NETHERLANDS JUDICIAL DEVELOPMENTS

SREBRENICA CONTINUED. DUTCH DISTRICT COURT HOLDS THE NETHERLANDS LIABLE FOR COOPERATING WITH BOSNIAN SERBS

District Court of The Hague, *Mothers of Srebrenica et al.* v *State of the Netherlands*, Judgment of 16 July 2014[1]

On 16 July 2014, the District Court of The Hague held the State of the Netherlands liable for damages incurred by relatives of approximately 320 victims of the Srebrenica massacre,[2] resulting from the cooperation between Dutchbat – the Dutch battalion of the United Nations (UN) forces responsible for the safe area around the Bosnian town of Srebrenica – and the Bosnian Serbs in the deportation of male Muslim refugees from Dutchbat's compound on 13 July 1995. Most of these refugees were subsequently killed by Bosnian Serb forces. This case had initially also been brought against the UN, but the Dutch courts, up to the Supreme Court, as well as the European Court of Human Rights (ECtHR), had upheld the immunity of the UN[3] – after which only the case against the State of the Netherlands continued.

Mothers of Srebrenica should be distinguished from a similar, though narrower, case in which the Dutch Supreme Court, on 6 September 2013,[4] issued a declara-

1. District Court of The Hague (*Rechtbank Den Haag*) 16 July 2014, *Mothers of Srebrenica* v. *State of the Netherlands*. The ECLI (European Case Law Identifier) number of the Dutch (and authentic) judgment is ECLI:NL:RBDHA:2014:8562. The ECLI number of the (unofficial) English translation is ECLI:NL:RBDHA:2014:8748, available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:8748>. The translation of the judgment is reproduced in the annex to this annotation.

2. The case was brought by ten individual claimants and by the foundation *Mothers of Srebrenica*, a legal person which promotes the interests of approximately 6,000 surviving relatives of the Srebrenica victims.

3. Supreme Court (*Hoge Raad*) 13 April 2012, ECLI:NL:HR:BW1999, *NJ* 2014/262; ECtHR 27 June 2013, *Stichting Mothers of Srebrenica and others* v. *the Netherlands*, Appl. No. 65542/12; *NJ* 2014/263, annotation N.J. Schrijver. See also the annotation by Th.M. de Boer in 60 *NILR* (2013) pp. 121-130.

4. Supreme Court (*Hoge Raad*), *State of the Netherlands* v. *Mustafić et al.*, ECLI:NL:HR:2013:BZ9228 (Advocate General's advisory opinion: ECLI:NL:PHR:2013:BZ9228); *State of the Netherlands et al.* v *Nuhanović*, ECLI:NL:HR:2013:BZ9225 (Advocate General's advisory opinion: ECLI:NL:PHR:2013:BZ9225). This case has been reprinted and commented upon in a previous issue of the *Netherlands International Law Review* (C. Ryngaert, 'Netherlands Judicial Decisions on

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tory ruling that the Netherlands was responsible for the damage suffered by the relatives of a Bosnian electrician (*Mustafić*) who worked as a local employee for Dutchbat, and who was killed by the Bosnian Serbs, and for damages suffered by an interpreter who worked as a UN employee for Dutchbat and whose father, mother and brother (*Nuhanović*) also after eviction from the Dutchbat compound were also killed. In *Mustafić* and *Nuhanović*, the successive courts did not consider the liability of the Netherlands *vis-à-vis* refugees in the compound or in the mini safe area created just outside the compound after the fall of Srebrenica. The more wide-ranging case of *Mothers of Srebrenica* did exactly that.

Mothers of Srebrenica is an important case in several respects. The Court attributed a number of acts carried out within the framework of a UN peacekeeping operation to the Netherlands as a troop-contributing state on the basis of the 'effective control' standard. Furthermore, it gave (limited) extraterritorial application to international human rights law in accordance with the *Al-Skeini* judgment of the ECtHR,[5] and determined the law of the forum state of the Netherlands to be the applicable tort law in light of the principles of Dutch private international law. These questions will be discussed in turn.

1. Attribution

The Court attributed to the Netherlands a number of actions carried out by Dutchbat in the Srebrenica area, while eventually only considering wrongful its cooperation with Bosnian Serb Forces in evacuating refugees who had sought refuge in the compound.[6] What is of interest to us in this first section is on what grounds the Court attributed Dutchbat's actions to the Netherlands.

Public International Law – Supreme Court (Hoge Raad), *State of the Netherlands* v. *Mustafić et al., State of the Netherlands* v. *Nuhanović*, Judgments of 6 September 2013', 60 *NILR* (2013) pp. 441-485). The judgments as well as the Advisory Opinions are in Dutch and can be found on the website of the Dutch judiciary through <http://uitspraken.rechtspraak.nl> using the above-mentioned ECLI numbers. The full English translations of both judgments, including the Advocate General's Advisory Opinions can be found on the webpages of the Dutch Supreme Court at <www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/> (through: Summaries of some important rulings of the Supreme Court).

5. ECtHR 7 July 2011, *Al-Skeini and others* v. *United Kingdom*, Appl. No. 55721/07.

6. Compare *Mothers of Srebrenica*, paras. 4.144 (attributing the following acts to the Netherlands: (i) Abandoning the *blocking positions*; (ii) Not reporting war crimes; (iii) Not providing the refugees with adequate medical care; (iv) Handing in weapons and other equipment to the Bosnian Serbs; (v) Maintaining the decision not to allow refugees into the compound during the transitional period; (vi) Separating the men from the other refugees during the evacuation; (vii) Cooperating in evacuating refugees who had sought refuge in the compound) with 4.335 (considering *not* wrongful: (i) Abandoning the *blocking positions*; (ii) Not providing adequate medical care to the refugees; (iii) Handing over weapons and other equipment to the Bosnian Serbs; (iv) Upholding the decision throughout the transition period not to allow refugees entry to the compound; (vi) Separating the male refugees from the other refugees during the evacuation, in so far as this constitutes assistance by forming a lock and guiding the refugees to the buses in turns) (*sic*).

The Court started out by holding that the criterion to attribute acts carried out by a UN-troop contributing State to that State is whether the State, rather than (just) the UN, had *effective control* over the acts. The Court applied in this respect Article 7 of the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (DARIO, 2011), as the Court of Appeal of The Hague and the Supreme Court of the Netherlands had done earlier in *Mustafić* and *Nuhanović* (para. 4.33), defining 'effective control' as 'actual say or "*factual control*"' (para. 4.34).[7] In doing so, the Court endorsed the validity of the effective control standard as *the* criterion to attribute conduct to member states and/or the UN within the framework of peacekeeping operations. The question remains, however, how the effective control standard should be precisely operationalized. The leading technique which the Court used in this respect was to assess whether or not Dutchbat's acts were *ultra vires* of the orders given by the UN. Only if, in the Court's view, these acts were *ultra vires,* could Dutchbat's acts be attributed to the Netherlands (possibly alongside the UN; paras. 4.57-4.60).

It is noted that *ultra vires* is not addressed in Article 7 DARIO, but only in Article 8 DARIO, which governs attribution *to the organization* of the conduct of an organization's organ or agent even when exceeding the authority of that organ or agent. Articles 7 and 8 remain silent on the question of whether a troop-contributing State's *ultra vires* acts are *per se* attributable to that State rather than (only) to the UN. That said, *ultra vires* acts have been considered in the *literature* (literature which was *not* cited by the Court for that matter) as among the acts that could be considered as being carried out under the *effective control* of the troop-contributing State rather than the UN, as the UN supposedly does not possess any prevention mechanism in this respect.[8]

It appears defensible for the Court to use the *ultra vires* character of acts for purposes of attributing such acts to the State. However, whilst doing so, the Court should remain cautious as to not overlook *other* scenarios that could lead to the establishment of attribution. These may include acts conducted pursuant to authorized discretion by the national force commander, who, when exercising this discretion, should prevent wrongful acts.[9] It seems as if the Court has done just this, by devoting excessive attention to the execution – *ultra vires* or not – of UN

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7. The Court observed in passing that under Art. 48 DARIO 'the same act and/or acts might be attributed to both the State and the UN under what is called "*dual attribution*"' (para. 4.34), thereby confirming the earlier (somewhat controversial) holding of the Supreme Court in the said cases. Supreme Court, *Mustafić*, *supra* n. 4, para. 3.9.4.

8. T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard ILJ* (2010) p. 114; K.M. Larsen, 'Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test', 19 *EJIL* (2008) pp. 509, 523; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', 8 *HRLR* (2008) pp. 151, 166 ('An act committed outside the scope of the international mandate of the operation or outside its chain of command is performed in a national capacity').

9. See Dannenbaum, *supra* n. 8, p. 114.

General Gobilliard's order to Dutchbat to protect refugees 'in their care' (para. 2.37b),[10] defined as those refugees who found themselves in the 'mini safe area' around Dutchbat's compound (paras. 4.87-4.90). Acts carried out by Dutchbat that were unrelated to the mini safe area or were taken before the so-called 'transitional period', i.e., the period during which Dutchbat was preparing to withdraw (para. 4.85), were considered as *not* being carried out under the effective control of the Netherlands (para. 4.87). As a result, the Netherlands was held not to have effective control over the alleged advice of some soldiers to Bosnian Muslim men at a crossroads in Srebrenica to flee into the woods, their failure to sound the general alarm about the flight of the male refugees into the woods, and even the closing of a hole in the compound fence through which refugees could enter (4.93-4.115).

Obviously, someone needs to have had effective control over these acts: if it was not the Netherlands then logically it was the UN. It is not readily clear, however, whether all these acts give effect to a specific UN mandate. In the confusion reigning at the time, also before the start of the transitional period, it is well possible that these acts were discretionary, improvised operational decisions that should be attributed to the Netherlands (and possibly to the UN). The range of relevant attributable acts could thus be much wider, and consequently also the breadth of the responsibility of the Netherlands for wrongful acts – at least potentially, subject to the victims falling within the human rights jurisdiction of the State, and wrongful activity actually being established.

2. Extraterritorial application of human rights

While the Court attributed Dutchbat's acts in relation to the mini safe area to the Netherlands, ultimately the Court decided that only the individuals who had found refuge in the smaller *compound* of Dutchbat fell within the human rights jurisdiction of the Netherlands. At first sight this is somewhat puzzling, as both the attribution and the jurisdiction question were solved on the basis of an 'effective control' standard (para. 4.158). The geographical discrepancy resulting from the application of this standard to both questions may be explained by the different purpose and content of the standard as applied to questions of attribution and/or jurisdiction. Questions of attribution are governed by the law of international responsibility, the relevant rules of which aim to identify *what actor* (the State, the organization, or possibly both) had effective control over the persons which carried out specific acts. Questions of human rights jurisdiction are concerned with the scope *ratione loci* of human rights norms, or the circle of *individuals* whose rights the *State* should protect; the ECtHR, as far as the European Convention on Human Rights (ECHR) is concerned, has limited this circle to those individuals within the territories of the States Parties to the ECHR as well as to

10. This may be explained, at least in part, by the arguments advanced by the claimants, which indeed appear to have focused on Dutchbat's *ultra vires* acts.

those individuals over whom it exercises effective control outside the territories of these States. This distinction means that an injury to an individual caused by or which is attributable to a State Party to the ECHR may nevertheless not lead to the responsibility of that State since it did not breach its obligations under the Convention.

In the limited number of cases relevant to international military operations heard by the ECtHR, the Court has largely avoided dealing with questions of jurisdiction and attribution simultaneously. In *Banković*, the Court only addressed the jurisdictional question, and in *Behrami,* only the question of attribution.[11] In *Al-Jedda*, the Court did address attribution and jurisdiction, but it appeared to collapse the conceptual distinction between both.[12] In *Mothers of Srebrenica*, in contrast, the Court neatly carried out a separate analysis of attribution and jurisdiction, eventually concluding that not all individuals affected by acts attributed to the Netherlands fell within its jurisdiction in the meaning of Article 1 ECHR. Such a conclusion is however only possible where a strict jurisdictional control standard is used. Indeed, if, for jurisdictional purposes, effective control is defined as control exercised by state agents regardless of the place *where* they do so, jurisdiction will largely follow attribution. Once it becomes clear that agents of the troop-contributing State, as opposed to the international organization, have control over the impugned acts (attribution), the State will be regarded as having human rights obligations towards the potential victims of such acts (jurisdiction).

The latter rather loose effective control standard, which may bring any person who is somehow affected by State action within the State's jurisdiction, has not been embraced by the ECtHR nor by the Court in *Mothers of Srebrenica*. Rather, in *Al-Skeini*, the ECtHR introduced a spatial 'public powers' model, pursuant to which jurisdiction is a function of the performance of the executive or judicial functions of one State in the territory of another State.[13]

It is recalled that in *Mustafić* and *Nuhanović*, the Dutch courts had relied on this model to hold that both applicants fell within the jurisdiction of the Netherlands

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11. ECtHR 2 May 2007, *Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway,* Appl. Nos. 71412/01 and 78166/01. It is true that also in *Behrami* the Court did consider that the concepts are 'interdependent' (para. 69), but it held that in this specific case the question of the 'compatibility *ratione personae*' was more relevant than the jurisdictional question.

12. ECtHR 7 July 2011, *Al-Jedda* v. *United Kingdom*, Appl. No. 27021/08, holding in para. 86 under the heading 'jurisdiction' 'that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention'. The fact that the Court took the view that the question of attribution formed part of the question of jurisdiction pursuant to Art. 1 ECHR may be explained by the arguments raised by the UK (see briefly para. 60).

13. *Al-Skeini*, *supra* n. 5, para. 135: '[T]he Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government [and] where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State …'

since they found themselves in the spatially delimited Dutchbat compound subject to Dutch authority, which was exercised within the framework of UNPROFOR on the basis of a Status of Forces Agreement between the UN and Bosnia-Herzegovina.[14] In *Mothers of Srebrenica*, the Court similarly held that the individuals who had sought refuge in the compound fell within the jurisdiction of the Netherlands (para. 4.160), unlike those who stayed in the mini safe area just outside the compound, let alone those outside the mini safe area (para. 4.161). According to the Court, the Netherlands did not exercise any formal authority in the latter area (para. 4.156), nor – in an apparent nod to the state agent control model – did it have physical power and control over the individuals there (para. 4.159).

It remains to be seen, however, whether the State indeed did not carry out executive functions in the mini safe area which it had set up itself, to which it was under an obligation to provide humanitarian assistance, and from which it was to prepare the evacuation of the refugees (see para. 4.80). It is recalled that in *Al-Skeini* the United Kingdom was considered to exercise public powers not just in its military compounds but throughout the entire occupied area of South Eastern Iraq on the ground that it had 'assumed authority and responsibility for the maintenance of security' there.[15] It would thus appear that, at least in the mini safe area, again borrowing from *Al-Skeini*, the Netherlands exercised 'some of the public powers normally to be exercised by a sovereign government',[16] and accordingly the approximately 20,000-25,000 refugees (see para. 2.35) who had sought refuge there fell within the jurisdiction of the Netherlands.

3. Applicable national law

A final issue that deserves contemplation is the question of the national law applicable to assess the lawfulness of a troop-contributing State's actions. Legal cases against such a State, although having a public international law dimension, are after all cases that are primarily brought under national tort law. Before applying the tortious standard of care expected from the State, it is then first necessary to identify the applicable law: the law of the troop-contributing State, or alternatively the law of the State where the troops are deployed.

In *Mustafić* and *Nuhanović*, the Dutch courts had applied, apart from international law,[17] the law of Bosnia and Herzegovina to assess the lawfulness under national law of Dutchbat's actions, on the ground that the impugned actions took

14. *Mustafić*, *supra* n. 4, para. 3.17.

15. *Al-Skeini*, *supra* n. 5, para. 149.

16. Ibid.

17. Namely the legal principles (*sic*) implicit in Arts. 2 and 3 ECHR and Art. 6 ICCPR, which, according to the Court of Appeal of The Hague, qualify as rules (*sic*) of customary international law, and which have universal operation and are binding on the State. This legal framework which was applied by the Court of Appeal was uncontested on appeal in cassation. *Mustafić*, *supra* n. 4, para. 3.15.

place in Bosnia.[18] In *Mothers of Srebrenica*, however, the Court applied Dutch law on the ground that military actions consist of the exercise of public authority ('*acta jure imperii*'), even if these actions took place outside the Netherlands (paras. 4.167-4.170). There is no principled reason why in one case local law and in another case foreign law should apply, as the tortfeasor (Dutchbat) and the *locus delicti* (Potočari/Srebrenica) are the same, and the victims met the same fate (killed at the hands of General Mladić's men). Accordingly, one of the decisions must be misguided.

It is observed that since the entry into force of Book 10 of the Dutch Civil Code on 1 January 2012, pursuant to Article 10:159, *acta jure imperii* should be assessed according to the law of the State that exercised the said authority.[19] Pursuant to this article, it appears that Dutch law should indeed apply.[20] It is unclear, however, whether this rule already existed before 2012 (in particular at the time when suit was brought in 2007), but an exception had already been made for acts in furtherance of the exercise of public authority. The Court took the view that this exception existed as a matter of 'unwritten private law' (para. 4.169), and implied that this unwritten conflict rule apparently continued to exist and applied separately from the 2001 Dutch Conflict of Laws Act in relation to Non-Contractual Liability (*Wet Conflictenrecht Onrechtmatige Daad*), which did not contain such a rule. It also drew a parallel with the law of State immunity, which attaches immunity to *acta jure imperii,* as opposed to *acta jure gestionis* (para. 4.170). The Court did not however adduce strong evidence of the fact that the exception indeed predates its codification. Neither is the transposition of the concept of *acta jure imperii* from the law of State immunity to private international law self-evident, as the former is concerned with preventing (courts from) one State from sitting in judgment of another State and the latter with the application of substantive law. From the absence of jurisdiction of the foreign State it does not flow as a matter of course that the jurisdictionally competent 'home' State should apply its own law.

18. See *Nuhanović* and *Mustafić*, *supra* n. 4, para. 6.3.

19. Art. 10:159 of the Dutch Civil Code indeed provides that Dutch law applies to 'obligations flowing from the exercise of Dutch public authority' ('*op verbintenissen voortvloeiend uit de uitoefening van Nederlands openbaar gezag*'). It is observed that such acts do not fall within the scope of the so-called Rome II Regulation (Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007, on the law applicable to non-contractual obligations, *OJ* 2007, L 199/40), which provides in Art. 1(1) that the Regulation shall not apply to 'the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'. Accordingly, the Dutch legislator's decision that *acta jure imperii* should be assessed according to Dutch law was a discretionary one that did not find its legal basis in the Rome II Regulation.

20. Still, one may argue that the provision only refers to the exercise of public authority *in the Netherlands*, as a result of which damage occurs abroad, e.g., where a Dutch financial services authority, because of inadequate supervision, causes damage abroad. Under the conflict rule of Art. 4(1) of the Rome II Regulation, the law of the State where the damage occurs would normally apply, a result which the Dutch legislator wanted to avoid. It is not clear, however, whether, when adopting Art. 10:159 of the Dutch Civil Code, the legislator also had the situation of Dutch military operations acting *and* causing damage abroad in mind.

However that may be, one would expect that the (lower) Court in *Mothers of Srebrenica* would defer to the views of the Court of Appeal and the Supreme Court on matters of applicable law (even if the District Court is technically not bound by a decision of the Supreme Court in what was after all a different case). Nevertheless, the Court did not, and justified this by observing that in the latter cases the 'applicable law was not in dispute and for that reason did not have to be officially determined' (para. 4.171).[21] But even then, one would assume that although in *Mustafić* and *Nuhanović* the applicable law may not have been in dispute, the Courts went on to apply Bosnian and international law because they considered this application to be substantively correct (indeed, they are not bound by the determinations of the parties, and, in the interest of the law, could rule differently).[22]

Ultimately, however, this controversy may be of limited practical relevance, since Bosnian and Dutch law, as relevant to the case, are allegedly the same; only the rules on settling the amount of immaterial damage appear to differ (para. 4.172).

4. Concluding observations

The Hague District Court's judgment in *Mothers of Srebrenica* is currently subject to appeal, and may well be overruled by higher courts. Even if the judgment rests, or is said to rest, on the earlier decisions of the Court of Appeal and the Supreme Court in the related *Mustafić* and *Nuhanović* decisions, it is hardly certain that these courts will confirm the interpretation given to them in what is after all a much broader case, involving not just a handful but thousands of victims. It is arguable that in attributing acts to Dutchbat, and excluding victims in the vicinity of the Dutchbat compound from the human rights jurisdiction of the Netherlands, the District Court has erred too much on the side of caution. What is undeniable, however, is that the District Court has given further impetus to the development of accountability principles where UN peace operations go wrong. The judgment notably puts on notice UN troops who actively cooperate with militia which commit international crimes.

Cedric Ryngaert
Board of Editors

21. Oddly, these two last sentences in the translation of the judgment do not feature in the original Dutch (and authentic) text; arguably this omission was by mistake and was not deliberate.

22. The Courts must apply the rules of private international law *ex officio/proprio motu* (currently codified in Art. 10:2 Dutch Civil Code).

ANNEX

THE HAGUE DISTRICT COURT **[ECLI:NL:RBDHA:2014:8748]**
Trade Team
Case Number/Cause List Number: C/09/295247 / HA ZA 07-2973

Judgment of July 16th 2014

in the Case of
1.-10. **[Claimants]**, all living in Bosnia-Herzegovina,
11. the *Stichting* [= foundation] **STICHTING MOTHERS OF SREBRENICA**,
with registered office at Amsterdam,
claimants,
advocates M.R. Gerritsen LL.M., Dr A. Hagendorn LL.M., J. Staab LL.M. and S.A. van der Sluijs LL.M., at Amsterdam

versus

1. **THE STATE OF THE NETHERLANDS, Ministry of General Affairs,**
established at The Hague,
Respondent,
advocates G.J.H. Houtzagers LL.M. and K. Teuben LL.M. at The Hague,
2. the organisation possessing legal personage
THE UNITED NATIONS,
established at New York, United States of America,
Respondent,
not appearing.

Claimants are jointly referred to as 'Claimants', Claimants under 1 up to and including 10 together as '[Claimant 1] et al' and Claimants under 11 as '*de Stichting*' [= the Foundation]. Respondents are referred to as 'the State' and 'the UN'.

1. Course of the proceedings

1.1. The following evidences the course of the proceedings
– the Summons of June 4th 2007 with accompanying Exhibits
– the Letter of September 17th 2007 from the State to the District Court with the Letter of August 17th 2007 from the UN to the Permanent Representative of The Netherlands at the UN
– the Letter of September 20th 2007 from Claimants to the District Court
– the Official Conclusion of the *openbaar ministerie (OM)* [= Public Prosecution Service] taken at the Cause List Session on November 7th 2007
– the UN which did not appear was granted default of appearance on November 7th 2007
– the Procedural Documents in the Procedural Issues the State raised on December 12th 2007 to seek
(1) a Declaratory Judgment from the District Court stating it has no jurisdiction over the claims laid against the UN and

(2) Admission of the State as Intervening Party alternatively as Party joining in an action on the side of the UN, in the case against the UN
- the Judgment of this District Court of July 10th 2008 in which the District Court stated it was not competent to take cognizance of the claim against the UN and in which it established that a decision in the Procedural Issue for Intervention alternatively Joinder may be omitted
- the Procedural Documents in the proceedings pending on Appeal at The Hague Appeals Court against the Judgment of July 10th 2008
- the Judgment of The Hague Appeals Court of March 30th 2010 in which briefly stated the Appeals Court upheld the Judgment of July 10th 2008
- the Procedural Documents in the Proceedings Pending in Cassation by Claimants at the Supreme Court against the Judgment of The Hague Appeals Court of March 30th 2010
- the Judgment of the Supreme Court of April 13th 2012 that dismissed the Appeal in Cassation
- the Deed of Depot of May 30th 2012 concerning the deposit of the following documents at the court registry of this District Court by Houtzagers LL.M.:

(1) *Nederlands Instituut voor Oorlogsdocumentatie* [= Dutch Institute for War, Holocaust and Genocide Studies] (hereinafter: NIOD), *Srebrenica. Een 'veilig' gebied. Reconstructie, achtergronden, gevolgen en analyses van the fall of een Safe Area* [= Srebrenica. A 'safe' area. Reconstruction, background, consequences and analyses of the fall of a Safe Area] (Parts I up to and including III), Amsterdam, Boom 2002 (hereinafter: NIOD Report),
(2) *Parlementaire enquête Srebrenica Missie zonder Vrede* [= Parliamentary committee of inquiry on Srebrenica Mission without Peace] Final Report presented to the Lower House of the Dutch Parliament on January 27th 2003 (*Kamerstukken* [= Parliamentary papers] II 2002/03, 28506, Nos. 2 to 3) and
(3) *Parlementaire enquête Srebrenica, Missie zonder Vrede*, [Parliamentary committee of inquiry Srebrenica, Mission without Peace] hearings (Kamerstukken II 2002/2003, 28506, no 5);

- Answer with Exhibits
- Reply with Exhibits
- Rejoinder with Exhibits
- Claimants' Petition for Oral Pleadings of October 8th 2013
- Cause List Decision of November 13th 2013 allowing the Petition for Pleadings
- Memoranda of Oral Pleadings handed over by both Parties on April 7th 2014 and the Official Record drawn up of said Pleadings.

1.2. Finally the District Court gave its ruling on the case today.

2. The facts of the case

2.1. In 1991 the Republics of Slovenia and Croatia declared themselves independent of the Socialist Federal Republic of Yugoslavia after which fighting broke out in both of the Republics.

2.2. On January 2nd 1992 the warring parties in Croatia concluded a ceasefire and accepted a peace plan that made provision for the posting of a UN peacekeeping force. The Security Council of the United Nations (hereinafter to be referred to as: the Security Council) in its Resolution 743 of February 21st 1992 set up the *United Nations Protection*

Force (hereinafter to be referred to as: UNPROFOR) with its headquarters in Sarajevo. As of April 1st 1995 UNPROFOR was renamed the *United Nations Peace Forces* (hereinafter to be referred to as: UNPF).

2.3. On March 3rd 1992 the Republic of Bosnia-Herzegovina declared itself independent of the Socialist Federal Republic of Yugoslavia. After the Bosnian Serbs had declared the independence of the Republika Srpska on March 27th 1992 fighting broke out between the army of Bosnia-Herzegovina (*Armija Bosna I Herzegovina* (hereinafter to be referred to as: ABiH)) and the Bosnian-Serb Army (hereinafter to be referred to as: BSA) or *Vojska Republijke Srpske* (hereinafter to be referred to as: VRS).

2.4. In Resolution 758 of June 8th 1992 the Security Council extended UNPROFOR's mandate to include Bosnia-Herzegovina.

2.5. From 1992 onwards fighting took place in the eastern part of Bosnia-Herzegovina initially between Muslim *jihadis* and Serbian militias and later between ABiH and VRS. This led to the establishment of Muslim enclaves in eastern Bosnia-Herzegovina one of which was Srebrenica. To start with in January 1993 the enclave of Srebrenica first under *jihadi* control and later that of the ABiH comprised an area of 900 square kilometres skirting the town but in March 1993 after fighting with the Bosnian Serbs this was reduced to an area of just 150 square kilometres.

2.6. On March 10th 1993 the then Commander of UNPROFOR, the (French) General P.P.L.A. Morillon, accompanied by employees of *Medicins Sans Frontières* (hereinafter to be referred to as: MSF), visited Srebrenica that was then under siege and overpopulated and where vital necessities were almost non-existent. On March 14th 1993 Morillon addressed a crowd of Bosnian Muslims in Srebrenica and promised them that they were under the protection of the UN and that he would not abandon them.

2.7. On April 16th 1993 Security Council Resolution 819 was adopted the substance of which included the following:

> '*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; (...)*
> *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".*'

2.8. On April 18th 1993 in the presence of the Commander of UNPROFOR General R. Mladić (hereinafter: Mladić) of the VRS and General S. Halilovic (hereinafter to be referred to as: Halilovic) of the ABiH concluded a demilitarisation agreement on which grounds – where relevant here – in any case all of the weapons in the town of Srebrenica had to be handed in to UNPROFOR.

2.9. On May 6th 1993 the Security Council adopted Resolution 824 extending the scope of Resolution 819 to five other enclaves in Bosnia-Herzegovina.

2.10. On May 8th 1993 in the presence of the Commander of UNPROFOR Mladić and Halilovic concluded a supplementary demilitarisation agreement. Where relevant here, the substance of this agreement consisted of extending the area where weapons had to be handed in to encompass the entire enclave of Srebrenica. Once this had been accomplished the Bosnian Serbs would withdraw their heavy weaponry that had formed a threat to the demilitarised zones.

The agreements referred to under 2.8 and 2.10 will be referred to hereinafter jointly as: 'the demilitarisation agreements'.

2.11. On May 15th 1993 the UN and Bosnia-Herzegovina signed the *Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina* (known also as the *Status of Forces Agreement* hereinafter to be referred to as: SOFA).

2.12. Under Resolution 836 of June 4th 1993 the Security Council decided *inter alia* the following:

'*Reaffirming in particular its resolutions 819 (...) and 824 (...)*
(...)
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) of 14 September 1992; (...)
(...)
9. Authorizes UNPROFOR, in addition to the mandate defined in resolutions 770 (1992) of 13 August 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; (...)'

2.13. In his report of June 14th 1993 the UN Secretary-General provided an analysis of ways in which Resolution 836 could be implemented, including *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 has a supplementary deterrent to attacks on the safe areas. (...)*'

The Security Council adopted this in Resolution 844 of June 18th 1993.

2.14. On September 3rd 1993 the Permanent Representative of The Netherlands to the UN offered to put at the disposal of the military advisor to the Secretary-General of the UN a battalion of the Airmobile Brigade (hereinafter referred to as: Dutchbat) to implement in particular Resolution 836 across the *safe areas* it cited. The Dutch Minister of Defence repeated the offer to the Secretary-General of the UN on September 7th 1993 who accepted it on October 21st 1993. On November 12th 1993 the government of The Netherlands approved posting Dutchbat abroad.

2.15. On March 3rd 1994 Dutchbat relieved the Canadian regiment Canbat of its duties. In July 1994 Dutchbat I was relieved by Dutchbat II that in turn was relieved by Dutchbat III in January 1995.

2.16. The headquarters of Dutchbat were located at an abandoned factory site in Potočari (hereinafter to be referred to as: the compound). Potočari lay within the *safe area* about five kilometres from the town of Srebrenica where a company of Dutchbat was encamped in addition to which it manned a number of observation posts (hereinafter to be referred to as: OPs).

2.17. The UN chain of command provided Dutchbat with fixed rules of engagement and instructions: the *Rules of Engagement*, the *Standing Operating Procedures* (hereinafter referred to as: SOP) and the *Policy Directives as set up by the Force Commander*. The Ministry of Defence set down these rules of engagement and instructions, as well as a number of already existing rules and rules specially set up for this particular mission in the Dutch Standing Order 1 (NL) VN Infbat.

2.18. Where relevant here within the hierarchy of the UN the following persons in the period concerned held the following positions:

UN

i) The UN Secretary-General was Boutros Boutros-Ghali (hereinafter to be referred to as: the Secretary-General of the VN)
ii) The Special UN envoy for Bosnia-Herzegovina was Yasushi Akashi (hereinafter to be referred to as: Akashi)

UNPROFOR at Zagreb, Croatia as of April 1st 1995 UNPF

iii) *Force Commander* was the French Lieutenant General B. Janvier (hereinafter to be referred to as: Janvier)
iv) Chief of staff was the Dutch Brigadier General A.M.W.W.M. Kolsteren (hereinafter to be referred to as: Kolsteren)
v) Head of operations was the Dutch Colonel J.H. De Jonge (hereinafter to be referred to as: De Jonge);

BOSNIA-HERZEGOVINA COMMAND UNPROFOR at Sarajevo, Bosnia-Herzegovina, as of May 1995 HQ UNPROFOR

vi) Commander was the English Lieutenant General Sir R.A. Smith (hereinafter to be referred to as: Smith)
vii) Deputy Commander was the French General H. Gobilliard (hereinafter to be referred to as: Gobilliard)
viii) Chief of staff was the Dutch Brigadier General C.H. Nicolai (hereinafter to be referred to as: Nicolai)
ix) Assistant Chief of staff was the Dutch Lieutenant Colonel J.A.C. de Ruiter (hereinafter to be referred to as: De Ruiter)

Sector North East at Tuzla (part of HQ UNPROFOR)

(x) Commander was the Norwegian Brigadier General H. Haukland
(xi) Chief of staff and Deputy Commander was the Dutch Colonel C.L. Brantz (hereinafter to be referred to as: Brantz)

Dutchbat III at Srebrenica

xii) Battalion Commander was the Dutch Lieutenant Colonel T.J.P. Karremans (hereinafter to be referred to as: Karremans)
xiii) Deputy Battalion Commander was the Dutch Major R.A. Franken (hereinafter to be referred to as: Franken)

In The Netherlands unconnected to the UN the following positions were held

xiv) Minister of Defence was J.J.C. Voorhoeve (hereinafter to be referred to as: Voorhoeve)
xv) Chief of the Defence Staff was Lieutenant General H.G.B. van den Breemen (hereinafter to be referred to as: Van den Breemen)
xvi) Deputy Commander of the *Koninklijke Landmacht* (the Royal Netherlands Army hereinafter to be referred to as: KL) was Major General A.P.P.M. Van Baal (hereinafter to be referred to as: Van Baal).

2.19. The supply of goods to the *safe area* went by convoy through largely Bosnian Serb territory. As of mid 1994 the Bosnian Serbs refused to sanction convoys travelling to the *safe area* meaning not all the humanitarian help and food intended for the populace living in the *safe area* arrived at its destination. Moreover the provisioning of Dutchbat suffered because of this.

2.20. On May 29th 1995 Smith issued a *Post Airstrike Guidance* that where relevant here read as follows:

> '*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 – where of relevance here – as follows:

> '*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 Commander's discretion when they are threatened and in his judgment life or lives have or will be lost. (...).*'

2.21. On June 3rd 1995 the Bosnian Serbs surrounded observation post OP-E. In response Dutchbat requested close air support but as the request was denied Dutchbat abandoned the observation post.

2.22. On July 6th 1995 under the command of Mladić the Bosnian Serbs began to attack the *safe area*. Once the Bosnian Serbs had approached the town of Srebrenica they expanded the aim of their attack to taking the town of Srebrenica.

2.23. During this attack on the *safe area* ABiH submitted various requests to Dutchbat to once again have at their disposal the weapons that had been handed in under the demilitarisation agreements but Dutchbat denied all such requests.

2.24. On July 6th1995 the Bosnian Serbs began shelling the town of Srebrenica. A request for close air support from Dutchbat that was made on the same day was denied.

2.25. On July 8th 1995 the Bosnian Serbs deployed tanks to fire on observation post OP-F. They also shelled the town of Srebrenica. On that day Dutchbat requested close air support but this was denied. Dutchbat then abandoned observation post OP-F.

2.26. On July 8th 1995 Dutchbat also abandoned observation posts OP-U, OP-S, OP-K and OP-D.

2.27. In the morning of July 9th 1995 in response to a request from HQ UNPROFOR airplanes appeared above the *safe area* a so-called '*air presence*'. UNPF Zagreb took no decision on a request for close air support submitted later that same day.

2.28. On July 9th 1995 Dutchbat abandoned observation post OP-M.

2.29. On July 9th 1995 Dutchbat was given an order to take up so-called *blocking positions* to throw up a barrier in the face of the advancing Bosnian Serbs. The order drawn up by De Ruiter in the Dutch language and signed by Nicolai that the oral command given earlier that evening confirms reads as follows:

> '*With the resources at your disposal you should take up "blocking positions" to prevent any further breach in the line of defence and advance by the VRS units in the direction of Srebrenica town. Everything possible must be done to further reinforce these positions including arming them. These blocking positions must be recognisable on the ground. You can expect the supplementary means we have promised you to arrive as of Monday July 10th 1995.*'

2.30. In the early morning of July 10th 1995 Dutchbat took up *blocking positions* but gave them up again later that same day.

2.31. On July 10th 1995 Dutchbat made three requests for close air support none of which led to actual air support being given on that day.

2.32. On July 11th 1995 at about 08:00 hours Dutchbat requested close air support. The request was denied. A following request for air support at about 10:00 hours was approved at about 12:00 hours by the UN and roughly half an hour after that by NATO. At about 14:45 hours bombs were dropped in the direction of the VRS tanks. At about 15:30 hours airplanes once again took off that dropped no bombs. After that close air support came to an end.

2.33. On July 11th 1995 at about 16:00 hours Dutchbat took up a new *blocking position* to the south of the compound that they abandoned a few hours later.

2.34. On July 11th 1995 at about 16:30 hours the town of Srebrenica fell and was captured by the Bosnian Serbs.

2.35. Earlier that afternoon at about 14:30 hours Bosnian Muslim refugees began to stream out of the town of Srebrenica and head towards the compound. A *mini safe area* was set up there consisting of the compound and the area of Potočari that lay close by with factory premises and a bus depot.

About 20,000 to 25,000 refugees sought refuge in the *mini safe area*. About 5,000 of them were housed in the compound.

2.36. Around 10,000 to 15,000 men from the *safe area* did not flee to the *mini safe area with factory* but to the woods in the vicinity of the town of Srebrenica (hereinafter to be referred to as: the woods). About 6,000 of these men fell into Bosnian Serb hands.

2.37. On July 11th 1995 at about 18:45 hours Karremans received a fax from Gobilliard the substance of which was as follows (hereinafter also referred to as: the order from Gobilliard):

> '*a. Enter into local negotiations with BSA forces for immediate ceasefire. 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.*'

2.38. In the evening of July 11th 1995 Janvier, Van den Breemen and Van Baal held joint talks in Zagreb to discuss the situation that had developed consequent upon the fall of Srebrenica.

2.39. In the evening of July 11th 1995 Karremans spoke with Mladić on two separate occasions about evacuating the refugees from the *mini safe area* and in the morning of July 12th 1995 for a third time.

2.40. In the early afternoon of July 12th 1995 on the orders of the Bosnian Serbs buses arrived and lorries (hereinafter to be referred to jointly as: the buses) at the *mini safe area*. At about 14:00 hours the evacuation of the refugees from the *mini safe area* began. The Bosnian Serbs who had announced they would be screening able-bodied men for war crimes pulled out men from the rows of refugees who were heading towards the buses. In the afternoon of July 12th 1995 the Bosnian Serbs began to carry off the men in separate buses. After the evacuation of the refugees had been stopped in the evening of July 12th 1995 it was resumed in the morning of July 13th 1995. At the end of the afternoon the last of the refugees remaining in the compound were carried off.

2.41. On July 12th and 15th 1995 Dutchbat abandoned its remaining observation posts (OP-A, OP-C, OP-N, OP-P, OP-Q and OP-R).

2.42. On July 12th 1995 the Security Council adopted Resolution 1004 the substance of which included 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 never observed.

2.43. After the fall of Srebrenica the Bosnian Serbs killed more than 7,000 men from the *safe area* most of them in mass executions in the period from 14th up to and including 17th July 1995.

2.44. Dutchbat left the compound on July 21st 1995.

2.45. As regards [Claimant 1] et al, where relevant here, the following facts have been established:

2.45.1. Before the war Claimant [Claimant 1] lived with her husband and son in the town of Srebrenica. On July 11th 1995 the husband of [Claimant 1] fled into the woods and was never found again. [Claimant 1] and her son sought refuge in the part of the *mini safe area* that lay outside the compound. On July 13th 1995 she and her son became separated. She has not seen him again since.

2.45.2. Before the war Claimant [Claimant 2] lived in Sućeska, near to Potočari. Her husband and two sons fled into the woods. Remains of her husband's body were found in a mass grave in 2005. To this day the bodies of her sons have not been found. On July 11th 1995 [Claimant 2] sought refuge in the part of the *mini safe area* that lay outside the compound.

2.45.3. Both before and during the war Claimant [Claimant 3] lived in Potočari. Her husband and two sons had fled into the woods on July 11th 1995. [Claimant 3] fled to the *mini safe area* along with her daughter where they were not allowed into the compound. [Claimant 3] lost both her husband and her sons.

2.45.4. In 1992 Claimant [Claimant 4] fled to the town of Srebrenica together with her husband and children. On July 11th 1995 two of her sons fled into the woods. She never saw them alive again. [Claimant 4] fled with her husband to the part of the *mini safe area* that lay outside the compound. On July 13th 1995 she became separated from her husband and she never saw him again. In 2003 positive identification of the body of one of her sons did take place.

2.45.5. From the outbreak of war Claimant [Claimant 5] lived with her husband and son in the town of Srebrenica. Her son fled into the woods on July 11th 1995. [Claimant 5] and her husband fled to the *mini safe area*. They were refused entry to the compound. On July 13th 1995 she became separated from her husband. The body of her husband was found in a mass grave. She knows nothing of the fate of her son.

2.45.6. During the war Claimant [Claimant 6] lived with her family in the town of Srebrenica. In 1993 her husband was taken prisoner of war by the Bosnian Serbs and has been reported missing since then. On July 11th 1995 [Claimant 6] fled to the *mini safe area*. She made no attempt to enter the compound, as she had heard that no more refugees were being allowed in. Her two sons fled into the woods. The mortal remains of her eldest son were found thereafter; she never saw her other son again.

2.45.7. Before and during the war Claimant [Claimant 7] lived in Potočari with her husband and son near to the compound. Her husband fled to Tuzla before the fall of Srebrenica. On July 11th 1995 her son fled into the woods after which his body was found. [Claimant 7] fled to the *mini safe area* where she was allowed to enter the compound.

2.45.8. From the outset of war Claimant [Claimant 8] lived in the town of Srebrenica. On June 11th 1995 [Claimant 8] and her husband fled to the *mini safe area* where they learnt that no one else could enter the compound. On July 13th1995 [Claimant 8] became separated from her husband after which time she never saw him again.

2.45.9. During the war Claimant [Claimant 9] lived together with her husband and two sons in the town of Srebrenica. One of her sons fled when war broke out. He has survived the war. During the fall of Srebrenica [Claimant 9] and her other son [son of Claimant 9] fled to the *mini safe area*. [son of Claimant 9] was allowed to enter the compound, though she herself and her husband were not. On July 12th 1995 her son [son of Claimant 9] was carried off from the compound. To this day he has not been found. On July 13th 1995 [Claimant 9] became separated from her husband. His mortal remains were found in 2004.

2.45.10. In 1993 Claimant [Claimant 10] moved to the town of Srebrenica together with her parents. On July 11th 1995 her father fled into the woods. His body was later found in a mass grave. [Claimant 10] fled with her mother and sister to the *mini safe area* where they were not allowed into the compound. They sought refuge in the part of the *mini safe area* that lay outside the compound. The Bosnian Serbs raped [Claimant 10]'s mother and she died in 1996.

2.46. The *Stichting* [= Foundation] is a legal person under Dutch law with full legal capacity whose object in sum is to promote the interests of approximately 6,000 surviving relatives of the victims of the fall of Srebrenica.

3. The dispute

3.1. Claimants demand – in sum – a Court Order enforceable with immediate effect as follows:

I. To obtain a declaratory judgment that *vis-à-vis* [Claimant 1] et al and the persons whose interests the Stichting promotes the State has fallen short of fulfilling the obligations with which it is charged

II. To obtain a declaratory judgment that *vis-à-vis* [Claimant 1] et al and the persons the Stichting promotes the State has acted unlawfully

III. To obtain a declaratory judgment that the State has infringed its obligation to prevent genocide as laid out in the *Convention on the Prevention and Punishment of the Crime of Genocide* of December 9th 1948 (hereinafter to be referred to as: the Genocide Convention)

IV. To uphold a judgment against the State to compensate [Claimant 1] et al for the loss they have suffered for the State to make amends and to make settlement as the law provides

V. To rule that the State pay [Claimant 1] et al an advance payment on said compensation to the tune of €25,000 per Claimant

VI. To rule that the State pay all of the legal costs of these proceedings.

3.2. In sum Claimants base their case on the fact that the State:

i. Is culpable of having fallen short of implementing the obligation placed upon it to protect the populace in the *mini safe area*

ii. Under National and International humanitarian law including the European Convention on Human Rights (hereinafter to be referred to as: ECHR) the International Covenant on Civil and Political Rights (hereinafter to be referred to as: ICCPR), the Geneva Conventions, the UN Charter, the SOP and the mandate) acted against Claimants unlawfully and furthermore
iii. Violated their obligation to prevent genocide.

3.2.1. Claimants reproach the State for the following reasons:
i. During the period prior to the fall of Srebrenica Dutchbat did too little to ensure delivery of convoys with food and humanitarian assistance reached the people in the *safe area.*

In the period prior to the fall of Srebrenica Dutchbat did to little to deter the advance of the Bosnian Serbs and to protect the people in the *safe area* against this in particular that Dutchbat:

a) Did not use the knowledge it had about the intended attack by the Bosnian Serbs
b) Stuck to the demilitarisation agreements and refused to give back confiscated weapons when the Bosnian Serbs were approaching the town of Srebrenica
c) Prevented active resistance by the ABiH
d) Abandoned observation posts
e) Abandoned *blocking positions* too easily and too readily.

The State first blocked close air support to Dutchbat and then brought it to a halt
The State rejected the French offer of July 10th 1995 to put at its disposal Tigre helicopters with personnel and after the fall of Srebrenica frustrated plans to retake Srebrenica
After the fall of Srebrenica Dutchbat acted contrary to the order of Gobilliard not to abandon right away the observation posts it still ran
Dutchbat acted contrary to the order of Gobilliard not to hand over weapons and other equipment to the Bosnian Serbs
Dutchbat advised the male refugees to flee into the woods
Dutchbat did not raise the general alarm when the male refugees fled into the woods
Dutchbat did not allow all of the refugees to enter the compound
Dutchbat did not report the war crimes it had observed
Dutchbat did not provide the refugees with adequate medical care
Dutchbat cooperated in separating the male refugees from the other refugees during the evacuation
Dutchbat cooperated in the evacuation of refugees housed at the compound.

3.2.2. Claimants argue they can appeal directly on the grounds of the violation of standards contained in legal ground 3.2. under ii) and iii) and that the accusations concerning conduct referred to under 3.2.1 are related to the State and can be attributed accordingly.

3.2.3. [Claimant 1] et al who lost their homes and many members of their family after the fall of Srebrenica argue that the State is liable for the loss that they suffered as a result.

3.3. The State puts up a reasoned defence averring that the agreement under which the populace in the *safe area* may derive rights to contradict and to dispute the conduct to which Claimants' accusations are related may be attributed to it. Alternatively should they decide to appeal directly to this the State disputes Claimants' argument that a violation of standards occurred.

4. The judgment

Intent

4.1. The judgment begins in Part 1 with a number of general considerations and follows in Part II with the judgment of Claimants' demands where these are based on failure attributable to the State. In Part III the District Court discusses the claims based on the State acting unlawfully due to violation of international and/or national law. In addition we deal with the demands Claimants have made based on violation of the Genocide Convention. In Part III under 1 the District Court handles the question as to whether the conduct to which Claimants' accusations refer may be attributed to the State. The District Court answers the question affirmatively as regards a number of instances concerning conduct and under 2 goes on to examine the lawfulness of said instances. Part IV of the judgment contains the conclusion. We have added a table of contents for this chapter that takes the form of an appendix to the judgment.

I General considerations

4.2. The District Court handles in succession (i) the scope of the dispute, (ii) the District Court's use of reports about the fall of Srebrenica, witness statements and other court judgments, (iii) a number of questions relating to terminology and (iv) Claimants' arguments as to the course of action the State adopted.

(i) The scope of the dispute

4.3. In this case the first question for discussion is whether the UN enjoys immunity. The District Court answered this question affirmatively in its interim judgment of July 10th 2008 and declared it was not competent to take cognizance of the claim against the UN. This judgment was confirmed right up to the court of last resort in The Netherlands. Claimants then submitted a complaint to the European Court of Human Rights (hereinafter referred to as: ECHR) that on June 11th 2013 declared their complaint to be without merit.

4.4. Since the District Court is not competent to take cognizance of the claim against the UN it only remains to assess the claim against the State. The District Court is not going to assess the substance of Claimants' accusations against the UN. For these reasons therefore representation of the facts and the dispute is limited to the case against the State.

4.5. Claimants hold the State responsible for the fall of Srebrenica and the consequences this brought with it. Besides the arguments reproduced in 3.2 they also formulate arguments about the decision-making process that led to the participation of The Netherlands in the UN mission and about the preparations for the mission especially the training and equipping of Dutchbat and what in Claimant's eyes was insufficient *intelligence* gathering. According to Claimants these arguments do not contain any substantive accusation but 'this is about the State not being able to advance the circumstances as being in any way exculpatory since Claimants can show after all that preparations and the equipping of Dutchbat were an integral part of the State's responsibility and that the State acted irresponsibly in that regard or at least took the wrong decisions.' In accordance with Claimants' intentions the District Court is not going to handle as being in any way substantive the accusation concerning the decision-making process and/or the preparations for the mission.

4.6. Jointly laying the accusations against the State is the *Stichting* that is asking for a declaratory judgment. We do not dispute that the *Stichting* is a legal person under Section

3:305a of *Burgerlijk Wetboek* (BW) [= Dutch Civil Code] authorised to bring just such an action though not an action for damages.

4.7. Given the fact that from Claimants' arguments it follows that said declaratory judgment is requested with a view to a claim for damages by one or more persons representing the *Stichting* in subsequent proceedings the District Court understands the declaratory judgment applied for concerning the unlawful actions of the State as relating to qualifying said actions as unlawful acts in the sense applicable under international and/or national law. That then means in order to allow the action all of the criteria for an unlawful act must be met.

(ii) The District Court's use of reports about the fall of Srebrenica, witness statements and other court judgments

4.8. Both Claimants and the State base their arguments on the reports of (i) the Secretary-General of the UN (*Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica* of November 15th 1999), (ii) the NIOD [= Dutch Institute for War, Holocaust and Genocide Studies], (iii) the French Parliamentary committee of inquiry (*Rapport d'information commune sur les événements de Srebrenica* of November 22nd 2001), and (iv) the Dutch Parliamentary committee of inquiry and the statements made in the context of the Dutch Parliamentary committee of inquiry and the provisional examination of witnesses in the cases of Nuhanović and Mustafić *versus* the State of The Netherlands (hereinafter to be referred to as: Nuhanović and Mustafić cases). These papers form part of the case file. Parties are not unanimous in endorsing the conclusions drawn in the aforementioned reports. Unless otherwise mentioned below therefore the District Court has not included them when forming its judgment. Following on from Parties the District Court did however, based in part upon the judicial finding of fact from the aforementioned reports and on the statements brought into the case.

4.9. Parties all refer to court judgments in which the fall of Srebrenica was discussed namely the pronouncements of the Yugoslavia Tribunal (*International Criminal Tribunal for the former Yugoslavia,* hereinafter: ICTY) of August 2nd 2001 (in the first instance) and April 19th 2004 (on appeal) in the Krstić case, the pronouncement of the International Court of Justice (hereinafter to be referred to as: ICJ) of February 26th 2007 in the case between Bosnia-Herzegovina and Serbia and Montenegro and finally the judgments in the Nuhanović and Mustafić cases of the Supreme Court and the Appeals Court at The Hague (namely: HR September 6th 2013, ECLI:NL:HR:2013:BZ9225 and ECLI:NL:HR:2013:BZ9228, and The Hague Appeals Court July 5th 2011, ECL:NL:GHSGR:2011:BR0133 and ECLI:NL:GHSGR:2011:BR0132). The District Court takes into account the established offences and where they are related to the fall of Srebrenica makes the judgments given in these cases its own. Unless otherwise mentioned, the follow-up passages the ICTY quotes in the Krstić case always refer to passages from the judgment in the first instance made on August 2nd 2001 that remained undisputed on appeal and/or were upheld.

4.10. In the cases of Nuhanović who worked as an interpreter employed by the UN and Mustafić who worked as an electrician for Dutchbat, the Supreme Court upheld the judgment of the The Hague Appeals Court (hereinafter: the Appeals Court). That judgment reads as follows: not taking Nuhanović's family members with them, though he himself was on the list of local personnel that could be evacuated with Dutchbat and arranging for Mustafić who was not on the list and who left the compound with his family, may both be

attributed to the State and are unlawful acts. The State emphasises the fact that in these cases only the specific position of Mustafić and the family members of Nuhanović and the acts Dutchbat carried out when the evacuation of the refugees from the compound came to an end when there were hardly any other refugees left … [?]. In these cases the Appeals Court considers that is all it has to assess and not the position of the refugees who had left the compound, the refugees who were immediately outside the compound, or the other refugees who were at the compound.

4.11. Claimants' accusations regarding Dutchbat's entire mission and its actions in relation to the Muslim population in the *safe area*. Besides this the case is specifically about the family members of [Claimant 1] et al. The body of facts in this case is more wide-ranging than in the Nuhanović and Mustafić cases. Moreover it is not limited to the actions of Dutchbat but also relates to the actions of the government of The Netherlands e.g. in relation to the decision-making process surrounding the provision of close air support to Dutchbat. This does not alter the fact that the judgments given in these two cases are of significance to the current case, as this takes place in the same context as the fall of Srebrenica.

4.12. The District Court adopts the same starting point as Parties namely that after the fall of Srebrenica genocide did take place. The IGH and the ICTY have ruled that there is genocide in the sense in which that is understood in the Genocide Convention. In the Krstić case the *Appeals Chamber* of the ICTY deliberated as follows:

> '*By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for the extinction the forty thousand Bosnian Muslims living in Srebrenica, a group that was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identification.*' (Legal ground No 37).

4.13. The State sticks to its position emphasising the fact that the fall of Srebrenica and the many dead is a matter of regret and constitutes a 'black page' in the history of Europe and that the international community did not succeed in preventing this drama from playing out. Moreover the State points out that it was the Bosnian Serbs who were responsible for committing the genocide. The District Court notes that nevertheless in this regard if unlawful acts did take place that are attributable to the State it may be held liable.

(iii) A number of questions relating to terminology

4.14. The District Court adopts the same position as Parties using the term 'refugee' to indicate the members of the Muslim population who found themselves in the *safe area* and who left it around the time when the fall of Srebrenica took place on July 11th 1995. In doing so the District Court makes no judgment as to whether they are refugees in the sense in which that is understood by the Geneva Convention on Refugees.

4.15. 'War crimes' is a term the District Court uses in just the same way as Parties where Claimants accuse Dutchbat of not reporting the crimes they had observed. Here too the District Court makes no judgment as to the legal qualification of any such crimes.

4.16. The gathering of facts described how the enclave of Srebrenica and the establishment of a *safe area* came about. The District Court always refers to 'the *safe area*' as indicating the town of Srebrenica and its environs that formed the safe area as

indicated in the mandate. The town the District Court denotes is always 'the town of Srebrenica'. 'The fall of Srebrenica' refers specifically to the fall of the town of Srebrenica on July 11th 1995 that heralded the end of the UN mission. 'The *mini safe area*' is aimed at the compound and the nearby area where from July 11th up to and including July 13th refugees were staying. The District Court uses 'Potočari' for the area around the *mini safe area* where the houses were located to which the Bosnian Serbs brought the male refugees who they had selected from the *mini safe area*.

(iv) The State's adopted course of action during the proceedings

4.17. Claimants argue that the State's adopted course of action during the proceedings was 'improper' and 'from a legal, humane and moral point of view unacceptable'. In their view this has led to the legal proceedings having a lack of equilibrium that must be restored. More specifically they accuse the State of 'enlightened self-interest' in earlier on in these proceedings arguing for immunity from prosecution for the UN and withholding documents.

4.18. Earlier on in these proceedings the Appeals Court judged that the State had a reasonable interest in explaining its position before the Court at which the case against the UN was pending and to defend its opinion that said Court would have to declare it was not competent to take cognizance of the case. What the State did may be held against it but to do so does not guarantee success.

4.19. Claimants accuse the State of withholding the following papers from them namely: the *Rules of Engagement*, their accompanying explanation, the records of talks concerning what was discussed around the time of the fall of Srebrenica in the bunker of the *Defensie Crisisbeheersingscentrum* (hereinafter to be referred to as: DCBC) [= Defence Crisis Control Centre] and Dutchbat's debriefing reports. Claimants argue that by not bringing said documents into the case the State has failed to comply with the instruction contained in Section 21 of the *Wetboek van Burgerlijke Rechtsvordering* (Rv) [= Dutch Code of Criminal Procedure].

4.20. Under the *Wet Openbaarheid van Bestuur* (hereinafter: WOB) [= Government Information (Public Access) Act] Claimants have petitioned the Minister of Defence to publish the *Rules of Engagement* of the UN and their explanation, UNPROFOR's SOP and the *Force Commander Directives* from UNPROFOR's Commander in Chief. Claimants have mounted a legal challenge to the refusal of the Minister of Defence to publish these papers and this has been upheld right up to the court of last resort. From the judgment of the Administrative Disputes Division of the Council of State of March 3rd 2010 it appears that it was deliberated upon in sum that the Minister of Defence must respect the judgment of the UN about these documents and the High Contracting Parties at the Convention on the Privileges and Immunities of the UN. The UN has made provision to the effect that these documents are to remain confidential and are thus not intended for publication (ECLI:NL:RVS:2010:BL6245). This judgment is an obstacle to Claimants' conclusion that the State wrongly failed to bring into the case the *Rules of Engagement* and their accompanying explanation.

4.21. It does not appear that under the WOB Claimants have sought to take cognizance of the other papers they mention in 4:19. Nor does it appear that they have availed themselves of the already existing options in civil law to be empowered to dispose over copies of these papers or to take cognizance of their substance. Claimants could have

taken cognizance of part of said papers as described in the NIOD Report. Moreover in this action the State has appealed exclusively to sources that are in the public domain. Accordingly against this background the District Court sees insufficient basis in general as Claimants argue but the State disputes that when assessing the points of dispute the criteria set for the State's obligation to furnish facts should be less strong and/or where the State has met the obligation to furnish facts it should be charged with the burden of proof even if it does not bear the burden of proof according to Section 150 Rv or to regard Claimant's position as being proven for the time being. The District Court assesses Claimants' arguments on their own merits based on the established facts and after reviewing Parties' positions about this in relation to applicable law.

II Attributable failure

4.22. Claimants argue that failure to meet its obligations to them to protect the populace in the *safe area* is attributable to the State. According to Claimants said obligations arise from the agreement between the State and the UN to put at its disposal troops to protect the populace in the *safe area* and this is to be deemed as a third-party clause in the sense of Section 6:253 BW. They argue that the populace accepted this clause thereby becoming a party to said agreement.

4.23. Since during the plea Claimants made it known that they wish to limit the basis for the judgment of the claim to this agreement the District Court does not take into account other papers in the proceedings relating to other agreements.

4.24. Apparently Claimants are focussing on the offer referred to under 2.14 that came from the government of The Netherlands for a battalion of the Airmobile Brigade for implementation of UN resolutions especially Resolution 836 that the Secretary-General accepted on October 21st 1993. In the cases of Nuhanović and Mustafić the Appeals Court already decided that in this general course of events an agreement was concluded that cannot reasonably be understood other than as Parties intending the Dutch battalion should function under the command structure of the UN and so for the implementation of the peace-keeping operation would be placed under the final authority of the United Nations Security Council.

4.25. Since the agreement between the State and the UN was concluded prior to the EU Treaty concerning the law applicable to contractual obligations June 19th 1980, Trb. [= Treaty Series] 1980 No 156 (hereinafter to be referred to as: EVO) [= Convention on the Law Applicable to Contractual Obligations] was changed into Regulation (EC) No 593/2008 of June 17th 2008 on the law applicable to contractual obligations, PbEU 2008 L177 ('Rome I Regulation') applicable law must be decided based on EVO.

4.26. Where no choice of laws is made under Section 4 EVO the agreement is governed by the law of The Netherlands since it is The Netherlands that has the distinctive characteristic of putting its troops at the disposal of the UN and there is nothing to show that the agreement is more closely connected to any other country not even Bosnia-Herzegovina whither Dutchbat was sent.

4.27. Other than Claimants argue concerning the agreement whereby the State put troops at the disposal of the UN for the purpose of implementing Resolution 836 there was no right for the populace in the *safe area* to demand protection from the State or to appeal in any other way to the State agreement as referred to in Section 6:253 BW. It is also not feasible that the State together with the UN has agreed a third-party clause to the benefit

of the Claimants as this would be at odds with an international law argument attributing liability for actions of troops in the context of UN missions. After all Claimants' appeal to the agreement between the State and the UN with the third-party clause for which they argue in fact comes down to directly forcing the State to observe Resolution 836 and implies that the populace of a country or a place under a UN resolution where the UN acts with the help of military forces claims to observation of the resolution can be made at all times against a sending state supplying the military forces for the implementation of the resolution.

4.28. The foregoing leads to rejection under 3.1 under I of the declaratory judgment and the claims under 3.1 under IV and under V to pay damages and an advance payment on the part of [Claimant 1] et al where these are based on an attributable failure on the part of the State.

III Unlawful acts due to violation of international and/or national law

4.29. That means in order to allow the action under 3.1 under II the declaratory judgment applied for declaring that the State has acted unlawfully the following are required (1) that the acts to which Claimants' accusations relate may be attributed to the State and (2) that according to applicable international and/or national law all of the additional criteria for an unlawful act are met.

1 Attributing the unlawful acts of which it is accused to the State

4.30. Since this dispute relates to a UN peacekeeping operation for which purpose the State sent troops the question arises as to whether in as much as they took place under the flag of the UN the unlawful acts of which it is accused may indeed be attributed to the State. Together with parties the District Court is of the opinion that first and foremost this question must be answered according to the norms of international public law.

4.31. In doing so the District Court distinguishes as between (A) Dutchbat's acts (B) other acts related to Claimants' accusations for example the decision-making process surrounding the provision of close air support [= CAS] to Dutchbat. Under (C) the conclusion on the acts attributable to the State.

(A) Attributing Dutchbat's actions to the State

4.32. The District Court handles *seriatim* the following points:
(a) The attribution criterion: *effective control*
(b) Transfer of *command and control* over Dutchbat to the UN
(c) *Effective control* of Dutchbat's actions in general
(d) Claimants' additional arguments about attributing Dutchbat's actions in the period prior to the fall of Srebrenica
(e) The conclusion as to the *effective control* of the State over Dutchbat's actions in the period prior to the fall of Srebrenica
(f) *Effective control* by the State over Dutchbat's actions after the fall of Srebrenica
(g) *Effective control* by the State over Dutchbat's specific actions after the fall of Srebrenica and
(h) The conclusion as to the State's *effective control* over Dutchbat's actions after the fall of Srebrenica.

(a) The attribution criterion: effective control

4.33. In the Nuhanović and Mustafić cases the Supreme Court ruled that the criterion for attributing Dutchbat's actions to the State is whether the State exercised *effective control* over said actions. The Supreme Court derives this criterion from Section 7 of the *Draft Articles on Responsibility of International Organisations* (hereinafter to be referred to as: DARIO) that the *International Law Organisation* (ILO) has drawn up. In the cases referred to the Appeals Court considered that though this provision of *effective control* is only mentioned in relation to attribution to the UN the same criterion holds when answering the question whether actions of troops must be attributed to the state that placed them at the disposal of others. The Supreme Court considered that the ILO's DARIO recommendations and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter to be referred to as: DARS) may generally be accepted as a reflection of current, unwritten international law and were apparently accepted as such even in 1995.

4.34. *Effective control* means the actual say or '*factual control*' of the State over Dutchbat's specific actions. Whether or not this is a point of discussion must be assessed in terms of the circumstances surrounding the case. When doing so it should be remembered that under Clause 48 DARIO the same act and/or acts might be attributed to both the State and the UN under what is called '*dual attribution*'.

4.35. Other than Claimants argue the way in which the UN enjoys immunity is not relevant. International law of custom offers no support for Claimants' position that given immunity the 'broadest possible' measures of attribution for Dutchbat's actions must be applied, as otherwise Dutchbat would be placed 'above the law'. The opinion of the Supreme Court in the judgment referred to under 1.1 that according to current international law the absence of an alternative judicial process is not prejudicial to the immunity of the UN (confirmed by the ECHR see: 4.3) underlines the fact that the UN's immunity is not patient of the formulation of an argument that Dutchbat's actions beyond the framework of current international law are attributable to the State.

(b) Transfer of command and control over Dutchbat to the UN

4.36. Since the dispute is related to a UN peacekeeping operation to implement a UN mandate when attributing Dutchbat's actions to the State it is important to know what powers the State still had and what powers it had transferred to the UN. This is why it merits discussion as to whether and if so to what extent the State had handed over *command and control* of Dutchbat to the UN.

4.37. Just like the State the District Court is of the opinion that the State did hand over *command and control* of Dutchbat to the UN. This was not recorded in any written agreement as frequently does occur in a so-called '*transfer of authority*'. Nor is that necessary since in order for the transfer of *command and control* to take place no procedural requirements have to be observed. After the agreement referred to under 2.14 in which the State put troops at the disposal of the UN Dutchbat was indeed placed under UN orders and operated as a contingent of UNPROFOR.

4.38. The transfer of *command and control* over Dutchbat took place for the purpose of a UN peacekeeping operation based on Chapter VII of the UN Charter to implement the mandate (see 2.12). The Security Council is solely responsible for implementing international peace and security and is primarily responsible for implementing the

mandate. The *command and control* the State transferred to the UN is *inter alia* cited and described in the Operations order of December 14th 1994 that aims at Dutchbat III replacing Dutchbat II. The substance of said order is *inter alia* as follows:

> '*(2) Upon arrival in YU* [District Court's addition: Yugoslavia] *Dutchbat is oob [NAVO: operational control(1) (opcon)] of UNPROFOR*'.

In footnote (1) at *Operational control* we read as follows:

> '*OPCON. The authority delegated to direct forces assigned to the commander limited by function, time or location; to deploy units concerned, and to retain or assign tactical control of these 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. [Dutch: onder operationeel bevel (oob)]*' [under operational orders].

Voorhoeve worded this as follows:

> '*When The Netherlands puts its troops at the disposal of an international organisation in the form of a peacekeeping operation it transfers operational orders over its troops to that organisation or coalition of countries. In this case therefore Dutch troops were placed under United Nations' orders and their own commanders Lieutenant Colonel Karremans and the other commanding officers of Dutchbat reported to the North-East Sector of Unprofor in Tuzla and in Sarajevo. (...) The next successive level is General Janvier in Zagreb and on the civilian side Mr Akashi the special representative of the United Nations.*' (Proceedings TK 1994/95, p. 5987).

4.39. In part in the light of the above the District Court regards as insufficient Claimants' argument that transfer of *command and control* over Dutchbat to the UN was due only to a lack of knowledge.

4.40. It has now been established that the State attached no conditions to the transfer of *command and control* over Dutchbat to the UN. Given the substance of the operation order the primary responsibility of the Security Council for the operational implementation of the mandate and what is usual in peacekeeping operations that the UN carries out included in the *command and control* the State transferred to the UN the say over Dutchbat's operational implementation of the mandate. In this regard the UN chain of command at UNPROFOR directed Dutchbat in this giving orders and instructions to the commander of Dutchbat. During implementation of the UN mission therefore the State had no formal competence *vis-à-vis* Dutchbat's operational implementation of the mandate and was thus not competent to exercise its say about Dutchbat whether via the Dutch officers in the UN chain of command or directly.

4.41. After transferring *command and control* states supplying troops at all times retain the right to withdraw them and to cease taking part in the operation ('*full command*'). As usual during a transfer of *command and control* over the operational implementation of the mandate to the UN the State retained further say about personal matters of the military personnel put at the disposal of the UN who remained in service of the State and Dutchbat's material logistics. The State also retained the authority to punish said military personnel by disciplining them and subjecting them to criminal law. Finally the State had a say over the preparations for the mission e.g. in selecting and training the troops. Nor is any of this disputed as between parties.

4.42. Transfer of *command and control* over Dutchbat's operational implementation of the mandate was a normal situation in which a state puts its troops at the disposal of others during a peacekeeping operation working under the orders of the UN and that is described in a report of the Secretary-General of the UN of 1994 as follows:

> '*In general, United Nations command is not a full command and closer in meaning to the generally recognized concept of "operational command". It involves the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole).*' (UN Doc. A/49/681 of November 21st 1994, paragraph 6).

4.43. The situation as described in the above held in any case till the fall of Srebrenica.

(c) Effective control of Dutchbat's actions in general by the State

4.44. Claimants formulate a number of general positions that according to them lead to all of Dutchbat's actions that form part of the accusations being attributed to the State. Based in part on these positions the District Court fills in the details about the criterion for *effective control* over said actions on the part of Dutchbat.

4.45. Given the option of *dual attribution* available we do not need to examine whether the UN also had *effective control* over Dutchbat's actions that form part of the accusations.

4.46. First and foremost the District Court hereby pronounces that in order to accept *effective control* there would be no requirement for the State in giving instructions to Dutchbat to have broken the structure of the chain of command at the UN or exercised independent operational authority to give orders. It comes down to the actual say over specific actions whereby all of the actual circumstances and the particular context of the case must be examined. In the Nuhanović and Mustafić cases the Appeals Court considered that there not only is the question significant as to whether the actions constituted implementation of a specific instruction the State had given but also whether in the absence of any such specific instruction the State had it in its powers to prevent the actions concerned. These considerations remained undisputed on cassation.

4.47. Referring to a quotation from the Claimants argue that the Dutch Government itself found that it did exercise effective control over Dutchbat despite transferring *command and control* and that for that reason alone there is room for attributing all of Dutchbat's actions to the State. The quotation concerned is as follows:

> '*The Minister of Defence, Voorhoeve, adopted the following position vis-à-vis NIOD namely that the regulation surrounding Command and Control in The Netherlands and the question as to where everyone's responsibility lay was more or less clear but that in practice it did not appear to be possible to separate these kinds of matters meaning they got mixed up together. According to him in a strict international law sense it was possible to argue that once The Netherlands had put units at the disposal of the UN the only right it still had was to withdraw its units but that everything else was up to the UN. The Hague would say about this: these military personnel are now UN blue helmets so this is no longer our problem. In practice however things were not like that, argued Voorhoeve.*' (NIOD, p. 2283).

4.48. The substance of this quotation provides insufficient grounds for Claimants' conclusion. It fits into the previously sketched framework for attribution in which transfer

of *command and control* over the operational implementation of the mandate to the UN is not decisive and leaves open the possibility that the State exercises *effective control* over Dutchbat's actions.

4.49. As summarised above in 2.18 there were within UNPROFOR Dutch officers appointed to various high levels of command. Claimants argue that this 'Dutch line' within UNPROFOR maintained close links with 'The Hague' (read: the Dutch Government hereinafter also referred to as: The Hague) crossing the UN's *command and control* meaning The Hague exercised continuous influence by passing formal lines and responsibilities.

4.50. The State correctly points out that the mere fact that Dutch military personnel were appointed to UNPROFOR does not mean *per se* that the State exercised *effective control*. Dutch officers worked in the UN chain of command whence operational implementation of the mandate was directed. It is usual for military personnel from countries that supply troops form part of the UN chain of command for UN peacekeeping operations.

4.51. Even the fact that Dutch UNPROFOR officers as and when necessary had direct contact with Dutchbat and in doing so missed a link or two in the UN chain of command is not *per se* accompanied by *effective control* of the State. Such direct contact was according to statements Nicolai made to the Parliamentary committee of inquiry prompted by the practical wish to discuss questions directly (PE hearings [= PCI interviews], p. 259). This contact did take place *inter alia* during the discussion about abandoning the observation posts between Nicolai and Karremans prior to issuing the *Post Airstrike Guidance* that we will discuss below and that took place within the UN chain of command.

4.52. Nor does the fact that Dutch officers in the UN chain of command maintained contact with The Hague constitute grounds for assuming *effective control*. Claimants argue that the influence of The Hague expressed itself *inter alia* in frequent requests for information. The State correctly points out that requests for information by the Dutch Government do not constitute exercise of *effective control*. In addition Nicolai's sigh that Claimants advanced contained in the NIOD Report namely, '*I phoned The Hague at one point and was pissed off when the people in The Hague started asking where the forward Air Controllers were. You can't get more crazy than them wanting to know that in The Hague.*' (p. 2626) the District Court understands this as apparently detailed requests for information. Other than Claimants argue these requests do not *per se* demonstrate any control being exercised by the Dutch Government over Dutch officers and/or Dutchbat during operational implementation of the mandate. Given the responsibility that the State had even after the transfer of *command and control* over the operational implementation of the mandate *vis-à-vis* Dutchbat (see: 4.41) contact between the Dutch Government and the Dutch officers at UNPROFOR would seem obvious.

4.53. A further general point is that communications between Dutch UNPROFOR officers and the Dutch Government is not accompanied by *effective control* unless in that regard we can talk of there having been orders or instructions to said Dutch officers or some other form of operational guidance by the State.

4.54. The fact has become established that in the period leading up to the fall of Srebrenica contact between The Hague on the one hand and the Dutch UNPROFOR officers and Dutchbat on the other hand was intensified, though on its own this would not constitute *effective control*. Claimants argue with reference to page 2276 of the NIOD Report that the DCBC in this period concerned itself more with operational matters. On

this page under the heading '*verhoudingen tussen DCBC en KL Crisisstaf*' [= 'relations between DCBC and KL Crisis Staff'] the relations between these two units are described *inter alia* as follows:

> '*As matters in Srebrenica became more and more tense under the political pressure of the moment DCBC began to get more and more involved with implementation of the operation and the dividing line between DCBC's tasks and those of KL Crisis Staff became vague.*'

That DCBC in relation to KL Crisis Staff 'concerned' itself more with operational matters again does not result in *effective control*; even leaving aside the fact that this concern can consist of heightened interest and need for information here above all as the State has sufficiently explained we are dealing with the relationship and division of tasks between two organisational units within The Netherlands.

4.55. Claimants further argue that in conflict with express orders of the UN there was 'an invariable line of conduct' at Dutchbat to allow its own interest to prevail. This is why according to them it has become established that Dutchbat's actions are the result of *effective control* being exercised by the State 'since military personnel hardly ever act on their own initiative'. Quite apart from the question whether the latter remark is true or is true in all circumstances these generalisations on the part of Claimants provide insufficient basis to be able to conclude that such actions were always preceded by instructions from the State.

4.56. With their arguments about Dutchbat's actions being in conflict with the orders the UN gave and their argument that the State may not appeal to *inter alia* inadequate training and preparation of Dutchbat in order to excuse itself for the accusations made against it Claimants do indeed lay a basis for attributing Dutchbat's actions to the State namely Dutchbat acting *ultra vires* over and against UN instructions. As to this the District Court deliberates as follows.

4.57. If a military force's *command and control* over operational implementation of the mandate is transferred to the UN and said military force then goes on to act beyond the authority given it by the UN or on its own initiative acts against the instructions of the UN as Claimants point out said military force acts *ultra vires* [= beyond its legal power or authority]. Such action is attributable to the State supplying the troops because the State has a say over the mechanisms underlying said *ultra vires* actions, selection, training and the preparations for the mission of the troops placed at the disposal of the UN. Moreover the State supplying the troops has it in its powers to take measures to counter *ultra vires* actions on the part of its troops given the fact that it has a say about personal matters and disciplinary punishments.

4.58. In order to attribute *ultra vires* actions to the State supplying the troops there is no requirement for said state to give any instruction or order relating to *ultra vires* action or that this specifically influences the case in some other way. What is decisive is that the State delivering the troops retains the powers it has after transfer of *command and control* to the UN as well as the relevant say in respect of and with it *effective control* over self-willed powers acting beyond the powers the UN has granted or against the instructions of the UN concerning the actions of troops put at the UN's disposal. In this regard the District Court points to the explanation of the ILO at Clause 7 DARIO in which *inter alia* the following is recorded:

'*Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters. This may have consequences with regard to attribution of conduct. (...) Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.*' (See under 7, p. 21).

4.59. That the UN is of the opinion that this kind of *ultra vires* action on the part of troops placed at its disposal must exclusively be attributed to it unless '*gross negligence or wilful misconduct*' occurs (see UN Doc A 50/995 of July 9th 1996 and UN Doc A 46/185 of 23 May 1991) alters nothing as far as the aforesaid is concerned. The fact of the matter is that this opinion of the UB is not decisive for attributing the actions of troops in the framework of peacekeeping operations according to the relevant valid norms.

4.60. We do not need to discuss whether *ultra vires* actions on the part of troops may be attributed (*dual attribution*) to both the sending state and the UN or that it is only appropriate to attribute such actions to the sending state as is argued in the literature.

(d) Claimants' additional arguments about attributing Dutchbat's actions in the period prior to the fall of Srebrenica

4.61. Based on Claimants' arguments the District Court now discusses whether there are grounds to attribute to the State certain actions by Dutchbat due to Voorhoeve's instruction to Dutchbat to avoid unnecessary casualties (i) or due to *ultra vires* actions on Dutchbat's part (ii).

(i) Attribution due to Voorhoeve's instruction to avoid unnecessary casualties

4.62. Claimants cite Voorhoeve's pronouncements on July 10th 1995 in the television programme NOVA:

'*During the coming weeks we have to give the highest priority to the safety of the Dutch military personnel. This is why the commanders are charged in the first place with avoiding casualties. I want to see all of those men and women come back home in one piece. (...) For this reason during the past few days we telephoned all the commanders and spoke with them. We do not wish to take any risks with Dutch personnel or defend any indefensible positions. Be wise and bring all of our boys and girls back home in one piece.*'

According to Claimants this quotation shows that the State did give Dutchbat instructions and that said instructions were given in any case as of July 8th 1995, as Voorhoeve speaks of 'the last few days'.

4.63. The District Court establishes that no earlier than July 9th 1995 from The Hague via the UN chain of command the instruction was issued to Dutchbat to avoid unnecessary casualties. As to this the District Court deliberates as follows.

4.64. The decision to take up *blocking positions* was taken on July 9th 1995 in Zagreb and was passed on that day to Dutchbat and to the Dutch Government. To the Parliamentary committee of inquiry Voorhoeve stated as follows:

'*Whilst we were discussing the blocking positions I expressed the hope that the commanders would take such measures as to ensure as few casualties as possible would fall.*' (PE hearings, p. 625).

In his letter to the Parliamentary committee of inquiry in answer to questions about *blocking positions* Van den Breemen writes as follows:

> '*The Minister too had considerable doubts and worries but agreed with me. In the end the commanders have to decide with the note in the margin to the effect that the political wish remained intact namely that unnecessary casualties must be avoided. If I remember correctly this was then briefly communicated to the UN. In the afternoon Nicolai phoned me to report an update of the latest state of affairs. I cannot remember precisely what I said in any case nothing important such as don't lose your bottle and all the best and don't forget: no unnecessary casualties.*' (PE hearings, p. 735).

To the Parliamentary committee of inquiry in answer to the question if he too was told to cause no casualties when given instructions about the blocking positions Franken replied as follows:

> '*in the evening I was informed that there was a message from the Minister of Defence Voorhoeve that contained the wish that no Dutch dead and wounded should fall. (...) Lieutenant Colonel Karremans informed me of this.*' (PE hearings, p. 67, the latter in answer to the question who communicated this to whom).

4.65. From the above it appears that from The Hague via the UN line of command the instruction was given to Dutchbat that when taking up the *blocking positions* as decided on July 9th 1995 no unnecessary casualties should be caused. There is no point of departure to be able to assess whether the instruction was given any earlier than July 9th 1995 or that it had any broader import than actions at the *blocking positions* or that it had some other, namely '*greener*' – i.e. more military character and was more risky than the '*blue*' actions in the context of the peacekeeping operation – as far as concerns the implementation of the mandate.

4.66. Just like Claimants the District Court is of the opinion that this instruction from Voorhoeve demonstrates the exercise of *effective control* by the State over the actions of Dutchbat. After all the State interfered in an operational matter for which moreover UNPROFOR had given a specific order and this was after the State had transferred *command and control* over the operational implementation of the mandate by Dutchbat to the UN and the say over this operational matter was reserved to the UN. This is not altered by the fact that the instruction matches up with the immediately preceding general instruction of the UN expressed in the *Post Airstrike Guidance* of May 29th 1995, '*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.*' (See 2.20). What is decisive here is that the State in giving Dutchbat this instruction interfered with the management of the operational implementation of the mandate by Dutchbat that it had already transferred to the UN.

(ii) Attribution due to ultra vires actions of Dutchbat

4.67. Now we have arrived at the point at which we can discuss the argument Claimants advanced namely of *ultra vires* acts on the part of Dutchbat in respect of the mandate (1) and when abandoning the observation posts (2).

(1) *Ultra vires* acts in respect of the mandate

4.68. Claimants argue that by making insufficient effort to protect the populace of the *safe area* Dutchbat acted contrary to the mandate. The State correctly points out that the resolutions and the mandate ascribe powers to Dutchbat. During operational implementation of the mandate Dutchbat acted under *command and control* of UNPROFOR. If it did act independently and beyond the powers given in the mandate the District Court is of the opinion that *ultra vires* acts on the part of Dutchbat may be attributed to the State.

4.69. Claimants' position that Dutchbat made insufficient effort to protect the populace in the *safe area* however is not related to independently exceeding the powers given in the operational implementation of the mandate by Dutchbat and thus to *ultra vires* acts under *command and control* of the UN. There are no grounds for attributing to the State Dutchbat's acts for implementation of and within the framework of the mandate.

(2) *Ultra vires* acts when abandoning the observation posts

4.70. Claimants argue Dutchbat abandoned observation posts whilst none of the criteria listed for abandoning said posts under 9b of the *Post Airstrike Guidance* of May 29th 1995 were met. According to Claimants only isolated positions in areas taken by Bosnian Serbs were allowed to be abandoned when lives were at risk or there were dead to be mourned over.

4.71. Referring to the NIOD Report Claimants note that contrary to the *standing order* to set light to everything when forced to abandon an observation post Dutchbat did not set light to observation post OP-E (p. 2005). The District Court leaves this remark without discussion in the light of the fact that it bears no relation to the heart of Claimants' accusation namely that Dutchbat abandoned the observation posts without offering any resistance and in doing so failed to provide Srebrenica with sufficient defence.

4.72. *Post Airstrike Guidance* was given to Dutchbat in the following context. On May 25th and 26th 1995 airstrikes were carried out on targets in the vicinity of the Bosnian-Serb Government centre in Pale. After this the Bosnian Serbs captured hundreds of UNPROFOR military personnel to use as hostages to prevent further airstrikes from taking place. On May 28th 1995 the Bosnian Serbs captured two of Britbat's observation posts taking some tens of British military personnel hostage resulting in Britbat withdrawing to its compound. That evening Nicolai had given Karremans the order to abandon a number of observation posts. Karremans disagreed with this. Then in discussions between Nicolai and Karremans awaiting further instructions from Smith expected the following morning a compromise was reached whereby preparations would be made where necessary to abandon the observation posts within one hour. The observation posts would be maintained till further orders were received or till severe danger threatened with Nicolai giving the instruction that no unnecessary risks should be taken. In the night of 28th and 29th May 1995 Dutchbat was given the instruction about the preparations for abandoning the observation posts and implemented it. The further instructions from Smith came in the form of the *Post Airstrike Guidance* of May 29th 1995 (NIOD, pp. 1991 to 1996).

4.73. The instruction Claimants cite concerning the abandoning of the observation posts under 9b of the *Post Airstrike Guidance* should be viewed neither as being separate from the context we gave above nor as being separate from the rest of the *Post Airstrike Guidance*. This begins with the report of the Serbian reaction at the end of May 1995 to the close air support [= CAS] given and the UN instruction namely:

'*(...) that the execution of the mandate is secondary to the security of UN personnel. The intention is to avoid loss of life defending positions for their own sake and unnecessary vulnerability to hostage taking.*'

Then the *Post Airstrike Guidance* mentions targets for UNPROFOR actions in the coming period *inter alia*:

'*Using force if necessary including CAS and Air Strikes as a last resort (...) Maintaining as best as we can our position as Peacekeepers endeavouring to fulfil our mandate.*'

Then follows the more specific instruction that Claimants cite:

'*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 Commander's discretion when they are threatened and in his judgement life or lives have or will be lost. (...)*'

4.74. Claimants' position therefore that observation posts were abandoned 'without offering any resistance' is not compatible with the facts. Observation post OP-E was abandoned after the Bosnian Serbs had surrounded it, Dutchbatters had heard explosions and a volley of fire and the Bosnian Serbs warning them by megaphone to leave it forthwith. When the garrison left the observation post in a YPR, an armed vehicle, the Bosnian Serbs fired at them. Observation post OP-F was abandoned after it had come under fire from VRS tanks shooting at the ABiH and was then seized by the Bosnian Serbs who were clearly making preparations to attack said observation post. Other observation posts too were continually being abandoned after being surrounded or coming under fire from the Bosnian Serbs. That held too for observation post OP-M that during the days prior to its being abandoned was fired at on July 9th 1995. Shortly before the garrison at observation post OP-M left that day incoming fire from the VRS came ever closer till a shell destroyed the gate to the observation post. Right after Dutchtbat had left the observation post it received a direct hit and came under fire from a heavy calibre machinegun (NIOD, p. 2258).

4.75. Quite apart from the discrepancy between facts and arguments without further explanation we would be unable to see that Dutchbat by abandoning the observation posts in the given circumstances acted contrary to the instruction under 9b of the *Post Airstrike Guidance* especially if in doing so we take into account the context and the additional substance of the *Post Airstrike Guidance*.

4.76. The above would not be other if Dutchbat could perhaps have chosen to offer more resistance to the Bosnian Serbs by for example shooting at them. Claimants' references to the *Rules of Engagement* and other UN instructions may be of no avail to them in this regard. These instructions grant powers to use force and regulate the use of such powers but do not oblige its use in any way. That an instruction could have been carried out in some other way does not mean without further ado that actions have been carried out contrary to the instruction. That holds also for the possibility that others would have acted differently – as Claimants suggest in Janvier's explanation to the French Parliamentary committee of inquiry when he was talking in general terms about Dutchbat's actions in this regard where *inter alia* he said:

> '*si nous avions eu 400 Français à Srebrenica, cela aurait été totalement diffèrent car nous nous serions battus.*' ['if we had had 400 Frenchmen at Srebrenica it would have been totally different because we would have hit back'] (Report of the French Parliamentary committee of inquiry, Part 2, p. 123).

4.77. The conclusion reads that there was no question of Dutchbat acting *ultra vires* by abandoning observation posts prior to the fall of Srebrenica – that may not therefore be attributed to the State.

4.78. Given the fact that Dutchbat's actions in this matter as we explained earlier have already been attributed to the State on the grounds of Voorhoeve's instruction we may leave without discussion here whether Dutchbat could be said to have acted *ultra vires* when abandoning the *blocking positions* as Claimants argue.

(e) Conclusion as to effective control of the State over Dutchbat's actions prior to the fall of Srebrenica

4.79. From the above it follows that given the lack of *effective control* the State had with the exception of actions surrounding the *blocking positions* Dutchbat's actions prior to the fall of Srebrenica are not attributable to the State. This concerns the following:
i) Claimants' accusation that Dutchbat did too little to arrange for convoys with food and humanitarian help reaching the *safe area*
ii) Claimants' accusation that Dutchbat did too little to block the advance of the Bosnian Serbs and to protect the populace in the *safe area* from this especially by:
a) Not using the knowledge it had about the intended attack by the Bosnian Serbs
b) Sticking to the demilitarisation agreements and refusing to give back confiscated weapons when the Bosnian Serbs were approaching the town of Srebrenica
c) Preventing active resistance by the ABiH
d) Abandoning observation posts.
These accusations remain without further discussion. We discuss later whether Dutchbat's actions in connection with the *blocking positions* were lawful or unlawful.

(f) Effective control by the State over Dutchbat's actions after the fall of Srebrenica

4.80. The previously normal situation in which a state puts its troops to work at the disposal of and under the orders of the UN during a peacekeeping operation changed substantially when Srebrenica fell at the end of the afternoon of July 11th 1995. After that a period of transition was entered into in which the State had a say in the actions of Dutchbat when providing humanitarian assistance to and preparing the evacuation of the refugees from the *mini safe area*. As to this the District Court deliberates as follows.

4.81. In the morning of July 11th1995 when the Bosnian Serbs approached the town of Srebrenica the situation was discussed within the DCBC. Those present included *inter alia* Voorhoeve, Van Baal and Van den Breemen. After that Van Baal and Van den Breemen travelled to Sarajevo to speak with Janvier. They had received the instruction from Voorhoeve to conduct the talk with Janvier in the context of the meeting held that same morning. Van Baal had stated before the Parliamentary committee of inquiry the following:

> '*We agreed amongst ourselves that we would stick to the position that the implementation of the task should be directed towards protecting the populace and that we should do so for*

as long as possible in addition taking into account that fighting at that point was not or was hardly worthwhile. Allowing casualties to fall unnecessarily would then no longer be a point of discussion. The third point was that we had to take into account that we could find ourselves in a situation in which Dutchbat would have to evacuate along with the populace to MKF territory [District Court's addition: Muslim Croat Federation]. *Those were the conclusions of the meeting that we took to general Janvier in Zagreb. That is the basis on which we conducted talks with him.*' (PE hearings, p. 344).

4.82. In the meantime when Van Baal and Van den Breemen arrived in Sarajevo Srebrenica had fallen and the mission to protect the *safe area* had failed. The talks that Van Baal and Van den Breemen conducted that evening with Janvier were about the situation that had come about after the fall of Srebrenica. In Van Baal's own words in his statement about the talks with Janvier to the Parliamentary committee of inquiry:

'*The accent then shifted in fact from UNPROFOR's military operation to the problem of the refugees.*'

and:

'*We said: Dutchbat and the populace will evacuate together or after each other. That was agreed as such with General Janvier. (...)*' (PE hearings, pp. 344 to 345).

4.83. In the cases of Nuhanović and Mustafić the Appeals Court decided that what was discussed between Janvier, Van den Breemen and Van Baal could not be understood in any other way than that the UN in the person of Janvier and the Government of The Netherlands in the person of Van den Breemen and Van Baal decided in mutual consultation that in the new situation in which Srebrenica had fallen and the UN mission had in fact failed Dutchbat should direct its efforts towards its humanitarian task and the preparations for the evacuation of Dutchbat and the refugees from the *mini safe area.* In doing so the Government of The Netherlands took part in this decision-making process at the highest level. This decision was accompanied by a transitional period in which matters in Potočari were settled.

4.84. Taking as its starting point Van Baal's statement during the preliminary witness hearings in the Nuhanović and Mustafić cases the District Court fixes the time when the transitional period became operative at about 11 pm on July 11th 1995:

'*Later that day I went to Zagreb shortly after noon. I arrived there sometime in the afternoon. Talks with General Janvier began about one hour after we had arrived. The talks took place with a number of interruptions and went on till late in the evening our last contact being after ten o'clock.*'

4.85. Dutchbat's withdrawal was prepared during the transitional period and the State had independent powers to withdraw it (see 4.41). With the joint decision with the UN not to evacuate Dutchbat any earlier than at the same time as the refugees or after the refugees the State tied implementation of these powers to the provision of humanitarian assistance to preparations for the evacuation of the refugees in the *mini safe area* during the transitional period. This too was discussed in contacts between Voorhoeve and Nicolai on July 11th 1995. Nicolai made the following statement about this to the Parliamentary committee of inquiry:

> '*After I had informed the Minister about the fact that the airstrikes had been brought to an end he asked me whether I knew of Dutchbat's extraction plan. I answered: "Yes" (...) I informed him that after lengthy consultations that in fact lasted only briefly we saw no other solution in Sarajevo than to evacuate the populace who were completely unprotected and present there under wretched circumstances; we had no means of doing anything about it. From the point of view of security or guaranteeing security of the refugees we saw no other option than to include in the evacuation Dutchbat and any other UN means required since we did not wish to leave it to the Serbs. He agreed with this at once.*' (PE hearings, p. 271).

About this Voorhoeve stated:

> '*(...) The second consideration that was discussed directly and prominently – Mr Nicolai emphasised this – was that the blue helmets were needed to care for the refugees. We agreed about this at once. (...).*' (PE hearings, p. 626).

4.86. After this talk Nicolai phoned Karremans instructing him to arrange for the evacuation of the refugees at and around the compound. About this Nicolai stated:

> '*I had already said earlier on that I phoned Karremans immediately after my talk with Minister Voorhoeve and gave him the instruction to raise with the Serbs the arrangements for the evacuation of the refugees (...)*' (PE hearings, pp. 272 to 273).

During his first talks with Mladić Karremans informed him that he was also acting on behalf of the Government of The Netherlands.

4.87. The foregoing facts and circumstances lead the District Court to conclude that during the transitional period the State did have *effective control* over providing humanitarian assistance to and preparation of Dutchbat's evacuation of the refugees in the *mini safe area*. This action therefore on the part of Dutchbat may be attributed to the State. Such *effective control* was limited to this and did not spread to Dutchbat's involvement with the stream of refugees that prior to commencement of the transitional period moved during the course of the afternoon from the town of Srebrenica to the *mini safe area*. Such *effective control* was also not related to refugees outside the *mini safe area* or to Dutchbat's actions outside the *mini safe area* e.g. the abandonment of observation posts after the fall of Srebrenica.

4.88. Such *effective control* by the State over Dutchbat's actions during the transitional period continued until Dutchbat withdrew on July 21st1995 after the refugees had been evacuated from the *mini safe area*. Resolution 1004 (see 2.42) did not lead to any other actual situation during the transitional period: the Bosnian Serbs did not give heed to the call it contained to discontinue their offensive and to withdraw from the *safe area* forthwith. Nor did it appear that said resolution led to any order to Dutchbat to take positions in and around Srebrenica or in any other way to attempt to retake Srebrenica by military intervention.

4.89. For this reason too if and inasmuch as Dutchbat acted contrary to Gobilliard's order (see: 2.37) this *ultra vires* action must be attributed to the State.

4.90. The District Court considers that inasmuch as it was related to the refugees Gobilliard's order was limited to those refugees in the *mini safe area* that Dutchbat had demarcated and where the refugees were staying when the order was given. On July 11th 1995 Karremans had informed the Bosnian Serbs that he regarded the compound and the

surroundings as a *safe area* (NIOD, p. 2,604). In this actual situation with due regard for the text of Gobilliard's order in which the task of protecting the refugees '*in your care*' follows on immediately after that of withdrawal of Dutchbat in Potočari we are unable to understand the order as reasonably relating to anything other than just the refugees in the *mini safe area*.

(g) attributing specific actions of Dutchbat to the State after the fall of Srebrenica

4.91. Based on what has been deliberated upon in the above Claimants' following accusations against the State fall within the scope of the State's *effective control* over Dutchbat's actions during the interim period:
(i) Not reporting war crimes
(ii) Not providing the refugees with adequate medical care
(iii) Handing in weapons and other equipment during the evacuation of the refugees
(iv) Maintaining the decision not to allow refugees into the compound that as will become clear was taken and implemented prior to the commencement of the transitional period and prior to Gobilliard's order
(v) Separating the men from the other refugees during the evacuation
(vi) Cooperating in the evacuation of refugees who had sought their refuge in the compound.

4.92. Claimants argue that as the State had *effective control* over Dutchbat not reporting war crimes under the Geneva Conventions oblige us to attribute this to the State but we may leave this without discussion here.

4.93. The following accusations concerning Dutchbat's actions lie beyond the scope determined in 4.87 of said *effective control* of the State over Dutchbat's provision of humanitarian assistance to and preparations for the evacuation of the refugees during the transitional period:
(i) Not abandoning observation posts after the fall of Srebrenica
(ii) Handing over weapons and other equipment to the Bosnian Serbs
(iii) Dutchbat allegedly advising the male refugees to flee into the woods
(iv) Failing to sound the general alarm when the men fled to the woods
(v) Not allowing all of the refugees into the compound.
This is to do with Dutchbat's actions in respect of refugees beyond the *mini safe area* (under (i) up to and including (iv) and/or – as established below – Dutchbat's actions prior to the commencement of the transitional period (under (iii) up to and including (v)). The District Court will now proceed to examine whether the State in some other way had *effective control* over one or more of said actions on the part of Dutchbat and that for that reason may be attributed to the State even at this late stage.

(i) Not abandoning observation posts immediately after the fall of Srebrenica

4.94. After the fall of Srebrenica Dutchbat abandoned the last observation posts namely on July 12th 1995 observation posts OP-C, OP-N, OP-P, OP-Q, OP-R and on July 15th 1995 observation post OP-A. Claimants argue that in doing so Dutchbat acted *ultra vires* since this was contrary to Gobilliard's order '*Concentrate your forces into the Potocari Camp, including withdrawal of your Ops. Take all reasonable measures to protect refugees and civilians in your care.*'

4.95. It does not appear that Gobilliard's order that Karremans received by fax was

passed on within Dutchbat to the garrison at the observation posts who therefore did not act upon said order. Dutchbat did not immediately and under pressure of the Bosnian Serbs abandon the observation posts. In doing so *vis-à-vis* this order it did act *ultra vires*. Not leaving the observation posts immediately after the fall of Srebrenica is thus attributable to the State.

(ii) *Ultra vires* actions due to giving up weapons and other equipment

4.96. Claimants argue that Dutchbat's laying down and handing over of weapons on July 11th 1995 at the *blocking positions* 'is only the more incomprehensible' when we take into account Gobilliard's order as follows: '*Giving up any weapons and military equipment is not authorised and is not a point of discussion.*' Claimants then go on to point to the total number of weapons missing as referred to on page 2,250 of the NIOD Report i.e. 199 rifles, 25 UZIs, 38 pistols, 18 individual .30 machine guns and 11 individual .50 machine guns. The District Court understands Claimants' position thus that from the point at which Gobilliard had ordered them not to do so they accuse Dutchbat and with it the State of having handed over weapons and other equipment to the Bosnian Serbs.

4.97. It has now been established that in the transitional period during the evacuation of the refugees in the *mini safe area* Dutchbat acting on the orders of the Bosnian Serbs handed over weapons and other equipment as well as vehicles that they were using to accompany the buses filled with refugees. Dutchbat also handed over weapons and other equipment when surrendering the last *blocking position.* In conclusion we have now established that the garrisons at the observation posts were doing this too even after the fall of Srebrenica.

4.98. Gobilliard's order did not allow for the 'surrender' of weapons and other equipment under any circumstances whatsoever. This is why the actions reported under 4.97 are to be categorised as being *ultra vires* actions on the part of Dutchbat in respect of Gobilliard's order and attributable to the State on those grounds.

(iii) The alleged advice to the male refugees to flee into the woods

4.99. As regards the flight of the men into the woods Claimants go on to refer to page 2480 of the NIOD Report and point 61 of the judgment of the ICTY in the Krstić case. The reference to the NIOD Report concerns the chapter '*The journey from Srebrenica to Tuzla*', this has to do with a group of men and members of the 28th Division of the ABiH who travelled from Srebrenica to Tuzla. On July 11th 1995 these men gathered during the course of the day in Susnjari and in the night of July 11th to 12th 1995 left in the direction of Tuzla. In the Krstić case the statement records the following (in legal ground 60):

> '*As the situation in Potočari escalated towards crisis on the evening of 11 July 1995 word spread through the Bosnian Muslim community that the able-bodied men should take to the woods and form a column together with the members of the 28th Division of the ABiH and attempt a breakthrough towards Bosnian Muslim-held territory in the north.*'

4.100. The State adduces that the men had themselves decided to flee to the woods and refer to the UN Report that states as follows:

> '*The majority of Srebrenica's men of military age did not seek refuge in Potočari. The vast majority of them, including the civilian and military authorities, as well as some of their fami-*

> *lies, decided instead that they would risk making their way on foot to Tuzla, some 50 km away, through Serb lines and through forested, partly mined territory. They decided that they would fight their way through if they had to. By mid-afternoon, the men who were preparing to make the journey began to gather in the hamlet of Susnjari, located in the north-western portion of the enclave.*' (No. 310).

4.101. We have established that around the time of the fall of Srebrenica approximately 10,000 to 15,000 men from the *safe area* fled to the woods in the vicinity of the town of Srebrenica. A large number of them about 6,000 according to the ICTY (Krstić legal ground 83) fell into Bosnian Serb hands after which they were no longer seen alive. Claimants argue that this flight took place on the advice of Dutchbat and that Dutchbat that knew the men were in danger on July 11th 1995 should have sounded the general alarm and taken action. The State disputes whether any such advice was ever given.

4.102. In what follows the District Court acts on the assumption that Dutchbat did give the alleged advice and thus refers to it hereinafter as 'the advice'.

4.103. The advice is discussed *inter alia* in [Claimant 5]'s statement as follows:

> '*When you enter Srebrenica you arrive at a crossroads close to a petrol station; one street leads to Potočari, the other street in the direction of the woods. Dutchbatters at the time used hand signals to indicate that the men had to go to the woods.*'

Given the location of the crossroads just outside the town of Srebrenica this statement evidently relates to the start of the refugees' journey to Potočari. Even if [Claimant 5] had been in the rear of the stream of refugees the point at which she arrived at the crossroads must have been at the commencement of the transitional period. The District Court hereby takes into account that the town was empty when Srebrenica fell at about 4.30 pm.

4.104. [Claimant 2] who arrived at the *mini safe area* on July 11th 1995 at 23:00 hours made the following statement about the advice:

> '*I then saw a lorry with old people and Dutch soldiers. Said lorry stood at a fork in the road between Potočari and Srebrenica. I saw how Dutchbatters used hand signals to indicate the men had to go into the woods.*'

If this statement relates to the same location as that about which [Claimant 5] had made her statement what we deliberated on under 4.101 holds equally for the advice she refers to. If that is not so given the time when [Claimant 2] arrived in the *mini safe area* this advice could equally have been given prior to the commencement of the transitional period. We are unable however to exclude the fact that the advice dates from Gobilliard's order. Since that order bore no relation to the refugees beyond the *mini safe area* there is no place for attribution due to *ultra vires* actions *vis-à-vis* this order.

4.105. From the written witness statements of [Claimant 1], [Claimant 4], and [Claimant 10] in which the advice was also mentioned whilst there is no evidence of where the advice was given we do know that the male refugees were urged to go to the woods with hand signals and that this advice was disseminated using megaphones and interpreters. In [Claimant 1]'s statement we find that there was a hole in the fence surrounding the compound but that she and her son were not allowed in when they arrived at there. The hole in the fence was closed prior to 16:30 hours (NIOD, p. 2618). According to her statement [Claimant 4] arrived at the *mini safe area* in the evening at about eight

o'clock. There is no evidence that [Claimant 10] who does not mention any time of arrival came any later than the other Claimants who arrived at the *mini safe area* prior to the commencement of the transitional period. That means in addition that the advice about which [Claimant 1], [Claimant 4], and [Claimant 10] make statements must have taken place prior to the commencement of the transitional period.

4.106. The District Court is of the opinion that neither from the passages just cited nor from the additional arguments of parties and the case papers facts and circumstances appear that could lead to the judgment that the State exercised *effective control* over the disputed advice to the male refugees to flee into the woods.

4.107. Inasmuch as the disputed advice was given after Gobilliard's order as previously deliberated upon it still holds that this order has no bearing on these refugees. Even if the advice were to be contrary to this order it would not lead to attribution to the State. We do not therefore need to answer the question whether the advice was *ultra vires* in respect of this order.

4.108. The above leads the District Court to the conclusion that the advice is not attributable to the State. That means the District Court does not have to get round to examining whether the disputed advice was given and to assess its lawfulness. Since this fits in with the deliberations relating to the lawfulness and/or unlawfulness of the actions that may be attributed to the State below and superfluously the District Court dedicates one of its deliberations to the lawfulness and/or unlawfulness of the stated advice.

(iv) Neglecting to sound the general alarm about the flight of the male refugees into the woods

4.109. Claimants argue that on July 11th 1995 Dutchbat could have sounded the general alarm about the flight of the male refugees since they were aware of the real risk these men were running.

4.110. This action of which Dutchbat stands accused is not attributable to the State: it falls beyond the scope of the State's *effective control* during the transitional period that relates to Dutchbat providing humanitarian assistance and preparing the evacuation of the refugees from the *mini safe area*. Gobilliard's order is not aimed at these refugees who were outside the *mini safe area*. Moreover there is no evidence that would compel us to accept that the State had *effective control* over said neglect.

4.111. Here too it still holds that although the District Court does not have to come to a judgment concerning the lawfulness of the actions of which Dutchbat is accused since these are not attributable nevertheless it gives its opinion superfluously and in one of its deliberations in Chapter 2 under B.

(v) Not allowing all of the refugees into the compound

4.112. In the early evening of July 10th 1995 during consultations Karremans and Franken decided to allow refugees into the compound at a point at which refugees were expected to come there that same evening. In doing so they decided to tailor the number of refugees they would allow in to the number of people who could fit into the large vehicle hallways on the compound and to allow in refugees through a hole in the fence at the south-west corner of the compound. On the evening of July 10th 1995 the hole was cut into the fence. No refugees arrived at the compound that evening. When during the course

of the afternoon of July 11th 1995 the stream of refugees got going refugees were let in to the compound through the hole in the fence made earlier till the vehicle hallways were full. At 16:30 hours at about the same time as the fall of Srebrenica the gates were opened of one of the factory premises close to the compound. At that point the improvised access to the compound had already been closed. (NIOD, p. 2,618).

4.113. From the foregoing it appears that both the decision not to allow all of the refugees into the compound and the actual implementation of this by closing the hole in the fence the vehicle hallways on the compound were full from before the commencement of the transitional period. This means Dutchbat's actions fall beyond the scope of the *effective control* of the State over them in the transitional period.

4.114. Gobilliard's order was given after the decision by Karremans and Franken not to allow all of the refugees into the compound and shortly after its actual implementation. The question then as to whether in doing so Dutchbat acted *ultra vires* in respect of the order is answered in the negative. Nor is there any evidence of the State's *effective control* over this action prior to the transitional period.

4.115. Claimants' accusation on this point however is regarded as something that should be viewed together with the maintenance of this situation during the transitional period and after Gobilliard's order. To that extent this accusation does fall within the scope of the State's *effective control* over Dutchbat actions in the transitional period. Inasmuch as here we can speak of *ultra vires* actions in respect of Gobilliard's order that is aimed at these refugees it is on that basis moreover attributable to the State.

(h) Conclusion on effective control of the State over Dutchbat's actions after the fall of Srebrenica

4.116. From the above it follows we may attribute to the State the following actions of Dutchbat after the fall of Srebrenica:
(i) Not leaving the observation posts
(ii) Not reporting war crimes
(iii) Not providing the refugees with adequate medical care
(iv) Handing over weapons and other equipment to the Bosnian Serbs
(v) Maintaining the decision not to allow any refugees into the compound
(vi) Separating the men from the other refugees during the evacuation
(vii) Cooperating in the evacuation of refugees who had sought refuge at the compound.

(B) Attributing to the State other actions of which it is accused

4.117. The criterion of *effective control* holds too for attribution of the other actions of which the State is accused that relate to the decision-making process within the UN and NATO. Here we are talking about the State exercising decisive influence over the supposed unlawful acts of these international organisations. To be able to establish whether said influence did exist we would have to assess all of the actual circumstances and the special context of the case.

4.118. The District Court discusses whether the State did have *effective control* over (a) the absence of close air support (b) stopping close air support (c) the failure of French helicopters to appear and thwarting plans for the recapture of Srebrenica.

(a) The absence of close air support [= CAS]

4.119. Claimants accuse the State primarily of thwarting and calling off at the last minute the deployment of the air force in the period from July 6th up to and including July 11th 1995 alternatively not managing the deployment thereof in this period. According to Claimants the State exercised *effective control* over this. In essence the matter comes down to this: Claimants arguments boil down to the decisions within the UN chain of command about close air support being prompted by the State's overpowering wish to guarantee Dutchbat's security including that of about 30 Dutchbatters taken hostage by the Bosnian Serbs, though according to Claimants they had gone along with the Bosnian Serbs voluntarily and for that reason to avoid every risk. According to Claimants the State had discontinued or had others discontinue various requests for close air support for which there was operational necessity. The State disputes it had *effective control* over deployment of the air force.

4.120. The District Court notes that Claimants' primary arguments relate to obstructing the deployment of *close air support*, the air force for direct support of UN troops on the ground and not of *air strikes,* an air attack with a destructive character. In what follows only the air force in the form of *close air support* forms part of the discussion.

4.121. When answering the question whether the State had *effective control* over the deployment of the air force the District Court argues first and foremost that the State had no formal powers that were in any way connected with the deployment of the air force. The procedure for requesting *close air support,* called *Blue Sword,* is the sum of two parts: approval by the UN and approval by NATO.

4.122. According to the UN procedure the battalion commandant goes through the sector headquarters UNPROFOR in Sarajevo to request close air support (for Dutchbat: Sector North East in Tuzla). The *Close Air Support Committee* consisting of the most important officers and civil officials then assesses the request after which UNPROFOR commandant sends it through to UNPF headquarters in Zagreb. In Zagreb the *Crisis Action Team* under leadership of the Chief of Staff Kolsteren then considers the request and submits it for signature to the *Force Commander* Janvier who in turn requests permission from the Special Representative for Bosnia-Herzegovina Akashi. All officials weigh up the request based on a checklist of fixed criteria.

4.123. NATO approval for a request for CAS went as follows. For the purposes of communication with the UN peacekeeping force in the former Yugoslavia NATO liaison officers were present at their headquarters in Sarajevo and Zagreb. In Sarajevo there was an *Air Operations Coordination Center* (AOCC) for contact with *Combined Air Operations Center* (CAOC) NATO air force in Vicenza. In Zagreb there was a liaison cell for contact with Vicenza and besides this there was a NATO officer present for contact with the headquarters of the *Commander-in-Chief Allied Forces Southern Europe* (CINCSOUTH) in Naples the American Admiral Leighton Smith. Though AOCC in Sarajevo had no formal powers it was important in providing information about the specific circumstances under which air strikes had to be carried out. Through the prior warning it gave to NATO decisions could be prepared there and airplanes be made ready. It was nevertheless CINCSOUTH that had to give permission for close air support.

4.124. We have been able to establish that during the period from July 6th up to and including July 11th 1995 within the UN chain of command nine requests for *close air support* were formulated. Of these nine two requests were allowed.

4.125. Claimants argue it was always the Dutch General Nicolai who rejected or postponed the requests. Assuming Nicolai did postpone the requests this would not in and of itself mean there was any *effective control* of the State over the deployment of the air force. To do that we would have to establish that the State had decisive influence over the decision-making process regarding close air support. According to Claimants as of July 8th 1995 this was the case.

4.126. Firstly Claimants point to the meeting that took place in the evening of July 8th 1995 in the presence of Nicolai at *Bosnia Herzegovina Command* in Sarajevo where the options regarding the provision of CAS to Dutchbat were discussed. Nicolai then decided not to submit any '*pre approved*' request for CAS in case the Bosnian Serbs decided to further press their attack but in the morning of July 9th 1995 to deploy *air presence*. The request was not submitted. According to Claimants this course of action on the part of Nicolai can be explained by the fact that Voorhoeve had at that moment already phoned with an instruction from the State that precedence had to be given to the safety of Dutch military personnel. Claimants point to the TV interview that Voorhoeve gave to NOVA on July 10th 1995 cited earlier and argue here that the instruction was apparently given as of July 8th 1995.

4.127. We established earlier that on July 9th 1995 from The Hague through the UN chain of command the instruction was given not to cause any unnecessary casualties. We earlier assessed this instruction as only relating to the *blocking positions.* From Voorhoeve's statement in the same interview that the deployment of the air force was '*inevitable*' we can further derive that this instruction did not also mean that Dutchbat's safety had to prevail above that of the CAS. No other facts or circumstances are argued or proven from which it would follow that the State exercised decisive influence over Nicolai's actions on July 8th 1995.

4.128. Secondly Claimants argue that in the morning of July 9th 1995 Karremans discontinued Dutch F16 *air presence* and then forbade *forward air controllers* to leave the compound. According to Claimants at the basis of these interventions on the part of Karremans lies the same instruction just discussed by Voorhoeve as that which Nicolai is supposed to have received. The deliberation at 4.127 about Voorhoeve's instruction holds here too. The disputed actions on the part of Karremans therefore provide no proof of the *effective control* of the State.

4.129. Thirdly Claimants ask for attention to be paid to the requests for CAS that on July 10th 1995 Nicolai through 'State intervention' is supposed to have thwarted. In this connection they point to the following passage in the NIOD Report (p. 2,181):

> '*At 12 noon a discussion was conducted between Zagreb and Nicolai about the positions of The Hague in relation to CAS; it was confirmed that this was available. First however there had to be a request for Close Air Support and that had at that moment not yet reached Zagreb. The paperwork in Sarajevo for a Blue Sword Request had been prepared. The simultaneous judgment of the intelligence staff at Zagreb was that the VRS would not attack. On board the USS Lasalle where NATO Admiral Smith was located there was serious concern about where precisely the VRS were and what the Bosnian Serbs had in mind. There the idea was active that the VRS had come very close.*'

4.130. Without any further facts and circumstances argued and proven the District Court is of the opinion that from this passage there appears to be no evidence that the

State exercised *effective control* over deployment of the air force on July 10th 1995. Apparently '*Haagse standpunten*' [= positions adopted in The Hague] – moreover it is not clear precisely what they contained – were discussed that day within the UN chain of command. As we explained earlier it is not unusual to have an exchange of information and views between the UN and the sending state during a mission such as the one currently being discussed. From the passage cited there appear to be other factors within the UN chain of command that could have influenced the decision-making process about CAS such as the absence of a specific request and the assessment of the intelligence staff at Zagreb.

(b) Stopping CAS on July 11th 1995

4.131. Claimants argue that *effective control* of the State follows from the circumstance disputed by the State namely that in the course of July 11th 1995 at around noon of that day within the UN and NATO chain of command approved CAS had been discontinued. In that connection Claimants point to an equally disputed telephone conversation of July 11th 1995 at about 12:30 hours that Van den Breemen with Voorhoeve at his side conducted with Kolsteren. In that conversation Van den Breemen is supposed to have remarked that safety was paramount now that the task threatened to become inoperable (NIOD, p. 2,236). They further point to a passage recorded under number 306 of the UN Report relating to a telephone conversation between Akashi and Voorhoeve in the afternoon of July 11th and where of relevance the following content:

> '*The Special Representative of the Secretary-General recalled having received a telephone call from The Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with the request.*'

Finally Claimants cite the Secretary-General of the UN during a press conference on July 14th 1995 that the truth had to be acknowledged that it was the Government of The Netherlands that had asked the UN to make no further use of the air force (NIOD, p. 2,317).

4.132. We have established that at about the time of the fall of Srebrenica and thus in the afternoon of July 11th 1995 Voorhoeve phoned Akashi and requested that CAS be discontinued. Parties do not dispute the fact that the decision to discontinue CAS at about the time of the fall of Srebrenica was taken by Akashi and Janvier; parties only dispute whether Voorhoeve's phone call just referred to was what prompted them to do so. If as Claimants argue by means of the phone call just described at around 12:30 hours *effective control* over deployment of the air force was being exercised we are unable to see why Voorhoeve still saw occasion to phone Akashi in the afternoon. Seen in that light there are insufficient indications that CAS was discontinued immediately after it had begun due to intervention by the State given the additional fact that at about 14:45 hours bombs were being dropped.

4.133. The District Court notes that in the quotation reproduced under 4.131 from the UN Report the suggested decisive influence of the State does not recur in the message that was sent to the Secretary-General of the UN shortly after July 11th 1995 that reads as follows:

> '*Admiral Smith has agreed to our request, proposed by The Netherlands minister of defence to the SRSG, to suspend air presence and close air support missions over Srebrenica. It is our view that they would endanger the civilian population and our own personnel who are now intermingled with Serb forces.*' (NIOD, p. 2,301).

Nowhere is there any suggestion of decisive influence of the State in a written confirmation Janvier sent to Leighton Smith on July 11th 1995 concerning the suspension of *close air support*: suspension was suggested by '*the extreme confusion on the ground in the Srebrenica area and especially the current BSA threat to the thousands of Bosnian refugees in the Northern part of the area, as well as the UNPROFOR forces*' (NIOD, p. 2,301). That *Deputy Force Commander* Ashton stated to NIOD that even before Voorhoeve had phoned Akashi had taken the decision not to deploy any further *close air support* is something the District Court regards it as relevant. This statement corresponds with statements by Kolsteren and an employee of Akashi (NIOD Report, p. 2305). Moreover De Jonge and De Ruiter made statements to the effect that calling off the *close air support* was not connected with the phone call between Voorhoeve and Akashi but that it was based on military reasons and the fact that the Bosnian Serbs had become intermingled with the refugees and the Dutchbatters (NIOD Report, p. 2305).

4.134. In the light of Claimants' arguments the District Court is of the opinion that given the State's dispute with arguments and the facts and circumstances sketched in the previous paragraphs there are insufficient facts to be able to conclude that on July 11th 1995 the State exercised decisive influence on discontinuing CAS. We pass over therefore the offer of evidence Claimants made for this purpose.

4.135. Claimants further cite the then American diplomat Holbrooke, the French General Quesnot, the French Minister of Defence Million, the American Ambassador to The Hague Dornbush, the Permanent Representative of The Netherlands to the UN Biegman, all of whom held a position that was supposed to confirm that the State discontinued or had discontinued the CAS. In as much as these quotations are already related to specific actions on the part of the State they do not refer to any actions other than those already discussed above. These quotations therefore require no further discussion.

4.136. Claimants have their alternative position namely that the State acted unlawfully by not targeting CAS within the UN chain of command and working it out in greater detail. Quite apart from this the accusations of the State 'neglecting to do things' are also not attributable to it in any case since given the formal decision-making process described above the State had no powers to effect the deployment of CAS.

4.137. Thus the District Court arrives at the conclusion that the failure of CAS to appear and the fact that it was discontinued in the period from July 6th up to and including July 11th 1995 is not attributable to the State.

(iii) The failure of French helicopters to appear and to be deployed and the thwarting of the plans to recapture Srebrenica

4.138. Claimants point to a French offer referred to in the NIOD Report of July 10th 1995 to supply Tigre helicopters with crew if Dutchbat were to get into any further difficulty (p. 2291). It is an established fact that the State never got round to accepting this offer.

4.139. Quite apart from the answer to the question if the French offer would have had

any effect since the planning and preparation of the operation would easily require 72 hours (NIOD, pp. 2291 to 2292) the State did not have full or final say over deployment of helicopters for Dutchbat's purposes. The fact is that prior to any such action that the mandate did not foresee there would first have had to be agreement reached within the UN and it would have had to be attuned to NATO since helicopters are vulnerable and need air cover. This stands in the way of attributing to the State the failure of the Tigre helicopters to appear and to be deployed.

4.140. Claimants argue that the State thwarted plans to recapture Srebrenica. Their arguments are aimed at the plan of the then French President Chirac to recapture Srebrenica using parachutists under the command of his military advisor Quesnot who had said the following: '*Give me two regiments I will jump and retake Srebrenica.*' This French plan was made known at a press conference on July 11th 1995. Claimants point to the reaction of the Council of Ministers to these plans that found said announcements to be hardly credible given the background developments (NIOD, p. 2411 ff.). Claimants also point to the opinion of Van den Breemen that retaking Srebrenica would be irresponsible as long as there continued to be Dutch nationals in the *safe area* since they would be at risk. According to Claimants this evidences the fact that there was a constant pattern in the politics of The Netherlands and the army command to completely subordinate the interests of the refugees to that of themselves.

4.141. As to this the NIOD Report states that Van den Breemen had an investigation carried out into the options available to gain possession of the *safe area* by military means and that the conclusion was '*that retaking the enclave was a pious hope but that the troops needed to do so just weren't available*' and that '*Van den Breemen (...) had called a helicopter operation with six hundred personnel a complete non-operation that could moreover endanger those Dutch nationals still present in the enclave.*' The NIOD Report then goes on to describe how the Government of The Netherlands had asked for the British and the American views via their accredited attachés in The Hague as follows: '*their reaction was no different to that of The Hague.*' The NIOD Report goes on to state that the UN in the words of Janvier and Akashi had rejected military intervention that other countries too continued to hold back from accepting the plan and that more reactions rejecting the plan came in that would have affected the demeanour of representatives at the UN and/or NATO and meant this was not carried out (NIOD, pp. 2414 to 2417).

4.142. From the description of the occurrences in the NIOD Report to which Claimants refer there does not appear to be any *effective control* by the Government of The Netherlands over the implementation of the French plan. In addition Claimants have not put forward any specific facts and circumstances from which to deduce this. The Government of The Netherlands was one of the Governments that along with the UN had doubts as to the feasibility of the French plan for the recapture of Srebrenica.

4.143. Claimants further emphasise that the Government of The Netherlands did submit a notice of objection to the text of Draft Resolution 1004 in which it was written '*to use all resources available*' and had a preference for the form of words '*to use his best efforts*' and The Netherlands in connection with this withdrew as co-sponsor of this resolution that on July 12th 1995 was adopted unanimously. This position of the Government of The Netherlands provides no evidence of *effective control* just as the assessment of Van Kappen the Dutch military advisor to the Secretary-General Boutros-Ghali to the effect that the recapture of Srebrenica from both a military and a political point of view was not feasible. Van Kappen acted as an official of the UN. It has not been argued nor proven that

the Government of The Netherlands influenced his estimation in any way. As previously explained the fact that Van Kappen is a Dutch national in no way implies that the State exercised *effective control* or that Van Kappen's estimation is attributable to the State.

(C) Conclusion attributing Dutchbat's actions to the State

4.144. From the above it follows that the ensuing actions of which Dutchbat is accused are attributable to the State:
(i) Abandoning the *blocking positions*
(ii) Not reporting war crimes
(iii) Not providing the refugees with adequate medical care
(iv) Handing in weapons and other equipment to the Bosnian Serbs
(v) Maintaining the decision not to allow refugees into the compound during the transitional period
(vi) Separating the men from the other refugees during the evacuation
(vii) Cooperating in evacuating refugees who had sought refuge in the compound.

2. Unlawfulness of Dutchbat's actions attributable to the State

4.145. Claimants argue that unlawful acts on the part of Dutchbat took place under both national and international law. The District Court now examines whether that is the case. We discuss *seriatim* the applicable law and the assessment framework (A) and the unlawfulness of the accusations attributable to the State as summarised earlier (B). There follows under (C) the conclusion regarding the claims based on an unlawful act and the claim specifically tailored to the supposed violation of the Genocide Convention.

(A) Applicable law and assessment framework

4.146. The District Court first handles the applicability of the provisions of international law to which Claimants appeal and the assessment framework it provides (i). The District Court then deals *seriatim* with the national law that according to Dutch international private law applies to the claim under the heading unlawful act (ii) and into the substance of these standards governing unlawful acts (iii).

(i) International law: applicable law and assessment framework

4.147. Claimants adopt the position that the State has violated international law in the following ways:

- Violating the mandate by not supplying humanitarian assistance and not defending the *safe area*
- Violating international humanitarian law (the Geneva Conventions, Article 87 of the First Supplementary Protocol to these Conventions and the SOP) by not reporting war crimes Dutchbat had observed whereby Claimants also appeal to Article 1 paragraph 3 of the UN Charter
- Failing to prevent genocide as prescribed in Article I of the Genocide Convention
- Violating human rights *inter alia* the right to life for which protection is provided in Article 2 ECHR and Article 6 ICCPR.

In addition to the treaty provisions already mentioned Claimants appeal to the underlying legal principles as part of the international law of custom.

The State disputes that Claimants may derive rights from the provisions or legal principles to which they appeal directly.

4.148. Under Section 93 of the *Grondwet (Gw)* [= Constitution] provisions of treaties and decisions of international law organisations may be legally binding on all as to their substance with legally binding powers coming into effect after they are published. For a provision of a treaty or a decision of an international law organisation to become qualified as 'binding on all' it must be eligible for immediate applicability in cases submitted to a court of law. It must be a provision that is sufficiently precise as to the right it confers or the obligation it imposes on subjects so that in the national system of laws they can operate without question as objective law. On other forms of international law namely those whose provisions in the form of treaties and international decisions are not binding on all as well as the totality of the international law of custom whether or not characterised by *ius cogens* Section 93 Gw does not apply. Said right remains in effect within the system of laws of The Netherlands by means of application of national law for example through the law governing the unlawful act.

4.149. Whilst UNPROFOR's mandate is indeed regarded as a decision by an international law organisation it only has a powers-creating character and does not call to life any obligations Claimants can enforce at a court of law for UNPROFOR i.e. Dutchbat.

4.150. The District Court now handles the applicability of the human rights treaties ECHR and ICCPR (a) and after that the applicability of other standards of international law including the obligation to prevent genocide (b).

(a) ECHR and ICCPR

4.151. Articles 2 and 3 and Articles 6 and 7 ICCPR are obligations binding on all in the sense in which that is understood in Section 93 Gw.

4.152. In Article 2 paragraph 1 ECHR and Article 6 paragraph 1 ICCPR the right to life is established as a fundamental human right in Article 3 ECHR and Article 7 ICCPR incorporates the prohibition of torture and inhuman treatment. From these treaty obligations there arises a positive obligation on the State to protect the right to life and the physical integrity of the person subject to the legal system of the states that are Contracting States.

4.153. Under Article 1 ECHR the Contracting States to the convention all '*within their jurisdiction*' guarantee the rights and freedoms as enacted in the first title of the Convention. Under Article 2 paragraph 2 ICCPR Contracting States undertake to respect and guarantee convention rights '*within its territory and subject to its jurisdiction*'. Although the concept of jurisdiction in both conventions is not identical it is accepted that both concepts be interpreted in the same way and parties do not argue otherwise. In respect of both conventions it holds that only in very extreme cases does a state have jurisdiction beyond the borders of its own territory.

4.154. Where of relevance here in the Al-Skeini et al judgment against the United Kingdom (July 7th 2011, no. 55721/07) ECHR gave the following opinion:

> '*134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (...).*
> *135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Gov-*

ernment (...). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (...).
136. In addition, the Court's case law demonstrates that, in certain circumstances, the use of force by a State's agent operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. (...) The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.
(...)
138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (...). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions.
(...)
139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (...). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (...)'

4.155. Referring to this judgment and the SOFA Claimants argue first and foremost that Dutchbat's actions fall under the jurisdiction of the State since the deployment of military personnel to protect civilians is part of the core tasks of any state Dutchbat was the only military power of any significance in the *safe area* that had to protect the civilians against the Bosnian Serbs and Dutchbat's presence was of crucial importance for the existence of the *safe area*.

4.156. The District Court dismisses this argument that is also regarded as aimed at the *mini safe area* and the refugees present there. Dutchbat's deployment did not concern the exercise of '*public powers*' by *the State* in the form of '*executive or judicial functions*' in the *safe area* that would normally be implemented by the Government of Bosnia-Herzegovina. Prior to the fall of Srebrenica Dutchbat was operating within the *command and control* structure of the UN as previously explained. SOFA is an agreement between the UN and Bosnia-Herzegovina from which no starting point for the formal authority of the State can be derived.

4.157. Again referring to the Al-Skeini et al judgment against the United Kingdom Claimants further argue that the jurisdiction of the State alongside that of the UN exists because Dutchbat was in fact the only military power in the *safe area* and as such exercised '*effective control*' over the *safe area*. They also argue that the refugees in the *mini safe area* were under Dutchbat's supervision. In this position the District Court follows Claimants in part.

4.158. It is important to draw a distinction between the *effective control* criterion in the context of attributing actions to the State and in the context of the jurisdiction of the State which criterion is applied in both cases according to the circumstances of the case. In this way a state can have *effective control* over an area without exercising *effective control* over the specific actions of individuals in that area and vice-versa.

4.159. The District Court considers that there is nothing to show that through Dutchbat the State had '*physical power and control*' as referred to in the judgment over the populace in the *safe area*. The same holds for the refugees who after the fall of Srebrenica remained in the *mini safe area*. In addition the actual situation as described above did not form a proper basis for the conclusion that through Dutchbat the State had '*domination*' over the *safe area*. For this it is again relevant that Dutchbat operated within the *command and control* structure of the UN and that Dutchbat had limited manpower.

4.160. The District Court is of the opinion however that through Dutchbat after the fall of Srebrenica the State had *effective control* as understood in the Al-Skeini judgment over the compound. The compound was a fenced-off area in which Dutchbat had the say and over which the UN after the fall of Srebrenica exercised almost no actual say any more. In addition we have established the fact that other than the *mini safe area* the Bosnian Serbs respected this area and left it untroubled after the fall of Srebrenica.

4.161. The foregoing leads the District Court to the conclusion that by means of Dutchbat the State was only able to supervise observance of the human rights anchored in the ECHR and ICCPR *vis-à-vis* those persons who as of the fall of Srebrenica were in the compound. The State was not able to do this for the populace of the *safe area* prior to the fall of Srebrenica and even less after that *vis-à-vis* the refugees in the *mini safe area* that lay beyond the compound or beyond the *mini safe area*. This assessment is confirmed in the conclusion of the Supreme Court in its profuse deliberations in the Mustafić and Nuhanović cases namely that after the fall of Srebrenica the State exercised jurisdiction in the sense in which that is understood by the ECHR and ICCPR at the compound.

(b) Other standards of international law including the obligation to prevent genocide

4.162. Claimants recognise that in the case of violations of the other standards of international law requested in principle only states can effectuate liability. They point out that in both the literature and legal practice this is experienced as being unsatisfactory and argue that this principle ought to be broken and that individuals too should be able to submit claims against states based on standards of international law. In doing so they point *inter alia* to *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* that the General Assembly of the UN adopted in Resolution 60/147 of December 16th 2005.

4.163. This argument fails. After all from the preamble of said resolution seventh paragraph it appears expressly that the resolution does not call into existence any new international or national obligations:

> '*(...) Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms. (...)*'

The substance of the resolution makes the provisions Claimants are invoking not as yet 'enforceable'.

4.164. The foregoing implies that Claimants' declaratory judgment the substance of which is that the State violated its obligation to prevent genocide as in the Genocide Convention is not allowable. After all the obligation to prevent genocide as is evidenced by the text of the Convention and the history of how it came about now holds only between Convention states themselves. We can leave without further discussing whether this obligation is regarded as a *ius cogens* rule since any such rule is not yet a provision binding on all in the sense of Section 93 Gw and does not create enforceable obligations to which Claimants are legally entitled.

4.165. As previously deliberated upon in the legal system of The Netherlands the international law of custom operates through application of national law. The District Court is of the opinion that this moreover provides for a '*mechanism for the implementation of existing legal obligations under international human rights law and international humanitarian law*' as wished for in the aforementioned *Basic Principles* of the Member States.

(ii) Applicable national law

4.166. Just as Claimants the District Court is of the opinion that the unlawfulness according to national law of the actions of which Dutchbat is accused and that are attributable to the State must be assessed according to the law of The Netherlands. As to this it deliberates as follows.

4.167. The State correctly has not denied that unlawful actions of the State as Claimants argue consist of the exercise of public authority i.e. *acta jure imperii.* Till the current Section 10:159 BW came into force the international private law of The Netherlands contained no codified special rule governing the choice of law for *acta jure imperii*. Section 10:159 BW stipulates that *acta jure imperii* should be assessed according to the law of the State that exercised said authority. According to the explanation the basis of said indicative ruling is that:

> '*the exercise of government authority is pre-eminently an area left to the sovereignty of the State concerned. In doing so foreign law should not be applied to the question whether in exercising authority we can speak of there being unlawful acts and if so to what extent this leads to liability.*'

(Note of amendment to the proposed law Enacting and introducing Book 10 on International private law in the Civil Code (Law to enact and introduce Book 10 of the Civil Code) (TK 2009/10, 32137, no. 7).

4.168. In 1995 no legal community-wide rule governing the choice of law existed for law applicable to agreements based on unlawful acts. There did exist however the COVA judgment referred to by the State (HR November 19th 1993, NJ 1994, 622) that formulated a jurisprudential rule governing the choice of law that meant the starting point was the applicable law of the country where the unlawful act had taken place. This rule governing the choice of law was codified in 2001 in the *Wet Conflictenrecht Onrechtmatige daad* (hereinafter to be referred to as: WCOD) [= Unlawful Act (Conflict of Laws) Act].

4.169. In the Explanatory Memorandum to the WCOD that contains no special rule for *acta jure imperii* there is *inter alia* the following:

> '*The legislative bill only lays down the most important rules of the international unlawful act and in so doing ties in with the COVA judgment referred to.*' (TK 1998/99, 26608, no. 3, p. 2.).

From this explanation the District Court deduces that not all of the rules of unwritten private law in The Netherlands are codified in the WCOD and this apparently includes the now codified rule governing the choice of law that relates to the very rare situation whereby the State becomes liable for government troops outside The Netherlands.

4.170. The District Court further considers that the *acta jure imperii* has for decades had a special place in the international private law of The Netherlands when answering the question whether a state enjoys immunity from jurisdiction. In that connection the thought in the explanation to 10:159 BW lies equally at the basis of the starting point namely that in cases of *acta jurii imperii* it may only be summoned to appear before a court of law on its own territory and beyond that enjoys immunity from jurisdiction.

4.171. The foregoing leads the District Court to the opinion that the law of The Netherlands applies to Claimants' valid claim concerning the unlawful act. That we are dealing here with actions in the context of a UN mission does not lead to any other opinion given the fact that as earlier deliberated upon it may be attributed to the State. Nor does the fact that Bosnian law was applied to the Nuhanović and Mustafić cases where likewise there was a valid claim based on an unlawful act having taken place lead to any other opinion. In those cases the applicable law was not in dispute and for that reason did not have to be officially determined.

4.172. Moreover from the deliberations of the Appeals Court in the Nuhanović and Mustafić cases the District Court deduces that in order to answer the question whether specific actions were unlawful it makes no difference whether the assessment is based on Bosnian law or the law of The Netherlands. Upon being asked at the sitting the State informed the court that any differences between both legal systems would only emerge when settling the amount of immaterial damage.

(iii) Applicable norms for assessing accusations of unlawful acts

4.173. Here we discuss whether Dutchbat's actions constitute an unlawful act according to the law of The Netherlands (Section 6:162 BW).

4.174. For the State the following valid international norms additionally flesh out the standard of care in Section 6:162 paragraph 2 BW.

4.175. First and foremost the substance of the mandate is relevant since it was Dutchbat's task by being present and where necessary with deployment of CAS to protect the populace in the *safe area* against armed attack and other hostile actions on the part of the Bosnian Serbs. This idea of protection should always have been uppermost in the mind of Dutchbat during its acts of commission and/or omission.

4.176. Of relevance too are the underlying universal legal principles enshrined in Articles 2 and 3 ECHR (and 6 and 7 ICCPR). These imply that the military force whose task it was to protect the refugees in the *safe area* was there to protect the right to life and the integrity of the human person inasmuch as that may reasonably asked of it.

4.177. SOP 208 that Dutchbatters ought to have respected prescribed that all information, including explanations about observed war crimes had to be reported immediately in writing to *Bosnia Herzegovina Command*. That as the State argues and in the absence of knowledge Claimants dispute the obligation only held for verified crimes is insufficiently explained partly because this criterion does not appear from the only available secondary source in this case namely the NIOD Report. SOP 208 was based on all relevant international conventions, charters and Security Council resolutions relating to human rights and war crimes including the Geneva Conventions (NIOD, p. 2653). SOP 208 was intended to provide a short-term deterrent for combative parties and for the longer term to create the potential for prosecuting those committing war crimes (NIOD, p. 2655).

4.178. As we deliberated upon earlier States parties to the Genocide Convention are obliged to prevent genocide. The State is party to this convention. In the case of Bosnia and Herzegovina *versus* Serbia and Montenegro the ICJ [= International Court of Justice] devoted various general deliberations to the obligation resting on the State:

> '*(1) The Obligation to Prevent Genocide*
> *(...)*
> *430. (...) it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position in respect of the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.*
> *431. (...) In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the* existence of a serious risk that genocide will be committed*.* *From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent. (...)*' (Emphasis provided by the District Court).

4.179. As state and convention party the State must be guided by these standards of international law that partly serve to protect Claimants' family members and that continue to work through in the standard of care set out in Section 6:162 paragraph 2 BW.

4.180. When implementing the standard of care applicable to Dutchbat's actions attributable to the State the general measure holds that given what the management knew at that point during the actions of which they are accused could they reasonably have decided and acted in the way in which they did?

4.181. Moreover it is important to know that because the matter had to do with a war situation there is no reason for a cautious assessment of Dutchbat's actions. In the subsequent judicial determination of actions of a military force all of the relevant facts and circumstances of the case must be taken into account including the fact that here it is a matter of taking decisions under extreme pressure.

4.182. The requirement of a causal link (*conditio sine qua non)* is present if it can be established with a sufficient degree of certainty that without the unlawful actions the damage would not have occurred. In this case we have therefore to examine whether with a sufficient degree of certainty it may be established that the men from the *safe area* would not have been killed without the unlawful actions of the State.

4.183. Inasmuch as in doing so the obligation to prevent genocide plays any role the following deliberation of the ICJ in the case of Bosnia-Herzegovina and Serbia and Montenegro is relevant:

> '*462. The Court cannot however leave it at that. Since it now has a rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law (...) The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.*'

(B) The lawfulness or unlawfulness of Dutchbat's actions attributed to the State

4.184. The assessment of the lawfulness or unlawfulness of Dutchbat's actions being attributable to the State is the sum of two parts namely (i) Dutchbat's actions beyond the *mini safe area* prior to and after the fall of Srebrenica and (ii) Dutchbat's actions within the *mini safe area* after the fall of Srebrenica.

(i) Dutchbat's actions beyond the mini safe area

4.185. Here the District Court discusses *seriatim* Claimants' accusations in terms of (a) Dutchbat's actions in relation to the *blocking positions* (b) not abandoning observation posts after the fall of Srebrenica and (c) handing in weapons and other equipment at the observation posts.

(a) Dutchbat's actions in relation to the blocking positions

4.186. Claimants accuse Dutchbat of not or of not correctly implementing the formal order it received from Sarajevo on July 9th 1995 at 22:00 hours to take up *blocking positions* to prevent any further advance by the Bosnian Serbs towards the town of Srebrenica. In this connection Claimants point out that the commander of Dutchbat's B company Captain Groen interpreted incorrectly the order by instructing his men that only if there were a direct attack could they use self-defence and only then if it was necessary whereby initially they were to fire over the heads of the Bosnian Serbs. According to Claimants in doing so Dutchbat allowed its own safety to prevail over that of the task with which it had been charged namely to protect the populace in the *safe area* as is also evidenced by Karremans' statement in response to the current order namely, '*that he thought his troops were too good to be sacrificed*'. According to Claimants Dutchbat had abandoned the *blocking positions* too quickly and too easily and at the last *blocking position* taken had acted contrary to Gobilliard's order by leaving it unfortified.

4.187. The District Court deliberates as follows. Janvier classed the *blocking positions* Dutchbat was to take up as being '*a line in the sand*' (the so-called '*horizontal 84*', a line on the map at approximately one-and-a-half kilometres south of the town of Srebrenica). Besides the order of July 9th 1995 to take up the *blocking positions* a warning was issued to the Bosnian Serbs from the UN chain of command that an attack on the *blocking positions* Dutchbat had taken up would be regarded as unacceptable and could lead to deployment of CAS. Within Dutchbat Franken explained the order to Groen. In doing so Franken made it known that the order should be regarded as being a '*green assignment*'. Franken thus confirmed the assignment by fax that B company had to set up a line of defence and had to prevent the Bosnian Serbs from getting through to the town of Srebrenica by all available means. The fax message underlined the fact that this was a '*green assignment with serious intent*'. In his statement to the Parliamentary committee of inquiry Groen explained his chosen way of implementing the assignment as follows:

> '*We had the advantage that everyone had grown up with the entire situation and everyone had already been in the area for six months. So everyone knew how the situation had developed and everyone knew that we still had to try and act to de-escalate the situation. If we had opened fire without giving it serious thought we would have risked forfeiting our UN status in the eyes of the adversary even if perhaps we had not thought so ourselves. Then the question is what would this achieve; you run the risk of just being seen as an adversary like the jihadis. For that matter the jihadis had tried constantly to get us onto their side and to give up our impartial status so that we could fight against the Bosnian Serbs together. Naturally we wished to avoid that as we were impartial there and that was precisely why we could act as a human shield between the Bosnian Serb forces and the civilian population which is in my opinion what it was all about.*
> *(...)*
> *We knew we could shoot in self-defence. We did not go there to open fire immediately at the first signs of movement. It remained the case that we had to act to de-escalate to use our common sense to continue to monitor the situation. We were not meant to react to every provocation.*
> *(...)*
> *If we got into a situation in which we ran the risk of actually opening fire there was always an intervening step: shooting over people's heads. If by doing so we could bring about a situation in which people did not pursue an attack we would have achieved the same goal only this time without casualties and without any further escalation. This is always an intervening step.*' (PE hearings, p. 15).

4.188. The NIOD Report reveals the following. On July 10th 1995 Dutchbat had taken up four *blocking positions* (Bravo 1-4): Bravo-1 was at Stupine to the west of the town of Srebrenica, Bravo-2 and Bravo-4 were on the road from Zeleni Jadar to Srebrenica. Bravo-3 was at observation post OP-H to the east of Srebrenica on the road that leads to Srebrenica from Mt. Kvarac via Crni Guber. Since you could cover the position of Bravo-2 from Bravo-4 in practice Bravo-2 became redundant. On July 10th 1995 Bosnian Serbs shot at Bravo-3 three times. From Bravo-3 Dutchbat shot over the heads of the VRS units. At 19:13 hours Groen gave the order to the garrison at Bravo-1 to withdraw to Srebrenica. After this the garrisons at Bravo-3 and 4 began to withdraw. There from Bravo-1 Dutchbat fired shots over the heads of VRS units. In the night of July 10th to 11th 1995 the garrisons at Bravo-1, 3 and 4 remained in the town of Srebrenica. On the orders of Franken at 10:44 hours the garrison of Bravo-1 moved 500 metres to the south. At 11:17 hours Franken gave the instruction to shoot 'at will'. After coming under fire from VRS lorries Bravo-1 received the order to withdraw to the compound at Srebrenica. On July 11th 1995 after CAS had been given that led to heavier attacks from the Bosnian Serbs Groen gave Bravo-1 the order to abandon its position and together with the garrisons from Bravo-3 and 4 to withdraw from Srebrenica in the direction of Potočari. Franken then gave Groen the order to take up a new *blocking position* close to where the road turns off to go to Susnjari just to the south of the factory complexes at Potočari. This *blocking position* was abandoned under threat from VRS units and disarmed by Bosnian Serbs.

4.189. At heart Claimants' accusations target Groen's choice and instruction to act to de-escalate the situation at the *blocking positions* and Dutchbat's actions consequent upon said instruction. The order from Sarajevo relating to the *blocking positions* that speaks of doing '*everything possible*' to '*fortify these positions including reinforcing them*' according to the District Court provides enough room for Groen's chosen manner of implementing it. Claimants' sole argument that Groen's choice was 'incomprehensible', or that Dutchbat could have implemented the order in some other way e.g. by using as Claimants suggest more force does not mean this is contrary to the order. Moreover the District Court is unable to agree with Claimants' position that Dutchbat gave up the *blocking positions* too readily. In doing so the District Court also takes into consideration the fact that Dutchbat had insufficient equipment to be able actually to stop the advance of the Bosnian Serbs on the ground. Claimants have not contradicted the fact that Dutchbat with the arms it had was only in a position to shoot at the Bosnian Serb infantry and not at the same time at the artillery and the tanks that formed the greatest threat to Dutchbat and the populace in the *safe area*. Besides this it is also relevant to take as being established that the Dutchbatters in their *blocking positions* were facing the overpowering manpower of the Bosnian Serbs and were thus in a severe minority. Nor could Dutchbat be expected to keep on manning the *blocking positions* when requests for CAS were not being honoured by the UN chain of command and when on July 11th 1995 CAS did indeed arrive it did not have the desired effect but led precisely to an intensification of the Bosnian Serb attacks.

4.190. The Secretary-General of the UN commenting in general about Dutchbat not firing directly at the Bosnian Serbs concluded:

> '*Had they engaged the attacking Serbs directly it is possible that events would have unfolded differently.*' (UN Report, no 472).

He goes on immediately to provide a nuance to this conclusion as follows:

> '*At the same time, it must be recognized that the 150 fighting men of Dutchbat were lightly armed and in indefensible positions and were faced with 2,000 Serbs advancing with the support of armour and artillery.*'

The Secretary-General goes on to conclude:

> '*Ultimately, it is not possible to say with any certainty that stronger actions by Dutchbat would have saved lives, and it is even possible that such efforts could have done more harm than good.*' (No 473).

4.191. The conclusions of the Secretary-General of the UN quoted above and that are not part of any discussion between parties raise the question if a more robust approach on the part of Dutchbat at the *blocking positions* as Claimants support could be regarded as in any way a 'better' alternative than the way in which Dutchbat chose to implement the order. No facts or circumstances have been argued or appear on which basis the question could be answered unequivocally in the affirmative.

4.192. The foregoing leads the District Court to the conclusion that in the light of the facts and circumstances it knew about at the time Dutchbat could reasonably have decided and acted as it did in relation to the *blocking positions*. On this point then there is no question of any unlawful acts.

4.193. The foregoing applies also to the handing over of the weapons and other equipment when abandoning the last *blocking position* on July 11th 1995. This happened after VRS troops with whom Dutchbatters were speaking aimed their weapons at the Dutchbatters and made them ready to fire (NIOD, p. 2250). It appears that the Dutchbatters did not have a realistic alternative when under threat of arms they were urged to hand over their weapons and other equipment. That they did so contrary to the orders of Gobilliard is in itself insufficient to qualify their actions *vis-à-vis* Claimants as unlawful.

4.194. We can leave whether the other criteria for an unlawful act have been met therefore in the middle.

(b) Not leaving the observation posts after the fall of Srebrenica

4.195. Claimants accuse Dutchbat that instead of withdrawing to the compound and using there all the means at their disposal to protect the refugees they waited at the observation posts to see what was going to happen.

4.196. This accusation fails to hit its target in respect of observation post OP-A that was abandoned on July 15th 1995 that during the evacuation of the refugees fulfilled a role as a relay station for radio traffic between the battalion staff at the compound on the one hand and Dutchbat vehicles that accompanied the refugee convoys on their way to Kladanj, on the other hand (NIOD, p. 2,255).

4.197. The garrison at the observation posts that were abandoned on July 12th 1995 fell into the hands of the Bosnian Serbs. The Bosnian Serbs dropped the garrison of observation post OP-P off at the gate to the compound on July 12th 1995 at around 22:00 hours (NIOD, p. 2,253). The garrison of observation post OP-C was taken under escort of the Bosnian Serbs to Milici. The Bosnian Serbs brought the garrison of the other observation posts to Bratunac.

4.198. We are unable to exclude the possibility that if all of the observation posts had been abandoned right away none of these Dutchbatters or at least less of them would have

fallen into the hands of the Bosnian Serbs. It has neither been argued nor proven however that the evacuation of the refugees from the *mini safe area* would have taken place in some other way and in particular that men would have escaped death or that Dutchbat would have acted differently if the Dutchbatters who fell into the hands of the Bosnian Serbs had been in the *mini safe area* during the evacuation of the refugees and the garrison of observation post OP-P had arrived there earlier. The causal link between immediately leaving the observation posts and the loss Claimants suffered is missing too. We can leave without discussion as to whether abandoning the observation posts is an unlawful act.

(c) Handing in weapons and other equipment at the observation posts

4.199. We have established that when taking the observation posts on July 12th and 15th 1995 the Bosnian Serbs took weapons and other equipment as spoils of war. The garrison of observation post OP-M laid down their weapons on the ground after they had come outside having been signalled to do so by the Bosnian Serbs who then took whatever they wanted out of the observation post including the YPR stationed there at the time. The garrison of observation post OP-P allowed itself to become disarmed when the post was surrounded by tanks and infantry and Bosnian Serbs who searched the observation post and took with them the YPR. The Bosnian Serbs – who with approximately 25 men had forced their way into observation post OP-Q and surrounded it with one hundred men – when taking the post had seized the weapons and accompanying munitions of the garrison who before that had taken the opportunity to destroy all of the documents, the maps and the mortar's firing mechanism. Under threat the garrison of observation post OP-R had handed over their weapons to the roughly 20 Bosnian Serbs who had forced their way into this post only to plunder it along with the YPR that was stationed there. The garrison of observation post OP-A had rendered the YPR, the antitank weapon and the mortar unready prior to leaving the observation post and then before meeting the Bosnian Serbs the viewfinder and the thermal viewer that they had brought with them. The Bosnian Serbs took from the Dutchbatters the weapons and the flak jackets (NIOD, p. 2,251 to 2,257).

4.200. ABiH also took weapons and equipment as spoils of war namely from the garrison of observation post OP-C: in the evening of July 11th 1995 before the Bosnian Serbs took this observation post on July 12th 1995 ABiH soldiers under threat of weapons robbed the garrison of various items including their weapons, munitions and back packs. In doing so one Dutchbatter had to hand in his flak jacket after a weapon had been held to his head (NIOD, pp. 2,253 to 2,254).

4.201. It has neither been argued nor proven that Dutchbatters not handing in their weapons and equipment was a realistic option as in a number of cases they had anyway rendered unfit for use weapons and other equipment and were able therewith to preclude others from using them. In the given circumstances therefore the Dutchbatters who had no choice but to comply were able reasonably to decide and act as they did. The single fact that in doing so they acted contrary to Gobilliard's order renders their actions not unlawful in respect of the Claimants.

(ii) Dutchbat's actions in the mini safe area during the transitional period

4.202. After a number of general deliberations of importance when assessing Claimants' specific accusations about Dutchbat's actions in the *mini safe area* (1) a discussion of the accusations follows (2).

(1) General deliberations

4.203. Firstly the District Court reflects on the situation in the *mini safe area* in the transitional period (a) then during the evacuation of the refugees from the *mini safe area* (b) and the genocide of the men who came from the *safe area* and the war crimes the Bosnian Serbs committed in Potočari (c). After that the District Court will discuss Dutchbat's observation of war crimes the Bosnian Serbs committed (d) and what Dutchbat knew or could have suspected about the fate of the male refugees the Bosnian Serbs took away from the *mini safe area* (e). Finally the District Court will reflect on what Dutchbat knew or could suspect as to the fate of the men who did not flee to the *mini safe area* but to the woods (f).

(a) The situation in the *mini safe area* in the transitional period

4.204. After the fall of Srebrenica a *mini safe area* was created consisting of Dutchbat's compound in Potočari and the area in the vicinity to the south of the compound on both sides of a road where *inter alia* a number of factory hallways and a bus depot were located. There were about 150 Dutchbatters at the compound. The *mini safe area* was cordoned off with tape. Dutchbat had blocked the approach roads to this area with armed vehicles and had set up perimeter checkpoints at the *mini safe area*. Approximately 5,000 refugees had been accommodated. The remainder of the refugees were in the part of the *mini safe area* located beyond the compound.

4.205. After the fall of Srebrenica about 20,000 to 25,000 refugees from there sought refuge at the *mini safe area.* The District Court agrees with this and with the reiteration of the facts referred to (see 2.35) The total number of refugees matches the number of refugees the ICTY established were in the *mini safe area.* The precise number of refugees is difficult to establish even according to the NIOD. We are not ruling out then that there were about 30,000 refugees beyond the compound as Claimants assert. That corresponds with the estimate cited from the MSF and the *United Nations Military Observers* (UNMO) in the NIOD Report (on p. 2620) The District Court's assessment would not be any different however if we were to take Claimants' number of refugees referred to as our starting point.

4.206. The majority of the refugees consisted of women, children and elderly people (Krstić legal ground no 37). It remains unclear as to how many men had sought their refuge to the *mini safe area.* Based on an internally prepared extrapolation by co-workers of the prosecutor at the ICTY for the purpose of the Krstić case NIOD has accepted that probably around 2,000 men were in Potočari of whom three-quarters were of fighting age i.e. 16 to 60 years of age (NIOD Report, p. 2620). The ICTY deliberated that according to witness estimates at least 300 men were at the compound and between 600 and 900 in the rest of the *mini safe area* (Krstić legal ground no 37) and that the Bosnian Serbs selected and carried off about 1,000 men from the *mini safe area* (Krstić legal ground no 66). The District Court takes as its starting point the fact that the men formed a small minority within the totality of the group of refugees in the *mini safe area.*

4.207. Greater clarity exists as to the number of men at the compound. On July 13th 1995 a list was drawn up of men of fighting age that became known as '*the 239 list*' or '*the Franken list*'. The list consisted of 251 names. Around 70 men refused to put their names on the list because they were afraid of problems instead of protection. The NIOD Report concluded that about 320 men were at the compound (NIOD, p. 2659). This matches up with witness estimates of at least 300 men to which the ICTY refers (Krstić legal ground no 37).

4.208. In the *mini safe area* circumstances were poor. The ICTY deliberated as follows:

> '*Conditions in Potočari were deplorable. There was very little food or water available and the July heat was stifling.*' (Krstić legal ground no 38).

And:

> '*The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and the small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound*' (IGH February 26th 2007, legal ground no 284).

4.209. On 12th and 13th July 1995 these circumstances deteriorated visibly. In answer to the question whether there was anything he could say about the hygiene at the *compound* Franken made the following statement to the Parliamentary committee of inquiry:

> '*There wasn't any. That's probably the best answer I can give. People were so panic-stricken that they were doing their doings in the hallway entirely understandably for that matter. When that occurs where there are 5,000 people in a temperature of 30 degrees above zero sitting in a bare concrete hallway you can imagine what that's like. We didn't have any water for them to wash in though we did manage to arrange for water for babies and handtowels and that sort of thing that the men could hand in and that could be used as nappies for babies and small children. People were sitting there impassively in that filthy mess and women were lying there giving birth; it's most unusual. Let me just put it like that.*' (PE hearings, p. 74).

4.210. When asked how long the refugees could be held at the compound and the surrounding area from July 11th 1995 Franken made the following statement to the Parliamentary committee of inquiry:

> '*People were already dying. We had buried nine or eleven people at the base who had not died as a result of acts of war but because of exhaustion and such like. My information was that with a level of certainty of one less or one more depending on the weather we could do it for another four days.*' (PE hearings, p. 73).

(b) The evacuation of the refugees from the *mini safe area*

4.211. In the transitional period Dutchbat concentrated on its humanitarian task and the preparation of the evacuation of Dutchbat and the refugees in the *mini safe area*.

4.212. The evacuation of the refugees was discussed between Karremans and Mladić. Mladić mentioned the order in which the refugees should be carried off. The last group was that of the men aged between 16 and 60 years of age who were first to be screened for war crimes. Mladić had informed Karremans that '*after screening the men would be returned to the enclave*' (IGH February 26th 2007, legal ground no 287). After it had first been agreed that Dutchbat would supervise the evacuation and arrange transportation for the refugees in the final talk with Karremans Mladić made it known that he would be taking care of transport.

4.213. On July 12th 1995 at about 14:00 hours on the instructions of the Bosnian Serbs buses arrived at the *mini safe area* and the evacuation of the refugees began. The evacuation began in chaos: there was a massive *run* on the buses whereby the refugees threatened to trample one another underfoot. The first buses were overfull.

4.214. After the evacuation had commenced the behaviour of the Bosnian Serbs gradually began to change. The NIOD Report contains the following quotation from Lieutenant Mustert:

> '*At the point at which the buses drove up we just walked between them. If people failed to respond quickly enough to the signs from the BSA (VRS) to get in a kick or a push would be delivered at which we would urge them to stop. After just an hour they had had enough of this and we were no longer allowed near the buses. So then we were there with our backs to the wall.*' (p. 2647).

4.215. Dutchbat having consulted with the Bosnian Serbs then supervised the way to the buses by creating a type of sluice with a human chain of Dutchbatters and a tape tied tight around it. The refugees who Dutchbatters called up in numbers were called to go through the sluice and into the buses (NIOD, p. 2,649). Franken explained this in a statement to the Parliamentary committee of inquiry as follows:

> '*The first thing we do is to make a sluice to try to regulate the massive flow of people. From the Serbian side too it was hectic when the stampede began. We wanted to prevent the Serbians from getting into a panic and doing God knows what.*
> *(...)*
> *The argument was: the Serbians use rather a lot of physical violence even against women and children to fill buses suitable for 40 to 50 people nevertheless with twice that number. With our presence we did try to direct that but the buses still kept on leaving overfull. I repeat: these people had to sit in such a thing for a few hours at very high temperatures. To prevent that we thought: if we ourselves could arrange these busloads the Serbians would not be able to overfill the buses.*' (PE hearings, p. 75 to 76).

4.216. The buses transported the refugees to Tišca. There they had to get out and cover a few kilometres on foot through no man's land between the area under the control of the Bosnian Serbs and that controlled by the Bosnian Muslims to Kladanj. There a Pakistani UN Battalion collected them and took them by bus to the airport at Tuzla where provisional reception had been arranged (Krstić legal ground no 49, NIOD, p. 2,651).

4.217. Shortly after the afternoon of July 12th 1995 when the evacuation had begun the Bosnian Serbs started systematically to remove men of fighting age from the rows of refugees making their way to the buses and to carry them off to the buildings close to the *mini safe area* (Krstić legal ground no 53). The men who managed to get to the first buses arrived safely along with the other refugees in Kladanj (NIOD, p. 2,651). After that the Bosnian Serbs stopped buses on their way screening them for men (Krstić legal ground no 56). In addition men who had come with the other refugees were taken out of the buses where they were to alight at Tišca and were carried off by the Bosnian Serbs who left the other refugees undisturbed (NIOD, p. 2,651).

4.218. In the afternoon of July 12th 1995 the Bosnian Serbs began to carry off the men in separate buses (Krstić legal ground no 59; NIOD, p. 2,648).

4.219. In the evening of July 12th 1995 the evacuation of the refugees was suspended. Then 4,000 to 5,000 refugees were evacuated. The next morning the evacuation was

resumed. On July 13th 1995 at the end of the afternoon all of the refugees were carried off from the *mini safe area* situated beyond the compound. Then finally a start was made with carrying off the refugees from the compound. The NIOD Report states that this was going on at about 16:00 hours (p. 2701) but according to the UN Report this was at about 17:15 hours (no 348). In the evening of July 13th 1995 according to the ICTY at 20:00 hours the evacuation of these refugees was complete (Krstić legal ground no 51). The compound was then populated by Dutchbat and the UN and MSF employees that left on July 21st 1995 along with Dutchbat.

(c) Genocide of the men from the *safe area* and the war crimes the Bosnian Serbs committed in Potočari

4.220. Later it appeared that buses with men from Potočari went to Bratunac. The men who had not fled to the *mini safe area* but to the woods and had been held captive by the Bosnian Serbs were also taken to Bratunac. In total about 7,000 men from the *safe area* were killed in mass executions by the Bosnian Serbs that began on July 13th 1995 in the region to the north of the town of Srebrenica and then on July 14th up to and including July 17th 1995 at various places to the north of Bratunac (Krstić legal ground no 59, 66 to 67).

4.221. The IGH and the ICTY are of the opinion that the killing of the men evacuated from the *mini safe area* and the men who had not fled to the *mini safe area* and were held captive elsewhere is genocide in the sense in which that is understood in the Genocide Convention. In this connection the ICTY deliberated as follows:

> '*Evidence presented in this case had shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.*' (Krstić legal ground no 572).

4.222. In addition on July 12th and 13th the Bosnian Serbs killed men in Potočari. It has not been possible to establish the precise number. The NIOD Report estimates it as being between 100 and 400 men (pp. 2668 to 2669).

4.223. The ICTY deliberated as follows about the dead men referred to in Potočari that it denotes as being '*opportunistic killings*':

> '*Hence, it* [= ICTY, District Court's addition] *cannot find that the killings committed in Potočari on 12 and 13 July formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan.*' (Krstić legal ground no 573).

4.224. We have been able to establish that in the night of July 12th to 13th 1995 Bosnian Serbs raped female refugees.

(d) Dutchbat's observation of war crimes

4.225. The war crimes Claimants listed that according to them Dutchbatters did observe but wrongfully did not report consist of killing and maltreating the male refugees in the *mini safe area,* raping women, separating the men from the rest of the refugees and

'*deporting*' refugees. The discussion that follows on after this is aimed at Dutchbat's observations of the killing and maltreatment of male refugees and of the rape of women in the *mini safe area* and in Potočari.

4.226. We leave beyond consideration what Claimants mention in terms of Dutchbat's observations of war crimes from the period prior to the fall of Srebrenica for example the actions of Bosnian Serbs that Dutchbatters witnessed on July 10th 1995 on the road from Zeleni Jadar to Srebrenica where the Bosnian Serbs advanced with tanks and systematically shot a shell through the roofs of the houses situated along the road resulting in house after house going up in flames and then routed fleeing people by shooting at them using machine guns (NIOD, p. 2,173). After all these observations are not linked to any actions of Dutchbat attributable to the State.

4.227. The NIOD Report states that the Bosnian Serbs tried to prevent observations and patrols being carried out by Dutchbat (p. 2669). Dutchbat did not have a complete view of what was happening in and around the *mini safe area* and definitely not in the night of July 12th to 13th 1995. All the same Dutchbatters did observe war crimes being committed by Bosnian Serbs in the night of July 12th to 13th 1995.

4.228. Claimants refer to a number of observations by Dutchbatters in the period up to and including July 13th 1995 as described in the NIOD Report. The State has not disputed these observations. In addition the ICTY has included a number of observations by Dutchbatters in its judgment of the Krstić case and discussed observations by Dutchbatters in the hearings of the Parliamentary committee of inquiry. Taken as a whole these deal with the following observations whereby the male refugees are marked out even though they are not specifically called 'man' or 'men':

- In the course of the afternoon of July 12th 1995 many Dutchbatters heard shots being fired in the vicinity that could have indicated executions were being carried out (NIOD Report, p. 2650)
- Oosterveen as a witness at the preliminary witness hearings in the Nuhanović and Mustafić cases stated that personnel at the compound during the evening and the night of July 12th to 13th 1995 heard shots being fired about which in an interview he had earlier stated, '*Not normal fighting fire, shots with intervening gaps. To execute people*'
- In the debriefing statement of Private Van Veen it is written '*that on July 12th he saw that in the afternoon between 12 noon and two o'clock a group of five Muslim men under supervision of an armed VRS combatant were running away. He saw them at a distance of between two and three hundred metres go into a house on the hill diagonally opposite the big factory [...] Shortly after that he heard five or six shots. After some time he saw an armed BSA [VRS] combatant again come outside. He saw that said BSA combatant had nothing more than a pistol with him.*' (NIOD, p. 2,680)
- On July 12th 1995 one Dutchbatter saw a '*civilian lorry with the hood closed*' driving towards a house that ten men had just entered and that stopped next to the house. The account of the facts in the debriefing states: '*He then heard shots being fired in the direct vicinity of the house referred to. Some minutes later he heard and saw the lorry referred driving away from the house in a northerly direction. Based on the foregoing he suspected that possibly ten Muslims had been shot dead by BSA (VRS) soldiers.*' (NIOD, p. 2,682);
- In a debriefing statement by a Dutchbatter it is written that on July 12th 1995 at a distance of 50 to 60 metres from the main gate to the compound in Potočari five

male captives came out of one of the Bosnian Serb minibuses after which they tried to flee and ran straight into the arms of the Bosnian Serbs and two of the five were shot dead (NIOD, p. 2,693)

- In a debriefing statement from a Dutchbat soldier it is written that on July 12th to 13th 1995 on various occasions he saw that men aged between 16 and 60 in groups of 10 to 15 were being brought in by VRS soldiers into a house diagonally opposite a bus depot after which the whole group again came out of the house and then sometimes single males were allowed to go free whilst the remaining men walked with the VRS soldiers round to the back of the house. Shortly after this the Dutchbatter heard shots being fired and then VRS soldiers came from round the back of the house again without the men referred to. This pattern repeated itself on July 12th to 13th 1995 (NIOD, p. 2,676)
- In the Krstić case a statement by Rutten is cited in which it is written that on July 12th 1995 he had seen '*Rambo types*' setting light to houses in the hills in the vicinity of Potočari and later that night threatening to slit the throat of a young man who had been wounded (legal ground no 153, footnote 342)
- In the morning of July 13th 1995 Rutten heard from various sides that in the vicinity of a well seven civilians were allegedly executed. He then went with Lieutenant Koster in the direction of a well with which he was familiar. In a meadow near a stream he saw nine corpses of men lying in civilian clothing who had been killed apparently not long before – despite a temperature of more than 30 degrees Celsius the blood had not yet begun to clot and there were no flies to be seen. Rutten concluded that this discovery could not be related to the reports that had reached Lieutenant Schotman a considerable time before (see below) (NIOD, p. 2,719)
- In the debriefing statement of Dutchbatter Van Beukering it is written that in the afternoon of July 13th 1995 VRS soldiers had beaten a man with rifle butts after which the Dutchbatter was told to avert his gaze. Later the man was dragged round to the back of the house by his hair then a few seconds later a shot rang out and the VRS soldiers emerged from around the back of the house without the man (NIOD, p. 2669)
- Dutchbatter Vaasen had seen that on July 13th 1995 two VRS soldiers took a man with them round to the back of the White House one of the buildings beyond the *mini safe area* where the Bosnian Serbs had taken the men they had selected from the rows of men of fighting age. He heard a shot and saw the VRS soldiers return without the man (Krstić legal ground no 58)
- In addition in the Krstić case a statement of Vaasen is cited the substance of which is that he heard screams coming from one of the houses near to the *mini safe area* and an AK-47 being fired that made him conclude that refugees in that house were being killed (legal ground no 153, footnote 344)
- The debriefing statement of Dutchbatter Scholing reads as follows:

> '*Then I got to see [...] the people who* [two VRS soldiers, District Court's addition] *they had been calling. Under the large tree there stood a small group of Bosnian Serb civilians. In their midst sat a man on his knees. The soldiers exchanged some words with the civilians after which one of the soldiers harshly dragged with him the struggling man. They disappeared from my view around the back of a small house. I at once heard someone shriek and a shot. The soldier came back and then he gave a number of civilians a hand as if they were old friends.*' (NIOD, p. 2675)

– On July 12th or 13th 1995 at a place roughly 200 metres away from the compound and about 30 metres from where he stood Groenewegen saw the execution of a man by VRS soldiers who took the man out of a group of refugees and put him up with his face against the wall of a house that lay nearby upon which one of the VRS soldiers shot the man in the neck with his AK-47. (Krstić legal ground no 58, NIOD, pp. 2720 to 2721)
– Oosterveen also made the following statement about discovering nine bodies:

> '*A young lad drew our attention to bodies lying there. In response in the evening we went to take a look in the enclave and found bodies of Muslims there. It appeared that these were executions since they had all been laid down neatly on their bellies. A colleague took photos. We had to do it on the quiet because in the meantime the Serbs were cleansing the houses in the vicinity.*' (NIOD, p. 2722)

For the record the District Court calculates that Karremans did indeed understand the observations of Rutten (see above) and Oosterveen to be one and the same but as the NIOD Report explains it concerned two different locations and so also observations of incidents that must be distinguished from each other (NIOD, pp. 2722 to 2724)
– In Zagreb one Dutchbatter reported that he had seen how a man had been taken out of a house and disappeared behind a bus after which a shot was fired. The same thing happened again some days later (NIOD, p. 2696)
– Dutchbatters had told UNMO Colonel Joseph Kingori that men were being taken around the back of the White House and were not coming back. Then Kingori went to investigate, heard shots being fired as he approached but was stopped by VRS soldiers before he could establish what had happened. (Krstić legal ground no 58)
– Christina Schmitz of MSF a Dutchbatter had her attention drawn to the discovery of bodies round the back of a factory. When she went with an UNMO a VRS soldier warned her that he could not guarantee her safety. Schmitz then gave up looking any further and alerted the Dutch officers on the spot (NIOD, pp. 2669 and 2713)
– Franken stated as follows: '(…) *there was a report of someone who at quite a distance had seen the execution of a single man*.' (PE hearings, p. 76). This could perhaps be one of the executions of a man by Bosnian Serbs mentioned above and observed by Dutchbat.

4.229. Although these observations are not always first-hand observations of executions or concern the killing of male refugees by the Bosnian Serbs in some other way there is no doubt that the men in question were killed by the Bosnian Serbs. Since the Dutchbatters involved themselves couple their observations consisting of hearing shots with suspected executions their observations too become relevant.

4.230. In addition to this on July 12th and 13th 1995 rumours reached Dutchbat about bodies and/or executions for example as follows:
– In the debriefing statement of Schotman it is written that in the evening of July 12th 1995 opposite the bus depot he saw two VRS soldiers with about ten people going in a westerly direction into a sand track up the hill. In the night and after that again the next morning he heard from civilians that about 200 to 300 metres in that direction bodies were said to be lying in a house. After the third report Koster who was the commander on the spot wanted more information. Koster and Rutten then went to the spot and discovered and photographed what they saw (NIOD, p. 2718)
– On July 12th 1995 Koster heard rumours about nine or ten bodies (NIOD, p. 2722).

4.231. Dutchbatters also saw Bosnian Serbs maltreating refugees and made observations indicating inhuman treatment of those men the Bosnian Serbs had selected:

– On July 12th 1995 Franken received increasing numbers of reports that those men who had been selected by the Bosnian Serbs were being interrogated using physical violence. About this he stated as follows:

> '*I was concerned about the men. When the first reports came in stating that they were being beaten I sent the UNMOs (...) over there. (...) I received reports that they had gained the impression that it had quietened down because of their presence there but that they were acting rather rough. More and more reports came in*.' (PE hearings, p. 77).

– On July 13th 1995 Rutten together with Van Schaik entered the White House. There they saw a man in handcuffs hanging from the stairs in a painful position. In the various rooms there they found hundreds of men frightened to death. Later Rutten would go on to describe the atmosphere there as being one of '*a complete fear of death: you could smell death*' (NIOD, pp. 2718 to 2719, source in footnote 612, PE hearings, 46 to 47).

4.232. Claimants point to a witness statement made in the presence of the ICTY from which it appears that in the night of July 12th to 13th 1995 two Dutchbatters were witness to the rape of a woman by two Bosnian Serbs. With this they are apparently targeting the rape that Vaasen observed as referred to in legal ground no 45 in the Krstić case and on page 2686 of the NIOD Report.

4.233. Claimants further point to Dutchbatter Schuurman in 2002 declaring to journalists of *Vrij Nederland* [= a newspaper] that on July 13th 1995 whilst travelling from an observation post to the compound he saw '*corpses everywhere*' and smelt '*the dreadful smell of dead bodies*' that it was then at the time clear to him that '*people were just being shot dead over there*' and finally that despite his reports during his debriefing in Assen as to this in the debriefing report the only thing that came out right was that '*it is possible that something strange was going on over there*'.

4.234. The District Court deliberates that Schuurman's statement appeared not to be a one-off statement given the conclusion in the NIOD Report in respect of the debriefing report that reads as follows: '*Wherever possible the "narrow" approach was maintained and disagreeable subjects were avoided and left underexposed*' (NIOD, p. 3001).

In this connection of relevance too is the statement Lieutenant Van Duijn made during his debriefing about discovering '*identity papers*' described in the debriefing report as '*personal possessions*' (PE Report, p. 338). Moreover whilst drawing up the debriefing report apparently the rule held that an observation was not accepted if no '*evidence of support*' was regarded as being present (PE Report, p. 337).

4.235. The above justifies the opinion that Dutchbatters were witnesses to more war crimes than recorded in the debriefing report and related in the NIOD Report and the observations listed above. In this connection the District Court regards as relevant what the ICTY deliberated on about the situation in the *mini safe area* in the days following on from the arrival of the refugees there on July 11th 1995 as follows:

> '*By all accounts, the harassment of the Srebrenica refugees by Serb forces was too widespread and persuasive to be overlooked.*' (Krstić legal ground no 155).

(e) Dutchbat's knowledge or suspicion as to the fate of the male refugees from the *mini safe area* who were carried off

4.236. Claimants contend that from the word go Dutchbat and the State knew that genocide could or might take place. They point to the aim of preventing genocide when setting up the *safe area* and to paragraphs 14, 17, 19 and 27 'g' of the *Report of the Security Council Mission established pursuant to resolution 819 (1993)* April 30th 1993 (UN Doc, S/25700). There the conclusion is drawn that without the demilitarisation agreement of April 18th 1993 (see 2.18) a '*massacre of 25,000 people*' could have taken place that justifies the efforts of UNPROFOR with the critical note in the margin that the fact that the Bosnian Serbs had little respect for the authority of UNPROFOR is a point of particular interest for the UN. Claimants further emphasise that in its pronouncement of February 26th 2007 the IGH had deliberated as follows:

> '*(...) given all the international concern about what looked likely to happen at Srebrenica, (...), it must have been clear that there was a serious risk of genocide in Srebrenica*'.

4.237. These documents and deliberations confirm that even before the dispatch of Dutchbat the international community was concerned that genocide would take place in Srebrenica and that the risk of it was assessed as being serious. These are however insufficient grounds on which to base specific knowledge of Dutchbat and/or the State of the fate of the 7,000 men from the *safe area* even before the fall of Srebrenica.

4.238. In the above the District Court notes that the IGH deliberated that for the Serbian State it was not clear until after the fall of Srebrenica that there was a *serious risk* of genocide (legal ground no 436):

> '*Thirdly, the Court recalls that although it had not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above (...)), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.*
> (…)
> *Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (...) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the "fall of Srebrenica" (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milosević of his serious concern and pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war.*'

4.239. There is no reason to suppose that prior to the fall of Srebrenica the State was already for some considerable time aware or could have been aware that there was a *serious risk* of genocide that one of the 7,000 men was out of the *safe area*. Dutchbat's observations however must be seen against the background of the actual general concern in the international community and that this obliged Dutchbat to be more alert.

4.240. In this regard finally the District Court deliberates that the '*ethnic cleansing*' that is discussed in the mandate (see 2.7) is linked to the cleansing of Bosnia of other ethnic groups by the Bosnian Serbs in their struggle towards a '*Greater Serbia*'. During the conflict in Bosnian Herzegovina there was earlier and for that matter on both sides *ethnic cleansing* in areas that had been captured. That the Bosnian Serbs would attempt to drive

out non-Serbian ethnic groups from the area should be seen against this background and could be reasonably expected to happen. That does not hold for the genocide that took place in respect of the men from the *safe area.*

4.241. When assessing what Dutchbat knew or may have suspected about the fate of the men carried off by the Bosnian Serbs from within the *mini safe area* it boils down to facts and circumstances that Dutchbat knew about at the time and the conclusions that in the given circumstances they made or reasonably could have made and had to make. In this regard the District Court deliberates as follows.

4.242. The ICTY deliberated on the separation of the men of fighting age from the rest of the refugees with the aim of screening these men for war crimes as follows:

> '*The Prosecution's military experts accepted that it was not inherently unreasonable or criminal for the Bosnian Serbs to conduct such screening given widespread and plausible allegations that Bosnian Muslim raiders from Srebrenica had committed war crimes against Bosnian Serb villages.*' (Krstić legal ground no 156).

4.243. In the given circumstances there was no need that separating the men of fighting age from the rest of the refugees in order to screen them for war crimes should arouse fear at Dutchbat that these men would be treated inhumanely or would be killed. Whether that was any different in combination with the other facts and circumstances Duchtbat knew about is something we discuss below.

4.244. In this regard it is relevant that screening the men for war crimes would normally lead to either the selected men being brought before a court-martial with a view to being held in detention or to allowing them to go back to the other refugees in the *mini safe area* or to transport them to Kladanj. Handling the men during screening had to be according to the Geneva Conventions.

4.245. On July 12th 1995 Franken had been receiving more and more reports of the Bosnian Serbs using physical violence to interrogate the selected men. After the Bosnian Serbs had begun to carry off the men separately in the afternoon of July 12th 1995 Franken then heard that evening that buses with men were not arriving at Kladanj whilst the buses with the other refugees were arriving there. Franken made the following statement about this to the Parliamentary committee of inquiry:

> '*We began quite quickly to receive reports that after a number of times the blue bus no longer appeared at the point at which people were meant to alight at the border at Kladanj so it was clear that they were holding the men separately. Mladić had also announced this in advance. He announced that he wanted to examine every man of fighting age to see whether they were combatants – he used the word "war criminals.*' (PE hearings, p. 76).

4.246. The District Court is of the opinion that Dutchbat's observation of the killing of the men on July 12th and 13th 1995 may in no way whatsoever be regarded as consonant with screening for war crimes. These *opportunistic killings* to use the words of the ICTY therefore together with reports of the use of physical violence against those being interrogated form a strong indication that the men the Bosnian Serbs had selected ran a real risk of death or inhumane treatment.

4.247. Basing its conclusion on the above the District Court is of the opinion that Dutchbat in the evening of July 12th 1995 must have suspected that the men selected and carried off by the Bosnian Serbs ran a real risk of death or inhumane treatment.

4.248. This suspicion was also alive among Dutchbat in the evening of July 12th 1995. Franken stated in the presence of the Parliamentary committee of inquiry that '*it already appeared worse for the men than you could have imagined beforehand*' (PE hearings, p. 76). Franken had then considered stopping the evacuation but decided not to do so in the interests of the large numbers of women and children who were being brought to safety because of it. Franken did however have a list drawn up on July 12th 1995 of the names of the men in the compound because of his concern and in the hope that this would act to protect them. His statement about this to the Parliamentary committee of inquiry is as follows:

> '*When I thought about how I could offer the men some sort of protection a trick from Amnesty [= Amnesty International] suddenly came to mind: anonymous victims are no victims. I then tried to find ways of giving the men an identity. You can do this in several ways for example by taking photos but I did not have those resources to hand. I then consulted with the committee we had meanwhile set up the well-known troika that acted to represent the refugees, tried to register all of the men with full name, date of birth, place of birth etc. It was the intention that I would bring out the list – I had also informed the Serbs that I had registered them – and that where possible I would publish the list to put the Serbs under a certain amount of pressure: watch out we know precisely who has left and we can monitor them and follow them.*' (PE hearings, p. 77).

4.249. When Rutten and Van Schaik went into the White House (see 4.231) we saw that the men who were being held there were being treated badly and that they were very afraid. In this regard the deliberation of the ICTY about the visit of Krstić to the White House is relevant:

> '*However the Trial Chamber is satisfied that, from his presence at the White House, General Krstić must have known the segregated men were being detained in terrible conditions and were not being treated in accordance with accepted practice for war crimes screening. General Krstić must have realised, as did all the witnesses present in and around the compound that day, that there was a terrible uncertainty as to what was going to happen with the men who had been separated.*' (Krstić legal ground no 367).

4.250. In the morning of July 13th 1995 Rutten and Van Schaik during their visit to the White House just referred to had seen that outside personal possessions including identity papers had been thrown onto a heap. Rutten stated to the Parliamentary committee of inquiry as follows:

> '*When approaching the house we walked through the garden and saw there heaps of identity papers, passports, work permits etc. Then we saw heaps of clothing there.*' (PE hearings, p. 46; NIOD, p. 2718, footnote 611).

4.251. Van Duijn too on July 13th 1995 when the evacuation of the refugees was almost complete saw the pile of identity papers lying at the White House and discussed it with a Serbian commander who said the men no longer had any need of their passports. He made the following statement about this to the Parliamentary committee of inquiry:

> '*However when passports are no longer needed it begins to dawn on you that something very serious could be about to happen. That the vast majority would be killed was however at that point not something we could get our heads around*' (PE hearings, p. 35).

4.252. Later on July 13th 1995 after the last men had been carried off from the White House the Bosnian Serbs set light to the heap of personal possessions. We could see this was going on from the compound (NIOD, p. 2650).

4.253. The ICTY deliberated as follows:

> '*The Chamber accepts that, at the stage when the Bosnian Muslim men were divested of their identification en masse, it must have been apparent to any observer that the men were not being screened for war crimes. In the absence of personal documentation, these men could no longer be accurately identified for any purpose. Rather, the removal of their identification could only be an ominous signal of atrocities to come.*' (Krstić legal ground no 160).

4.254. The foregoing leads the District Court to conclude that where in the evening of July 12th 1995 Dutchbat could have suspected that the men who had been selected and carried off by the Bosnian Serbs ran a real risk of being killed or of being treated inhumanely on July 13th 1995 they knew that this would happen after they had seen the heap of identity papers lying about at the White House and in any case they had seen said heap burning as the men were carried off. Basing its opinion on statements by Franken, Rutten and Van Duijn the ICTY came to the same conclusion namely:

> '*At that point Dutch Bat soldiers were certain that the story about screening for war criminals could not be true: something more ominous was afoot.*' (Krstić legal ground no 160).

4.255. Moreover the District Court is of the opinion that at the end of the afternoon of July 13th 1995 Dutchbat given what they knew then and had observed as reproduced above must have been aware of a *serious risk* of genocide of the men separated and carried off from Potočari by the Bosnian Serbs as referred to in the deliberation cited in 4.178 of the IGH: the Bosnian Serbs systematically selected men who were then badly treated and stripped of their identity papers – so that they could no longer be identified – and then carried off separately to an unknown destination.

4.256. Referring to the opinion of the IGH cited earlier about the existence of a *serious risk* of genocide the State points out that the IGH deliberated that not until July 14th 1995 was it clear that there was a *serious risk* of genocide.

4.257. That the opinion of the IGH relates to the knowledge of the *Serbian State* leaves intact that based on the facts and circumstances they knew of others were at some other moment aware or should have been aware of a *serious risk* of genocide. The opinion of the IGH therefore provides room for judging that *Dutchbat* in the given circumstances in respect of the men in the *mini safe area* at some other moment – namely at the end of the afternoon of July 13th 1995 – should have been aware of a *serious risk* of genocide of the men who had been carried off from the *mini safe area*.

(f) Dutchbat's awareness of the fate of the men who had not fled to the *mini safe area* but to the woods

4.258. The men who had not fled to the *mini safe area* but to the woods were literally out of Dutchbat's sight. Dutchbat was aware that a large part of the male population from Srebrenica had not fled to the *mini safe area*. Van Duijn made the following statement before the Dutch parliamentary committee of inquiry:

> '*The night before Srebrenica fell, so the night of the 10th, the last day I retreated from the blocking positions, following the route of the refugees, we see a large column of men, some of whom we recognised because they were from the villages around the observation posts. We saw that those men were walking down the road towards OP Mike. This was the same column that broke out from the other route and most men were part of that group.*' (PE hearings, p. 30).

Koster, who was at the bus depot in the afternoon of the 11th July 1995 to receive refugees, saw armed combatants saying goodbye to their families and leave for the hills in the west (NIOD, p. 2617).

Rutten made the following statement before the Dutch parliamentary committee of inquiry:

> '*At night we talked to the inhabitants of the enclave and to refugees. (...) I said: I see that many men are not here. They stated that most young men and combatants had left the enclave to break out on their own. This occurred in the area, as they indicated, between November and Alpha.*' (PE hearings, p. 45).

4.259. In retrospect it became clear that a large part of the men who had not sought refuge in the *mini safe area* had fallen into the hands of the Bosnian Serbs and were killed during the mass executions that occurred from 13th July 1995. There is insufficient basis to hold that on 11th July 1995 – or at any other moment in the following days – Dutchbat was or became aware of the danger those men were in. Nor is there sufficient basis to hold, in the given circumstances and given its knowledge at the time about the fate of the men who had been or would be carried off by the Bosnian Serbs from the *mini safe area*, that Dutchbat could and should have known or suspected that the other men who had not fled to the *mini safe area* had fallen or would fall into the hands of the Bosnian Serbs and what their fate would be. The reasoning that Dutchbat knew that many men from Srebrenica had not fled to the *mini safe area* and that it was clear that the area outside the *mini safe area* was not safe because the men were fleeing through an area controlled by the Bosnian Serbs which was also full of landmines, is insufficient.

4.260. In this regard the District Court holds, superfluously, that since Dutchbat did not have reason to assume at any point in time that the men who had not fled to the *mini safe area* but to the woods were meeting certain death or inhumane treatment, its advice to flee to the woods – even if this advice was indeed given, which the State disputes – and not raising the alarm about it cannot be deemed as unlawful. Dutchbat could reasonably proceed to do so in the given circumstances.

(2) Claimants' accusations regarding Dutchbat's actions in the mini safe area after the fall of Srebrenica

4.261. The District Court shall now discuss *seriatim* the following accusations of Claimants about Dutchbat's actions and assess whether they lead to liability of the State on account of unlawful acts:
(a) Failure to report war crimes;
(b) Failure to provide adequate medical care to refugees;
(c) Handing over weapons and other equipment to the Bosnian Serbs;
(d) Upholding the decision throughout the transition period not to allow refugees entry to the compound;
(e) Separating the male refugees from the other refugees during the evacuation;
(f) Cooperating in the evacuation of refugees who had sought refuge at the compound.

(a) Failure to report war crimes

4.262. Claimants argue that in the period from 11th July up to and including 13th July 1995 Dutchbat observed many war crimes being committed by the Bosnian Serbs, but failed to file reports about them to superiors in the UN chain of command. Claimants argue that this failure to report led to the international community becoming informed about these war crimes too late, namely after (most of) the genocide following the fall of Srebrenica had taken place. Claimants also argue that if an alarm about said war crimes of 12th or 13th July 1995 had been raised, the lives of many could have been saved as this could have prompted the UN, NATO or individual states to launch a direct military intervention.

4.263. Parties agree that Dutchbat did not report all observed war crimes to the UN chain of command. Dutchbat did not submit any written notification of war crimes at all. Karremans orally passed on information about Rutten's discovery of nine dead bodies in civilian clothes (see 4.228) in the morning of 13th July 1995 to *Bosnia Herzegovina Command* in Sarajevo and also brought it to the attention of Nicolai. Although Karremans stated during the debriefing in Assen that he also orally reported Groenewegen's observation in the afternoon of 12th or 13th July 1995 of an execution of a refugee at about 200 meters from the compound to the UN chain of command, the District Court is unable to establish with a sufficient degree of certainty – since confirmation from another (Dutchbat) source is not available – that the notification of Groenewegen's observation actually left the compound. The District Court takes into consideration that the NIOD raised the question whether Karremans may have made a mistake regarding this aspect, as he had stated during the debriefing in Zagreb on 22th July 1995 that he had no knowledge of any eyewitness accounts of actual executions (NIOD, p. 2720, middle). It has not been asserted, nor is there any evidence that Dutchbat made any other notifications.

4.264. In the opinion of the District Court Dutchbat's failure to report war crimes observed during the transition period constitutes a violation of generally accepted standards in accordance with law of custom, in connection with which special reference is made to 4.175-4.177 for the interpretation of the standard of care. It is indisputable that during the transition period Dutchbat could not protect the refugees inside and around the *mini safe area* located outside the compound on its own, i.e. without outside help, due to its limited manpower and due to the superior military strength of the Bosnian Serbs. Furthermore, Dutchbat at most had a clear view of the men selected by the Bosnian Serbs who were being held in various buildings outside the *mini safe area*. In these circumstances Dutchbat had the obligation to report the war crimes it had directly and indirectly witnessed up to that point as well as from that moment onwards to the UN chain of command.

4.265. The District Court finds that the argument put forward by the State, namely that reporting war crimes did not have the highest priority in Dutchbat as it lacked the manpower to maintain order on site does not constitute a justification defence, not even when it is taken into consideration that decisions were made under great pressure in a war situation.

4.266. The State put forward the argument that Dutchbat could not have reported more than was already known by the UN shortly after the fall of Srebrenica and that more reports would not have led to the UN, NATO or individual states launching a direct military intervention.

4.267. In establishing what was known in the UN chain of command about (suspected) war crimes committed by the Serbs and about possible preparations for genocide, the District Court follows the contents of the following passages from a UN report that is not disputed by either party:

'*D. 13 July -- the killing of hundreds of unarmed men and boys begins*
346. The UNMOs in Srebrenica reported that the Serbs had resumed the deportation of the population outside the Potočari compound at approximately 0700 hours on 13 July. The Serbs again continued to separate the men from the women and children, diverting the men to Bratunac. As before, the BSA prevented Dutchbat from following the latter group, or ascertaining where the men were being taken. The UNMOs also reported that they would try and investigate a rumour that the Serbs had killed several men that they had taken out of the crowd the previous day. Neither the UNMOs nor Dutchbat reported that they had observed or had reason to believe that any other abuses had been committed thus far. (...)
349. As the process of deportation was coming to an end, the first UNHCR team was able to reach what was left of the Srebrenica enclave. The UNHCR convoy had set out from Belgrade on 12 July, but had been stopped at the international border, and allowed to proceed only on the afternoon of 13 July. The convoy passed through Bratunac, where Serb soldiers, many of whom appeared to be drunk, could be seen celebrating in the streets. The convoy then proceeded to Potočari, where they found UNPROFOR and Serb soldiers working together to bring the last groups of Bosniacs from the UNPROFOR compound to the waiting Serb buses. When this operation was completed, and after having attempted to secure safe passage out of Potočari for UNHCR's local staff members, the UNHCR convoy returned to Bratunac. There the UNHCR staff members heard from local Serbs that large numbers of Bosniacs were being held at the nearby football field. Darkness was falling, and from their motel rooms, the UNHCR team could hear sporadic shooting from the direction of the football field.
350. By the end of the day on 13 July, there were virtually no Bosniac males left in the former "safe area" of Srebrenica. Almost all were in one of four categories: (...)
351. The UNMOs and Dutchbat were aware that Bosniac men were being detained in Bratunac, but did not know the precise numbers or locations. (...)
352. Although the precise details of what happened to the men of Srebrenica on 13 July have only been reconstructed after subsequent enquiry over the past 4 years, there was concern at the time, and at least five written messages were sent on that day, expressing alarm about potential human rights abuses having been committed or that potentially might be committed.
353. On the afternoon of 13 July, the UNMOs reported that General Mladić had told them that there were "several hundred" bodies of dead Bosniac soldiers in the Bandera triangle portion of the enclave. Mladić had requested Dutchbat to inform the ARBiH that that it was not his "intention to kill any more soldiers. They only have to surrender and hand over their weapons." However, the BSA did not permit the UNMOs or Dutchbat to visit the area to verify that the bodies were indeed there. This report was subsequently forwarded up the United Nations chain of command, reaching the Secretariat in New York the next morning. The SRSG requested that the report not be made public, in order not to place the UNMOs in Srebrenica in further danger.
354. A team of UNMOs in Sector Northeast separately reported that they had spoken to some of the refugees arriving in Kladanj from Potočari. The refugees told of having witnessed "men being separated from others, severely beaten, stoned and in some cases stabbed." They added that 30-35 wounded had been taken to Bratunac, and that another vehicle had "disappeared" en route to the drop-off point. In another report on 13 July, the UNPROFOR Commander (who had been recalled from leave) informed the SRSG and the Force Commander that "reports of abductions and murder, unconfirmed as of yet, are beginning to be heard" from the Srebrenica area.
355. The Chargé d'Affaires of the Permanent Mission of Bosnia and Herzegovina also officially expressed his Government's concern on 13 July, in a letter to the Secretary-General, the

text of which was circulated as a document of the General Assembly and the Security Council (A/50/285; S/1995/573). He communicated the reports his Government had heard that men aged 13 years and older had been separated from those transported to Kladanj, and that their whereabouts were unknown. He added that there had been additional reports of women between the ages of 15 and 35 whose whereabouts were also unknown. He noted that "the fate of these detainees is uncertain and there are substantial grounds to fear their execution, though these reports could not yet be confirmed." He concluded his letter by stating that "since the United Nations has failed to defend the population of Srebrenica, on United Nations demilitarized territory, it is not absolved of its obligations to provide for them now, once in Government-held territory, after having exposed them to life threatening danger resulting from the absence of timely United Nations action."
356. The Secretariat also learned from another source on 13 July that the Serbs had separated males of military age from amongst the displaced persons and brought them to Bratunac. The same day, the Secretariat expressed concern to the SRSG that, without the presence of the NGOs, ICRC or other United Nations agencies in the area, the fate of these displaced would remain unknown. The Secretariat stressed that it was imperative that in any negotiations with the Serbs, access to these individuals be given priority.
(...)'

4.268. The District Court concurs with the conclusion drawn by the UN Secretary-General based on the passages cited above:

'*359. Thus, on 13 July, there was strong alarm expressed at various levels that abuses may have been or were being committed against the men of Srebrenica, but none had been confirmed to have taken place at that time. Efforts were nevertheless focused at the highest levels to try and address the situation.*'

4.269. Contrary to what the State argues, the District Court is of the opinion that Dutchbat could have reported more than that which the UN already knew shortly after the fall of Srebrenica. Dutchbat's reports of the observations mentioned above could have been a confirmation of crimes against male refugees in Potočari, particularly the summary executions, which were lacking according to the UN Secretary-General's statement in the above passage regarding July 13th 1995. Based on other information from the UN Secretary-General's report, particularly sections 403 and 404, the District Court concludes that his Secretariat did not receive a report about this confirmation until ten days after Dutchbat's debriefing in Zagreb on July 22nd 1995. The information put forward by both parties and the contents of the NIOD report (part IV, chapter 4, section 24) do not prove that Dutchbat or UNMO gave first-hand confirmation of executions at an earlier time.

4.270. The next point to be addressed is whether or not it can be claimed with a sufficient degree of certainty if the lives of Claimants' family members would have been saved, in other words, whether or not Dutchbat's actions would have resulted in military intervention in the very short term, within several days, given the fact that most executions took place in the period from July 14th to 17th 1995, if Dutchbat had reported all of its observations of July 12th and 13th 1995.

4.271. In this connection, Claimants point out the following passage from the UN report:

'*It is harder to explain why the Dutch battalion did not report more fully the scenes that were unfolding around them following the enclave's fall. Although they did not witness mass killing, they were aware of some sinister indications. It is possible that if members of the Dutch battalion had immediately reported in detail those sinister indications to the UN chain of com-*

> *mand, the international community may have been compelled to respond more robustly and more quickly, and some lives might have been saved.*' (no. 474).

Furthermore, they derive from a quotation from chapter eight of part III of the NIOD report ('Plans for the recapture of Srebrenica') that a sizeable armed force, in the form of a Rapid Reaction Force for example, was kept ready for deployment to provide protection to Dutchbat, and they therefore conclude that there is no reason to assume that there would not have been options to provide military protection to the population.

4.272. The State, on the other hand, argues with reference to the NIOD report that there was no, or at least hardly any, support at an international level for a recapture of the *safe area* and that such an operation was not feasible from a military point of view, or at least that the success of such an operation was entirely uncertain. Furthermore, the State points out the conclusion drawn by deputy head of Operations Hilderink, shortly after the fall of Srebrenica, that there were not enough troops available for the recapture and that the accelerated build-up of the *Rapid Reaction Force* did not offer possibilities: by the time the troops could have been deployed, all refugees would already have left the *mini safe area* (NIOD, pp. 2414 to 2415).

The State also cites the analysis of Van Kappen, employee of the UN Secretary-General, which is described in the NIOD report (p. 2426) as follows:

> '*In any case, Van Kappen believes that the UN had to take into account that a recapture would have entailed three separate military plans. First of all, the recapture of a land corridor to the enclave and the area belonging to the former Safe Area. Second of all, an operation to ensure provisioning for an indefinite period of time and thirdly an air campaign to take out the VRS Air Defence, also across the Drina river in Serbia. Such an air campaign required NATO's consent. All in all, this required a full division in order to recapture Srebrenica, to be reduced to a brigade and mechanised division to keep a land corridor open, a total of 35,000 men, to be reduced to 15,000 men. Van Kappen believed that the Rapid Reaction Force was not suitable for opening up a land corridor.*'

4.273. The District Court is of the opinion, also in the light of the State's defence, that Claimants' arguments provide an insufficient basis for the conclusion that Dutchbat meeting its duty to report would have led to a direct military intervention of the UN, NATO or individual states and also that the case dossier does not provide that basis. This opinion is clarified below as follows.

4.274. From the cited passages from the UN report it indisputably follows that on July 13th 1995 the UN chain of command was aware of several '*sinister indications*' about crimes against male refugees, albeit possibly in less great numbers and less detailed than the indications Dutchbat had. It does not become apparent from the UN report or any other source that a military intervention shortly after the fall of the *safe area* was not launched (simply) because the '*sinister indications*' available to the UN Secretary-General were not confirmed yet (by the report of direct observations of Dutchbat). However, there are strong indications that this intervention was not effected due to the lack of feasibility.

4.275. In 4.141, the time required to prepare a military intervention, the uncertainty of a feasible military intervention to recapture the *safe area,* and the hesitations and negative reactions to plans to that effect expressed by the UN and the international community were discussed. This uncertainty is also present in the opinions of Hilderink and Van Kappen, on which Claimants have not taken a reasoned or substantiated position to the contrary apart from their standpoint given in 4.271. Claimants' standpoint does not carry sufficient

weight against the practical barriers and obstacles to a timely military intervention, which are not contested with reasons by Claimants, and against the hesitations of the UN and the international community about a timely military intervention. Claimants' standpoint therefore provides insufficient basis for the conclusion that Dutchbat's compliance with the duty to report could have led to a timely deployment of the *Rapid Reaction Force*.

4.276. Following on from the above, the District Court is of the opinion that a military intervention would not have been launched if Dutchbat had met its duty to report. In this regard the District Court refers to the fact that on July 16th 1995 Janvier informed the UN Secretary-General that he agreed with Van Kappen's analysis and that the recapture of the *safe area* lay outside the capabilities of UNPROFOR, all the more so because a possibly military action would have to be undertaken out of sight of a hostile population and in all probability would have led to an overt war with Bosnian Serbs and possible even Yugoslavia, as NATO would have had to attack the integrated air defence system. This was the last word on the French ideas discussed in 4.138 and elsewhere about recapturing the *safe area* (NIOD, p. 2429). Van Kappen analysis applied in full to the situation on July 12th and 13th 1995.

4.277. The conclusion therefore is that the question whether Dutchbat's (proper) compliance with its duty to report would have led to a direct military intervention of the UN, NATO or individual states is answered in the negative. In a situation such as this, the follow-up question remains unanswered whether direct military intervention would have resulted in the lives of Claimants' family members being saved with a sufficient degree of certainty.

4.278. The conclusion is that Dutchbat wrongfully failed to report observed war crimes to the UN chain of command. However, the State is not liable for this unlawful failure, as the causal connection, required for liability, with Claimants' damages is lacking.

4.279. The foregoing includes the opinion that compliance with the duty to report could not have prevented in any way the Bosnian Serbs from committing (more) war crimes in Potočari on July 12th and 13th 1995, including the rape from Claimant [Claimant 10]'s statement (see 2.45.10).

(b) Failure to provide adequate medical care to refugees

4.280. Claimants accuse Dutchbat of failing to provide adequate medical care to refugees, allegedly acting in violation of Gobilliard's order to '*provide medical assistance and assist local medical authorities*'. In this context, Claimants point out an internal Dutchbat memorandum of July 10th 1995 which states that priority was given to keeping a 'base stock' for possible Dutchbat victims and Karremans' order, a 'low point' for Claimants, not to carry out operations on refugees.

4.281. Whether or not those acts constitute unlawful acts on the part of Dutchbat can be left undiscussed, as these allegations of Claimants are not connected with the genocide that was committed. Other damages in connection with this these acts were not put forward. This accusation of Claimants therefore cannot succeed.

(c) Handing over weapons and other equipment to the Bosnian Serbs during the evacuation

4.282. During the evacuation of the refugees, the Bosnian Serbs took weapons away from Dutchbat soldiers. Initial reports to this effect were received around 18:00 on July

12th 1995. Initially, the Bosnian Serbs wanted to exchange weapons, which the Dutchbat soldiers refused. As time progressed, an increasing amount of Dutchbat soldiers were threatened with Kalashnikovs or by means of other forms of intimidation, such as showing bullets Dutchbat's flak jackets could not withstand, and forced to hand over their weapons and flak jackets (NIOD, pp. 2647 to 2648). When the buses with refugees left on July 12th 1995 Dutchbat sent along one or two vehicles with communication equipment per convoy to supervise that part of the evacuation. In the afternoon and evening of July 12th 1995 the Bosnian Serbs took away fourteen Mercedes vehicles from Dutchbat (NIOD, pp. 2650 to 2651).

4.283. It is the District Court's opinion that handing over weapons and other equipment was contrary to Gobilliard's order not to do so, but that this cannot be considered as unlawful towards Claimants, given the circumstances, as Dutchbat soldiers were forced to do this and it has not been asserted, nor is there any evidence that there was a realistic alternative.

(d) Upholding the decision throughout the transition period not to allow refugees entry to the compound

4.284. In order to answer the question whether or not Dutchbat should have allowed all refugees entry to the compound during the transition period, particularly after strong suspicions had arisen in the evening of July 12th 1995 that the men selected and carried off by the Bosnian Serbs ran a real risk of being killed or inhumanely treated, it is important to take account of the circumstances in which the decision to allow the refugees entry to the compound was taken and implemented as well as the considerations on which that decision was based.

4.285. The decision to allow refugees entry to the compound was taken when the city of Srebrenica nearly fell and refugees were expected to come to Potočari who would have to be received there. The Bosnian Serbs had made it known on July 11th 1995 that refugees were not allowed to enter the compound. They had also set an ultimatum which was accompanied by the threat to kill the Dutchbat soldiers who had been taken hostage and to use all weapon systems in an attack on the compound and the city of Srebrenica (NIOD, pp. 2603 to 2604). It was unclear how the situation would develop, both in terms of what would (have to) happen with the refugees and the response/further actions of the Bosnian Serbs.

4.286. Franken made the following statement before the Dutch parliamentary committee of inquiry about the grounds for allowing some refugees entry to the compound:

> '*The entire compound was in the Serb artillery's line of direct fire. The Serbs were close on the right side of the CL, from where they had a complete view of our compound. By the time the refugees started to arrive I had no idea how things would progress. We then decided that we should at least make sure that the refugees would be protected from the Serbs to some degree and that they would not be stuck in open terrain. There was a huge factory building in the centre of the base. It was in a deplorable state, but did meet our requirements. I had to try to get the people inside, as it was also incredibly hot. And I had to prevent large-scale panic from breaking out among the refugees at the sight of a Serb. I also had to maintain our freedom of action to be able to deploy military means. If I had let all refugees in, the base would have been overcrowded from fence to fence and we would have lost our freedom of movement. I also would not have been able to anticipate something – anything – that could have happened. That is the reason why I said: Okay, we can take in refugees at the base, for sure. We can*

> *have the factory's ground floor inspected. I ordered one of the military engineers to inspect the upper floor, because the building had suffered quite a lot of damage during previous hostilities. He believed that we could also use the upper floor, which we did. So we let in the maximum number of refugees at the base. We housed the others in the buildings directly outside the base.*' (PE hearings, p. 71).

4.287. Rutten made the following statement before the Dutch parliamentary committee of inquiry:

> '*With the intent to receive them at the compound, we eventually let in about 5,000 people. And then the factory halls were full. You could ask yourself – and this was not something I was involved in – whether or not more people could have been admitted, but that would have meant that they would have been unprotected outdoors. That was the problem. I can only guess what kind of situation we would have been in. I could not assess that situation and the Serbs' reactions beforehand.*' (PE hearings, p. 45).

4.288. Even if the compound had been large enough, as according to Claimants it was as large as the *Malieveld* where crowds of about 20,000 to 25,000 people convene for demonstrations, a large part of the refugees would have been housed outdoors, in sight and in the field of fire of the Bosnian Serbs, who had threatened to open fire at the compound if Dutchbat received refugees there. Furthermore, maintaining freedom of movement at the compound for Dutchbat, which was also included in Franken's consideration, was in the interest of the reception of and assistance to the refugees. When also considering the very precarious living conditions at the compound, admitting all refugees after all (about 25,000) at the compound during the transition period was not a realistic option.

4.289. When in the evening of July 12th 1995 suspicions had arisen that the men selected and carried off by the Bosnian Serbs ran a real risk of being killed or inhumanely treated, admitting all refugees to the compound who were in the *mini safe area* at the time still was not a viable option. Although it concerned less refugees than the day before, following the evacuation of 4,000 to 5,000 refugees, Franken's consideration still applied and also to the remaining refugees, while the refugees' circumstances were also visibly deteriorating.

4.290. Since the reception of all refugees at the compound was not a realistic option either during the transition period, failure not to make use of that opportunity cannot successfully alleged against Dutchbat.

4.291. Similarly it was not a realistic option for Dutchbat to admit only the male refugees to the compound after suspicions had arisen in the evening of July 12th 1995 that the men selected and carried off by the Bosnian Serbs ran a real risk of being killed or inhumanely treated. This would have entailed Dutchbat removing the men from the crowd of refugees who were in the part of the *mini safe area* that lay just outside the compound and bringing them to the compound. Aside from the fact whether or not the circumstances would have permitted the reception of these men, there are no indications that this would have been practicable, also in view of the limited manpower available to Dutchbat and the risk of endangering the evacuation of the other refugees, whose interests were best served with evacuation. The District Court therefore also finds the decision not to allow the male refugees entry to the compound during the transition period not unlawful.

(e) Separating the male refugees from the other refugees during the evacuation

4.292. Claimants argue that the State should not have cooperated with 'the deportation' of the refugees, which they argue the State wrongly qualifies as 'evacuation'. The State,

in turn, objects to Claimants' accusation to have cooperated with the 'deportation'. So far, the District Court consistently used the term *evacuation* regarding Dutchbat's decisions about all refugees after the fall, the removal of the refugees other than the male refugees by the Bosnian Serbs and in assessing the attributability of Dutchbat's actions during the transition period. The District Court did not use this term when it concerned the removal of the male refugees selected by the Bosnian Serbs. Like Claimants, the District Court is of the opinion that the designation evacuation does not do justice to the actual situation of the removal of the male refugees, which was a *deportation*. The term evacuation does apply to the removal of the other refugees from the *mini safe area*, for which the District Court takes into consideration that a safe haven had to be found for the refugees after the fall of Srebrenica and that there was no reason to have concerns about the fate of these refugees. The fact that the men were removed from the queues for the buses, is not reason enough to also designate the removal of the other refugees as deportation.

4.293. Claimants' accusation essentially does not concern the evacuation of the other refugees, but Dutchbat's cooperation with the separation of the men from the other refugees prior to their deportation.

4.294. In so far as Claimants also wish to argue that Dutchbat should not have cooperated at all with the evacuation of the refugees, the District Court considers that there is no reason to regard Dutchbat's cooperation with the evacuation of the other refugees who as a result were brought to safety, which is not in dispute.

4.295. The District Court proceeds to discuss Claimants' accusation about the separation of the men from the rest of the refugees in chronological order, namely supervising the evacuation of the refugees on July 12th 1995 (1), the decision not to stop the evacuation in the evening of July 12th 1995 (2), continuing the supervision of the evacuation on July 13th 1995 (3), and Claimants' asserted active involvement of Dutchbat in separating the men from the other refugees (4).

(1) Supervision of refugees on July 12th 1995

4.296. The State contests that Dutchbat was actively involved in separating the men from the other refugees. It argues that due to the *run* on the buses, which can be explained by the miserable conditions in which the refugees had been staying at and around the compound, Dutchbat only wanted to channel and guide the evacuation of refugees.

4.297. The State's position is also found in Van Duijn's statement before the Dutch parliamentary committee of inquiry, in which it is also acknowledged that Dutchbat's supervision of the evacuation of refugees possibly made it easier for the Bosnian Serbs to remove men from the queues:

> '*(...) the only goal we had in mind at that time was to prevent people from collapsing, being trampled or crushing each other. And also to ensure that panic did not break out. At the time, we didn't think that we could be giving the Serbs a means with which they could pick out the men more easily. (...) There was no other option, really. If you see people nearly crushing each other to death, you have to take action.*' (PE hearings, p. 32).

Franken made the following statement before the Dutch parliamentary committee of inquiry about this:

> '*No, it didn't make it easier. Granted, it accelerates the process, but they could have just as easily let the mixed group of refugees board the buses and then pick out the men. That does not have any effect at all. We just wanted to prevent a wave of refugees from panicking and running to the buses and that the Serbs would respond to that, possibly even with force. For that reason we wanted to channel the crowd.*' (PE hearings, p. 76).

4.298. As concluded above in 4.247 Dutchbat could initially reasonably assume on July 12th 1995 that the Bosnian Serbs would screen the male refugees who were removed from the queues for war crimes and had no reason to fear for the fate of these men. In part against this background Dutchbat could in all reasonableness decide to supervise the evacuation in the manner described above.

(2) the decision not to stop the evacuation in the evening of July 12th 1995

4.299. In the evening of July 12th 1995 Dutchbat could suspect, and did suspect, that the men selected and carried off by the Bosnian Serbs ran a real risk of being killed or inhumanely treated. It was then also considered to stop the evacuation and it was decided not to do so.

4.300. About this decision Franken made the following statement before the Dutch parliamentary committee of inquiry:

> '(...) *The women and children who I had prioritised arrived unharmed. So there was no reason to stop the evacuation at that point. It was the only solution at the time, because I could not take care of them. (...) We expressly and clearly chose to help the large number of women and children. If I had stopped the evacuation, Mladić would not have had to worry at all, because the problem would have solved itself within a matter of days. That sounds very cynical, but it would have created a situation with many casualties without direct influence from Mladić (...) I started to have suspicions than it was more grim for the men than I initially thought. All in all, I decided, or rather advised, to continue the evacuation and not stop it. That means that you make a conscious decision: I chose 25,000 women and children at the possible expense of 600 to 700 men – it was also unclear to us that all those men would be killed.*' (PE hearings, p. 76).

4.301. Claimants point out Franken's answer to the following question posed by one of the ICTY judges of the Krstić case:

> '*You said you – considering the history, that is, you were saying that, considering the history of the Serb side, not directly in the area of Srebrenica but on the whole, "I expected the Serb forces to start killing civilians indiscriminately". In other words, that would be delivering the Srebrenican people to their butchers, if I put your statement with the decision to let the Serbs evacuate them.*'

His answer is: '*That is correct, sir. I had those fears*'.

4.302. In a hearing cited in legal ground 6.7 by the Appeals Court within the context of the Nuhanović and Mustafić cases Franken made the following statement:

> '*He (Ibro Nuhanović – Appeals Court) asked me to stop the evacuation, because he feared everybody would be killed by the Serbs. I answered that I feared, in fact, for the men as well but that, in fact, he asked me to make the choice between thousands of women and children and the men. And then he answered that he understood what I meant, and he agreed and went away*'.

4.303. The statement cited above shows that Franken acknowledged the consequences of not stopping the evacuation. As has been considered above, it was not a realistic option to admit all refugees to the compound at that point, nor removing the men from the *mini safe area* outside the compound and admit them to the compound. Dutchbat did not have a viable alternative under the given circumstances to bring the refugees to safety and to take them out of the quickly deteriorating situation in the mini safe area. Furthermore, it is not proven – and Claimants do not argue this – that the other refugees who were being evacuated and taken to Kaldanj as agreed ran the risk of being killed or inhumanely treated. Continuing the evacuation was in fact in the interest of this large group of other refugees, who had been brought to safety and taken out of the miserable conditions of the *mini safe area*. In this regard the District Court takes into consideration that as a result of this situation in the *mini safe area* several people had already been killed and that on July 11th 1995 the assessment was made that the refugees – depending on the circumstances – could stay in the *mini safe area* for another three to five days. So on July 12th 1995 another two to four days. It is the District Court's opinion that, in the given circumstances and in view of what it knew at the time, Dutchbat was able to take a reasonable decision to continue the evacuation, which brought the majority of the refugees to safety and out of a situation that was becoming increasingly untenable. The District Court therefore does not accept Claimants' argument that an unjustifiable assessment.

(3) Continuing the supervision of the evacuation on July 13th 1995

4.304. Dutchbat also supervised the continued evacuation on July 13th 1995 in the manner described above. When in the morning of 13th July 1995 the buses showed up earlier than the Bosnian Serbs, Dutchbat started leading the refugees – including the male refugees – to the buses. Several buses with refugees left prior to the arrival of the Bosnian Serbs more than an hour later. There were also men in these buses. The Bosnian Serbs stopped a number of these buses en route and took the men out of the buses. A number of men who had left that morning survived however (NIOD, pp. 2739 to 2740).

4.305. Van Duijn, who that morning had decided to let the evacuation start, made the following statement before the Dutch parliamentary committee of inquiry:

> '*The first day of the transportation you see families being torn apart and men being separated from women and children. Those images are etched in your memory. As well as the kicking and beating of the Bosnian refugees by Serbian soldiers. The Serbian soldiers had said that they would arrive around half past eight in the morning. I myself was there at about six that morning. I also expected the buses to arrive later, but they had arrived earlier. At that time I thought: the Serbian soldiers are not here yet, the people have to leave anyway; let's start; that way, the people can calmly walk to the buses themselves and we can assist them; we can also help them if people fall or are unable to walk. This way we can let them board the bus in a humane manner without Serbian soldiers interfering or pulling men out. I am happy that the NIOD has been able to find men who in those few hours slipped through the Serbian net and escaped. (...)*' (PE hearings, p. 32).

4.306. Claimants refer to the statement Rutten made before the Dutch parliamentary committee of inquiry:

> '*(...) an alternative position was that of observer. That is what I said to be done: sit down on the side of the road, observe, write down names, record facts. If you end up in a situation where you no longer have weapons and are walking around in a T-shirt, but still can record*

> *that "millimetre", then that should be your position. If you fail to do that or choose a different position, you take on some kind of responsibility. I was unwilling to take that responsibility. I tried to document what actually was happening, which was, to put it bluntly, a deportation. There is no other word for it.*' (PE hearings, p. 49).

4.307. This statement refers to the discussion that Rutten and Van Duijn had later that day, on 13th July 1995. Claimants also refer to the documentation of this discussion in the. This discussion occurred after Rutten had found the bodies and had visited the White House. Rutten demanded that his fellow Dutchbat soldiers stop 'doing odd jobs' for the evacuation and confronted the Bosnian Serbs, after which the evacuation was temporarily stopped (NIOD, pp. 2740 to 2741).

4.308. Rutten made the following statement before the Dutch parliamentary committee of inquiry about this discussion with Rutten:

> '*(...) there were in fact only two options. Those were clear to me. It was a choice between two evils. But I didn't have the time to explain to him what exactly had been the run-up to the situation.*' (PE hearings, p. 34).

4.309. About the possibility of preventing the separation of the men from the rest of the refugees, Franken made the following statement during the provisional witness examination in the Nuhanović and Mustafić cases: '*The only way to prevent the separation of the men was to stop the evacuation, about which I already made a statement.*'

4.310. The District Court acknowledges that on July 13th 1995, after the decision had been made not to stop the evacuation, in its actions during the evacuation Dutchbat had to make an assessment about on the one hand the safety of the able-bodied men who were at risk of being removed from the queues by the Bosnian Serbs on their way to the buses, and on the other hand the safety of the other refugees. In view of the experiences of the day before, at the chaotic start of the evacuation when there was a large *run* on the buses and people were being trampled and buses became overcrowded, Dutchbat in all reasonableness was able to decide to continue to assist the evacuation by forming a lock through which groups of refugees walked in turns to the buses. The District Court also takes into account that the alternative of not assisting by means of taking up a position as observer as suggested by Rutten would not have stopped the Bosnian Serbs from pulling men out of the rows of refugees. It has not been asserted, nor is there any evidence that there was any alternative other than to stop the evacuation as mentioned by Franken. It has previously been assessed that Dutchbat was able to decide in all reasonableness to continue the evacuation, in view of the interests of the other refugees being served.

4.311. The foregoing leads the District Court to conclude that (also) Dutchbat's supervision of the evacuation on July 13th 1995 by forming a lock and leading the refugees to the buses in turns is not unlawful.

(4) The asserted active involvement of Dutchbat in separating the men from the other refugees on July 13th 1995

4.312. In the given circumstances, Dutchbat could have been expected to only supervise on July 13th 1995 and to refrain from any active actions that could lead or contribute to Bosnian Serbs taking able-bodied men from the queues of refugees heading towards to the buses. According to the District Court active actions include any acts beyond the mere assistance of refugees to the buses via the lock through which they walked in turns. This

includes, for example, pointing out men, removing men from the queues with the Bosnian Serbs and guarding the men who had been removed from the queues. Such actions cannot stand up to the test of reasonableness and must be deemed unlawful.

4.313. Most written statements of [Claimant 1] et al., mention supervision of the evacuation by Dutchbat as described above.

4.314. The written statement of [Claimant 3], stating that her daughter-in-law's son – who was later found decapitated – was stopped by Dutch and Serbian soldiers and not allowed to get on the bus, describe the more active actions referred to above.

4.315. Two different written statements also relate to more active actions by Dutchbat on July 13th 1995, namely:

– [Claimant 4]'s statement about what occurred on July 13th 1995 refers to the fact that a Dutchbat soldier and an interpreter were standing among the refugees and the waiting buses and that this Dutchbat soldier through the use of the interpreter said that men and women had to go to different buses. This statement also refers to the fact that a group of armed Dutchbat soldiers were standing around a group of waiting men and that Dutchbat soldiers were walking around together with Serbian soldiers across the site. '*Together they separated the men from the women. I was also separated from my husband. I never saw him again.*'
– [Claimant 9]'s statement mentions that when she and her husband met each other in front of the compound on July 13th 1995 and wanted to go to the buses, a Dutch soldier stopped her husband and led him to a Bosnian Serb and that she saw that a man was trying to hide at the compound, but was grabbed by the hands by two Dutchbat soldiers and removed from the compound.

4.316. If these statements are true, these are unlawful acts by Dutchbat attributable to the State. The truth of these statements disputed by the State by arguing that there is no supporting evidence however does not need to be investigated because in the opinion of the District Court, the required causal relationship for liability of the State is lacking. The District Court considers as follows:

4.317. It cannot be established with a sufficient degree of certainty that the husbands of [Claimant 4] and [Claimant 9] would have survived in the absence of the more active actions of Dutchbat as described in their statements. After all, the Bosnian Serbs systematically selected men from the queues of refugees heading to the buses. Rutten's statement before the Dutch parliamentary committee of inquiry describing the process of the assistance also reveals that the refugees had to walk several hundreds of meters before reaching the buses:

> '*Between two tapes, groups were assembled of 60 to 70 people and subsequently they were directed into the buses. In one spot the groups were assembled and a few hundred meters farther they were led to the buses. That morning I had already observed that on the interlinking terrain the men and women were being separated. (...)*' (PE hearings, p. 48).

It is therefore very unlikely that the men would not have been pulled out of the queues by the Bosnian Serbs at any other or later time on the way to the buses. At any rate, Claimants have not put any argument forward from which it can be deduced that this chance was smaller. Furthermore, it has been established that the buses were stopped by the Bosnian Serbs and screened for men en route and at the alighting point in Tišca. Only a few buses

that had left early on July 13th 1995 were not checked. The other buses were checked by the Bosnian Serbs en route, who then removed the men who had been able to get on board of the buses and carried them off. The following considerations of the ICTY provide a clarification:

> '*As the buses carrying Bosnian Muslim women, children and elderly to Kladanj reached Tišca, they were stopped and further screening was carried out for men who had managed to escape the net at Potočari.*' (Krstić, legal ground no. 368) and:
>
> '*The strength of the desire to capture all the Bosnian Muslim men was so great that the Bosnian Serb forces systematically stopped the buses transporting the women, children and elderly at Tišca and checked that no men were hiding on board. Those men found in the buses were removed and subsequently executed.*' (Krstić, legal ground no. 547).

Finally, it has been established that nearly all men from the *mini safe area* taken prisoner by the Bosnian Serbs were killed.

(f) Cooperating in the evacuation of refugees who had sought refuge at the compound

4.318. In view of Claimants' standpoints, this accusation focuses on the men who had sought refuge at the compound. Apart from that, it applies here too that it has not been proven that the actions of Dutchbat during the evacuation of the other refugees who had sought their refuge at the compound are unlawful.

4.319. Dutchbat assisted with the evacuation of the compound in the same manner it had done up to that point. The Nuhanović and Mustafić cases prove that – in any case by the end of this part of the evacuation, when nearly all refugees had left the compound – Dutchbat urged refugees who did not want to leave the compound to leave and/or sent them away from the compound.

4.320. In order to protect the able-bodied men, Franken faxed the list he had ordered to be drawn up to various national and international authorities, among which the Royal Netherlands Army. According to his interpreter, Franken told the Bosnian Serbs that they had to take into account that Dutchbat had this list and that copies had been sent to the International Red Cross in Geneva and the UN in New York (NIOD, p. 2747). Franken stated before the Dutch parliamentary committee of inquiry that he saw the drawing up of this list as the only way to protect the men: '*I explained to you before why I did not physically protect the men. This does not mean that I regard the drawing up of a list as being equivalent to the physical protection of the men. But in the given situation, it was one of the possibilities to at least offer them some protection.*' (PE hearings, p. 77).

4.321. In the opinion of the District Court, Dutchbat should have reassessed its actions regarding the evacuation of the refugees when the evacuation of the compound started in the afternoon of July 13th 1995, and it was unable to take the decision in reasonableness to let the able-bodied men leave the compound, especially with the knowledge it had at that time, namely that if the men were carried off by the Bosnian Serbs they would face death or inhumane treatment. The District Court therefore considers as follows.

4.322. The compound took up a separate position within the *mini safe area*. Dutchbat was fully in control of the enclosed compound. The Bosnian Serbs who were present in the *mini safe area* outside the compound and did not shy away from committing war crimes there, never interfered with the compound and respected Dutchbat's authority over

the compound. As has been assessed above, the State had jurisdiction in the compound, as stipulated in Article 1 ECHR and Article 1 ICCPR, in contrast with the part of the *mini safe area* that lay outside the compound.

4.323. At the start of the evacuation of foreign nationals at the compound, the group of refugees to be evacuated had decreased to approximately 5,000, about a fifth of the original number previously present in the *mini safe area*. This puts the argument of the State in perspective regarding the minor number of Dutchbat soldiers in the *mini safe area* in relation to the number of refugees. In addition, Dutchbat had an overall insight into the number of able-bodied men within the compound, of whom the majority were on the list Franken had had drawn up, and did not have insight into the number of men among the refugees in the part of the *mini safe area* outside the compound.

4.324. Because of the events that took place on July 13th 1995, especially the discovery of the burning pile of identity papers at the White House, Dutchbat knew when the evacuation of the refugees of the compound became relevant that the men selected and carried off by the Bosnian Serbs faced death or inhumane treatment. It has therefore also been considered that by the end of the afternoon of July 13th 1995, Dutchbat must have been aware of the serious danger (*serious risk*) of genocide if the men residing at the compound were to be carried off by the Bosnian Serbs.

4.325. The District Court acknowledges that the situation at the compound was miserable and that accommodating all refugees for a longer period was not a realistic option due to the lack of food and other provisions, and due to the risks that are inherent to a large group of people living in the sweltering heat and under unsanitary conditions.

However, it has not been proven that it was impossible to accommodate the orderly group of able-bodied men who were present at the compound for some time longer. Nor has it been proven that by allowing the other refugees from the factory hall at the compound to depart and letting the able-bodied men remain there would have presented practical problems. The situation in the compound differed in this sense as well from the situation of the evacuation of refugees from the part of the *mini safe area* outside the compound, which would have entailed Dutchbat picking men out of the crown of refugees.

4.326. The foregoing proves that the evacuation of the refugees from the compound differed substantially in a number of ways from the evacuation of the refugees from the part of the *mini safe area* outside the compound. In all reasonableness, Dutchbat could have been required to reassess the situation and all interests concerned prior to the evacuation of the refugees from the compound and that it should have decided to let the male refugees stay at the compound.

4.327. In that reassessment, Dutchbat should not and could not have reasonably relied on the fact that the list of able-bodied men at the compound drawn up by order of Franken would have offered the assumed protection against the fate faced by these men, known to Dutchbat. Dutchbat could and should have taken into account the possibility that the Bosnian Serbs would not respect this list. The Bosnian Serbs had already demonstrated during the evacuation of the refugees that they did not keep agreements to that effect, for example when it took over control of the evacuation on July 12th 1995 and apparently had already arranged buses. Furthermore, they did not shy away from selecting men from the queues of waiting refugees and from abusing refugees, literally under the gaze of Dutchbat soldiers. The Bosnian Serbs' remarks about the pile of identity papers as

referred to in the statement of Van Duijn (see 4.251) does not correspond with the purpose of screening the men, which was still being claimed by them, nor does the taking away and burning of these documents correspond with such a screening. These remarks and the conduct of the Bosnian Serbs showed that they were unreliable in their statements about the able-bodied men.

4.328. The District Court's opinion given above, namely that Dutchbat was unable to take the decision in reasonableness to let the able-bodied men leave the compound is in accordance with the ruling of the Appeals Court in the Nuhanović and Mustafić cases relating to the actions of Dutchbat in the final phase of the evacuation of the refugees from the compound. The Appeals Court considered that it cannot be assumed that a possible order from the UN or the Dutch government to cooperate with the evacuation of the refugees by the Bosnian Serbs would have entailed that the evacuation should have been supported if there had been a real risk for the able-bodied men at the compound to be killed or inhumanely treated by the Bosnian Serbs. The Appeals Court held that it would not have constituted a violation of any order given by the UN or the Dutch government if Dutchbat had decided no later than by the end of the afternoon of July 13th 1995 to no longer cooperate with the evacuation because of this risk. In accordance with the Gobilliard's order '*to take all reasonable measures to protect refugees and civilians in your care*', Dutchbat should have terminated its cooperation with the evacuation from that moment, in any case with regard to the able-bodied men, according to the Appeals Court. As is apparent from the foregoing, it is the opinion of the District Court that this applies from the moment the evacuation of refugees from the compound started, in which the necessity to terminate its cooperation became all the more pressing as, other than on July 12th 1995 and in the morning of July 13th 1995, Dutchbat must have been aware of a *serious risk* of the male refugees being killed in a genocide.

4.329. The actions of Dutchbat can be qualified as a violation of Article 2 ECHR and Article 6 ICCPR and as actions contrary to the standard of care under Book 6, Section 162 of the Dutch Civil Code. This standard of care is in this case exemplified by the principles of law that constitute the basis for the conventions mentioned above and the State's obligations under international law to prevent genocide. Dutchbat's acts are unlawful with respect to the male refugees who left the compound late in the afternoon on July 13th 1995.

4.330. In the opinion of the District Court, the required causal relationship regarding liability of the State is proven, as it is determined with a sufficient degree of certainty that the able-bodied men staying at the compound would have survived if Dutchbat had not cooperated with their deportation. The District Court therefore considers as follows.

4.331. Not cooperating with the deportation of the able-bodied men at the compound would in practice have meant that these men would have remained at the compound, together with Dutchbat and the local personnel and MSF personnel who were going to be evacuated along with Dutchbat. The Bosnian Serbs would have been unable to carry these men off and subsequently kill them. The fate of the men would have been tied in with that of Dutchbat. Under these circumstances, the Bosnian Serbs would have had no other option than to use force against Dutchbat and the compound in order to be able to transport the remaining men. The District Court holds beyond doubt that the Bosnian Serbs would not have proceeded to do so, even in the face of, in the words of the ICTY, '*a concerted effort (...) to capture all Muslim men of military age*' and was '*the operation to capture and detain the Bosnian men (...) well organized and comprehensive*' (Krstić, legal ground no. 85).

The District Court takes into account the fact that the Bosnian Serbs up to that moment had not interfered with the compound and that their earlier threats to use force against the compound had proven to be empty. It was already clear to Franken when the enclave fell that Mladić would not allow UN soldiers to be killed (NIOD, p. 2241) and on July 12th 1995, Voorhoeve had already concluded that sparing peacekeeping forces was part of the Bosnian Serbs' attack strategy (NIOD, p. 2439). It is also taken into account that the Bosnian Serbs must have been aware of the presence of an orderly number of able-bodied men at the compound, contrary to the rest of the *mini safe area*: during the Dutch parliamentary committee of inquiry, Franken stated that he had let two or three Bosnian Serbs onto the compound shortly after the fall of the enclave '*because they wanted to make sure that the entire 28th division was not there with me at the compound*' (PE hearings, p. 74). Finally, the Bosnian Serbs had found out on July 11th 1995 that the UN and NATO were willing to deploy air weapons and the District Court considers it impossible that no air support would have been provided if the compound had been attacked.

4.332. It follows on from the foregoing that the State is liable for the deportation of the able-bodied men who had been staying at the compound in the late afternoon on July 13th 1995 on account of unlawful acts.

4.333. The District Court also posed the question whether it can be determined with a sufficient degree of certainty that the lives of the male refugees staying outside the compound could also have been saved if Dutchbat had not only reported the observed war crimes from the evening of July 12th 1995 onwards, but also would have reported in the late afternoon of July 13th 1995 that due to observations earlier that day the male refugees would not be allowed to leave the compound.

4.334. The District Court answers this question in the negative. The District Court already determined above that the military intervention required to save the lives in question could not have been launched (in time). A report in the later afternoon of July 13th 1995 of the fact that the male refugees were not allowed to leave the compound could not have changed this. The opinion given in 4.333 also implies that it should be determined with a sufficient degree of certainty that the male refugees staying at the compound would eventually have been brought to safety via diplomatic channels, like the UN and MSF personnel, partly because the fate of Dutchbat would have been tied in with that of the male refugees. Since the latter would not have applied to the other male refugees, who after all had been deported from the mini safe area with a then unknown destination, or who had fled into the woods and consequently were out of sight, it cannot be determined with a sufficient degree of certainty that diplomatic efforts would have led to the saving of the lives of the last-named group of refugees.

(C) Conclusion regarding unlawful acts of the State

4.335. The District Court has determined that the following acts of Dutchbat attributable to the State are not unlawful:

(i) Abandoning the *blocking positions*
(ii) Not providing adequate medical care to the refugees
(iii) Handing over weapons and other equipment to the Bosnian Serbs
(iv) Upholding the decision throughout the transition period not to allow refugees entry to the compound
(vi) Separating the male refugees from the other refugees during the evacuation, in so far as this constitutes assistance by forming a lock and guiding the refugees to the buses in turns.

4.336. In a ground included for the sake of completeness, the District Court has held that even if it is established that Dutchbat advised the male refugees to flee to the woods, this advice – as well as the failure to raise the alarm about their fleeing – are not be deemed as unlawful. Whether or not this advice was indeed given does therefore not require further investigation.

4.337. The District Court holds that Dutchbat wrongly failed to report the observed war crimes to the UN chain of command. Since the causal connection required for liability of the State between this failure and Claimants' damages is lacking, the declaration claimed under 3.1 sub II cannot be granted regarding this failure. Even if it is established that the cooperation of Dutchbat with evacuation of refugees on July 13th 1995 also consisted of an active separation of the male refugees, this will not lead to allowing this declaration in this respect due to the lack of a causal connection between these acts and Claimants' damages. Further investigation into the facts is therefore not required.

4.338. The District Court deems Dutchbat's cooperation with the deportation in the late afternoon of July 13th 1995 of the able-bodied male refugees who had sought refuge at the compound an unlawful act for which the State is liable. It concerns about 320 men, among whom were Mustafić and Nuhanović's father and brother, to who the Nuhanović and Mustafić cases related. The majority of these men were never seen alive again. A small number of them ended up in the Batkovici prison camp near Bijelina and were released in December 1995 under the Daytona Agreement, along with another group of men from Srebrenica (NIOD, p. 2659).

4.339. The liability of the State extends to the family members of the men who were carried off from the compound and then killed by the Bosnian Serbs in the late afternoon of July 13th 1995, the starting point for which are the spouses and children of the adult men and the parents of the underage men. It should be noted that men who have reached the age of eighteen are deemed adults.

4.340. The fact that in the Nuhanović case the State was held liable for the damage incurred by Nuhanović as a result of the transportation of his adult *brother* Muhamed is not a reason to expand the identified circle of persons towards whom the State is liable. Nuhanović had a special position as a UN interpreter who was supposed to be evacuated along with Dutchbat. He made efforts to convince Dutchbat to let his brother remain at the compound and did not succeed in discouraging Dutchbat from sending his brother Muhamed away from the compound after the other refugees (maybe with the exception of the Mustafić family) had left the compound. This actual situation, in which the special position of Nuhanović plays a role, would not have occurred if Dutchbat – as the District Courts finds it should have done – had decided to let the group of able-bodied men stay at the compound at the *start* of the evacuation of the refugees from the compound in the late afternoon of July 13th.

4.341. None of the male family members of [Claimant 1] et al. were at the compound in the late afternoon of July 13th. [son of Claimant 9], the son of [Claimant 9], the only male family member who had sought refuge at the compound, had already left the compound on July 12th 1995. The other male family members of [Claimant 1] et al. had either fled to the woods or had been separated and carried off from the *mini safe area* that lay outside the compound. The claims of [Claimant 1] et al. are therefore dismissed.

4.342. In so far as the *Stichting* represents their interests, the State is liable towards the family members referred to under 4.339 of the men who in the late afternoon of July

13th 1995 were deported from the compound and subsequently killed by the Bosnian Serbs. Further possibly relevant questions fall outside the scope of these proceedings and therefore remain undiscussed.

4.343. The foregoing entails that the declaration referred to under 3.1 sub II shall be awarded in the sense that the ruling is that on account of an unlawful act the State is liable for damages incurred by the persons referred to under 4.339 and represented by the *Stichting*, resulting from the cooperation extended by Dutchbat to the deportation of the male refugees who in the late afternoon of July 13th 1995 were deported from the compound in Potočari by the Bosnian Serbs and subsequently killed.

Legal costs

4.344. In view of the result of these proceedings, the State is ordered to pay the costs of these proceedings on the part of Claimants so far estimated at €6,060.85 (€70.85 in summons costs, €4,182 in court fees and €1,808 in lawyer's fees; four items at rate II, applied in cases with an unspecified value).

5. The decision

The District Court

5.1. Rules that on account of an unlawful act the State is liable for damages incurred by the persons referred to under 4.339 and represented by the *Stichting*, resulting from the cooperation extended by Dutchbat to the deportation of the male refugees who in the late afternoon of July 13th 1995 were deported from the compound in Potočari by the Bosnian Serbs and subsequently killed

5.2. Orders the State to pay the costs of these proceedings on the part of Claimants so far estimated at €6,060.85

5.3. Declares the cost order provisionally enforceable

5.4. Dismisses all other applications.

This judgment was pronounced by L. Alwin LL.M., D.R. Glass LL.M. and J.W. Bockwinkel LL.M. and read in open court on July 16th 2014.