Questions of Legal Responsibility for Srebrenica before the Dutch Courts

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Abstract

This contribution provides an overview of the litigation in the Dutch civil and criminal courts concerning the Srebrenica massacre. The author maps out the Dutch courts' divergent approaches to immunity of United Nations peacekeepers, state responsibility and individual criminal responsibility for the events in Srebrenica.

1. Introduction

This contribution focuses on the decisions of the Dutch courts relating to the massacre that occurred in Srebrenica in 1995, in particular on the cases *Nuhanović* and *Mustafić*,[1] and *Mothers of Srebrenica*.[2] In addition to examining the merits of the judgments at all levels of the Dutch court system — District, Appeals and Supreme — the analysis also addresses issues of immunity,[3] including the important decision not to order the criminal prosecution of

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1 See *Mustafić v. the State of The Netherlands* and *Nuhanović v. the State of The Netherlands* (265618/HA ZA 06-167 and 265615/HA ZA 06-1671), District Court The Hague, 10 September 2008; *Mustafić and Nuhanović v. the State of The Netherlands* (200.020.173/01 and 200.020.174/01), Court of Appeals The Hague, 5 July 2011 and 26 June 2012 (the Appeal was dealt with in two stages); *Mustafić and Nuhanović v. the State of The Netherlands* (12/03329 and 12/03324), Supreme Court, 6 September 2013. The cases of *Mustafić* and *Nuhanović* are formally separate, but the judgments in the two cases are almost identical. Hereafter, all references will be to *Nuhanović* District Court, *Nuhanović* Appeals Court, *Nuhanović* Supreme Court. All Dutch judgments referred to in this article are freely available online at http://www.rechtspraak.nl.

2 *Mothers of Srebrenica Association et al. v. the Netherlands* (C/09/295247/HA ZA 07-2973), District Court The Hague, judgment of 16 July 2014 (*Mothers of Srebrenica* District Court).

3 *Mothers of Srebrenica Association et al. v. the Netherlands and the United Nations* (295247/HA ZA 07-2973), The Hague District Court, decision of 10 July 2008 (*Mothers of Srebrenica* (immunity) District Court); (200.022.151/01), The Hague Court of Appeal, decision of 30 March 2010 (*Mothers of Srebrenica* (immunity) Appeals Court); (10/04437), Supreme Court of the Netherlands, decision of 13 April 2012 (*Mothers of Srebrenica* (immunity) Supreme Court).

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three senior officials of Dutchbat[4] and the related recusal decision.[5] The legal issues the Dutch courts had to deal with centre around the immunity of the United Nations (UN) from the jurisdiction of the Dutch civil courts, as well as state responsibility of the Netherlands and individual criminal responsibility of senior members of Dutchbat for what happened in Srebrenica.

A very brief overview of the relevant facts will be provided first (Section 2). This is followed by a discussion on the immunity of the UN from the jurisdiction of the Dutch civil courts (Section 3). This article will then turn to the question of state responsibility of the Netherlands for the failure to protect the Bosnian Muslims from the Bosnian Serbs (Section 4). The (im)possibility of holding certain senior commanders of the Dutch peacekeeping battalion individually responsible before the Dutch criminal court will then be analysed (Section 5), followed by a conclusion (Section 6).

2. Facts of Srebrenica

The breakup of the Socialist Federal Republic of Yugoslavia (SFRY) began in the 1990s. In 1991, Slovenia and Croatia issued declarations of independence from Yugoslavia, which, at least in the case of Croatia, led to clashes with the Yugoslav Army.[6] The following year, the UN Protection Force (UNPROFOR) was sent to the region.[7] The disintegration of the SFRY continued when Bosnia and Herzegovina also issued a declaration of independence. Immediately thereafter, fighting broke out between Serbs and Muslims in Bosnia. Srebrenica, a town in eastern Bosnia, became a Muslim enclave, a place where Muslim civilians gathered to shelter from the violence of the war. Large numbers of civilians became trapped there as the war raged around them. In 1993, UNPROFOR Commander Philippe Morillon paid Srebrenica a visit and told a large crowd of frightened civilians: '*Vous êtes maintenant sous la protection de l'ONU. … Je ne vous abandonnerai jamais.*'[8]

The UN felt it had to keep this promise, which was, after all, made in its name. Srebrenica was subsequently designated a 'safe area', protected by a

4 'Dutchbat' is a contraction of 'Dutch battalion', the name commonly used to refer to the Dutch battalion of UN peacekeepers stationed in Srebrenica and part of UNPROFOR.

5 *Hasan Nuhanović, Mehida Mustafić-Mujić, Alma Mustafić and Damir Mustafić v. Thomas Jacob Peter Karremans, Robert Alexander Franken, and Berend Jan Oosterveen* (K14/0339), Court of Appeals Arnhem-Leeuwarden, decision of 29 April 2015 (*Nuhanović* decision not to prosecute). Reference will also be made to Court of Appeals Arnhem-Leeuwarden (K14/0339), decision of 23 October 2014 (*Nuhanović* recusal decision). The Court of Appeals is the court of first and last instance for such issues; see Section 5.

6 For a more detailed overview of the facts, see O. Spijkers, 'Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica', 1 *Human Rights & International Legal Discourse* (2007) 230–240.

7 SC Res. 743 (1992), adopted 21 February 1992.

8 National Assembly of France, *Rapport d'information déposé en application de l'article 145 du Règlement par la mission d'information commune sur les événements de Srebrenica*, 22 November 2001, at 22.

traditional peacekeeping force (UNPROFOR), backed by air strikes carried out by the North Atlantic Treaty Organization (NATO), and a weapons embargo within the enclave.[9] In early 1995, UNPROFOR personnel were taken hostage by the Bosnian Serbs. And then in July 1995, Bosnian Serbs took the enclave of Srebrenica. The civilians fled from the town and its surroundings to UNPROFOR's compound in nearby Potočari. Not long thereafter, women and children were transported from the compound, and the enclave was declared lost by Dutchbat. Almost all Muslim men of military age were removed from the compound; they were then killed by the Bosnian Serbs.

Against these background facts, three cases were brought before the Dutch courts. Hasan Nuhanović worked as an interpreter for the United Nations Military Observers. In this capacity, he provided assistance to Dutchbat. When the enclave fell, Nuhanović was permitted to leave with the soldiers of Dutchbat, but Dutchbat refused to protect his relatives. Nuhanović's father had some formal relationship with Dutchbat, and would have been permitted to remain. However, he decided to accompany his other son, who was not permitted to remain with Dutchbat. This was a heroic act that would cost him his life. Nuhanović's father and brother were handed over to the Bosnian Serb Army and killed along with thousands of other Bosnian Muslims. Nuhanović brought legal proceedings in the Netherlands to hold the state legally responsible for the failure of the Dutch UN peacekeepers to save his relatives from the Bosnian Serbs. He believed this failure constituted a wrongful act, attributable to the state of the Netherlands.

Rizo Mustafić was working as an electrician for Dutchbat and was thus on the list of local staff members who were permitted to evacuate with Dutchbat. However, because of some administrative misunderstanding, members of Dutchbat at the crucial time were not aware that his name was on the list and told him to leave the compound.[10] This led to his death at the hands of the Bosnian Serbs.

The Mothers of Srebrenica is a Dutch foundation representing the interests of surviving relatives of those killed at Srebrenica in 1995. The Foundation claims that the failure of the Dutch UN peacekeepers to prevent the genocide, and to save all Bosnian Muslims from the Bosnian Serbs, constitutes a wrongful act attributable to both the Netherlands and the UN.

3. Immunity of the UN

This section analyses the Dutch courts' decisions on immunity of the UN.[11] The question of immunity arose only in the *Mothers of Srebrenica* case, because

9 SC Res. 819 (1993), adopted 16 April 1993.

10 See also Section 5.

11 See also O. Spijkers, 'The Immunity of the United Nations before the Dutch Courts', 51 *Military Law and the Law of War Review /Revue de Droit Militaire et de Droit de la Guerre* (2012) 362–394; O. Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court', 13 *Journal of International Peacekeeping* (2009) 197–219.

Nuhanović and Mustafić directed their claims exclusively against the Netherlands, whereas the Mothers of Srebrenica brought claims against both the Netherlands and the UN.[12]

First, the Dutch courts had to address the scope of the UN's immunity. Article 105 of the United Nations Charter (UN Charter) obliges all states to ensure that the 'Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.[13] Article II section 2 of the Convention on Immunities of the UN (Immunities Convention) further elaborates on this obligation, providing that the UN 'shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity'.[14] The UN expressly indicated it had no intention to waive its immunity in this case.

The Dutch courts interpreted these provisions in a variety of ways. There was some disagreement among the courts on how exactly to evaluate the circumstances under which the immunity of the UN had to be respected in order to ensure the fulfilment of the UN's purposes. The Mothers of Srebrenica initially argued that the UN's failure to prevent a genocide could hardly be considered necessary for the fulfilment of the UN's purposes — quite the opposite — and thus the UN would not be immune from a claim involving such a failure. But such a reading of Article 105 would only allow the UN to rely on its immunity for claims relating to minor incidents in an otherwise successful mission.

A second way to interpret Article 105 of the UN Charter is that it obliges domestic courts to respect the UN's immunity from *any* civil claim relating to activities of the UN that aim to fulfil the organization's purposes as defined in the Charter.[15] Peacekeeping is clearly done to maintain international peace and security and thus the UN would be immune from any civil claims related to its peacekeeping efforts regardless how successful the peacekeeping mission is. Under this interpretation, immunity would prevent civil claims arising from damage caused by car accidents or other issues relating in some way to the mission, but also in relation to damage caused by a general failure of the mission.

Under a third, even more general interpretation of Article 105 of the UN Charter, the UN would enjoy immunity from *all* claims, regardless of their nature, brought before domestic courts because the prospect of having to appear before a domestic court hinders the UN in the fulfilment of its purposes.

The District Court adopted the second approach, finding that 'the activities of the UN objected to [in this particular case] fall within the functional scope of this organization' and that 'it is particularly for acts within this framework

12 For an analysis of the how the ECtHR has dealt with the conflict between UN immunity and the right of access to a court, see the contribution by Maria Irene Papa in this issue of the *Journal*.

13 *Charter of the United Nations*, 24 October 1945.

14 *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.

15 Art. 2 UN Charter.

that immunity from legal process is intended'.[16] It thereby suggested that the UN may in theory also act outside its functional scope.

In contrast, the Dutch Appeals Court took the third, more general approach. It explained the difference between the two approaches as follows: the question is not 'whether the invocation of immunity in this particular case in hand is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution *in general*'.[17]

The Supreme Court agreed with the approach of the Appeals Court. It held that Article 105 of the UN Charter, read together with Article II, section 2 of the Immunities Convention, meant that 'the UN enjoys the most far-reaching immunity from jurisdiction, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the [Immunities] Convention'.[18]

A. Lack of Alternative Legal Remedies at the UN Level and the Legal Consequences Thereof

Article VIII, section 29 of the Immunities Convention obliges the UN to 'make provisions for appropriate modes of settlement of disputes of a private law character to which the United Nations is a party'. Unfortunately, the Immunities Convention does not specify what consequences flow from a failure to provide alternative legal remedies at the UN level. This was thus a question the Dutch courts needed to address. The District Court stressed the importance of a UN dispute settlement procedure as an alternative to domestic proceedings, especially if access to the latter was blocked by the UN's immunity.[19] However, even though the existence of such an alternative dispute settlement mechanism at the UN was considered important and highly desirable, the District Court considered that the failure by the UN to set up such a mechanism did not mean per se that the UN's immunity had to be set aside by a domestic court.[20]

The Appeals Court adopted an entirely different approach when it came to the alternative legal remedies issue. It believed that the claimants actually *did* have an alternative legal remedy, albeit not at the UN level. The Appeals Court did not see why 'there would not be an opportunity for [the Mothers of Srebrenica] to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law'.[21] The Court was thinking of the criminal proceedings against Radovan Karadžić, Ratko Mladić and others before the International Criminal Tribunal for the former Yugoslavia (ICTY). Secondly, the Appeals Court also reminded the

16 *Mothers of Srebrenica* (immunity) District Court, *supra* note 3, § 5.12.
17 *Mothers of Srebrenica* (immunity) Appeals Court, *supra* note 3, § 4.4 (emphasis added).
18 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.2.
19 *Mothers of Srebrenica* (immunity) District Court, *supra* note 3, § 5.15.
20 *Ibid.*
21 *Ibid.*

Mothers of Srebrenica that 'the course of bringing the State, which they reproach for the same things as the UN, before a Netherlands court of law is open'.[22] These constituted alternative legal remedies in view of the Appeals Court and thus the lack of legal remedies at the UN level was not such a problematic issue. This part of the Appeals decision has been criticized by commentators. The alternative remedies identified by the Appeals Court were 'beside the point', noted Dekker and Ryngaert, because 'they concern[ed] remedies against other persons (individuals, a State, as opposed to the UN as an international organisation) for other acts (genocide in respect of the perpetrators, as opposed to a failure to prevent genocide)'.[23]

The Dutch Supreme Court dealt at length with the need for an alternative legal remedy. It found support in a judgment of the International Court of Justice (ICJ) on the jurisdictional immunities of states.[24] This ICJ judgment was issued *after* the Dutch District and Appeals Court had published their decisions and thus the lower courts could not have referred to it. According to the Dutch Supreme Court, it was the ICJ's view that there is 'no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress'.[25] The Dutch Supreme Court held that the same arguments used by the ICJ to uphold the immunity of Germany (a state) were also applicable to the immunity of the UN (an international organization).[26]

The Supreme Court thus did not have to look at the actual existence of alternative legal remedies at the UN level or elsewhere. It did not have to examine the alternative legal remedies identified by the Appeals Court. This reasoning, based on an equation of state and UN immunity, can be criticized. For example, Reinisch rightly noted that 'the necessity for the availability of dispute settlement mechanisms may be even more relevant in the case of international organizations than of states since states can (almost) always be sued before their own domestic courts whereas international organizations usually do not have any comparable internal courts'.[27] The UN certainly does not have an internal court system competent to deal with this issue, which is exactly why the need for a legal remedy at the state level was so urgent.

22 *Ibid.*, § 5.12.

23 I. Dekker and C. Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals', in Netherlands Society of International Law, *Making Choices in Public and Private International Immunity Law* (T.M.C. Asser Press, 2011) 83, at 102.

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

25 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.13, with reference to ICJ, *ibid.*, § 101.

26 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.14.

27 A. Reinisch and U.A. Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', 1 *International Organizations Law Review* (2004) 67. See also *ibid.*, 88–89.

B. Right to a Fair Trial

The decision of the Dutch courts to uphold the immunity of the UN from domestic jurisdiction, despite the absence of an alternative legal remedy at the UN level or elsewhere, means that people claiming to be victims of the UN's actions — such as the Mothers of Srebrenica — effectively have no access to any form of dispute settlement. This is problematic because Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) obliges all High Contracting Parties, including the Netherlands, to 'secure to everyone within their jurisdiction the rights and freedoms defined in this Convention'.[28] One of these rights is the right of access to a court. Article 6 proclaims that, 'in the determination of his civil rights, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law'.

The Dutch courts were thus confronted with the simple fact that upholding the UN's immunity would potentially result in a breach of Article 6 of the European Convention on Human Rights. The Dutch courts relied heavily on the case law of the European Court of Human Rights (ECtHR) when dealing with this dilemma, especially the case of *Waite and Kennedy*. In this case, the ECtHR was confronted with the clash between the immunity of an international organization (European Space Agency) and the right of individuals to have access to a domestic court.[29] According to the ECtHR, the right of access to the courts may be subject to limitations. Such limitations are acceptable as long as: (i) the very essence of the right of access to a court is not impaired; (ii) a legitimate aim is pursued; and (iii) there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[30] Whether the applicants had reasonable alternative means available to them to effectively protect their rights was a 'material factor' in the assessment of the legitimacy of any such limitations.[31]

The Dutch courts had different views on the applicability of the criteria set out in *Waite and Kennedy* to the present dispute. The Dutch District Court held that the situation in *Waite and Kennedy* was in significant aspects different from the dispute between the Mothers of Srebrenica and the UN. First of all, the UN was established before the ECHR had entered into force, and this meant that 'there can be no question of a restriction of the protection of human rights under the ECHR by transfer of powers to the UN'.[32] This is different from the *Waite and Kennedy* situation, which involved the European Space Agency, which was established in 1980, *after* the ECHR had entered into force for Germany. Furthermore, the UN has a universal membership, which the

28 *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted under the auspices of the Council of Europe in Rome on 4 November 1950, entry into force in 1953.

29 European Court of Human Rights, *Waite and Kennedy v. Germany*, Appl. No. 26083/94, Judgment of 18 February 1999 ('*Waite and Kennedy*').

30 *Ibid.*, § 59.

31 *Ibid.*, § 68.

32 *Mothers of Srebrenica* (immunity) Trial Court, § 5.24.

European Space Agency does not have. Because the UN was 'special' for all these reasons, there was no need, concluded the District Court, to apply the criteria of *Waite and Kennedy*.[33] The Dutch District Court thus put considerable emphasis on the 'special nature' of the UN and its work. It referred extensively to *Behrami*, another judgment of the ECtHR.[34] In the interpretation of the Dutch District Court, the ECtHR held in *Behrami* that the ECHR 'should not be an impediment to the effective implementation of duties by international missions … under UN responsibility', and that '[b]y virtue of this, states cannot, according to the Court, be held liable for the actions of national troops they made available for international peace-keeping missions'.[35] The Dutch District Court considered that the underlying idea, i.e. that European human rights law should not obstruct the effective and independent functioning of the UN, was equally relevant to the present case. Applying the same rationale to the Srebrenica dispute, the District Court held that the ECHR 'cannot be a ground for exception to the … immunity under international law of the UN itself', and that '[t]he UN therefore cannot be brought before a domestic court just on the grounds of the right to access to a court of law guaranteed in article 6 ECHR'.[36]

The Appeals Court did not consider that the UN was 'special' in this sense. According to the Appeals Court, the ECtHR had merely pointed out in *Behrami* the 'special position of the UN within the international community', and this was a factor to take into account, but did not provide a reason to not apply the criteria of *Waite and Kennedy* at all.[37] The Appeals Court thus proceeded to apply these criteria to the UN.[38] The Appeals Court first noted that the UN's immunity served a legitimate aim, namely ensuring the 'effective operation' of the international organization.[39] On the question whether granting the UN far-reaching immunities was a proportionate means to achieve that aim, the Appeals Court held that 'the immunity from prosecution granted to the UN … is closely connected to the public interest pertaining to keeping peace and safety in the world', and that is why it is 'very important that the UN has the broadest immunity possible allowing for as little discussion as possible'.[40] It would be highly problematic, according to the Appeals Court, if the UN would be exposed to claims by parties to a conflict each time it intends to keep the peace and bring the parties to such conflict closer together. And thus 'only compelling reasons' could lead to the conclusion that the UN's

33 *Ibid.*, §§ 5.23–5.24.
34 ECtHR, *Agim Behrami and Bekir Behrami against France*, Appl. No. 71412/01, 2 May 2007, decision on Admissibility, §§ 146–152.
35 *Mothers of Srebrenica* (immunity) Trial Court, § 5.22.
36 *Ibid.*
37 *Mothers of Srebrenica* (immunity) Appeals Court, *supra* note 3, § 5.3.
38 The general criteria are outlined in *Mothers of Srebrenica* (immunity) Appeals Court, *supra* note 3, § 5.2.
39 *Ibid.*, § 5.6.
40 *Ibid.*, § 5.7.

immunity from the jurisdiction of domestic courts was not proportional to the purpose such immunity intended to serve.[41]

It must be recalled that the ECtHR in *Waite and Kennedy* held that the availability of an alternative legal remedy at the organizational level was 'a material factor'. In the *Mothers of Srebrenica* case, however, it was an established fact that the UN had not provided such an alternative legal remedy. Yet, the Appeals Court considered that there *were* in fact alternative legal remedies available, albeit not at the UN level. Thus, it had no difficulty in upholding the immunity of the UN, since the availability of such alternatives meant that the very essence of the right of access to a court would not be impaired.[42]

C. Article 103 of the UN Charter

Where the Appeals Court applied the criteria in *Waite and Kennedy* the Supreme Court explicitly rejected this approach, as the District Court had done before albeit for different reasons.[43] The Supreme Court essentially relied on Article 103 of the UN Charter as a conflict rule. It held that both the ECtHR as well as the ICJ had stated in earlier judgments that Article 103 of the UN Charter should be interpreted to mean that 'the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement'.[44] The Supreme Court held that it followed from Article 103, combined with the special nature of the purposes and work of the UN, that there was no need to balance the individual's right of access to a court and the UN's right to immunity. The obligation to respect the UN's immunity is based on a provision in the UN Charter — Article 105 — and thus prevails over any obligations the Netherlands has under the ECHR. The Supreme Court thus essentially based its decision on the principle in Article 103 of the UN Charter that whenever there is a conflict between UN obligations and other obligations, the former prevail over the latter. It considered that it was following the analysis of the ECtHR, referring to *Behrami*.[45]

In support of the UN Charter-based argument, the Supreme Court further held that there was no need to balance the interests of the individual and the UN, or 'in any event not in relation to the UN's activities in the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression)'.[46] Like the District Court, the Supreme Court also based the view that the 'UN occupies a special place in the international legal community' on *Behrami*.[47] The difference was that the

41 *Ibid.*
42 *Ibid.*, § 5.13–5.14.
43 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.5.
44 *Ibid.*, § 4.3.4.
45 ECtHR, *supra* note 34, §§ 146–152.
46 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.3.
47 *Ibid.*, § 4.3.4.

Supreme Court used this argument as support for its reliance on Article 103 of the UN Charter, while the District Court considered the obligation to respect the special nature of the UN's work as the decisive argument. The District Court attached much less importance to Article 103 of the UN Charter as a conflict rule. It considered that it was possible that other norms of international law might clash with the UN's immunity, despite the hierarchical relationship between the UN Charter and ordinary norms established in Article 103. After having referred to Article 103 of the UN Charter, the District Court noted that 'there are insufficient grounds for accepting a full and unconditional prevailing of international-law obligations of the State under the UN Charter over other international-law obligations of the State'.[48] The Appeals Court agreed with the District Court that Article 103 of the UN Charter could not by itself serve as a conflict rule. This was because the Article was 'not intended to allow the [UN] Charter to just set aside like that fundamental rights recognized by international (customary) law or in international conventions'.[49] In support of its interpretation, the Appeals Court recalled that promoting respect for human rights was one of the purposes of the UN, also according to the UN Charter itself.[50] The ECHR gave further substance to this general obligation to respect human rights. The Supreme Court disagreed with the lower courts and saw Article 103 of the UN Charter as decisive.

As a consequence, the Supreme Court did not have to look at the existence of alternative legal remedies. It could thus avoid the controversial findings of the Appeals Court, i.e. that alternative legal remedies existed because the perpetrators of the genocide and the Netherlands could be brought before a court.

1. Jus cogens

The Mothers of Srebrenica had also argued that the fact that the proceedings related to a failure to prevent genocide, which was a *jus cogens* norm, meant that the interests of the claimants should prevail over those of the UN. The Association had made this argument, referring to the dissenting opinion in the ECtHR's judgment in *Al-Adsani*, in which it was argued that 'the acceptance of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions'.[51] The Dutch Appeals Court did not follow the *Al-Adsani* dissent. It acknowledged that the accusation that the UN had not undertaken enough to prevent the genocide in Srebrenica was a serious accusation. But the

48 *Mothers of Srebrenica* (immunity) Trial Court, § 5.16.

49 *Mothers of Srebrenica* (immunity) Appeals Court, *supra* note 3, § 5.5.

50 *Ibid.*

51 Dissenting opinion to European Court of Human Rights, *Al-Adsani v. The United Kingdom*, Appl. No. 35763/97, 21 November 2001, § 3, cited in *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.9. It must be emphasized that the majority in *Al-Adsani* reached the exact opposite conclusion and allowed immunity even in cases involving *jus cogens* violations.

seriousness of this accusation of negligence alone was insufficient to obstruct the UN's invocation of immunity.[52]

The Supreme Court also looked at the question whether 'the right of access to the courts should prevail … over UN immunity because the claims are based on the accusation of involvement in — notably in the form of failing to prevent — genocide and other grave breaches of fundamental human rights (torture, murder and rape)'.[53] The Supreme Court admitted that the dissenting opinion in *Al-Adsani* was important, because it 'agree[d] with no small proportion of the literature, both Dutch and foreign, on the subject of State immunity'.[54] At the same time, the Supreme Court did not follow this reasoning, largely due to the fact that the ICJ had in the meantime affirmed the more traditional viewpoint of the majority of the ECtHR in *Al-Adsani*. The ICJ did so in the case on jurisdictional immunities of the state, between Germany and Italy. With approval, the Dutch Supreme Court cited the ICJ's conclusion that 'a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict'.[55] This is because, according to the ICJ, there is no direct clash between the prohibition to commit — or obligation to prevent — *jus cogens* offences and the obligation to respect a foreign state's immunity. This is because 'the rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State [meaning that] they do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'.[56]

D. Conclusion

Albeit for different reasons, the district, appeals and supreme courts all reached the same conclusion: the UN enjoyed immunity from the jurisdiction of the Dutch courts. The Mothers of Srebrenica challenged the Supreme Court's decision at the ECtHR. But in a very lengthy decision, the ECtHR rejected, on 11 June 2013, the admissibility of the complaint.[57] In this article, the focus has been on exploring the different approaches of the Dutch courts. The reader is referred to the article by Irene Papa for a discussion of the admissibility decision of the ECtHR.

52 *Mothers of Srebrenica* (immunity) Appeals Court, *supra* note 3, §§ 5.8 and 5.10.

53 *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.7.

54 *Ibid.*, § 4.3.9.

55 ICJ, *supra* note 24, § 91, cited in *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.11.

56 ICJ, *supra* note 24, § 93, as cited in *Mothers of Srebrenica* (immunity) Supreme Court, *supra* note 3, § 4.3.12.

57 ECtHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Appl. No. 65542/12, Admissibility decision of 11 June 2013.

4. State Responsibility for Srebrenica

The UN could thus successfully rely on its immunity from the civil jurisdiction of the Dutch Courts. This had as consequence that only the claims directed against the state of the Netherlands could proceed to the merits stage. The main question on the merits, in all three cases — *Nuhanović*, *Mustafić* and *Mothers of Srebrenica* — was whether the Netherlands was responsible under international law for Dutchbat's failure to prevent the killing by the Bosnian Serbs of (some of) the Bosnian Muslim men in Srebrenica.[58] Article 2 of the Articles on Responsibility of States (ARS), drafted by the International Law Commission (ILC), makes clear that two elements need to be examined before a state could be held responsible under international law:[59] (i) the conduct must be attributable to the state of the Netherlands under international law; (ii) the conduct must constitute a breach of an international obligation of the Netherlands. The remainder of this section focuses on the ways the Dutch courts addressed these two elements of state responsibility.

A. Attribution

Let us begin with attribution. The central question was whether the acts of the peacekeepers could be attributed to the UN, to the Netherlands, to neither of the two, or to both. The relevant provisions include Article 7 of the ILC's Draft Articles on the Responsibility of International Organizations (DARIO), which states that 'the conduct of an organ of a State that is placed at the disposal of an international organization shall be considered under international law an act of the organization if the organization exercises effective control over that conduct'.[60] This provision would serve as the basis for attribution to the UN. For attribution to the troop-contributing state (the Netherlands), Article 4 of the ARS is relevant. According to this provision, 'the conduct of any State organ shall be considered an act of that State under international law'. The idea is that a battalion of peacekeeping soldiers like Dutchbat is and remains an organ of the state when placed at the UN's disposal, and thus the battalion's conduct might, in principle, engage the responsibility of the state. This is especially the case when the UN, at whose disposal the battalion is placed, has no effective control (anymore) over the battalion. There is also another approach, and that is to refer to Article 8 of the ARS, according to which 'the conduct of a group of persons shall be considered an act of a State under international

58 See also O. Spijkers, 'Responsibility of the Netherlands for the Genocide in Srebrenica: The Nuhanović and Mothers of Srebrenica Cases Compared', 18 *Journal of International Peacekeeping* (2014) 281–289.

59 *Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, adopted by the International Law Commission at its fifty-third session, in 2001. See *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, and UN Doc. A/56/10 (ARS).

60 *Draft Articles on the Responsibility of International Organizations*, with commentaries, adopted by the International Law Commission at its sixty-third session, in 2011. See *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, and UN Doc. A/66/10 (DARIO).

law if the group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. The Netherlands would then be responsible if it had (or regained) effective control over the battalion at the relevant times.

The Dutch District Court in *Nuhanović* had excluded the possibility of dual attribution, i.e. attribution of the same conduct to both the state of the Netherlands *and* the UN. It referred to the 'rule of exclusive attribution', and concluded that 'attribution of acts and omissions by Dutchbat to the United Nations … excludes attribution of the same conduct to the State'.[61] It found itself overruled on this point by the Appeals Chamber. The Appeals Court held that the possibility that the same conduct can be attributed to both state and organization was generally accepted.[62] The Dutch Supreme Court agreed with the Appeals Chamber, noting that it was possible, in theory, that both the UN and the Netherlands were responsible.[63] The Supreme Court found support for this position in Article 48 of the DARIO, which provides that where an international organization and a state are responsible for the same internationally wrongful act, the responsibility of both may be invoked in relation to that act.

In its judgment on the merits in the case of *Mothers of Srebrenica*, the District Court no longer excluded the possibility of dual attribution, as it had done earlier in the *Nuhanović* case. It now followed the opinion of the Supreme Court in *Nuhanović*, and also held that the same acts might be attributed to both the State and the UN under what is called 'dual attribution'.[64]

When examining the question of attribution in the *Nuhanović* judgment, the Dutch Supreme Court applied only international law. In doing so, it uncritically followed the Dutch Appeals Court. Both Courts held that the question of attribution was closely related to the interpretation of the agreement between the Netherlands and the UN on the provision of Dutch troops. And since this was an *international* agreement, the attribution question had to be answered on the basis of *international* law, as opposed to domestic law.[65]

There exist different views on what the conditions are for attributing the conduct of peacekeepers to either the UN or the troop-contributing state, or to both. It is the view of the UN Legal Counsel and Secretariat that, when soldiers replace their own helmets with the blue helmets of a UN peacekeeping mission, their actions should normally be attributable to the UN. The UN generally affirms that 'as a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization'.[66] The ILC acknowledged that this had been the practice of the UN since the very early days (ONUC in 1960s), a consistent practice which was reflected in the many

61 *Nuhanović* District Court, § 4.13.

62 *Nuhanović* Appeals Court, § 5.9.

63 *Nuhanović* Supreme Court, §§ 3.9.2–3.9.4, 3.11.2.

64 *Mothers of Srebrenica* District Court, *supra* note 2, §§ 4.34, 4.45.

65 *Nuhanović* Supreme Court, § 3.6.2.

66 *Comments and Observations on Responsibility of International Organizations Received from international organizations*, UN Doc. A/CN.4/545, 25 June 2004, comments from United Nations Secretariat, at 28.

agreements made between the UN and troop-contributing states. This practice was different when it came to *peace-enforcement* operations, where the UN Security Council authorizes states to take military action. In such operations, the soldiers do not wear blue helmets but instead keep their own national helmets. And the leadership on the ground over the military operation is left to the states that take part in such so-called 'coalitions of the willing'. With regard to such peace-enforcement missions, it is the UN's view that 'the conduct of the operation is imputable to the State or States conducting the operation'.[67]

The ILC did not accept the UN Secretariat's rigid distinction between peace-*keeping* and peace-*enforcement* missions. It was the ILC's view that the same rule, i.e. that it all depends on who has effective control over the specific acts concerned, 'should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State'.[68] The use of the word 'should' is interesting, because it suggests that the ILC is proposing a change in the law. It explains its reasons as follows: 'while it is understandable that, for the sake of efficiency of military operations, the UN insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion'.[69] All this suggests that, in view of the ILC, the UN and troop-contributing states ought to change their 50 years of consistent practice of holding the UN, in principle, responsible for the acts of peacekeeping operations, and instead, base responsibility on a factual criterion.

The ILC did not find much support in existing case law for this new approach. The judgments of the ECtHR, to which the ILC referred in its commentary, either chose a different criterion altogether (primarily *Behrami*), or were related to peace-*enforcement* missions, or even to acts of a multinational occupying force acting without UN authorization (*Al-Jedda*).[70] In fact, the only example that the ILC could find, in its DARIO commentary of 2011, of a case in which the effective control criterion was applied to a *peace-keeping* mission, was the Court of Appeal's judgment in our own *Nuhanović* case.

It is understandable that the UN prefers to accept legal responsibility for the conduct of its peacekeepers. The organization thereby protects the troop-contributing state from all sorts of lawsuits and this might persuade states to voluntarily provide such troops to the UN. If a troop-contributing state finds itself confronted with a claim for reparation of damages caused by the conduct of peacekeepers, it can simply refer the claimant to the UN. However, due to the UN's immunity before domestic courts and the UN's reluctance to provide an alternative legal remedy within the UN system, it is actually very difficult

67 *Ibid.*

68 See *Report of the International Law Commission of its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10, at 90.

69 *Ibid.*

70 ECtHR, *Al-Jedda v. United Kingdom*, Appl. No. 27021/08, Judgment of 2 May 2007.

for an individual to hold the UN responsible before a court of law. And thus, in the absence of a legal remedy against the UN, one cannot be surprised that persons claiming to be the victim of a wrongful act allegedly committed by a UN peacekeeper will begin proceedings against the troop-contributing state.[71]

The Dutch courts dealt with the attribution issue in different ways. The Dutch District Court in *Nuhanović* could not make use of DARIO and the ILC commentary to DARIO referred to above, because the ILC had not yet adopted the articles. It thus applied Article 6 of the ARS by analogy, instead of applying 7 of the DARIO.[72] This is problematic, because the two provisions are not identical.[73] Applying Article 6 of the ARS to the facts, the District Court concluded that only if the state countermanded the UN command structure, could there be scope for attribution to the state.[74] This had not happened.[75]

The Appeals Court and Supreme Court both based their assessment of the attribution issue primarily on Article 7 of the DARIO.[76] In its defence, the Netherlands had argued that Article 6 of the DARIO was the relevant provision, and not Article 7. Article 6 simply states that the conduct of an organ of an international organization is attributable to that international organization. The argument of the state was thus that the peacekeepers were a UN (subsidiary) organ.[77] This, as explained above, is also the view of the UN itself. But the Appeals Court and Supreme Court followed the ILC Commentary to DARIO, according to which a battalion of peacekeepers is not a UN organ, because the battalion to a certain extent still acts as an organ of the state supplying the soldiers. It is an important consideration that troop-contributing states retain disciplinary powers and criminal jurisdiction over peacekeepers.[78] And so the Appeals Court applied Article 7 of the DARIO, and concluded that the state exercised effective control over Dutchbat when it ordered the relatives of Nuhanović to leave the compound and go with the Bosnian Serbs.[79] And the Supreme Court held that 'for the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently', as the District Court had found.[80] Instead, 'the attribution of conduct to the seconding

71 *Mothers of Srebrenica* District Court, *supra* note 2, § 4.35.

72 *Nuhanović* District Court, § 4.8.

73 According to Article 6 ARS, 'the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State if the organ is acting *in the exercise of elements of the governmental authority* of the State at whose disposal it is placed'; and according to 7 DARIO, 'the conduct of an organ of a State that is placed at the disposal of an international organization shall be considered an act of the organization if the organization *exercises effective control* over that conduct.'

74 *Ibid.*, § 4.14.1.

75 *Ibid.*, §§ 4.14.1–4.14.5, 4.15.

76 *Nuhanović* Appeals Court, §§ 5.1–5.20.

77 *Nuhanović* Supreme Court, § 3.10.1.

78 See *supra* note 68, at 88–89.

79 *Nuhanović* Appeals Court, § 5.20.

80 *Nuhanović* Supreme Court, § 3.11.3.

State is based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account.'[81] In view of the Supreme Court, the Appeals Chamber had correctly applied the law (Article 7 of the DARIO) to the facts, when it found that the acts could be attributed to the Netherlands.[82]

Interestingly, the Dutch Supreme Court also referred to Article 8 of the ARS.[83] Strictly speaking, Article 7 of the DARIO says nothing about the attribution *to the state* of conduct of an organ placed at the disposal of an international organization by a state. The provision, like all provisions in DARIO, deals with the responsibility *of international organizations*. All it says is that, if the international organization does not have effective control over the conduct of the organ, then it is not responsible for that conduct. But that does not necessarily mean that this makes the state responsible in such cases. In theory, it could very well be that neither of the two is responsible. And so, to complete the picture, the Dutch Supreme Court relied on Article 8 of the ARS. According to this provision, the conduct of a group of persons shall be considered an act of a state if the group is in fact acting under the effective control of that state in carrying out the conduct. This provision was meant to make it possible to attribute acts of persons not formally part of the state system to the state in exceptional circumstances. One may wonder why the Supreme Court did not instead make use of Article 4 of the ARS, according to which the conduct of any state organ shall be considered an act of that state. If peacekeepers are not UN organs, as the UN itself claims, then it would be logical to consider the peacekeeping force as a state organ. They are not the mercenaries, militants or band of irregulars for which Article 8 of the ARS was primarily designed. In the Dutch Supreme Court's view, the peacekeepers are nobody's organ; and whoever happens to be in control of them at the relevant time is responsible for their actions. The Supreme Court did refer to Article 4 of the ARS, but the provision does not, in the Court's view, constitute the legal basis for attribution. Instead, the Supreme Court relied on Article 8 of the ARS, together with Article 7 of the DARIO, supported by the ILC Commentary to the latter provision.[84]

The District Court's *Mothers of Srebrenica* judgment did not add much to this legal argumentation. The Dutch District Court also relied on Article 7, without providing much clarification or commentary.[85] The District Court interpreted effective control as requiring 'the actual say over specific actions whereby all of the actual circumstances and the particular context of the case must be examined'.[86] Applying the law to the facts, the District Court concluded that the cooperation by Dutchbat in the evacuation of the refugees who had

81 *Ibid.*
82 *Nuhanović* Supreme Court, § 3.12.3.
83 *Ibid.*, §§ 3.8.1–3.8.2, 3.13.
84 *Ibid.*
85 *Mothers of Srebrenica* District Court, *supra* note 2, § 4.33.
86 *Ibid.*, § 4.46.

sought refuge in the compound itself could be attributed to the Netherlands. What played a key role in this decision was the fact that:

> 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.[87]

The Dutch District Court held that the Netherlands exercised effective control over the compound, but not the area outside the compound. This is explained as follows: '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.'[88]

Earlier, the Appeals Court and Supreme Court had reached a similar conclusion in *Nuhanović*. It was the Supreme Court's view that, although the mission had failed at the time Nuhanović's relatives were evacuated, and Dutchbat could, therefore, no longer exert any influence *outside* the compound, this did not detract from the fact that the state had effective control over Dutchbat's conduct *inside* the compound. And the surrender of Nuhanović's relatives to the Bosnian Serbs had taken place inside the compound.[89]

As said, the wrongful act in the *Mothers of Srebrenica* judgment consisted primarily in the assistance provided by Dutchbat in the evacuation of those men who had taken refuge on the compound itself. Of this group, the men were separated from the women, and taken away by the Bosnian Serbs. This transfer commenced during the afternoon of 13 July 1995, and by that time Dutchbat knew or ought to have known what was going to happen to these men. This issue of knowledge about what was going to happen to the Muslim men after being surrendered to the Bosnian Serbs, played a key role in the criminal cases against some senior members of the Dutchbat battalion.[90] In order to avoid breaching the human right to life, Dutchbat should have kept this select group of men at the compound for a little longer. In view of the courts, the Bosnian Serbs would not have attacked the compound itself.

87 *Ibid.*, § 4.80. The mini safe area to which the Court referred here is the area to which most people fled after the city of Srebrenica had fallen into the hands of the Bosnian Serbs. This mini safe area consisted of the compound in Potočari and the surrounding area, where deserted factories and a bus depot were located.

88 *Ibid.*, § 4.160.

89 See *Nuhanović* Supreme Court, § 3.12.3.

90 See Section 5.

B. Breach

The second element of state responsibility is breach. Article 12 of the ARS makes clear that 'there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character'. In order for the responsibility of the Netherlands to be engaged under international law, it must also be proven that the Netherlands breached an international legal obligation by its failure to act in Srebrenica.

One might think of human rights obligations. When discussing immunity, it was noted that, according to Article 1 of the ECHR, the Netherlands had an obligation to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in this Convention'. Earlier, the Dutch District Court in *Nuhanović* had referred to the *Bankovic* case of the ECtHR in support of the argument that the term jurisdiction in Article 1 of the ECHR should 'be interpreted as an essentially territorial concept', and the acts took place in Bosnia and not in the Netherlands.[91] But the Supreme Court, relying on the *Al-Skeini* judgment of the ECtHR, noted that the jurisdiction of a party to the ECHR extends, in exceptional circumstances, also to areas outside its own territory.[92] When determining whether the acts of Dutchbat fell within the Dutch 'human rights jurisdiction', the Supreme Court looked closely at the formal legal arrangements and at the facts and the situation on the ground. In doing so, it implicitly distinguished a *de jure* and de facto basis of extraterritorial jurisdiction. The Netherlands formally (*de jure*) had jurisdiction because the territorial entity, the state of Bosnia-Herzegovina, had surrendered its competence to govern in the area to UNPROFOR, of which Dutchbat was an element.[93] The Netherlands also had de facto jurisdiction, because an examination of the facts had shown that it was not impossible for the Netherlands to exercise jurisdiction through Dutchbat and prevent the human rights violations from happening. It could have done so, but it did not.

Included in the category of rights the Netherlands must secure to everyone within its jurisdiction is the right, formulated in Article 2 of the ECHR, not to be deprived of one's life intentionally. In the *Nuhanović* case, the Dutch Supreme Court held that Dutchbat had ordered the brother of Hasan Nuhanović to leave the compound, knowing he would end up in the hands of the Bosnian Serb army and be killed.[94] The Netherlands had thus failed in its due diligence obligation to protect the right to life of Nuhanović's brother.

It must be noted that, when assessing the wrongfulness of the acts attributable to the Netherlands, the Dutch Supreme Court, following the Appeals Court, situated itself primarily in the domestic legal order of Bosnia-Herzegovina — the rules of private international law require that the Court

91 *Ibid.*, § 4.12.3.
92 ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07, Judgment of 7 July 2011.
93 *Nuhanović* Supreme Court, § 3.17.3.
94 *Ibid.*, § 3.17.3.

applies the *lex loci delicti commissi*.[95] International (human rights) law only gave further support to the conclusion that the conduct was wrongful.

Interestingly, in the *Mothers of Srebrenica* case, the Dutch District Court held that the rules of private international law prescribe that, when a state exercises sovereign powers over a particular area outside its territorial jurisdiction, that the laws of that state apply.[96] Because the Dutch District Court was convinced the Netherlands had effective control over the compound in Potočari at the relevant time, it held Dutch — as opposed to Bosnia-Herzegovinian — private law applicable to the events in the compound. It thus disagreed with the Supreme Court's judgment in the *Nuhanović* case concerning the applicable law. But Article 93 of the Dutch Constitution gives direct effect to norms of international treaty law that are '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'.[97] This was the case for Article 2 of the ECHR, and thus the District Court in the *Mothers of Srebrenica* case could assess the wrongfulness on the basis of the same international law provisions the Dutch Supreme Court had used in *Nuhanović*.

In the *Mothers of Srebrenica* case, the claimants also argued that the Netherlands was responsible for a general failure to prevent the genocide. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide obliges all states to undertake to prevent genocide.[98] However, the District Court held that the obligation to prevent genocide under the Genocide Convention was applicable only between convention states themselves and had no direct effect. It could thus not be invoked by the claimants against the Netherlands before a Dutch civil court.[99]

5. Criminal Prosecution of Karremans and Others

Three surviving members of the Mustafić family and Hasan Nuhanović believed that some of the more senior members of Dutchbat were criminally responsible for what happened to their relatives. In their view, Peter Karremans, Alexander Franken and Berend Jan Oosterveen deserved to be prosecuted for complicity in genocide, war crimes and/or murder. At the time of the events, Karremans was senior commander of Dutchbat; Franken was alternate battalion commander; and Oosterveen was responsible for personnel.

Initially, the Dutch Prosecution Office refused to criminally prosecute these three individuals. But the surviving relatives made use of their right to complain in court against this decision of the Prosecutor. Article 12 of the Dutch

95 *Nuhanović* Appeals Court, §§ 6.1–6.21; *ibid.*, § 3.15.
96 *Mothers of Srebrenica* District Court, *supra* note 2, § 4.167.
97 *Ibid.*, § 4.148.
98 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, entry into force 12 January 1951.
99 *Mothers of Srebrenica* District Court, *supra* note 2, § 4.164.

Code of Criminal Procedure allows any persons, whose interests are directly affected, to issue a written complaint with the Appeals Court in case a criminal offence is not prosecuted.[100] It is not disputed that the complainants did fall within the category of persons with a direct interest in the prosecution.

Since it involved the prosecution of members of the military, the Military Chamber of the Appeals Court had to assess the complaint. The Military Chamber consists of two regular (civil) judges, and a military member, preferably belonging to the same armed forces to which the accused also belong or belonged.[101] The complainants challenged the composition of the bench, claiming that it was in breach of Article 6 of the ECHR, because such a Military Chamber could not be seen as 'an independent and impartial tribunal'. The argument was that the military judge was appointed with the approval of the Ministry of Defence and this Ministry was heavily involved in the events in Srebrenica. An attempt to have the military judge removed from the bench failed. The judge responsible for assessing the complainants' request to have the military judge removed from the bench, acknowledged that it was 'perfectly understandable' for the complainants to be unhappy about the fact that a military member would take part in the assessment of their complaint. However, this was not a good enough reason for recusal of the judge. The military judge must be presumed impartial by virtue of his appointment. And there were no 'exceptional circumstances that provide compelling evidence for the conclusion that Commander Laurens [the military judge] is biased against the complainants'.[102]

The complaint was thus dealt with by the Military Chamber of the Court of Appeals of Arnhem-Leeuwarden, of which the military judge remained a member. The Chamber rejected the complaint against the prosecutor's decision not to prosecute.[103] There is no possibility of appeal, so this decision is final.

The basis for any criminal prosecution of a member of the Dutch military, acting abroad, in Dutch domestic law is Article 4 of the Dutch Military Penal Code, which says that Dutch criminal law is applicable to any Dutch soldier who is guilty of a criminal offence committed outside the Netherlands.[104]

As a preliminary issue, the defendants — Karremans, Franken and Oosterveen — claimed that they were entitled to immunity from the Dutch criminal jurisdiction and could not be prosecuted for that reason. In their view, this followed from the immunity of the state itself from criminal prosecution. If valid, the consequence of this argument would be that soldiers belonging to the regular armed forces could never be prosecuted for war crimes or crimes against humanity committed in their official capacity. The Appeals Court held this to be 'absurd'.[105] In the Court's view, acts of the state must

100 Art. 12 *Wetboek van Strafvordering* (Dutch Code of Criminal Procedure).
101 Art. 63 *Wet op de Rechterlijke Organisatie* (Dutch Law on Judicial Organization).
102 *Nuhanović* recusal decision.
103 *Nuhanović* decision not to prosecute.
104 Art. 4 *Wetboek van Militair Strafrecht* (Dutch Military Penal Code). See *Nuhanović* decision not to prosecute, § 7.3.4.
105 *Ibid.*, § 4.1.

normally be considered to protect the public interest. However, committing war crimes and crimes against humanity cannot and should not be seen as a way of protecting the public interest, and thus, said the Court, there is no ground for immunity of the state for such acts.

The defendants also referred to the Agreement on the Status of UNPROFOR in Bosnia and Herzegovina.[106] This Agreement states that: 'Military members of the military component of UNPROFOR shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in Bosnia and Herzegovina.'[107] According to the same Agreement, a 'Participating State means a State contributing personnel to the military or police component of UNPROFOR'.[108] The Netherlands is one of these participating states, and thus the Agreement expressly *allows* the Dutch courts to exercise their criminal jurisdiction over the actions of the Dutch troops in Bosnia. So it is difficult to see this Agreement as in any way *limiting* the criminal jurisdiction of the Dutch courts, as the defendants claimed it did.

As a third and final preliminary issue, the defendants argued that they were repeatedly reassured by the Dutch authorities, especially during the mission debriefing, that there would be no criminal prosecutions of members of Dutchbat for the events that had taken place in Srebrenica. In the defendants' view, these reassurances created legitimate expectations on which they could rely. The Appeals Court used particularly strong words to reject this argument. The Court first noted that, during the debriefing, the interests of the Ministry of Defence in an optimal debriefing weighed very heavily in comparison with the interests of the Ministry of Justice in the eventual prosecution of (potentially serious) criminal offences committed by members of the Dutch army. The Court reminded the defendants that any agreement not to prosecute that might have been concluded as part of the debriefing would not be binding on an independent judiciary such as this Court.[109]

After all preliminary objections were rejected, the Court turned to the merits of the decision of the Dutch Prosecutor not to prosecute the three defendants. The complainants first argued that there was no prosecutorial discretion when international crimes were involved. Such crimes were so serious, that they *always* had to be prosecuted. The Court disagreed. In support of its conclusion that there is no obligation under international law to always prosecute international crimes, the Court referred to Article 53 of the Statute of the International Criminal Court (ICC), which allows the ICC Prosecutor to decide *not* to prosecute an international crime when such prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of

106 *Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina*, signed at Sarajevo on 15 May 1993 by Bosnia and Herzegovina and the UN.

107 *Ibid.*, § 45(b).

108 *Ibid.*, § 1(c).

109 *Nuhanović* decision not to prosecute, § 4.3.

the alleged perpetrator, and his or her role in the alleged crime.[110] The ICC is especially mandated to prosecute only the most serious of international crimes. Domestic criminal courts have an entirely different task, one that is certainly not limited to the most serious crimes. And thus it is not clear how one can draw any conclusions from this provision in the ICC Statute about any discretionary powers that domestic criminal prosecutors might have when faced with international crimes.

The complainants further argued that the rejection of their request for criminal prosecution of the defendants was contrary to the principle of reasonable and equitable balancing of interests. In their view:

(1) it had taken an unreasonably long time before the public prosecutor had reached a decision not to prosecute;
(2) serious errors were committed in the investigation of the facts;
(3) the decision not to prosecute was unsound; and
(4) the prosecutor had misjudged the feasibility of a possible prosecution.[111]

On the first and third issue, the Court was very brief. The Court held that, in a complaint procedure like the present one, the question put to the Court was whether the public prosecutor had made the *correct* decision, not whether that decision was taken *in due time*.[112] And the Court's response to the third complaint was held to be closely related, and dependent on, the Court's decision on the feasibility of the prosecution (the fourth complaint).

The second and fourth complaints were given more in-depth treatment by the Court. In response to the second complaint (errors in factual investigations), the Court agreed that very little attention was paid, at the debriefing stage, to gathering evidence to be used specifically for possible criminal prosecutions of members of Dutchbat. In the view of the Court, this was understandable, because the idea that members of the Dutch battalion might have had some criminal involvement in war crimes and other (international) crimes only emerged later.[113] The Court noted that there was a big difference between civil responsibility for the state of the Netherlands for a failure to stop the Bosnian Serbs from committing genocide and other international crimes, and criminal responsibility of individual members of Dutchbat for complicity in these international crimes. The one does not follow from the other.[114] The evidence on which the decision not to prosecute was based was primarily evidence gathered for purposes other than criminal prosecution.[115] But the Court did not believe there was now a reason to look specifically for additional evidence on the defendants' personal involvement (or lack thereof) in the crimes. The Court added to this that the long delays and extensive

110 Art. 53 ICCSt.
111 *Nuhanović* decision not to prosecute, § 7.1.
112 *Ibid.*, § 7.2.
113 *Ibid.*, § 7.3.1.
114 *Ibid.*, § 7.3.2
115 *Ibid.*, § 7.3.5.

public debate on the fall of Srebrenica could raise serious concerns about the reliability of any 'new' testimonial evidence.[116]

In assessing the feasibility of a criminal prosecution (fourth complaint), the Court looked in some detail at the facts of the fall of Srebrenica. In view of the Court, it was particularly important to find out:

(1) whether the executions of the Bosnian Muslim men by the Bosnian Serbs were already taking place *before* the departure of the relatives of Nuhanović and Mustafić from the compound;
(2) on what scale these executions took place; and
(3) whether Karremans, Franken, and Oosterveen *personally knew* or ought to have known of these executions at the time that the relatives of Nuhanović and Mustafić were told to leave the compound.[117]

The Court thus looked carefully at the facts to see if there was any reason to believe that Karremans, Franken and Oosterveen had personal knowledge of what was about to happen to the relatives of Nuhanović and Mustafić when surrendered by Dutchbat to the Bosnian Serbs. Ibro Nuhanović — Hasan's father — *voluntarily* decided to leave the compound, and this alone made a criminal prosecution in relation to his death unlikely to succeed. Rizo Mustafić was on the list of local staff members and could have evacuated with Dutchbat. However, Oosterveen claimed he did not know at the time Rizo Mustafić was on the list, and, therefore, surrendered him to the Bosnian Serbs. Karremans and Franken only heard of this error when Rizo Mustafić had already left. The Court referred to Oosterveen's action as a 'stupid mistake with terrible consequences', but saw in it no ground for criminal responsibility for what happened subsequently to Mustafić. Oosterveen had not acted with criminal intent. The Court further considered that Oosterveen may have breached a duty of care, inter alia by failing to verify the position of Mustafić. But that would justify at most a prosecution for manslaughter, not war crimes or murder. However, a prosecution for manslaughter was barred due to lapse of time.

So this left only the death Muhamed Nuhanović — Hasan's brother. Franken had ordered him to go with the Bosnian Serbs, and this also engaged Karremans' responsibility because Franken was his subordinate at the time. It all revolved around the question whether Franken and Karremans had personal knowledge of what was about to happen to Muhamed Nuhanović at the moment they surrendered him to the Bosnian Serbs.

The complainants argued that the defendants ought to be prosecuted for complicity in genocide. The Court pointed out what the legal difficulties involved in such a prosecution are: an accomplice in genocide must have had *actual knowledge of the genocidal intent* of the principal perpetrators; conditional intent is not sufficient.[118] The complainants referred to some Dutch case law

116 *Ibid.*
117 *Ibid.*, § 9.2.
118 *Ibid.*, § 11.1.

in which they believe a less stringent intent criterion was applied. But the Court decided to stick to the approach of the ICTY. The complainants admitted that Karremans, Franken and Oosterveen were probably unaware at the time that the Bosnian Serbs intended to commit genocide, so a criminal conviction for complicity in genocide was unlikely to succeed.

For complicity in war crimes and murder under Dutch law, it is sufficient to prove *conditional* intent. This means that it would be sufficient to prove that Karremans, Franken and Oosterveen had consciously accepted the reasonable chance that the relatives of Nuhanović and Mustafić might be subjected to war crimes or murder at the hands of the Bosnian Serbs and that they surrendered them to the Bosnian Serbs anyways. But even such a lower degree of intent is unlikely to be proven beyond reasonable doubt, held the Court. This is because one must make a distinction between the *institutional* knowledge of Dutchbat, and the *personal* knowledge of the defendants Karremans, Franken and Oosterveen. It is true that there were enough factors for Dutchbat to realize what was going to happen to the Bosnian Muslims, but that does not mean individual members of Dutchbat were fully aware. According to the Appeals Court, in the proceedings about civil liability of the state of the Netherlands — i.e. the cases of *Nuhanović*, *Mustafić* and *Mothers of Srebrenica* discussed above — the Dutch civil courts could take all factors together (as 'knowledge of Dutchbat'), and on this basis they could conclude that Dutchbat should not have sent the relatives of Nuhanović and Mustafić from the compound. But this conclusion could not simply be copied and pasted into the assessment of the same factual situation from a criminal law perspective. A criminal law perspective concerns *personal* responsibility, and therefore, it is not possible to lump all the factors together or throw them into one big pot, as could be done when determining civil liability of the state for the conduct of Dutchbat as a whole.[119] And so the Appeals Court concluded that it would thus be highly unlikely that any Dutch criminal court would ever come to a conviction of the defendants, and thus the prosecutor could have decided not to prosecute them.[120]

6. Conclusions

In this contribution, an overview was provided of the Dutch case law on the legal responsibility for what happened in Srebrenica in 1995. The Dutch

119 *Ibid.*, § 12.4 (my own translation; emphasis also in the original).

120 *Ibid.*, § 13.4 (on Franken's responsibility for the death of Muhamed Nuhanović), §§ 13.6.1–13.6.2 (Karremans' responsibility in relation to acts of his subordinate Franken); §§ 14.1–14.5 (no responsibility for the death of Ibro Nuhanović); §§ 15.1–15.8 (Rizo Mustafić). Interestingly, the Court also had much sympathy for Franken's necessity defence. The argument came down to this: Franken did not dare to identify Muhamed Nuhanović as a local staff member, which would be contrary to the truth but it might have saved him because all staff members were allowed to evacuate with Dutchbat, as this could have endangered the evacuation of the actual local staff members. See *ibid.*, § 13.5.

courts have focused primarily on the responsibility of the state of the Netherlands. As is well known, the principal perpetrators are not only being tried in the Netherlands, but by a UN tribunal, the ICTY. The Dutch courts' decisions have had the world's attention from the beginning. This is, first of all, because of the gravity of the events that occurred. But the attention, especially of students and scholars of international law, can also be explained by the novelty of the many legal issues involved. It is one of the first cases in which the ARS and DARIO are directly applied. This way, the cases provide much food for thought, and critical reflection.

And the story is far from over. After Jeanine Hennis-Plasschaert, the Dutch Minister of Defence, delivered a speech on Veterans Day, in which she acknowledged that the peacekeeping mission in Srebrenica was an impossible mission from the beginning, a group of veterans of Dutchbat decided to bring a claim against the Netherlands for sending them on an 'impossible mission'.[121] This they consider serious negligence and carelessness on the part of the state, and therefore wrongful.

121 The text of the speech is available online at https://www.defensie.nl/organisatie/bestuursstaf/inhoud/minister/weblog/2016/veteranendag-2016 (visited 8 July 2016).