfer of the wounded and ill civilians from Srebrenica and its surrounding areas and to urgently report thereon to the Council;

(…)"

(9) On 18 April 1993, VRS-General R. Mladić (hereinafter: Mladić) and AbiH-General S. Halilovic, in the presence of the commander of UNPROFOR, concluded a demilitarisation agreement under which all arms in the city of Srebrenica should be handed over to UNPROFOR. On 8 May 1993, they entered into a supplementary demilitarisation agreement pursuant to which the zone to be demilitarised was extended to include the entire enclave of Srebrenica and it surrounding areas. Subsequently, the Bosnian Serbs were to withdraw their heavy weapons which constituted a threat to the demilitarised zones. These agreements will be referred to hereinafter as the demilitarisation agreements.

(10) On 6 May 1993, the Security Council adopted Resolution 824, which extended the regime of Resolution 819 to five other enclaves within Bosnia and Herzegovina.

(11) On 15 May 1993, the UN and Bosnia and Herzegovina signed the *Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina* (also known as the *Status of Forces Agreement*), which set out the (legal) status of UNPROFOR in Bosnia and Herzegovina.

(12) By Resolution 836 of 4 June 1993 the Security Council decided, *inter alia*:

"Reaffirming in particular its resolutions 819 (1993) (…) and 824 (1993) (…)

Reaffirming the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina and the responsibility of the Security Council in this regard,

Condemning military attacks, and actions that do not respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina (…)

(…)

Reaffirming once again that any taking of territory by force or any practice of "ethnic cleansing" is unlawful and totally unacceptable,

(…)

Deeply concerned by the continuing armed hostilities in the territory of the Republic of Bosnia and Herzegovina which run totally counter to the Peace Plan,

(…)

Determined to ensure the protection of the civilian population in safe areas and to promote a lasting political solution,

(…)

Determining that the situation in the Republic of Bosnia and Herzegovina continues to be a threat to international peace and security,

(…)

3. Reaffirms the unacceptability of the acquisition of territory by the use of force and the need to restore the full sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina;

4. Decides to ensure full respect for the safe areas referred to in resolution 824 (1993);

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 deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) (…);

6. Affirms that these safe areas are a temporary measure and that the primary objective remains to reverse the consequences of the use of force and to allow all persons displaced from their homes in the Republic of Bosnia and Herzegovina to return to their homes in peace, beginning, inter alia , with the prompt implementation of the provisions of the Vance-Owen Plan [Supreme Court: the Peace Plan of January 1993] in areas where those have been agreed by the parties directly concerned;

7. Requests the Secretary-General, in consultation, inter alia, with the Governments of the Member States contributing forces to UNPROFOR:

(a) To make the adjustments or reinforcement of UNPROFOR which might be required by the implementation of the present resolution, and to consider assigning UNPROFOR elements in support of the elements entrusted with protection of safe areas, with the agreement of the Governments contributing forces;

(b) To direct the UNPROFOR Force Commander to redeploy to the extent possible the forces under his command in the Republic of Bosnia and Herzegovina;

8. Calls upon Member States to contribute forces, including logistic support, to facilitate the implementation of the provisions regarding the safe areas, (…) and invites the Secretary-General to seek additional contingents from other Member States;

9. Authorizes UNPROFOR, in addition to the mandate defined in resolutions 770 (1992) (…) and 776 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected

humanitarian convoys;

10. Decides that, notwithstanding paragraph 1 of resolution 816 (1993), Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 above;

(…)"

(13) In his report of 14 June 1993, the UN Secretary-General analysed the modalities in which Resolution 836 could be implemented, which included, *inter alia*:

"5. A military analysis by UNPROFOR has produced a number of options for the implementation of resolution 836 (1993), with corresponding force levels. In order to ensure full respect for the safe areas, the Force Commander of UNPROFOR estimated an additional troop requirement at an indicative level of approximately 34,000 to obtain deterrence through strength. However, it would be possible to start implementing the resolution under a "light option" envisaging a minimal troop reinforcement of around 7,600. While this option cannot, in itself, completely guarantee the defence of the safe areas, it relies on the threat of air action against any belligerents. Its principle advantage is that it presents an approach that is most likely to correspond to the volume of troops and material resources which can realistically be expected from Member States and which meet the imperative need for rapid deployment. (...)

6. This option therefore represents an initial approach and has limited objectives. It assumes the consent and cooperation of the parties and provides a basic level of deterrence, with no increase in the current levels of protection provided to convoys of the Office of the United Nations High Commissioner for Refugees (UNHCR). It does however maintain provision for the use of close air support for self-defence and as a supplementary deterrent to attacks on the safe areas. (…)"

(14) The term "*close air support*" in the abovementioned report refers to the deployment of air power in direct support of the UN ground forces. "*Close air support"* is not to be confused with the term "*air strikes*", which refers to an air attack of a destructive nature. The application procedure for *close air support* consisted of two parts:
1. approval by the UN, by, successively, the sector headquarters in Tuzla, UNPROFOR in Sarajevo, the UNPF headquarters in Zagreb, the *Crisis Action Team* under the command of the chief-of-staff in Zagreb, the *Force Commander* (Janvier) and the UN Special Envoy for Bosnia and Herzegovina (Akashi), as well as
2. approval by NATO, more particularly by the *Commander-in-Chief Allied Forces Southern Europe* in Naples, after involvement of the liaison officers in Sarajevo or Zagreb and the *Combined Air Operation Centre* (CAOC) of the NATO airbase in Vicenza.

(15) The Security Council adopted the option referred to as the 'light option' in the above report in its Resolution 844 of 18 June 1993.

(16) On 3 September 1993, the Dutch Permanent Representative to the UN offered to the UN Secretary-General military advisor a battalion of the Airmobile Brigade (hereinafter: Dutchbat) for the implementation of Resolution 836 in the *safe areas* referred to therein (term used in paragraph 1 of Resolution 819, *see* (8) above ). On 7 September 1993, the Dutch Minister of Defence repeated this offer to the UN Secretary-General, who accepted it on 21 October 1993. On 12 November 1993, the Dutch Government approved the deployment of Dutchbat.

(17) On 3 March 1994, Dutchbat relieved the Canadian regiment present in the Srebrenica enclave. In July 1994, Dutchbat I was relieved by Dutchbat II, which was relieved by Dutchbat III in January 1995.

(18) Dutchbat headquarters was set up in an abandoned factory at Potočari (hereinafter: the compound). The compound was situated in the *safe area*, at approximately five kilometres from the city of Srebrenica. One Dutchbat company was stationed inside the city of Srebrenica. Besides, Dutchbat manned a number of observation posts (hereinafter in the singular also OP, and in the

plural also OP's or Ops).

(19) Dutchbat was placed under the command of the UN and functioned as an UNPROFOR contingent. The State had handed over *command and control* to the UN to carry out the mandate in §5 and §9 of Resolution 836 (*see* (12) above). The *command and control* handed over to the UN by the State is described, *inter alia*, in the operation order of 14 December 1994 at the relief of Dutchbat II by Dutchbat III. The operation order reads, *inter alia*:

"a. Command

(…)

Upon arrival in YU [Yugoslavia] Dutchbat is uoc [NATO: operational control (opcon)] of UNPROFOR".

Note 1 to operational control reads:

"OPCON. The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control"

(20) The command and control handed over to the UN by the State included control over the operational implementation of the mandate by Dutchbat. In this respect, Dutchbat was controlled via the UN chain of command of UNPROFOR, which issued operational orders and instructions to the Dutchbat Commander. The State retained the authority to call back troops, discontinue participation in the operation, and to discipline soldiers, and retained control over the preparation of the Dutch troops, personnel matters and material logistics.

(21) Dutchbat was bound by the codes of conduct and instructions established by the UN chain of command: the *Rules of Engagement*, the *Standing Operating Procedures*, and the *Policy Directives* drafted by the *Force Commander*. The Ministry of Defence laid down these codes of conduct and instructions, plus a number of existing rules and rules especially drafted for this mission, in (Dutch) Standing Order 1 (NL) UN Infbat.

(22) In the period relevant to this case and in so far as significant here, the following individuals held the following positions:

Within the UN hierarchy:

**UN:**

i) the UN Secretary-General was Boutros Boutros-Ghali (hereinafter: the UN Secretary-General);

ii) the Special Envoy to the UN for Bosnia and Herzegovina was Yasushi Akashi;

**UNPROFOR in Zagreb (Croatia) (from 1 April 1995 UNPF):**

iii) the *Force Commander* was French Lieutenant General B. Janvier (hereinafter: Janvier);

iv) the Chief of Staff was the Dutch Brigadier General A.M.W.W.M. Kolsteren;

v) the Chief of Operations was the Dutch Colonel J.H. de Jonge;

**BOSNIA AND HERZEGOVINA COMMAND UNPROFOR in Sarajevo (Bosnia and Herzegovina) (from May 1995 HQ UNPROFOR):**

vi) the Commander was the British Lieutenant General R.A. Smith (hereinafter: Smith);

vii) the Deputy Commander was the French General H. Gobilliard (hereinafter: Gobilliard);

viii) the Chief of Staff was the Dutch Brigadier General C.H. Nicolai (hereinafter: Nicolai);

ix) Assistant Chief of Staff was the Dutch Lieutenant Colonel J.A.C. de Ruiter (hereinafter: De Ruiter);

**Sector North East in Tuzla (unit of HQ UNPROFOR):**

x) the Commander was the Norwegian Brigadier General H. Haukland;

xi) the Chief of Staff and Deputy Commander was the Dutch Colonel C.L. Brantz;

**Dutchbat III in Srebrenica:**

xii) the Battalion Commander was the Dutch Lieutenant Colonel Th.J.P Karremans (hereinafter: Karremans);

xiii) the Deputy Battalion Commander was the Dutch Major R.A. Franken (hereinafter: Franken).

Also appearing in the documents are the names of the Dutch Captain J.R. Groen (hereinafter: Groen) and the Dutch Second Lieutenant J.H.A. Rutten (hereinafter: Rutten). Groen was Commander of the B-Company. Rutten was Patrol Coordinator of C-Company and intelligence officer.

Non-UN positions were as follows:

**In the Netherlands**:

xiv) the Minister of Defence was J.J.C. Voorhoeve (hereinafter: Minister Voorhoeve);

xv) Chief of the Defence Staff was Lieutenant General H.G.B. van den Breemen (hereinafter: Van den Breemen);

xvi) Deputy Commander of the Royal Netherlands Army (hereinafter: RNLA) was Major General A.P.P.M. Van Baal (hereinafter: Van Baal).

The **Defence Crisis Control Centre** (DCCC) monitored from The Hague what happened during the peacekeeping operation from a policy perspective.

xvii) the Deputy Chief of Defence Staff (Operations) at the DCCC was Commodore C.G.J. Hilderink.

On behalf of **NATO** a NATO officer was present in Zagreb to liaise with the Commander-in-Chief Allied Forces Southern Europe headquarters in Naples, namely the American Admiral Leighton Smith.

(23) The supply of goods to the *safe area* went by convoy through largely Bosnian Serb territory. From mid-1994, the Bosnian Serbs refused passage to convoys on their way to the *safe area,* as a result of which not all humanitarian aid and food intended for the population in the *safe area* reached its destination. The provisioning of Dutchbat suffered from this, too.

(24) On 25 and 26 May 1995, NATO carried out air attacks (*air strikes*) on targets close to the Bosnian Serb government quarter in Pale. Next, the Bosnian Serbs took hundreds of UNPROFOR soldiers captive to use them as hostages in order to ward off further attacks. On 28 May 1995, the Bosnian Serbs occupied two Britbat observation posts and took the British soldiers hostage, after which Britbat retreated to its compound. Pending further orders from Smith, Nicolai and Karremans decided upon consultation that preparations should be made to abandon the observation posts within the hour if necessary. The observation posts would be maintained until further notice or until they were under serious threat, subject to instructions by Nicolai that no unnecessary risk should be run.

(25) After the said *air strikes*, UNHCR convoys only sporadically succeeded in reaching Srebrenica, as a result of which the UN could only provide 30% of the food needs in June 1995 (NIOD report, *Srebrenica: a 'safe' area*, 2002 (hereinafter: NIOD report), p. 1912).

(26) On 29 May 1995, Smith issued a *Post Airstrike Guidance,* which read, in so far as relevant here:

"7. I have been directed, today 29 May 95, that the execution of the mandate is secondary to the security of UN personnel. The intention being to avoid loss of life defending positions for their own sake and unnecessary vulnerability to hostage taking. My interpretation of this directive is at paragraph 9b".

Paragraph 9b reads as follows, in so far as relevant here:

"Positions that can be reinforced, or it is practical to counter attack to recover, are not to be abandoned. Positions that are isolated in BSA territory and unable to be supported may be abandoned at the Superior Commanders discretion when they are threatened and in his judgment life or lives have or will be lost. (…)."

(27) On 3 June 1995, shootings occurred at OP-E, and OP-E was surrounded by Bosnian Serbs. Dutchbat then requested close air support. The request was denied. Dutchbat then abandoned this observation post in a YPR (a light tracked armoured vehicle), while being shot at by the Bosnian Serbs. Dutchbat did not set fire to OP-E as was a *standing order* in the event of forced abandonment of an OP (NIOD report, p. 2005).

(28) On 6 July 1995, the Bosnian Serbs launched an attack on the *safe area* under the command of Mladić. When the Bosnian Serbs approached the city of Srebrenica, the objective of this attack was extended to occupying the city of Srebrenica.

(29) During this attack on the *safe area* the ABiH asked Dutchbat repeatedly to be given (back) the arms handed in under the demilitarisation agreements. Dutchbat denied these requests.

(30) On 6 July 1995, fighting also occurred at observation post OP-F between the Bosnian Serbs and ABiH (NIOD report, p. 2100). In the process, observation post OP-F was hit by shells fired from Bosnian Serb tanks twice. That day, the Bosnian Serbs also shelled the city of Srebrenica. A request for *close air support* by Dutchbat that same day was denied.

(31) On 8 and 9 July 1995, Dutchbat abandoned the observation posts OP-F, OP-U, OP-S, OP-K, OP-D and (upon retreat) OP-M. When retreating, Dutchbat soldiers did not fire at the Bosnian Serbs. They allowed Bosnian Serbs to disarm them, handed over armoured vehicles and taught them how to drive them. Also, Dutchbat soldiers departed with the Serbs; they were taken prisoner.

(32) In the morning of 9 July 1995, airplanes appeared above the *safe area* on the request of HQ UNPROFOR (*'air presence'*). UNPROFOR Zagreb did not take a decision on a request for *close air support* made later that day.

(33) In the evening of 9 July 1995, Dutchbat received verbal instructions to take up so-called *blocking positions* to put up a barrier against the advance of the Bosnian Serbs. The order confirming the verbal instructions, drawn up in the Dutch language by De Ruiter and signed by Nicolai, reads as follows:

"With the means available you must take up such "blocking positions" that further breakthrough and advance of VRS units towards the city of Srebrenica are prevented. You must do everything possible to reinforce these positions, also in respect of arming them. These blocking positions must be recognisable on the ground. You can expect the supplementary means promised as from Monday, 10 July 1995."

The VRS was informed that if it attacked a *blocking position*, *close air support* would be deployed (NIOD report, p. 2151).

(34) In the early morning of Monday, 10 July 1995, Dutchbat took up four *blocking positions* (Bravo 1-4); Bravo-1 west of the city of Srebrenica, Bravo-2 and 4 on the road from Zeleni Jadar to Srebrenica and Bravo-3 east of the city of Srebrenica. As the position of Bravo-2 was within range of Bravo-4, in actual practice Bravo-2 was not used. At 7:13 p.m. Groen ordered the Bravo-1 crew to retreat to Srebrenica. The crews manning Bravo-3 and 4 also retreated. No *close air support* was given that day. In the night of 10 to 11 July 1995, the soldiers manning Bravo-1, 3 and 4 stayed in the city of Srebrenica.

(35) On 10 July 1995, Minister Voorhoeve said in current affairs programme NOVA on Dutch television:

"In the next few weeks we have to give topmost priority to the safety of Dutch military personnel.

The commanders are instructed to avoid victims first and foremost. I want to see all men and women return home safely. (...) We have spoken to all those commanders, by telephone and otherwise in the past few days. We do not want Dutch personnel to be at risk, to hold untenable positions. Be sensible and bring all our boys and girls home safe and sound."

The said instruction to Dutchbat to prevent victims is also known as 'the Voorhoeve instruction'.

(36) In the early evening of 10 July 1995, Karremans and Franken decided to admit refugees to the compound in numbers that would fit into the large vehicle halls within the compound. That evening a hole was made in the fence in the south-western corner of the compound for that purpose. No refugees entered the compound that evening.

(37) On Tuesday, 11 July 1995 at around 8:00 a.m., Dutchbat requested *close air support*. The request was denied. A subsequent request for *close air support*, made around 10:00 a.m., was approved by the UN around noon and approximately half an hour later by NATO. Bombs were dropped around 2:45 p.m. Around 3:30 p.m. new airplanes took off. They did not drop bombs. *Close air support* was discontinued.

(38) On 11 July 1995 Groen ordered Bravo-1 to abandon its position and retreat from Srebrenica towards Potočari together with the Bravo-3 and 4 crew. Franken then ordered Groen to take up a new *blocking position* at the junction to Susnjari, south of the compound. Dutchbat did so around 4 p.m. Under threat of VRS units this *blocking position* was abandoned a few hours later and disarmed by Bosnian Serbs.

(39) On 11 July 1995 around 4:30 p.m., the city of Srebrenica fell and was occupied by Bosnian Serbs.

(40) Earlier that afternoon, at around 2:30 p.m., a stream of Bosnian Muslim refugees had started to move from the city of Srebrenica to the compound. In the course of the afternoon of 11 July 1995, refugees were admitted to the compound through the hole in the fence until the vehicle halls were full. At 4:30 p.m. the gates to one of the factory sites near the compound were opened. At that point, the hole in the fence had already been closed.

(41) After the fall of the city of Srebrenica a *mini safe area* was set up, consisting of the compound in Potočari (*see* (18) above) and a nearby area to the south which housed halls and a coach depot. The area was cordoned off with tape and the access roads with armoured vehicles. Control posts were set up at the edges. Maybe as many as 30,000, but at least approximately 20,000 to 25,000 refugees sought refuge in the *mini safe area*. About 5,000 of them were put up in the vehicle halls in the compound.

(42) Approximately 10,000 to 15,000 men from the *safe area* did not flee to the *mini safe area*, but instead fled to the woods surrounding the city of Srebrenica (hereinafter: the woods). Around 6,000 of these men fell into Bosnian Serb hands.

(43) Circumstances in the *mini safe area* were poor. There was little food, not enough water for all refugees, a shortage of medical resources and a lack of hygiene. Temperatures rose to 35 °C in that period. Circumstances deteriorated visibly on 12 and 13 July 1995.

(44) On 11 July 1995 at 6.45 p.m. Karremans received a fax from Gobilliard with the following contents (hereinafter also: Gobilliard's order):

"a. Enter into local negotiations with BSA forces for immediate cease-fire. Giving up any weapons and military equipment is not authorised and is not a point of discussion.

b. Concentrate your forces into the Potočari Camp, including withdrawal of your Ops. Take all reasonable measures to protect refugees and civilians in your care.

c. Provide medical assistance and assist local medical authorities.

d. Continue with all possible means to defend your forces and installation from attack. This is to include the use of close air support if necessary.

e. Be prepared to receive and coordinate delivery of medical and other relief supplies to refugees."

(45) In the evening of 11 July 1995, Janvier, Van den Breemen and Van Baal spoke in Zagreb about the situation that had arisen after the fall of Srebrenica.

(46) In the evening of 11 July 1995, Karremans spoke with Mladić about the evacuation of refugees from the *mini safe area* twice, and in the morning of 12 July 1995 a third time. Mladić then mentioned the order in which the refugees would be transported. Mladić informed Karremans that males between the ages of 17 and 60 would first be screened for war crimes (*inter alia*, NIOD report, p. 2641). After it had initially been agreed that Dutchbat would supervise the evacuation and arrange transport for the refugees, in his last conversation with Karremans Mladić disclosed that he himself would take care of their transport.

(47) On 12 July 1995, the Security Council adopted Resolution 1004 '*Demanding withdrawal of the Bosnian Serb forces from the safe area of Srebrenica, Bosnia and Herzegovina*', which included, *inter alia*, the following:

"1. Demands that the Bosnian Serb forces cease their offensive and withdraw from the safe area of Srebrenica immediately; (…)

(…)

6. Requests the Secretary-General to use all resources available to him to restore the status as defined by the Agreement of 18 April 1993 of the safe area of Srebrenica in accordance with the mandate of UNPROFOR, and calls on the parties to cooperate to that end.

(…)"

This Resolution was not complied with. The Bosnian Serbs did not heed the call to cease their offensive and withdraw from the *safe area* immediately, nor did the Resolution result in an order to Dutchbat to take in positions in and around Srebrenica or otherwise attempt to recapture Srebrenica by military intervention.

(48) In the early afternoon of 12 July 1995, on the orders of the Bosnian Serbs, buses and trucks (hereinafter always jointly: buses) arrived at the *mini safe area*. At around 2 p.m., the evacuation of the refugees from the *mini safe area* started. A massive run on the buses ensued, and there was a threat of refugees trampling each other. The first buses were overcrowded.

(49) In consultation with the Bosnian Serbs, Dutchbat then supervised the movement to the buses by creating a kind of corridor of vehicles and a human cordon of Dutchbat soldiers and tape. The refugees, called out in numbers by the Dutchbat soldiers, passed through this 'corridor' to the buses (*see* also NIOD report, p. 2649). The buses then transported the refugees to Tišca, from where, after marching for kilometres to Kladanj and a bus ride arranged by the UN, they reached a provisional shelter at Tuzla airport (*inter alia*, NIOD report, p. 2651).

(50) The Bosnian Serbs took male refugees from the rows of refugees on their way to the buses. In the afternoon of 12 July 1995, the Bosnian Serbs started to transport these male refugees in separate buses.

(51) In the evening of 12 July 1995, the evacuation of refugees stopped. By that time, 4,000 to 5,000 refugees had been evacuated.

(52) On 12 and 15 July 1995, Dutchbat abandoned the remaining observation posts (OP-A, OP-C, OP-N, OP-P, OP-Q, and OP-R). On 12 July 1995 around 10 p.m., the Bosnian Serbs dropped off the crew of observation post OP-P at the compound. The crew of observation post OP-C was escorted to Milići by the Bosnian Serbs. The crews of the other observation posts were taken to Bratunac by the Bosnian Serbs.

(53) Various Dutchbat soldiers observed war crimes committed by Bosnian Serbs between 10 and 13 July 1995.

(54) Dutchbat did not report the war crimes observed by its soldiers within the UN chain of command immediately. Karremans orally informed the *Bosnia and Herzegovina Command* in Sarajevo of the find of nine bodies by Rutten on Thursday morning 13 July 1995, and also brought this to Nicolai's attention. Furthermore, Karremans claims to have orally reported within the UN chain of

command the observation by a Dutchbat soldier of the execution of a refugee, but this report has not been established for a fact. Dutchbat did not report any other war crimes until after the evacuation.

(55) In the night of 12 to 13 July 1995, Bosnian Serbs raped female refugees.

(56) On 13 July 1995, Franken had a list made of male refugees aged between 15 and 60 who were in the compound, which list contained 251 names. He faxed the list to various national and international authorities and told this to the Bosnian Serbs. About 70 men in the compound refused to have their names taken down on the list for fear of trouble instead of protection.

(57) On 13 July 1995, the evacuation was resumed. When the buses appeared in the morning before the Bosnian Serbs did, Dutchbat just started to escort the refugees, including the men, to the buses. A number of these buses left before the Bosnian Serbs arrived over an hour later. En route, the Bosnian Serbs stopped part of these buses and removed the men from them.

(58) By the end of the afternoon of 13 July 1995 all refugees in the part of the *mini safe area* situated outside the compound had been moved out, and a start was made with moving out the refugees staying within the compound. In the evening of 13 July 1995, according to the *International Criminal Tribunal for the former Yugoslavia* at 8 p.m., the evacuation of these refugees was finished.

(59) After the fall of Srebrenica, genocide was committed against Bosnian Muslims. As has been established later, buses with male refugees went from Potočari to Bratunac. The men who had not gone to the *mini safe area* but had fled to the woods and had been taken captive, were also taken to Bratunac. In total, the Bosnian Serbs killed approximately 7,000 male Bosnian Muslims from the *safe area* in a number of different locations in mass executions, which started on 13 July 1995 in the area north of the city of Srebrenica and subsequently took place from 14 through 17 July 1995 in several places north of Bratunac. Moreover, the Bosnian Serbs killed between 100 and 400 Bosnian Muslim men in Potočari on 12 and 13 July 1995.

(60) Dutchbat abandoned the compound on 21 July 1995.

(61) [respondents] are the mothers, wives and/or daughters of the killed Bosnian Muslims who had fled into the woods or who had been staying inside the mini safe area outside the compound and were evacuated on 12 or 13 July 1995.

(62) The Foundation is a legal entity under Dutch law with full legal authority and has as its objective – in essence – to represent the interests of approximately 6,000 surviving relatives of the victims of the fall of Srebrenica. Based on Article 3:305a DCC, it is entitled to institute the claims in dispute, with the exception of claiming (an advance payment on) monetary compensation.

*The proceedings before the District Court and the Court of Appeal*

2.2.1 In these proceedings, the Foundation et al. are seeking the following, in so far as relevant in cassation:

(i) a judicial declaration entailing that the State acted wrongfully in respect of [respondents] and the persons whose interests are represented by the Foundation;

(ii) a judicial declaration entailing that the State violated its obligation to prevent genocide within the meaning of the Genocide Convention; and

(iii) an order for the State to compensate the damage that was suffered, to be determined by the court in follow-up proceedings.

2.2.2 In essence, the Foundation et al. have based the claim above in 2.2.1 at (i) on the argument that Dutchbat did too little to stop the advance of the Bosnian Serbs and to protect the population of the safe area around Srebrenica, and that during the evacuation of the refugees who were staying at the mini safe area, Dutchbat cooperated in the separation of the male refugees from the other refugees and cooperated in the evacuation of male refugees who were staying in the compound.

2.2.3 The District Court rendered a judicial declaration entailing that by virtue of a wrongful act, the State is liable for the damage suffered by the people represented by the Foundation as a result of Dutchbat's cooperation in the deportation of the male refugees who were deported from the compound and subsequently killed by the Bosnian Serbs in the afternoon of 13 July 1995. The District Court denied all other claims of the Foundation et al.

2.2.4 The Court of Appeal set aside the judgment of the District Court and, in a new judgment, rendered a judicial declaration entailing that the State acted wrongfully (i) by facilitating the separation of the male refugees by the Bosnian Serbs on 13 July 1995 by allowing the refugees to go to the buses in groups and through 'a sluice', and (ii) by not giving the male refugees who were in the compound on 13 July 1995 the choice of staying in the compound, and thus denying them a 30% chance of not being subjected to inhumane treatment and executions by the Bosnian Serbs. The Court of Appeal ordered the State to compensate the damage that was caused by the acts mentioned at (ii), to be determined by the court in follow-up proceedings.

In this context, the Court of Appeal held – in essence – the following.

*Attribution to the State – effective control and ultra vires acts*

For the question of whether and to what extent the acts that took place under the UN flag must be attributed to the State, the rules of written and unwritten international law apply, including in particular the rules laid down in the *Draft Articles on the Responsibility of International Organizations* (hereinafter "DARIO") and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter "DARS") that were drawn up by the *International Law Commission* (ILC). (para. 11.2)

It is not in dispute that the acts of Dutchbat can be attributed to the State if the State exercised effective control of those acts. This comes down to the State's factual control over the specific acts or the omission of those acts, in addition to which all factual circumstances and the special context of the case must be taken into account. As command and control over Dutchbat had been transferred to the UN, in principle the UN exercised effective control over Dutchbat. Whether the exceptional situation occurred in one or more specific cases that the State also exercised effective control over aspects of the conduct of Dutchbat is something the Foundation et al. has to argue with sufficient substantiation and must prove if it is contested. (para. 12.1)

Effective control by the State cannot be derived from statements entailing that casualties must be avoided and that personal safety has priority. The Foundation et al.'s argument about instructions being given regarding the blocking positions is disregarded by the Court of Appeal, as the Court of Appeal cannot establish that instructions about blocking positions were given from which effective control by the State can be derived. (paras. 12.2-12.12)

It is not in dispute in this case that a national contingent (such as Dutchbat) that has been made available to the UN for UNPROFOR qualified as an "organ" of the UN. It follows from Articles 7 and 8 of the DARIO that Dutchbat's acts must be regarded as acts by the UN if these took place "*in an official capacity and within the overall functions*" of the UN, even if they went against instructions. (para. 15.2)

It is a fact that Dutchbat never left the observation posts until the fighting troops were so close that they were seen as a threat and – at the very least – created a fear of mortal danger. The assessment on site of how real these dangers were, whether promised additional resources would arrive in time, whether reinforcement would be possible and whether it would be useful to fight the Bosnian Serbs through the exchange of fire, concerns military assessments and subsequently decisions that were taken in Dutchbat's UN capacity and assignment. These acts cannot be attributed to the State because it did not exercise control over these acts. (para. 17.3)

The decisions not to open fire on the Bosnian Serbs were always taken within the UN line of command and in view of Dutchbat's capacity and assignment as Peacekeepers, without the

State having specific say in those decisions. This also applies to the assessments of the option to prevent weapons and equipment from being captured when an observation post is taken over. (para. 17.4)

The Court of Appeal will not take a position on whether Dutchbat members did or did not advise or tell Bosnian men to flee to the woods and if so, whether this was contrary to the purport of Gobilliard's order. There is no evidence to demonstrate that the State had any factual and therefore effective control over such instructions. In view of the rulings in paras. 12-17 and taking into account the fact that no facts or circumstances to the contrary have been put forward, it must also be assumed that when the stream of refugees started to flow and continued to flow up to 23:00 on 11 July 1995 at the latest, Dutchbat assumed positions and performed acts in its capacity and assignment as UN Peacekeepers – visibly so – and on the basis of the estimates of the situations made in that capacity by their superiors in the UN chain of command. The directions given to the male Bosnian Muslims up to that point, therefore, were also given in the performance of the UN function. Laying down and surrendering arms while giving the Bosnian Serbs notice of the same was also done in that capacity, without the control by the State. (para. 26.1)

It has been established that the UN commanders on site, Karremans and Franken, decided early in the evening of 10 July 1995 to allow as many refugees into the UN compound as could fit into the large vehicle halls on the compound, and that this ultimately involved about five thousand people. They acted within their capacity and assignment as UN Peacekeepers. There was no State control at the time of that decision with regard to either admitting refugees or the number of refugees to be admitted, or with regard to where they would be allowed to enter: through a hole in the fence. The decisions in this regard cannot be attributed to the State. (para. 27.2)

Regarding air support, no facts or circumstances have been put forward that can support the conclusion that the State had effective control of whether or not Dutchbat requested air support at any given time. (para. 29.4)

*Interim conclusion*

With the foregoing, the Court of Appeal ruled that the disputed operational military combat operations of Dutchbat were performed without the State having factual control regarding the specific acts, and within the official capacity and within the overall functions of these UN troops. As a result, these acts cannot be attributed to the State, not even as *ultra vires* acts. (para. 32.1)

At 23:00 on 11 July 1995, the State decided together with the UN to have Dutchbat provide the humanitarian aid and the preparations for the evacuation of the refugees in the mini safe area. This is the point at which the transition period commenced in which the State did have effective control of the conduct of Dutchbat in respect of the humanitarian aid to and the evacuation of the refugees in the mini safe area. (para. 32.2)

*Direct effect of the Genocide Convention*

The "prevention of genocide" is not an accurately defined obligation: various preventative but also repressive methods can be imagined to prevent genocide. Although Article I of the Genocide Convention does provide that the Contracting States undertake to prevent genocide, it does not determine the manner in which they will do so. Article V of the Genocide Convention clearly says that further legislation is needed in that regard. Specific prevention obligations are not included in the Convention. A maximum effort obligation "*to take all measures to prevent genocide which were within its power*", as pronounced by the International Court of Justice on 26 February 2007 in the case between Bosnia-Herzegovina and Serbia and Montenegro – an obligation that applies to all Member States – does not impose any specific obligations that can be directly applied by the national court in a dispute between a citizen and the State. (para. 34.4)

*Wrongful conduct– general*

Within the context of the assessment according to Article 6:162 DCC, the court must determine whether Dutchbat could have reasonably decided and acted as it did. There is no ground for (more extensive) restraint in that assessment. However, the court must consider in the assessment all facts and circumstances that have been established, in this case including the circumstance that Dutchbat was acting in a war situation and had to take decisions under considerable pressure. (para. 39.2)

Dutchbat's command did not know any earlier or later than the evening of 12 July 1995 that the separated male refugees were in real danger of being exposed to torture or to inhumane or humiliating treatment, or of being executed. (para. 51.5, para. 52.7)

*The evacuation of refugees who were outside of the compound in the mini safe area*

After the Bosnian Serb troops arrived at the mini safe area on 13 July 1995, the evacuation of the refugees continued. In this, the uncontrolled flow of refugees into the buses was obstructed by four armoured vehicles positioned there, ribbons and a human chain of Dutchbat members standing hand-in-hand (hereinafter also: "the sluice"). Dutchbat assembled groups of refugees on an adjacent lot, which groups were subsequently led through the sluice one group at a time. While the refugees were walking to the buses in this manner, the male refugees were identified by the Bosnian Serb troops and separated from the women, children and elderly before they arrived at the buses. (para. 61.1)

In practice, this conduct by Dutchbat made it easier for the Bosnian Serbs to separate the male refugees. (para. 61.3)

As from 13 July 1995, Dutchbat should have stopped the cooperation in the evacuation it had provided until then, because as a result of the separation the male refugees were being exposed to the real risk of an infringement of the fundamental rights under Articles 2 and 3 ECHR, and Dutchbat knew or at least ought to have known this on 13 July 1995. (para. 61.5)

In this regard, the Court of Appeal also considered the highly complicated circumstances on site, known from the case file and put forward by the State, under which Dutchbat was forced to operate and under which it arrived at the choice to continue to cooperate in the evacuation by calling groups forward and using the sluice. The fact that stopping this cooperation would lead to chaos in which the Bosnian Serbs would treat the refugees harshly cannot justify cooperating in the separation of male refugees, resulting in their being subjected to the real risk of torture or inhumane or humiliating treatment, or being executed. Dutchbat thus acted wrongfully by continuing to cooperate in the evacuation on 13 July 1995 by forming groups and using a sluice. (paras. 61.6-61.8)

The Court of Appeal deemed it plausible that the men who were outside of the compound still would have fallen into the hands of the Bosnian Serbs and would have been murdered if Dutchbat had refrained from the aforementioned wrongful conduct. The causality, required for attribution of the damage, between the conduct of Dutchbat and the fate of the men is therefore lacking. (para. 64.2)

The wrongful conduct of Dutchbat facilitated the serious violation of fundamental rights. That justifies a judicial declaration entailing wrongful conduct, despite the fact that causality has not been established. (para. 65)

*The evacuation of male refugees who were inside the compound*

Dutchbat had sufficient opportunity and control to warn the male refugees who were inside the compound not to walk outside along with their families on 13 July 1995. (para. 63.2)

In any event, Dutchbat could have explained the risks for the male refugees and could and should have given them the choice of staying inside the compound. In view of the greater danger to which the male refugees were exposed in the hands of the Bosnian Serbs, it must be assumed that the men would have voluntarily remained inside the compound if they had known, as Dutchbat did, what was waiting for them outside. (para. 63.3)

The State has insufficiently substantiated that the scarcity of water, food, medicine and sanitary facilities was so urgent that it was reasonable for the State, knowing that the men ran a real risk of being exposed to inhumane treatment or of being executed, to decide to also cooperate in the evacuation of the 350 men from the compound already on 13 July 1995. (para. 63.4)

The State has not furnished sufficient proof to assume that if the men had not come out immediately, the Bosnian Serbs would have prematurely stopped the evacuation of the women, children and elderly. Nothing indicates that the Bosnian Serbs knew that there were still hundreds of men inside the vehicle hall. Nor has it been asserted that on 13 July 1995, during the evacuation from the compound, the Bosnian Serbs conducted an inspection of the vehicle hall. (para. 63.5)

If the Bosnian Serbs had known or discovered that there were men inside the compound and had stopped the evacuation for that reason, then Dutchbat could have still decided at that time that the men should leave the compound. There is no ground for assuming that, upon discovering the men, the Bosnian Serbs would have immediately used their weapons against those present inside the compound. (para. 63.6)

Knowing that the men, upon separation by the Bosnian Serbs, ran a real risk of being exposed to inhumane treatment or being executed, Dutchbat should not have unconditionally allowed the men inside the compound to go to the buses with the other refugees, but should have explicitly given them the choice of staying behind while the women, children and elderly were evacuated from the compound. However, Dutchbat directly allowed the men to walk from the vehicle hall in the compound into the hands of the Bosnian Serbs, in the same manner as the rest of the refugees. In doing so, Dutchbat acted wrongfully. (para. 63.7)

If Dutchbat had kept the men in the compound back, the Bosnian Serbs would have discovered these men quickly, before Dutchbat was evacuated. (para. 66.3)

It has not been established with sufficient certainty that the Bosnian Serbs would have left these men undisturbed. (para. 67.1)

The chance that the male refugees would have survived was not so small that it had to be deemed no longer realistic. Relevant in particular in this regard is that until then, the Bosnian Serbs had left the UN troops in the compound alone. Weighing all arguments, the Court of Appeal determined that the chance that the men would have escaped the inhumane treatment and execution by the Bosnian Serbs if they had remained in the compound was 30%. By not offering the men the choice of remaining in the compound, after informing them of the risks they would be running if they left the compound, on 13 July 1995, Dutchbat deprived them of this chance. (para. 68)

The surviving relatives of the men who were in the compound on 13 July 1995 are therefore entitled to compensation of 30% of the damage suffered. (para. 69.1)

## 3 Assessment of the ground for cassation in the cross-appeal

*Can the acts of Dutchbat that took place up until 23:00 on 11 July 1995 under the UN flag be attributed to the State?*

3.1.1 In parts 1 and 2 of their grounds for cassation, the Foundation et al. have directed complaints against the Court of Appeal's opinion that the conduct of Dutchbat that took place under the UN flag up until 23:00 on Tuesday, 11 July 1995 cannot be attributed to the State.

3.1.2 The Court of Appeal ruled that it is not in dispute that the conduct of Dutchbat can be attributed

to the State if the State had effective control of that conduct. As command and control of Dutchbat had been transferred to the UN, in principle the UN had effective control of Dutchbat. The argument as to whether an exception occurred in one or more specific instances, entailing that not only the UN but also the State had effective control, must be put forward by the Foundation et al. with sufficient substantiation and, if disputed, proven. (para. 12.1)

These opinions have not been contested in cassation.

3.2 In order to determine the conditions under which conduct may be attributed to a state or an international organization as developed in unwritten international law, alignment must be sought – as the Court of Appeal undisputedly has done (para. 11.1) – with two sets of articles drawn up and adopted by the UN's *International Law commission* (ILC): the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* from 2001 (hereinafter: DARS) and the *Draft Articles on the Responsibility of International Organizations* from 2011 (hereinafter: DARIO).[4]

3.3.1 For answering the question of whether conduct can be attributed to a state, the provisions in the DARS, *Part One "The internationally wrongful act of a State"*, *Chapter II, "Attribution of conduct to a State" are relevant*, of which Articles 4 and 8 read as follows:

> "**Article 4**
>
> **Conduct of organs of a State**
>
> 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.
>
> 2. (…)
>
> **Article 8**
>
> **Conduct directed or controlled by a State**
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

3.3.2 It follows from Articles 4 and 8 DARS that the conduct of Dutchbat may be attributed to the State if it is deemed to be an organ of the State (Article 4(1) DARS) or if Dutchbat was in fact acting *on the instructions, or under the direction or control* of the State (Article 8 DARS).

3.3.3 The Court of Appeal determined that in this case, it is not in dispute between the parties that Dutchbat was deemed to be an "organ" of the UN (para. 15.2). This opinion is not disputed in cassation. It must be assumed, therefore, that Dutchbat was not an organ of the State within the meaning of Article 4(1) DARS.

3.3.4 In these proceedings, the debate between the parties has focused on the question of whether the State had effective control of Dutchbat's conduct. This question must be answered in order to determine whether Dutchbat's conduct in fact took place under the direction or control of the State within the meaning of Article 8 DARS.

3.3.5 It should be noted that in these proceedings, unlike in the *[A]* and *[B]* judgments referred to above at 2.1.1, the question of whether making Dutchbat available to the UN implies that Dutchbat's conduct can exclusively be attributed to the UN and not to the State, or that dual attribution (attribution to both the UN and the State) is possible, is not at issue. It was found in the *[A]* and *[B]* judgments that the latter was the case. This is why the provisions in DARIO concerning the attribution of conduct to an international organization are not directly relevant in these proceedings. (In this regard, see the *[A]* and *[B]* judgments, para. 3.9.1 et

seq.)

*(i) effective control*

3.4.1 In the commentary to Article 8 DARS, the following is noted at (3) regarding the requirement "under the direction or control":

"More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control."

3.4.2 Subsequently, the Commentary to Article 8 DARS at (4) discusses the extent of direction or control that the State must exercise in order to attribute conduct to it. In this regard, the effective control standard is mentioned, which is derived from a judgment of the International Court of Justice of 27 June 1986 in the case *Nicaragua v. United States of America*[5]:

"The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives. But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

…

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State."

3.4.3 The International Court of Justice held in its judgment of 26 February 2007 in the *Bosnia and Herzegovina v. Serbia and Montenegro*[6]case that Article 8 DARS must be understood in light of the case *Nicaragua v. United States of America*. Regarding the effective control standard mentioned in the latter case, the International Court of Justice held in the *Bosnia and Herzegovina v. Serbia and Montenegro* case as follows:

"400. (…) It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (…). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility."

In the case *Bosnia and Herzegovina v. Serbia and Montenegro*, the International Court of Justice rejected the *overall control* standard that the Appeals Chamber of the Yugoslavia Tribunal had applied in its judgment of 15 July 1999 in the case *Prosecutor v. Duško Tadic*[7]:

"406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (…)."

3.5.1 Part 1 directs a series of complaints against the Court of Appeal's opinion that the State had no effective control of Dutchbat's conduct which took place under the UN flag until 23:00, 11 July 1995.

3.5.2 In so far as the complaints in part 1 are based on the argument that effective control can also ensue from a general, all-inclusive instruction from the State that concerns all aspects of the (later) conduct of the organ, those complaints are based on an incorrect interpretation of the law. In accordance with the Commentary (at 3 and 4) to Article 8 DARS cited above in 3.4.1 and 3.4.2, conduct by Dutchbat can only be attributed to the State if the State exercised effective control of certain acts; also see the considerations of the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro* cited above, paras. 400, 401 and 406.

3.5.3 In so far as the complaints in part 1 are based on the argument that effective control can also be evident from the circumstance that the State was in such a position that it had the power to prevent the specific act or acts of Dutchbat, this is also based on an incorrect

interpretation of the law. According to the Commentary (at 4) to Article 8 DARS cited above at 3.4.2, effective control only exists in the event of "*actual participation of and directions given by that State*".

3.5.4 In attributing acts to a state by virtue of Article 8 DARS, what matters is *factual control* of the specific conduct, in which all factual circumstances and the special context of the case must be considered (cf. the *[A]* and *[B]* judgments para. 3.11.3 and the Commentary to Article 7 DARIO cited in those judgments at 3.9.5).

3.5.5 In the challenged paragraphs, the Court of Appeal investigated, in light of all of the factual circumstances and the special context of the case, whether the State had factual control of the acts of which Dutchbat is accused. The Court of Appeal held:

- that the assumption that the State had effective control cannot be derived from statements by Minister Voorhoeve that casualties had to be avoided and that personal safety had top priority, and that it cannot be determined whether instructions were given regarding the blocking positions from which effective control by the State could follow (paras. 12.2-12.12);

- that the State exercised no control over abandoning observation points or the decisions not to open fire on the Bosnian Serbs (paras. 17.3-17.4);

- that there is nothing to indicate that the State had any factual control of the alleged advice that Dutchbat members gave to Bosnian men to flee to the woods and lay down their weapons (para. 26.1);

- that the State had no control of the decision taken early in the evening of 10 July 1995 to allow some 5,000 refugees into the compound (para. 27.2);

- that no facts or circumstances have been put forward that can support the conclusion that the State had effective control of whether or not Dutchbat requested air support at any given time or regarding the provision of that air support (paras 29.2, 29.4, 29.5a and 29.5b).

The opinion of the Court of Appeal is basically that the conduct of Dutchbat until 23:00 on 11 July 1995 was carried out in its capacity as UN Peacekeeper – which capacity was also visible – and based on estimates of the situations made by their superiors in the UN line of command. (para. 26.1)

In this opinion, the Court of Appeal has not demonstrated an incorrect interpretation of the law. The Court of Appeal's opinion that the State had no effective control of the acts of which Dutchbat is accused, has furthermore been sufficiently and comprehensibly reasoned. Contrary to the argument in part 1.3, the Court of Appeal also rightly disregarded the offer of proof in respect of the situation reports (para. 12.10). It has not been argued that these reports show that the State had factual control of the challenged conduct of Dutchbat.

Part 1 fails.

*(ii) ultra vires conduct*

3.6.1 Part 2 complains that the Court of Appeal failed to recognize that the conduct of UN Peacekeeping troops must always be attributed to the sending State if that conduct is in contravention of the instructions issued by the UN to the Peacekeeping troops (*ultra vires* conduct).

The interpretation of the law advocated in this part is not supported by the law. Article 8 DARIO – which, according to the Commentary to this article (at 9), also applies to UN Peacekeeping troops like Dutchbat – provides that *ultra vires* conduct is in principle attributed to the international organization:

"**Article 8**

**Excess of authority or contravention of instructions**

The conduct of an organ or agent of an international organization shall be considered an act

of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."

The challenged conduct of Dutchbat can only be attributed to the State if the requirements of Article 8 DARS are satisfied (cf. the judgment of the International Court of Justice in the case *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 406, cited above at 3.4.3). Contrary to what part 2 argues, the fact that the State retained organic command of Dutchbat – which pertains to matters such as the exercise of disciplinary powers and criminal jurisdiction – is insufficient for attribution to the State. The complaints in part 2 fail for this reason.

*Does the Genocide Convention have direct effect?*

3.7.1 The Foundation et al. accuse the State of failing to prevent the genocide perpetrated by the Bosnian Serbs and therefore of having violated Article I of the Genocide Convention. Part 4 is directed against the Court of Appeal's opinion that the obligation to prevent genocide included in Article I of the Genocide Convention does not have direct effect.

3.7.2 The question of the extent to which a convention provision has direct effect within the meaning of Articles 93 and 94 of the Constitution must be answered by interpreting that convention provision. This interpretation must be based on the standards of Articles 31-33 of the Vienna Convention on the Law of Treaties.[8] If neither the text nor the legislative history show that direct effect of the convention provision was not intended, the contents of that provision are decisive. The question is whether that provision is unconditional and sufficiently specific to be directly applied as objective law in the national system of law within the context in which it is being invoked[9].

3.7.3 The text and the legislative history of the Genocide Convention offer no ground for the assumption that the Contracting States intended to assign direct effect to the obligation of effort defined in Article I of the Genocide Convention. Although Article I of the Genocide Convention does provide that the Contracting Parties undertake to prevent genocide, it does not determine the manner in which they will do so. The obligation of effort to prevent genocide defined in Article I of the Genocide Convention is formulated in general terms and does not entail unconditional and sufficiently precisely described obligations that can be applied directly as objective law in a dispute between an individual and the State. The complaint in part 4 fails for that reason.

*Other complaints*

3.8 The other complaints of the ground for cassation cannot lead to cassation, either. In view of Article 81(1) of the Judiciary (Organization) Act, this needs no further reasoning, as the complaints do not necessitate answering questions of law that are in the interests of the uniform application of the law or the development of the law.

## 4 Assessment of the ground for cassation in the principal appeal

4.1 Undisputed in cassation is the Court of Appeal's opinion (in para. 33) that the Foundation et al.'s claim based on wrongful act must be assessed according to Dutch law. What follows, is therefore based on this assumption.

*Knew or ought to have known; standard to be applied*

4.2.1 Part 1.1 of the ground for cassation argues that the Court of Appeal failed to appreciate that in applying the standard of wrongful act applicable in this case, the only question is whether Dutchbat's command actually knew of the fate awaiting the separated male refugees. According to the complaint, in assuming wrongfulness, it is irrelevant whether the Dutchbat command "reasonably ought to have understood" that the separated male refugees would be exposed to inhumane or humiliating treatment, or would even be killed, as held by the Court of Appeal in para. 46, or "ought to have known" this, as held by the Court of Appeal in paras. 52.1, 61.5 and 61.8. Part 1.2 complains that in para. 50.1, the Court of Appeal failed to appreciate that wrongful conduct cannot be assumed merely because Dutchbat knew of the real risk that one of the parties involved in the combat would violate human rights; in that scenario, the question of the wrongfulness of Dutchbat's conduct also depends on the circumstances of the case. The issue is whether Dutchbat could have reasonably acted as it did, in respect of which also must be taken into account that Dutchbat was operating in a war situation and was forced to take decisions under significant pressure.

4.2.2 The Court of Appeal ruled in paras. 38.2-38.6 that through Dutchbat, the State had jurisdiction in the compound in the period relevant to this case as from 23:00 on 11 July 1995, within the meaning of Article 1 ECHR and Article 2(1) ICCPR. The Court of Appeal did not determine this in respect of the mini safe area outside the compound. However, it did rule in para. 38.7 that even if the provisions of the ECHR and the ICCPR do not apply to Dutchbat's conduct due to a lack of jurisdiction, this would make no difference to the assessment of the claims, as the standards derived from the ECHR and the ICCPR – by means of which the Court of Appeal is referring to the standards that pertain to protecting the rights to life and to physical integrity – are also inherent in Dutch law, in the sense that a breach of those standards must be deemed contrary to the general standard of due care. This opinion is not disputed in cassation; what follows, is therefore based on this assumption.

This entails that in the assessment of Dutchbat's conduct in the mini safe area – both inside and outside of the compound – it is decisive whether Dutchbat acted in violation with the standards derived from Articles 2 and 3 ECHR that pertain to protect the rights to life and to physical integrity; these standards are also inherent in the duty of care from Article 6:162 DCC. The same is true if the if the ICCPR is applied.

4.2.3 Under Article 2 ECHR, a state has a positive obligation to act appropriately to protect the right to life of civilians that are under its jurisdiction.[10] This positive obligation must be interpreted "in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources".[11]

If it is asserted that a state failed to comply with its positive obligation under Article 2 ECHR, according to the ECtHR an assessment must be made of whether "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk". The ECtHR emphasises that in answering the question whether a state has done all that it could be reasonably expected to do, all circumstances of the case must be taken into account.[12]

4.2.4 Based on Article 3 ECHR, a state has an obligation to take measures to protect civilians under their jurisdiction from torture or inhumane or humiliating treatment or punishments. A state may be held liable for a violation of this article "where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known".[13]

4.2.5 In the assessment of whether Dutchbat's conduct was wrongful because it violated the duty of care laid down in Article 6:162 DCC, therefore, it must be determined whether Dutchbat's command knew or reasonably ought to have known at the time of that conduct that there was a real risk of the rights of the Bosnian refugees protected by Articles 2 and 3 ECHR being violated and if so, whether Dutchbat failed to take the measures that it reasonably could have been expected to take in order to avoid that risk, given all of the circumstances of the case.

4.2.6 The Court of Appeal assessed Dutchbat's conduct based on the standards mentioned above at 4.2.2-4.2.5. Parts 1.1 and 1.2 fail for that reason.

*Did Dutchbat's command know?*

4.3.1 Part 1.3 is directed against the Court of Appeal's opinion in paras. 51.3-51.6 that Dutchbat's command knew in the evening of 12 July 1995 that there was a real risk of the rights of the male refugees under Articles 2 and 3 ECHR being violated by the Bosnian Serbs. According to this part, this opinion is incomprehensible.

4.3.2 The Court of Appeal's opinion that Dutchbat's command did have the aforementioned knowledge as from the evening of 12 July 1995, is based on the facts and circumstances reflected in paras. 51.3-51.5. Briefly put, these are:

- that Major Franken increasingly received reports that the Bosnian Serbs were subjecting the male refugees to gross violence, and that this is why he decided to register the male refugees still present in the compound in order to offer them at least some protection (para. 51.4c);

- that 2nd Lieutenant Rutten saw and reported to Karremans that the identification documents of the male refugees who were being held in the so called "White House" were piled in the garden and that he "could smell death" in the house (para. 51.4d);

- that according to a witness statement from Private Oosterveen, everyone in the compound heard incidental shooting in the night, not rapid machine-gun fire but shots at intervals, apparently in the process of executing people (para. 51.4e);

- that a representative of the refugees in the mini safe area asked Franken in the evening of 12 July 1995 to stop the evacuation because signals had been received that the refugees were not safe from the Bosnian Serbs (para. 51.4f);

- and that in the morning of 13 July 1995, Karremans, and subsequently Nicolai, was (were) aware of the discovery of nine bodies of people who had been executed and that the observation of an execution had been reported to Dutchbat's command by Private Groenewegen (para. 51.5).

In light of these facts and circumstances, it was not incomprehensible for the Court of Appeal to rule that as from the evening of 12 July 1995 – and therefore in any event at the time of the evacuations on 13 July 1995 – Dutchbat's command knew of the real risk that the Bosnian Serbs would violate the male refugees' rights to life and physical integrity. The circumstance that it was unclear to Dutchbat's command "whether all of those men would be executed", as Franken stated (see para. 51.4c), does not prevent to conclude that Dutchbat's command can be deemed to have known – in any event – of the real risk that rights protected under the standards of Articles 2 and 3 ECHR of the male refugees would be violated by the Bosnian Serbs.

Part 1.3 fails for that reason.

4.3.3 As parts 1.1-1.3 fail, the same applies to the parts 1.4 and 2.1 that embroider upon them.

*Interim conclusion: Dutchbat's command's knowledge on 13 July 1995*

4.4.1 The foregoing entails that in cassation it is definite that Dutchbat's command knew or

reasonably ought to have known at the time of the evacuations on 13 July 1995 that there was a real risk that the Bosnian Serbs would violate the rights to life and to physical integrity of the male refugees.

4.4.2 The question of whether Dutchbat acted wrongfully, therefore, boils down to whether Dutchbat omitted taking the measures that it could reasonably be expected to take, in view of all of the circumstances of the case, in order to avoid that risk (see above at 4.2.5). In that assessment, account must be taken of the fact that Dutchbat was acting in a war situation, that operational choices had to be made on the basis of priorities and the available resources, and that human conduct is unpredictable (see the judgment of the ECtHR reflected above at 4.2.3 in the case *Finogenov et al./Russia*).

*Was it wrongful for Dutchbat to continue to cooperate in the evacuation of the refugees located in the mini safe area outside of the compound, on 13 July 1995?*

4.5.1 Parts 2.2.1 and 2.2.2 challenge the Court of Appeal's opinion in paras. 61.1-61.8 and para. 65 that Dutchbat acted wrongfully by continuing to cooperate in the evacuation on 13 July 1995. The Court of Appeal has determined that Dutchbat cooperated in the evacuation of the refugees on 13 July 1995 by gathering groups together of sixty to seventy refugees, and subsequently leading the refugees through a sluice, in part formed by Dutchbat, to the buses (para. 61.1). The Court of Appeal held that this was wrongful because in doing so, Dutchbat facilitated the separation of the male refugees by the Bosnian Serbs, while Dutchbat knew or ought to have known that there was a real risk that the male refugees would be subjected to inhumane treatment or would be executed (paras. 61.3 and 61.8). According to the Court of Appeal, Dutchbat should have stopped cooperating in the evacuation instead (para. 61.5).

4.5.2 According to the parts, the Court of Appeal failed to appreciate that Dutchbat was in a war situation and had to take decisions under considerable pressure. In a situation in which one must "choose between two evils", the circumstance that Dutchbat, by forming a sluice, made it easier for the Bosnian Serbs to separate the men does not automatically entail that Dutchbat should have refrained from doing so, not even when Dutchbat knew or ought to have known at that point that there was a real risk that the rights of the male refugees protected under Articles 2 and 3 ECHR would be violated by the Bosnian Serbs. It is argued that in light of the circumstances mentioned by the Court of Appeal itself in paras. 61.6 and 64.2, it is incomprehensible that Dutchbat reasonably could not have opted to continue to cooperate in the evacuation by forming groups and the sluice.

4.5.3 The Court of Appeal established that the evacuation would have continued even without Dutchbat's cooperation (para. 61.4). It follows from the reasons given earlier in para. 61.4 that this was known to Dutchbat. The Court of Appeal furthermore deemed it plausible that even if Dutchbat had stopped cooperating in the evacuation, the male refugees would have ended up in the hands of the Bosnian Serbs and would have been murdered (para. 64.2). It also follows from the Court of Appeal's considerations that if Dutchbat stopped its cooperation, chaos would ensue in which people would be crushed and could be run over (para. 61.6 at a), that chaotic masses of people would end up at the buses, pushing forward with too many at a time in attempting to enter the buses, which buses then would have had to depart despite being overcrowded (para. 61.6 at b), and that the Bosnian Serbs would have treated the people harshly if Dutchbat had not positioned itself between them and the population (para. 61.6 at c).

4.5.4 It follows from the Court of Appeal's findings reflected above at 4.5.3 that Dutchbat reasonably did not have the option of acting in a manner that would avoid the risk of violation of the rights to life and to physical integrity of the male refugees located outside of the compound. Clearly, the evacuation of the refugees located outside of the compound in

the mini safe area would not have ended if Dutchbat ceased to cooperate in the evacuation. Therefore, ceasing to cooperate would not have affected the risk to the male refugees who were to be evacuated from the mini safe area outside of the compound.

In that light, the Court of Appeal's opinion (in para. 65) that Dutchbat, given its knowledge of the real risk for the male refugees, should have "unconditionally" refrained from cooperating further in the evacuation because this facilitated the serious violation of their fundamental rights, is incorrect. Given the war situation in which decisions had to be taken under considerable pressure, and given the fact that decisions had to be taken based on a weighing of priorities, Dutchbat was reasonably entitled to opt to continue to cooperate in the evacuation by designating groups and forming a sluice, in order to – in any event – prevent chaos and accidents involving the most vulnerable people (women, children and elderly). Although the Court of Appeal has rightly ruled that, briefly put, the latter interest (obviously) carries "less weight" than the real risk the men were facing (para. 61.6 at d), this does not mean, contrary to the opinion of the Court of Appeal, that Dutchbat should have opted to disregard the interest of the women, children and elderly by ceasing to cooperate in the evacuation. As it was clear to Dutchbat that ceasing to cooperate would not affect the risk the male refugees outside of the compound were facing, continuing to cooperate in the evacuation was not wrongful under the circumstances of the case, taking into account the war situation, the options available to Dutchbat and the interests of the women, children and elderly.

4.5.5 The foregoing means that the complaints in parts 2.2.1 and 2.2.2, as well as those embroidering upon these in part 2.3, are well-founded. Dutchbat was entitled to decide to continue to cooperate in the evacuation of the refugees who were outside of the compound. To that extent, the Supreme Court can conclude the matter by setting aside the judicial declaration that the State acted wrongfully in this regard and by denying the request to that effect.

*Was it wrongful for Dutchbat not to have offered a choice to the male refugees who were inside the compound?*

4.6.1 Part 3 is directed against the Court of Appeal's opinion (in paras. 63.2-63.8) that, as Dutchbat knew or ought to have known that the male refugees were running a real risk of being subjected to inhumane treatment or execution, Dutchbat should not have unconditionally allowed the male refugees in the compound on 13 July 1995 to go to the buses. Instead, Dutchbat should have explained to them the risks that they would face if they left with their families, and should have explicitly offered them the choice of remaining in the compound. By not offering that choice, Dutchbat acted wrongfully, according to the Court of Appeal.

4.6.2 Parts 3.2 and 3.3 complain, inter alia, that in light of the State's arguments, the assumption that it was a realistic option to offer the male refugees a choice, is incomprehensible. This is because the State put forward, while referring to a statement by Franken, that the refugees would not have accepted a separation by keeping the male refugees behind, meaning that Dutchbat would have had to use violence against the refugees in order to keep the male refugees behind in the compound. This would have led to chaos in the compound, possibly with serious consequences for the refugees. For this reason, it is also incomprehensible that the Court of Appeal assumed that the male refugees, had they been given a choice, would have remained behind voluntarily.

4.6.3 The Court of Appeal held that Dutchbat should have explained the risks that the male refugees faced if they were evacuated and should have then given them the choice of staying behind in the compound (para. 63.3). The Court of Appeal therefore did not state that Dutchbat would have had to force the male refugees – by using violence if necessary –

to stay behind in the compound. The issue according to the Court of Appeal is that Dutchbat should have given a warning that until then, male refugees had been separated from their families during the evacuation, and that they ran a real risk, briefly put, of inhumane treatment or execution, and that Dutchbat should have offered them the choice of either evacuating or staying behind in the compound without their families. By subsequently holding that the men, given the choice, would have voluntarily stayed behind in the vehicle hall, the Court of Appeal rejected in a comprehensible manner the position taken by the State that Dutchbat would have had to use violence to keep the refugees in the compound. With this, the complaints mentioned above at 4.6.2 fail.

4.6.4 The other complaints from parts 3.1-3.4.1 cannot lead to cassation, either. In view of Article 81(1) of the Judiciary (Organization) Act, this needs no further reasoning, as the complaints do not necessitate answering questions of law that are in the interests of the uniform application of the law or the development of the law.

4.6.5 Part 3.4.2 complains about the Court of Appeal's opinion (in para. 63.4) that the State has insufficiently substantiated the argument that the living conditions in the compound were such that it was impossible to keep the approx. 350 male refugees behind in the compound. According to the complaint, this is incomprehensible in view of the Court of Appeal's own findings (in paras. 53.2, 53.3, 53.5, 53.7 and 53.8) and the arguments put forward by the State. Part 3.4.3 complains that the Court of Appeal, in view of what was argued in part 3.4.2, could not arrive at the opinion that Dutchbat acted wrongfully by not offering the male refugees the choice of staying behind in the compound.

4.6.6 In the contested paragraph, the Court of Appeal discusses the question of whether it was possible for Dutchbat, in view of the living conditions in the compound, to allow the approx. 350 male refugees still in the compound on 13 July 1995 to stay behind in the compound for some time. In answering this question, the Court of Appeal explicitly considered that there was not enough water, food, medicine and sanitary facilities to keep the 5,000 refugees who were in the compound alive. According to the Court of Appeal, this nevertheless does not mean that it was also impossible to keep the approx. 350 male refugees in the compound (for some more time). According to the Court of Appeal, the State insufficiently substantiated its argument that the scarcity of water, food, medicine and sanitary facilities was so urgent that Dutchbat could reasonably decide that it would also cooperate in the evacuation, already on 13 July 1995, of the approx. 350 men staying in the compound without offering them the option of remaining in the compound, even though Dutchbat knew that the men would run a real risk of being exposed to inhumane treatment and being executed.

In light of the State's arguments, these opinions are sufficiently reasoned and are not incomprehensible. This is why part 3.4.2 fails, together with part 3.4.3 which embroiders upon it.

4.6.7 Part 3.5 complains that the Court of Appeal has failed to appreciate that in the afternoon or early evening of 13 July 1995, under the chaotic circumstances under which the evacuation of the compound was taking place, Dutchbat had to decide about the evacuation of all of the people who were in the compound, and that it was reasonable for Dutchbat to decide at that time not to offer the men the choice of staying behind in the compound.

4.6.8 The Court of Appeal based its opinion that Dutchbat acted wrongfully by not offering the male refugees the choice on 13 July 1995 of staying behind in the compound on the following considerations, briefly put.

Dutchbat had sufficient opportunities to explain to the male refugees who were inside the compound the risk they would run upon leaving the compound, and to offer them the choice of staying behind in the compound. Dutchbat did not need to use violence for this. Any turmoil among the refugees in the vehicle hall would not be noticed by the Bosnian Serbs.

(paras. 63.2-63.3)

Although the living conditions in the compound were extremely worrisome, it has been insufficiently substantiated that it was impossible to keep the approx. 350 male refugees behind in the compound for that reason. (para. 63.4)

Insufficient facts have been furnished to assume that the other refugees – women, children and elderly – who had to be evacuated from the compound, would be in danger if the men stayed behind in the compound on 13 July 1995. In this regard is relevant that there is nothing to indicate that the Bosnian Serbs already knew that there were male refugees inside the compound. (para. 63.5)

In the event that the Bosnian Serbs discovered, either during or after the evacuation, that there were still men inside the compound, Dutchbat could have decided, if at that time necessary and based on the situation at hand, including the attitude that the Bosnian Serbs would take, that the male refugees needed to leave the compound after all. There is no reason to assume that the Bosnian Serbs would have immediately used their weapons against the people in the compound in that event. (para. 63.6)

In cassation, these considerations either have not been disputed or have not been successfully disputed (see 4.6.2-4.6.6 above).

4.6.9 Based on the foregoing, the Court of Appeal arrived at the conclusion in para. 63.7 that Dutchbat acted wrongfully by not offering the male refugees the choice of remaining in the compound on 13 July 1995.

The Court of Appeal's opinion is basically that Dutchbat omitted taking the measures that, in view of all of the circumstances of the case, it reasonably could have been expected to take in order to avoid the real risk that the men would be exposed to inhumane treatment and executions. This is because Dutchbat had the opportunity, and therefore could be expected, to explain to the male refugees in the compound the risk they ran and to offer them the choice of staying behind in the compound, in view of the chance – albeit small, but not entirely negligible – that they might escape falling into the hands of the Bosnian Serbs (also see 4.7.1-4.7.9 below). If the Bosnian Serbs later discovered that there were still male refugees in the compound, Dutchbat – depending on the attitude of the Bosnian Serbs at that time – would still have opportunity to decide that the male refugees should leave the compound.

The Court of Appeal's opinion is based on the consideration of the circumstances of the case, and is therefore of a factual nature to a high degree. The opinion does not reflect a failure to appreciate the standard to be applied (see above at 4.4.2). In light of the established facts and the State's arguments, it is not incomprehensible nor insufficiently reasoned, not even in light of the war situation in which decisions had to be taken under significant pressure and amidst chaotic circumstances.

Part 3.5 fails for that reason. The same applies to part 3.6, which embroiders upon parts 3.1-3.5.

*Was there a real chance that the male refugees, had they stayed behind in the compound, could have escaped falling into the hands of the Bosnian Serbs?*

4.7.1 Part 4 is directed against the Court of Appeal's opinion in paras. 66.1-69.1 that, if the male refugees had been able to stay behind in the compound, the chance that they would have survived was not so small that it can be deemed to be no longer realistic, and that the chance that the male refugees would have escaped the inhumane treatment and execution by the Bosnian Serbs should be set at 30%.

4.7.2 Parts 4.1 and 4.2 complain that the Court of Appeal's assumption (at the closing of para. 67.1 at b) that sparing the blue helmets was an attack strategy of the Bosnian Serbs, is exclusively based on a factual conclusion drawn by Minister Voorhoeve when Srebrenica was

conquered, and it cannot lead to the conclusion that the Bosnian Serbs would not have used violence against Dutchbat and the refugees if they had discovered the men staying behind in the compound. In light of the Court of Appeal's own determination in paras. 54.3d and 54.3e as well, it is incomprehensible that there may have been a realistic chance that the male refugees could have escaped the Bosnian Serbs if they had been able to remain in the compound.

According to parts 4.3 and 4.4, the circumstance (taken "particularly" into account by the Court of Appeal) that the Bosnian Serbs had left the UN troops in the compound undisturbed up to that point, is insufficient to support the conclusion that there was a realistic chance, of 30%, that the male refugees in the compound could have escaped the Bosnian Serbs, in view of the Court of Appeal's own determinations in 54.3d and 54.3e and the other circumstances taken into account by the Court of Appeal in para. 67.1.

4.7.3 These parts are suitable for joint assessment. The undisputed point of departure in cassation is that at some time after the evacuation the Bosnian Serbs would have conducted an inspection of the compound, and that the male refugees would then have quickly been discovered, before Dutchbat was evacuated (para. 66.3).

4.7.4 In paras. 54.3d and 54.3e, the Court of Appeal held as follows within the context of the question whether it was realistic to assume that Dutchbat should have allowed the male refugees who were still in the part of the mini safe area situated outside the compound in the evening of 12 July 1995, to enter the compound.

The Bosnian Serbs were intent on getting their hands on the male refugees. It would be unrealistic to expect that they would have allowed some one thousand men to hide in the compound undisturbed together with Dutchbat, as they believed that at least a large part of these men were their enemy combatants. This means that Dutchbat was not entitled to assume that the Bosnian Serbs would have allowed hundreds of Bosnian Muslims to enter the compound and remain there; instead, the serious risk of slaughter had to be taken into account. Before the evacuation the Bosnian Serbs had not been unafraid to hunt the refugees and open fire on them, and their cannons and mortars could have easily wreaked slaughter. Dutchbat was entitled to assume that weapons would be used, or at least that there was a large risk that they would be used if about a thousand men were to gather together with Dutchbat in the compound without permission from the Bosnian Serbs.

4.7.5 In para. 67.1 at a to d, the Court of Appeal held as follows within the context of the question of whether the Bosnian Serbs would have left the male refugees who remained in the compound undisturbed.

Earlier, the Bosnian Serbs had not given the refugees the choice of staying behind in the area and were not afraid to use physical violence against the refugees. As late as 12 July 1995, Mladić had said in so many words that everyone would be evacuated, even those who did not want to go. It has not been established in any way that Dutchbat could have effectively protected the male refugees from the Bosnian Serbs. For example, it is known that the Bosnian Serbs were not afraid to strip UNPROFOR troops of their weapons and keep them as hostages. It is plausible that they could have overpowered Dutchbat and the refugees. The Bosnian Serbs were capable of stopping UN aid caravans and thus preventing the compound from receiving food and water supplies, which could have ultimately made it unsustainable not to cooperate in the Bosnian Serbs' evacuation. It is uncertain whether the international community could have intervened in a timely manner if the Bosnian Serbs had decided to remove the male refugees from the compound with force. If it had even been possible to mobilise close air support or even air strikes before the situation in the compound became completely untenable, then such actions might have proven difficult to execute on site because attacking the Bosnian Serbs could have easily led to shooting at the compound, with Dutchbat and the refugees.

4.7.6 The Court of Appeal's considerations reflected above at 4.7.4 and 4.7.5, which to that extent are not disputed in cassation, offer virtually no indications that the Bosnian Serbs would have left the remaining group of men undisturbed after discovery and allowed them to leave safely. The opinion of the Court of Appeal that there was nevertheless a real chance that the male refugees could have stayed alive, and that this chance should be determined at 30%, is apparently especially based on two circumstances: that sparing the blue helmets was part of the Bosnian Serbs' attack strategy (closing of para. 67.1 at b) and – according to para 68: "in particular" – that up until then the Bosnian Serbs had left the UN troops in the compound undisturbed (closing of para. 67.1 at c). However, those circumstances, opposed to the circumstances that follow from the Court of Appeal's considerations reflected above at 4.7.4 and 4.7.5, are insufficient to support the Court of Appeal's opinion that there was a realistic chance of 30% that the male refugees in the compound could have stayed alive if they had been offered the choice of staying behind in the compound. To that extent, the Court of Appeal's opinion is insufficiently reasoned.

Also relevant is that parts 4.1 and 4.2 rightly argue that the Court of Appeal has primarily based the first circumstance, as evidenced by the reference to the NIOD report, on an assumption expressed by Minister Voorhoeve on 12 July 1995, after Srebrenica was captured by the Bosnian Serbs, but that this has little relevance to the question of how the Bosnian Serbs would have responded after discovering that, contrary to the arrangements agreed, Dutchbat had hidden male refugees in the compound. The latter also holds true for the second circumstance taken into account by the Court of Appel, that the Bosnian Serbs had left the UN troops in the compound undisturbed "up to that point".

4.7.7 The parts mentioned above at 4.7.2 as well as part 4.5, which embroiders upon them, are therefore well-founded. The opinion of the Court of Appeal regarding the causality is insufficiently reasoned and therefore cannot be upheld.

4.7.8 Before the Court of Appeal, both of the parties put forward arguments on the basis of which, in their respective opinions, causality does or does not exist between the failure to offer the male refugees the choice of remaining in the compound and the killing of these men by the Bosnian Serbs. In cassation, both parties complained about the Court of Appeal's causality opinion, but the complaints of the Foundation et al. have been rejected by the Supreme Court (see above at 3.8). Neither of the parties complained that the Court of Appeal wrongly failed to take certain facts or circumstances into account in its opinion.

All this entails that the Supreme Court itself may assess the causality on the basis of the facts and circumstances established by the Court of Appeal. Although this also requires an assessment of the facts, the Supreme Court finds cause – in particular taking into account the long period of time that has passed since the events in Srebrenica in 1995 and the length of the proceedings (starting in June 2007) to date – to conclude the matter on the point of the causality, with due observance of Articles 420-421 DCCP.

4.7.9 Based on the circumstances taken into account by the Court of Appeal (see above at 4.7.4 and 4.7.5), the prospects of the male refugees were very bleak, even if they were to remain in the compound. It must be assumed that the Bosnian Serbs, after discovering that some 350 male refugees had stayed behind in the compound, would have been greatly displeased. They probably would have done everything within their power to remove the men from the compound or to have them removed. The Bosnian Serbs could exert heavy pressure to that end, either by continuing the shut-down of the supply route to the compound or by threatening to use violence, because they largely outweighed Dutchbat in terms of both the number of troops and strength of the weaponry. Dutchbat could not be expected to actually allow matters to progress to the level of armed combat, due to the great risk of large numbers of casualties among both the male refugees in the compound and Dutchbat itself. Although the Bosnian Serbs had left the compound undisturbed until then, this carries little weight because they had not yet had any cause to threaten the UN troops in the compound

with violence or to use arms against those troops. Effective support for the UN troops from the international community in the form of close air support or air strikes had virtually failed to materialise up to that point; the air strikes on 25 and 26 May had to be stopped because the Bosnian Serbs took UNPROFOR troops hostage in order to prevent further strikes; see above in 2.1.2 at (24). There was little cause to expect that this would be any different with new air strikes, even assuming that new air strikes could be conducted in time, before the Bosnian Serbs had removed the male refugees from the compound.

On the other hand, it cannot be completely ruled out that if Dutchbat had been able to withstand the threat of violence, the Bosnian Serbs would not have been willing to risk attacking the compound in order to deport the male refugees. In that event, after all, they would have to commence an open attack on UN troops, which could lead to international outrage and escalation of the conflict. Nor could it be entirely ruled out that the international community would be able to successfully exert diplomatic or military pressure on the Bosnian Serbs in good time, forcing them to abandon their objective of getting their hands on the male refugees in the compound. The Court of Appeal determined in para. 67.2, which is not disputed in cassation, that in that event, the male refugees could have escaped with their lives.

All in all, it must be ruled that the chance that the male refugees, had they been offered the choice of remaining in the compound, could have escaped the Bosnian Serbs, was indeed small, but not negligible. In view of all of the circumstances, the Supreme Court estimates that chance at 10%.

*Order to pay damages?*

4.8.1 Part 5 is directed against the order issued by the Court of Appeal against the State to compensate the damage, to be determined by the court in follow-up proceedings, suffered because the male refugees who were in the compound on 13 July 1995 were not offered the choice of staying behind in the compound. This part complains that this order demonstrates an incorrect interpretation of the law, or that it is incomprehensible.

4.8. 2 This complaint is well-founded. In so far as the Court of Appeal intended the order to pay damages in favour of [respondents] , it is incomprehensible in view of the Court of Appeal's opinion in para. 69.2 that these persons are not surviving relatives of men who were evacuated from the compound on 13 July 1995. In so far as the Court of Appeal intended the order to pay damages in favour of the Foundation, the Court of Appeal has failed to appreciate that the Foundation being an interest group within the meaning of Article 3:305a DCC, pursuant to paragraph 3 of that provision, it cannot lodge a claim seeking monetary compensation. Consequently, no order to pay damages may be issued to the benefit of the Foundation.

A claim for damages may only be lodged by the surviving relatives of the male refugees who were evacuated from the compound on 13 July 1995.

## 5 Summary and conclusion

5.1 Briefly put, the foregoing entails that the State is liable to a more limited degree than determined by the Court of Appeal.

In so far as this case concerns the acts of Dutchbat until 23:00 on 11 July 1995, those acts were performed under the command and control of the UN, without the State exercising effective control in that regard. Those acts cannot be attributed to the State for that reason. The State cannot be held liable for the fact that Dutchbat was unable to prevent Srebrenica from being captured by the Bosnian Serbs.

In the period starting from 23:00 on 11 July 1995, after Srebrenica had been conquered and after

it was decided to evacuate the Bosnian Muslims who had fled to the mini safe area, the State did have effective control of Dutchbat's conduct. That conduct can be attributed to the State for that reason.

The evacuation – which, in hindsight, turned into deportation of the male refugees by the Bosnian Serbs – commenced in the afternoon of Wednesday, 12 July 1995, with Dutchbat's cooperation. From the evening of 12 July 1995 Dutchbat became aware that the male refugees, after being separated from the other refugees by the Bosnian Serbs, ran a real risk of violation of their rights to physical integrity and life by the Bosnian Serbs. The continued cooperation in the evacuation of refugees on Thursday, 13 July 1995, was not wrongful, however. Although Dutchbat knew of the aforementioned realistic danger to the male refugees, Dutchbat discontinuing its cooperation could not have changed this, as the Bosnian Serbs would continue the evacuation. By continuing to cooperate in the evacuation, in any event Dutchbat could prevent women, children and the elderly from being trampled. This is why it was not wrongful for Dutchbat to continue its cooperation in the evacuation.

However, the latter is different in respect of the evacuation at the end of the afternoon of 13 July 1995 of the refugees who were inside the compound. Dutchbat failed to offer the male refugees in the compound the choice of staying behind there, even though that was possible. As a result, Dutchbat withheld from these male refugees the chance of escaping from the Bosnian Serbs. That was wrongful. The chance that the male refugees, had they been offered this choice, would have escaped the Bosnian Serbs was small, but not negligible. That chance is estimated at 10%. This is why the liability of the State is limited to 10% of the damage suffered by the surviving relatives of these male refugees.

5.2 The foregoing leads to an outcome that differs in part from the outcome at which the Court of Appeal arrived. For the sake of intelligibility, the Supreme Court will reword the entire decision. The Supreme Court finds cause, like the Court of Appeal, to compensate the costs of the proceedings in all instances thus that each party bears its own costs.

## 6 Decision

The Supreme Court:

*in the principal appeal:*

- sets aside the judgment of the Court of Appeal of The Hague of 27 June 2017;
- issues a judicial declaration entailing that the State acted wrongfully by not offering the male refugees who were in the compound on 13 July 1995 the choice of remaining in the compound, thus depriving them of the 10% chance of not being exposed to inhumane treatment and execution by the Bosnian Serbs;
- denies any other or additional claims;

*in the cross-appeal:*

- rejects the appeal;

*in the principal appeal and the cross-appeal:*

- compensates the costs of the proceedings at first instance, on appeal and in cassation thus that each party bears its own costs.

This judgment was rendered by Vice President C.A. Streefkerk as chairman and justices M.V. Polak, C.E. du Perron. M.J. Kroeze and C.H. Sieburgh, and pronounced in open court by Vice President C.A. Streefkerk on 19 July 2019.

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1 Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999.

2 ECtHR 11 June 2013, no. 65542/12 (*Mothers of Srebrenica*).

3 Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*[A]*) and Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*[B]*).

4 See Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228 (*[A]*), paras. 3.7-3.8.2 and Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225 (*[B]*), paras. 3.7-3.8.2.

5 International Court of Justice 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, p. 14.

6 International Court of Justice 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

7 IT-94-1-A, Judgment, 15 July 1999.

8 Vienna Convention on the Law of Treaties, 23 May 1969, *Tractatenblad* 1972, 51 and 1985, 79.

9 See Supreme Court 10 October 2014, ECLI:NL:HR:2014:2928, paras. 3.5.1-3.5.3.

10 ECtHR 28 March 2000, no. 22492/93 (*Kiliç/Turkey*), para. 62.

11 ECtHR 20 December 2011, no. 18299/03 (*Finogenov et al./Russia),* para. 209.

12 ECtHR 28 October 1998, no. 23452/94 (*Osman/United Kingdom),* para. 116; ECtHR 28 March 2000, no. 22492/93 (*Kiliç/Turkey*), para. 63.

13 ECtHR 28 March 2000, no. 22535/93 (*Kaya/Turkey),* para. 115; and ECtHR 10 May 2001, no. 29392/95 ( *Z./United Kingdom*), para). 73.