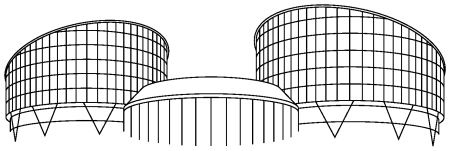

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 49037/15
Mehida MUSTAFIĆ-MUJIĆ and others
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 30 August 2016 as a Chamber composed of:

Luis López Guerra, *President*,
Helena Jäderblom,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 October 2015,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is appended to this decision. The applicants are all represented by Ms L. Zegveld and Mr T. Kodrzycki, lawyers practising in Amsterdam.

2. Ms Mehida Mustafić-Mujić is the widow of the late Mr Rizo Mustafić. Ms Alma Mustafić and Mr Damir Mustafić are the daughter and son, respectively, of the late Mr Rizo Mustafić. Mr Hasan Nuhanović is the son of the late Mr Ibro Nuhanović and the brother of the late Mr Muhamed Nuhanović.

3. Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović died on or shortly after 13 July 1995 in what has come to be known as the Srebrenica massacre.

4. The circumstances of the case, as stated by the applicants and as apparent from documents accessible to the public, may be summarised as follows.

A. Background to the case

1. The breakup of the Socialist Federative Republic of Yugoslavia

5. The Socialist Federative Republic of Yugoslavia (SFRY) was made up of six republics, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Slovenia and Croatia declared their independence from the SFRY on 25 June 1991 following referenda held earlier. Thereupon the Presidency of the SFRY ordered the JNA (*Jugoslovenska Narodna Armija/Југословенска народна армија*, or Yugoslav People's Army) into action with a view to reasserting the control of the federal government.

6. Other component republics of the SFRY followed Slovenia and Croatia in declaring independence. Eventually only Serbia and Montenegro were left to constitute the SFRY's successor state, the Federal Republic of Yugoslavia (FRY). Hostilities ensued, largely along ethnic lines, as groups who were ethnic minorities within particular republics and whose members felt difficulty identifying with the emerging independent states sought to unite territory that they inhabited with that of republics with which they perceived an ethnic bond.

7. By its Resolution 743 (1992) of 21 February 1992, the Security Council of the United Nations set up a United Nations Protection Force (UNPROFOR) intended to be "an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis". Although UNPROFOR's mandate was originally for twelve months, it was extended; UNPROFOR (later renamed UNPF, the name UNPROFOR coming to refer only to the operation in Bosnia and Herzegovina) continued in operation until late December 1995. Troop-contributing nations included the Netherlands.

2. The war in Bosnia and Herzegovina

8. Bosnia and Herzegovina declared independence on 6 March 1992 as the Republic of Bosnia and Herzegovina. Thereupon war broke out, the warring factions being defined largely according to the country's pre-existing ethnic divisions. The main belligerent forces were the ARBH (*Armija Republike Bosne i Hercegovine*, or Army of the Republic of Bosnia and Herzegovina, mostly made up of Bosniacs[1] and loyal to the central

1. Bosniacs (sometimes spelt Bosniaks) were known as "Muslims" or "Yugoslav Muslims" until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused

authorities of the Republic of Bosnia and Herzegovina), the HVO (*Hrvatsko vijeće obrane*, or Croatian Defence Council, mostly made up of Croats[2]) and the VRS (*Vojska Republike Srpske/Војска Републике Српске*, or Army of the Republika Srpska, also called the Bosnian Serb Army, mostly made up of Serbs[3]).

9. It would appear that more than 100,000 people were killed and more than two million people were displaced. It is estimated that almost 30,000 people went missing; in 2010, approximately one-third of them were still so listed[4].

10. The conflict came to an end on 14 December 1995 when the General Framework Agreement for Peace ("the Dayton Peace Agreement", adopted in Dayton, Ohio, USA) entered into force.

3. The VRS

11. The bulk of the JNA withdrew from Bosnia and Herzegovina in May 1992, leaving behind units whose members were nationals of Bosnia and Herzegovina with their weapons and equipment. These became the backbone of the VRS. In its operations the VRS obtained the assistance of paramilitary units, most of which were composed of Serbs but some of which comprised non-Serbs including nationals of countries outside the former SFRY.

4. The Srebrenica massacre

12. The municipality of Srebrenica in eastern Bosnia is constituted of a number of towns and villages, among them Potočari and the town of Srebrenica from which the municipality takes its name. Before the outbreak of the war its population was almost entirely Bosniac and Serb, Bosniacs outnumbering Serbs by more than three to one. It is now part of the Republika Srpska.

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with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

2. The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Croat" is normally used (both as a substantive and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Croatian", which normally refers to nationals of Croatia.

3. The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Serb" is normally used (both as a substantive and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Serbian", which normally refers to nationals of Serbia. This convention is followed by the Court in the present decision except in quotations from documents not originating from the Court itself, where the original wording is retained.

4. See the Press Release of the United Nations Working Group on Enforced or Involuntary Disappearances of 21 June 2010 on its visit to Bosnia and Herzegovina.

13. Being an obstacle to the formation of the Republika Srpska as a continuous territorial entity as long as it remained in the hands of the central government of the Republic of Bosnia and Herzegovina, Srebrenica came under VRS attack already in the course of 1992.

14. It appears that the central government of the Republic of Bosnia and Herzegovina refused to countenance any evacuation of Srebrenica's civilian population, since that would amount to the acceptance of "ethnic cleansing" and facilitate the surrender of territory to the VRS.

15. On 16 April 1993 the Security Council of the United Nations adopted, by a unanimous vote, a resolution (Resolution 819 (1993)) demanding that "all parties and others concerned treat the eastern Bosnian town of Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act."

16. By July 1995 the Srebrenica "safe area" was an enclave surrounded by territory held by the VRS. It contained ARBH combatants, most of them disarmed, and civilians. The latter numbered in their tens of thousands, mostly Bosniacs; these included by then, in addition to the local residents, persons displaced from elsewhere in eastern Bosnia.

17. There was also an UNPROFOR presence within the enclave, nominally consisting of some four hundred lightly-armed Netherlands air-mobile infantry, known as Dutchbat (from "Dutch" and "battalion"). In fact, however, Dutchbat was under-strength by this time, troops returning from leave having been prevented by the VRS from rejoining their unit. In July 1995 Dutchbat's leadership consisted of its commander, Lieutenant Colonel Karremans; its deputy commander, Major Franken; and other commissioned and non-commissioned officers including Warrant Officer Oosterveen who was in charge of personnel matters.

18. On 10 July 1995 the Drina Corps of the VRS attacked the Srebrenica "safe area" in overwhelming force, overrunning the area and taking control despite the presence of Dutchbat.

19. In the early afternoon of 11 July the VRS entered the town of Srebrenica meeting little resistance from either the ARBH or UNPROFOR. By this time the civilian population had left the town. A throng of civilians consisting of women, children and mostly elderly men were converging on the Dutchbat compound in the village of Potočari. The Dutchbat commander estimated the number of civilians inside the compound at 15,000.

20. At the UNPF Commander's request, the acting UNPROFOR Commander then issued instructions to Dutchbat, ordering them to enter into negotiations with the VRS to secure an immediate ceasefire. He ordered Dutchbat to concentrate their forces in the Potočari compound and to "take all reasonable measures to protect refugees and civilians in [their] care". He added that Dutchbat should "continue with all possible means to defend

[their] forces and installation from attack". This was "to include the use of close air support if necessary".

21. That night, as meetings were taking place between the Dutchbat Commander and General Mladić, a column of Bosniac men, possibly numbering as many as 15,000, started to move out of the enclave in the direction of Tuzla.

22. In the morning of 12 July a meeting took place between General Mladić and Lieutenant Colonel Karremans. Among other matters discussed, General Mladić threatened to shell the Dutchbat compound in retaliation if air power was used against the VRS. He also demanded to see all the men between the ages of 17 and 60 because, as he alleged, there were "criminals" in the crowd gathered at Potočari and he would need to question each of them. It was also arranged that the civilian population would be transported by bus to Kladanj, the nearest town in the hands of the government of the Republic of Bosnia and Herzegovina.

23. In the early afternoon of the same day the VRS entered Potočari in force and the deportation of the civilians began, beginning with those outside the compound. VRS soldiers separated the men (between the ages of approximately 16 and 65) from the women, children and elderly who were allowed to board the buses. Major Franken instructed civilian representatives to draw up a list of all the men between the ages of 16 and 65 both inside and outside the compound. The resulting list eventually included 239 names. He later explained that his intention had been to forward the information to the International Committee of the Red Cross and other authorities, so as to keep track of the men. He also explained afterwards that he had protested to the VRS about the separation of the men from the others, but had relented upon being told that the men would not be harmed and would simply be questioned as prisoners of war in accordance with the Geneva Convention.

24. On 13 July 1995 Lieutenant Colonel Karremans was instructed by the UNPROFOR command in Sarajevo to ensure that Dutchbat left the enclave together with locally recruited United Nations staff. Lieutenant Colonel Karremans informed General Mladić accordingly. Lieutenant Colonel Karremans interpreted these instructions so as to include staff of the non-governmental organisation *Médecins Sans Frontières*. Major Franken drew up a list of the persons concerned, which came to comprise 29 names. It was later learned that the *Médecins Sans Frontières* leadership had given Major Franken the names of persons who were related to its staff members but who were not actually employed by that body for inclusion on that list, misrepresenting them as staff members.

25. Also on 13 July 1995 Dutchbat personnel in Potočari turned men out of the compound. Once the men had left the compound they were taken prisoner by the VRS. Dutchbat personnel later stated that they had believed the VRS would treat the men in accordance with the Geneva Conventions.

26. In the days that followed, Bosniac men who had fallen into the hands of the VRS were killed. Others managed to evade immediate capture and attempted to escape from the enclave; some succeeded in reaching safety but many were caught and put to death, or died *en route* of wounds, or were killed by landmines. It is now generally accepted as fact that upwards of 7,000, perhaps as many as 8,000 Bosniac men and boys died in this operation at the hands of the VRS and of Serb paramilitary forces.

27. The remains of the victims were buried in mass graves. In the years that followed, attempts were made to hide evidence of the massacre by re-burying remains in secondary mass graves in remote locations.

B. The applicants' relatives

1. Mr Rizo Mustafić

28. Mr Rizo Mustafić was employed by Dutchbat as an electrician. On 11 July 1995 he sought refuge on the compound in Potočari with his wife and children. Although he did not hold a United Nations identity pass, he was placed on the list of 29 locally recruited United Nations staff who would be allowed to leave with Dutchbat on account of the length of his service. Nevertheless, on 13 July 1995 Warrant Officer Oosterveen – who was unaware of the existence of the list of 29 – ordered Mr Rizo Mustafić to leave the compound with the other refugees. Warrant Officer Oosterveen was later reprimanded by Major Franken for this "incredibly stupid mistake".

2. Mr Muhamed Nuhanović

29. Mr Muhamed Nuhanović was the younger brother of the applicant Mr Hasan Nuhanović. The latter was at that time employed as an interpreter for Dutchbat and for that reason his name was on the list of 29 United Nations employees who would be evacuated with Dutchbat. It appears that Mr Muhamed Nuhanović had intended to join the column of Bosniac men breaking out on foot in the direction of Tuzla, but had changed his mind and sought the protection of Dutchbat on the compound at Potočari on the strong urging of Mr Hasan Nuhanović. Both Mr Hasan Nuhanović and Mr Muhamed Nuhanović asked Major Franken to place Mr Muhamed Nuhanović on the list of United Nations staff. Major Franken asked the battalion security and intelligence officer whether a UN pass could be made on the compound but was told that this was not possible: such passes came from the United Nations office in Sarajevo. Major Franken then refused to place Mr Muhamed Nuhanović on the list, reasoning that he would compromise the safety of legitimate United Nations staff members by including among their number a person who did not meet the relevant

criteria. Major Franken ordered Mr Muhamed Nuhanović to leave the compound.

3. Mr Ibro Nuhanović

30. Mr Ibro Nuhanović, the father of Mr Hasan Nuhanović and Mr Muhamed Nuhanović, acted as the refugees' representative and attended the meeting between Lieutenant Colonel Karremans and General Mladić on 12 July 1995. He was permitted for this reason by Major Franken to stay in the compound and leave with Dutchbat. However, when Mr Muhamed Nuhanović was ordered to leave the compound Mr Ibro Nuhanović elected to leave with him.

4. Their eventual fate

31. It is known that all three, Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović, were killed after having left the compound, either by VRS or by Serb paramilitary forces. Their remains were found buried in mass graves on various dates in 2007, 2010 and 2011.

C. Domestic proceedings

1. The criminal complaint proceedings

(a) The complaint to the public prosecutor

i. The correspondence phase

32. On 5 July 2010 the applicants lodged a criminal complaint in writing with the public prosecutor (*officier van justitie*) to the Arnhem Regional Court (*rechtbank*). The complaint included a request for a criminal investigation to be initiated into the alleged complicity of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen in genocide or alternatively in war crimes committed by the VRS against Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović. Their argument was that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen had exposed the three men to the likelihood of death at the hands of the VRS in full awareness of their probable fate. The complaint made made reference to, *inter alia*, Articles 1 and 2 of the Convention. The public prosecutor acknowledged receipt on 12 August 2010.

33. On 31 August 2010 the applicants' counsel, Ms Zegveld, wrote to the public prosecutor asking for the applicants to be allowed to make statements. On various dates in 2011 she submitted information including *inter alia* statements made by witnesses in the parallel civil proceedings (see below), and excerpts from the debriefing report (see paragraph 65 below)

and the report of the Secretary General of the United Nations (see paragraphs 81-83 below).

34. On 17 November 2011 the public prosecutor wrote to Ms Zegveld informing her that the Public Prosecution Service (*Openbaar Ministerie*) had decided to enter into "particular reflection" (*nadrukkelijke reflectie*) on the results of the investigation up to that point with a view to deciding whether a full criminal investigation was called for. On 12 January 2012 this was followed up by a letter informing Ms Zegveld that a national reflection chamber (*nationale reflectiekamer*) had been appointed to consider the case.

35. On 7 May 2012 Ms Zegveld wrote to the public prosecutor stating that she had been contacted by the NOS (*Nederlandse Omroep Stichting*, Netherlands Broadcasting Foundation), a domestic public service radio and television broadcaster, who had apparently been informed that the reflection chamber had recommended that the prosecution go ahead. She asked the public prosecutor to confirm this.

36. On 9 May 2012 the NOS published a press item to the effect that the national reflection chamber had recommended the prosecution of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen. The press item cited unnamed sources and added that the Public Prosecution Service was refusing to give any details.

37. On 7 June 2012 the public prosecutor confirmed to Ms Zegveld that the reflection chamber had expressed an opinion but declined to give any details.

38. On 11 July 2012 Ms Zegveld wrote to the public prosecutor complaining that two years had passed since the criminal complaint had been lodged and asking that a decision be taken.

ii. The decision

39. On 7 March 2013 the public prosecutor wrote to Ms Zegveld informing her of his decision not to bring any prosecution. The reasoning on which this decision was based included the following:

> "In this matter, I have examined in depth the sources to which you refer in your criminal complaint as well as other sources for the presence of inculpating and disculpating material in relation to the complaint. An analysis has been made of the operational and factual context within which the impugned conduct has taken place and the legal framework within which this conduct must be considered. Important sources from which I have drawn are:
>
> - the criminal complaint;
> - the Srebrenica archive of the Regional Public Prosecution Service (*arrondissementsparket*) Eastern Netherlands (Arnhem) and the National Office of the Public Prosecution Service (*parket-generaal*);
> - the account of the facts resulting from the Srebrenica debriefing (*Feitenrelaas Debriefing Srebrenica*) (22 September 1995);

- the defence report *Debriefing Srebrenica* (4 October 1995);
- the parliamentary letters concerning Srebrenica;
- the reports of the Secretary General of the United Nations (27 November 1995 and 12 November 1999);
- the final report and the hearings of the parliamentary committee of inquiry, *Missie zonder Vrede* (Mission without Peace) (2003);
- the NIOD report [NIOD Institute for War, Holocaust and Genocide Studies (*NIOD Instituut voor Oorlogs-, Holocaust- en Genocidestudies*, 'NIOD'): *Srebrenica: Reconstruction, background, consequences and analyses of the fall of a 'safe' area*] (2002);
- the case-law of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') (among others, *Krstić*, *Popović*. *Blagojević* and *Tolimir*);
- the evidence given by, among others, members of the Netherlands armed forces before the ICTY;
- the evidence given in the [applicants' parallel civil proceedings] against the Netherlands State;
- the correspondence of Hasan Nuhanović published in the daily newspaper *Trouw*.

There has, at various times, been broad internal consultation on the results of the various parts of the investigation and the analyses and further investigative measures have been ordered and carried out. In the factual investigation no witnesses have been heard. The investigation was followed and monitored by a steering group consisting of members of the Regional Public Prosecution Service Eastern Netherlands, the National Organised Crime Prosecution Service (*landelijk parket*), the Public Prosecution Service at the Arnhem-Leeuwarden Court of Appeal (*ressortsparket*), and the National Office of the Public Prosecution Service."

The decision takes ten pages to describe the events leading up to and surrounding the fall of the Srebrenica enclave to the VRS and the deaths of Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović. It continues:

"3. *Criminal responsibility*

3.1 General

It must be noted at the outset that the (deadly) violence to which Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović were exposed after they had left the compound on 13 July 1995 constitute conduct that can be qualified as one or more of the crimes penalised in the Genocide Convention (Implementation) Act (*Uitvoeringswet Genocideverdrag*) and the War Crimes Act (*Wet Oorlogsstrafrecht*) and also that these crimes were committed by the VRS.

...

3.2 Culpable involvement in the killing of the victims named in the criminal complaint

Muhamed Nuhanović

...

[Major] Franken, as deputy battalion commander, after a sub-list of the UNMO with names of local staff had been placed before him, struck out the name of Muhamed Nuhanović. He did so deliberately, because, as he later informed the Netherlands UNMO officer and Hasan Nuhanović, he did not wish any names to appear on that list of persons who did not hold a UN pass and did not belong to the local staff of an international organisation. [Major] Franken was entitled to consider the possibility that the VRS would check the convoy that was due to leave the compound with care – he had pertinent knowledge – and that in so doing they would discover that Muhamed Nuhanović was being evacuated unduly (*ten onrechte*) with the local staff. [Major] Franken has stated that he feared for the lives of the persons who did hold a UN pass, which might, in the event of [Muhamed Nuhanović's] discovery, be in danger of VRS reprisals. In the given circumstances of that moment and the powerless position in which Dutchbat found itself, this weighing of interests is not unreasonable. Moreover, [Major] Franken did, as he could be expected to in the given circumstances, have the possibility to forge a UN pass on the compound checked. However, a staff officer of section S2 (intelligence and security) informed him that this was not possible, because only access passes could be made on the compound and not UN passes as well. In this actual and acute situation in which [Major] Franken was faced with a grave dilemma in which each of the choices to be made could cost the lives of one or two people, [Major] Franken weighed the interest of the local staff more heavily than that of Muhamed Nuhanović. He made a very difficult choice between these interests, but nonetheless one that can be condoned, after having had a possible alternative investigated.

In this connection, it should be observed that [Lieutenant Colonel] Karremans had received from his line of command the instruction to negotiate with the VRS about the evacuation. In view of Dutchbat's task – and the responsibilities thereto pertaining – [Lieutenant Colonel] Karremans and [Major] Franken gave their attention to the collective, more specifically to the position of the women, children, wounded, local staff in the service of the UN or other international organisations (for example *Médecins Sans Frontières*). He tried in vain to carry out these instructions by negotiating with Mladić about the evacuation in order that Dutchbat ensure the evacuation or accompany it. The position of Dutchbat to impose its will was however an impossible one, considering the events of that day and the preceding days. It turned out impossible to accompany or actually exercise any supervision, despite Dutchbat's attempts, since attempts to do so were made impossible by the VRS. There was therefore no alternative course of action as regards the refugees in general, nor in respect of individual cases. The decision concerning the position of Muhamed Nuhanović was taken at a time when the evacuation of the refugees was still in full swing. Muhamed Nuhanović left the compound with the last of the refugees. The local staff that was in the service of the UN or other international organisations remained behind. The conduct of [Lieutenant Colonel] Karremans and [Major] Franken in relation to Muhamed Nuhanović must also be considered in this light.

The involvement of [Lieutenant Colonel] Karremans was no more than indirect. It appears from the sources studied that he was aware that [Major] Franken had been approached with the request to allow Muhamed Nuhanović to remain on the compound. [Lieutenant Colonel] Karremans was aware that [Major] Franken had turned this request down. There are however no indications from which it would follow that [Lieutenant Colonel] Karremans was involved in the decision-making on this point. [Major] Franken's decision was compatible with his instruction relating to the local staff that would in due course be evacuated together with Dutchbat. There

was therefore no reason for [Lieutenant Colonel] Karremans to countermand [Major] Franken's decision, the less so since this instruction as such was not contrary to any legal rule.

It does not appear that [Warrant Officer] Oosterveen was aware of Muhamed Nuhanović's presence on the compound and the decision-making regarding his position.

I am of the view, on the above grounds, that there is no criminal reproach to be made against [Lieutenant Colonel] Karremans, [Major] Franken and [Warrant Officer] Oosterveen in this matter.

Ibro Nuhanović

As a member of the committee of representatives of the local population Ibro Nuhanović together with [Lieutenant Colonel] Karremans attended a meeting with Mladić. There, the impression was given that Ibro Nuhanović was entitled to safe passage. He was therefore permitted to remain on the compound to be evacuated together with Dutchbat. After [Lieutenant Colonel] Karremans had agreed with Mladić that local staff would be allowed to be evacuated with Dutchbat, he ordered his staff, in his capacity of battalion commander, to draw up a list with the names of local staff possessing a UN pass. In so doing he gave the instruction that only those employees enjoyed protected status. [Lieutenant Colonel] Karremans did not concern himself further with the composition of the list and was under the impression that Ibro Nuhanović had been granted safe passage.

When Ibro Nuhanović made moves to leave the compound, it was brought to his attention by [Major] Franken that he had safe passage and could remain on the compound. Ibro Nuhanović did not wish to leave his wife and son alone and left the compound together with them. His wife and son did not have safe passage. It must be recognised that Ibro Nuhanović took this decision in dramatic circumstances.

I realise that Ibro Nuhanović's decision can be traced to [Major] Franken's decision not to allow Muhamed Nuhanović to be evacuated together with Dutchbat. Since this decision by [Major] Franken – as I have set out above – does not incur any criminal reproach, Ibro Nuhanović's decision to leave the compound and his consequent death cannot be impugned in a criminal sense to [Lieutenant Colonel] Karremans or [Major] Franken.

As regards [Warrant Officer] Oosterveen, no involvement could be established in Ibro Nuhanović's leaving the compound. In this respect, no criminal reproach attaches to him.

Rizo Mustafić

Also in respect of Rizo Mustafić, the gist of the [applicants'] reproach is that Rizo Mustafić left the compound by the fault of [Lieutenant Colonel] Karremans, [Major] Franken and [Warrant Officer] Oosterveen, because he could not be evacuated together with the battalion.

[Warrant Officer] Oosterveen was given duties outside the compound on 12 July 1995. He was not aware that a list of names of local staff had been composed that in all probability included the name of Rizo Mustafić. In the morning of 13 July 1995 he met Rizo Mustafić on the compound more or less by coincidence. That meeting was brief and consisted only of Rizo Mustafić's statement 'We stay here'[5], to which [Warrant Officer] Oosterveen replied 'That is not possible, everyone has to leave with

5. In English in the original.

the exception of UN staff'. That reply corresponded to his knowledge that the battalion command had given the instruction that only local staff possessing a UN pass could be evacuated with Dutchbat and that the other local staff was to be treated in the same way as the refugees. That instruction was not contrary to any legal rule.

In the evening of 13 July 1995, after all refugees had left the compound, [Warrant Officer] Oosterveen told [Major] Franken about the meeting that morning with Rizo Mustafić. [Major] Franken took [Warrant Officer] Oosterveen to task for an immense blunder. [Major] Franken considered Rizo Mustafić to be a person who could count on special protection. That was when [Warrant Officer] Oosterveen first heard of the 'list of 29' and understood that Rizo Mustafić was on it.

[Lieutenant Colonel] Karremans did not see Rizo Mustafić during those days. He only noticed Rizo Mustafić's absence after 13 July 1995 and it surprised him that Rizo Mustafić had not remained on the compound. [Lieutenant Colonel] Karremans considered him to be a kind of permanent employee and had not realised that Rizo Mustafić did not possess a UN pass.

As regards [Warrant Officer] Oosterveen, it appears that he only informed Rizo Mustafić of what he had understood from the information given by the battalion command. [Lieutenant Colonel] Karremans and [Major] Franken have displayed no conduct of criminal relevance in this matter. Accordingly, no criminal blame attaches to [Lieutenant Colonel] Karremans, [Major] Franken and [Warrant Officer] Oosterveen in respect of the killing of Rizo Mustafić either.

On the basis of the events surrounding the departure of Rizo Mustafić from the compound I conclude that in the final analysis there must have been a dramatic misunderstanding."

and further includes:

"The criminal complaint paints a picture in which [Lieutenant Colonel] Karremans, [Major] Franken and [Warrant Officer] Oosterveen removed the loved ones of your clients without any concern for their fate. On the basis of the results of the investigation into the facts, it is however possible to consider that this picture is not tenable: the interests and the safety of the refugees have at all times guided the decisions taken, in so far as that could safely be done within the framework in which the Dutchbat leadership had to discharge their duties."

(b) Proceedings before the Military Chamber of the Court of Appeal

i. Before the hearing

40. On 3 April 2014 the applicants lodged a complaint under Article 12 of the Code of Criminal Procedure (*Wetboek van Strafvordering*) about the failure to prosecute Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen. They complained that the time taken for the public prosecutor to come to a decision had been excessive; that the investigation had been flawed in that it had been limited to information already available to the public; that the applicants had not been sufficiently involved, and in particular that they had not been heard; that the opinion of the reflection chamber – which in their submission favoured prosecution – had been ignored; that the decision not to prosecute was politically motivated; and that substantive criminal law had been misapplied.

41. On 19 May 2014 the applicants wrote to the Court of Appeal (*gerechtshof*) challenging the presence of a military member in the chamber that was to decide their complaint and asked that the case be heard by a regular civilian chamber of the Court of Appeal. They cited the fear that a serving officer would lack independence from the Ministry of Defence. They alleged that the Ministry of Defence had in the past obstructed investigations that might have led to criminal proceedings against Dutchbat members at an earlier stage.

42. On 23 October 2014 the Challenge Chamber (*wrakingskamer*) of the Court of Appeal dismissed the challenge. It found that there was no objective reason to doubt the independence and impartiality of the military member. It also pointed out that if the prosecution of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen were to be ordered by a civilian chamber of the Court of Appeal, the defence might well be in a position to challenge that order on the ground that it had not been given by a tribunal invested by law with the necessary competence.

43. On 28 August 2014 the public prosecutor who had earlier refused to order the prosecution submitted an official report (*ambtsbericht*). As relevant to the case, he argued that the Netherlands lacked jurisdiction within the meaning of Article 1 of the Convention, because as of 11 July 1995 "effective control" of the Srebrenica enclave had been exercised by the VRS not Netherlands armed forces. The length of the proceedings was acceptable given the sheer quantity of factual information to be examined and the painstaking consultation process that had taken place within the Public Prosecution Service. Information submitted by the applicants had been examined, as had information obtained by the Public Prosecution Service of its own motion; against the background of the information available there had been no perceived need for the applicants themselves to be heard in person. The opinion of the national reflection chamber was a purely internal document. The public prosecutor's position was therefore that the complaint about his decision not to prosecute should be dismissed.

ii. The hearing and the interlocutory decision

44. On 13 November 2014 a hearing took place before the Military Chamber of the Court of Appeal. The Military Chamber included as its military member an officer of the Royal Navy (*Koninklijke Marine*) holding titular flag rank and qualified for judicial office.

45. Two advocates general (*advocaten-generaal*) to the Court of Appeal submitted a position paper (*standpunt*) in which they endorsed the position of the public prosecutor that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen were not criminally liable and stated the view that a prosecution was bound to end in an acquittal.

46. On 5 December 2014 the Military Chamber of the Court of Appeal gave an interlocutory decision finding that the file was incomplete. It

reopened the investigation and ordered the Public Prosecution Service to add to the file the official record drawn up by the Royal Military Constabulary (*Koninklijke Marechaussee*) of statements taken from certain named Dutchbat members and the debriefing report of 22 September 1995.

47. On 26 January 2015 the applicants submitted written comments protesting that these documents had been deliberately drawn up so as to avoid any prosecutions but nonetheless highlighting particular statements contained in them.

iii. The decision

48. On 29 April 2015 the Military Chamber of the Court of Appeal gave its decision dismissing the applicants' complaint. Its reasoning, as relevant to the case before the Court, was the following (translation published by the applicants; emendations by the Court; footnotes omitted; emphasis in the original):

"**Procedural documents**

3.1 *Overview of the documents*

Both the original charges and the complaint are accompanied by many appendices. The written responses and pleadings from the lawyers of the Defendants have also been accompanied by many exhibits. The Advocates General have only submitted an official message from the Chief Public Prosecutor for the district Oost-Nederland [i.e. Eastern Netherlands] dated 28 August 2014.

In addition, a great deal of relevant information is available in the public domain via internet. In particular, the Court of Appeal mentions the following information, but this list is not exhaustive:

-the report entitled '*Srebrenica: een "veilig" gebied*' (Srebrenica: a 'safe' area), from [NIOD], with the accompanying component studies;

-the parliamentary documents on the subject of 'Srebrenica' (Lower House of Parliament, Parliamentary Years 1997-2003, 26 122);

-documentation from the parliamentary enquiry into the course of events in Srebrenica (Lower House of Parliament, Parliamentary Years 2001-2003, 28 506);

-statements made by witnesses before the International Criminal Tribunal for the former Yugoslavia (ICTY);

-pronouncements [i.e. judgments] of the ICTY and the International Court of Justice (ICJ);

-pronouncements in the civil cases brought by the Plaintiffs [i.e. the applicants] against the Kingdom of the Netherlands;

-pronouncements in the civil case brought by the Mothers of Srebrenica Foundation [i.e. Stichting Mothers of Srebrenica] and others against the Kingdom of the Netherlands and the United Nations.

The parties have also drawn on these sources; the Court of Appeal therefore feels at liberty to use such documentation in arriving at its decision.

The following documents were also submitted by the Advocate General in response to the interim decision:

-the testimony of witnesses 2nd Lieutenant R., Sergeant Major S., 1st Lieutenant K, [Warrant Officer] Oosterveen and Corporal D. given before the [Royal Military Constabulary] on 2 August 1995 (official record no. P13/1995-JD);

- 'The Account of the Facts in connection with the Srebrenica debriefing', with appendices, dated 22 September 1995.

Included with a letter from the lawyers for the Plaintiffs dated 26 January 2015 was also:

-an email message dated 5 December 2015 from a person of unspecified sex who claims to be a Dutchbat III veteran and wishes to remain completely anonymous.

...

Expediency

5. In his [advisory opinion], the Chief Advocate General notes that it is not, or insufficiently, evident what general interest would currently be served with the criminal prosecution of the Defendants.

On behalf of the Plaintiffs, [the applicant's counsel Mr] Sluiter has argued that this is an improper ground for non-prosecution.

There is no scope for a discretionary dismissal, since International law obliges the Netherlands to prosecute the most serious crimes.

The Court of Appeal agrees with [Mr] Sluiter that the margins for a discretionary dismissal are narrow in the case of very serious offences that have had a serious impact on the national or international rule of law. But International law does not permit the categorical exception called for by [Mr] Sluiter. Article 53 of the Statute of the International Criminal Court (ICC) describes the Prosecutor's authority to institute a discretionary dismissal in so many words. If there are justifiable reasons to assume that an investigation would not be in the interests of a proper administration of justice, or if prosecution would not be in the interests of the proper administration of justice, the Prosecutor is at liberty to reject a request for an investigation or refrain from prosecution. The supervision of such a discretionary dismissal by the Pre-Trial Chamber is more strictly regulated than it is under Dutch criminal procedure, because - in the case of the ICC - a non-prosecution decision must first be confirmed by the Pre-Trial Chamber. Nonetheless, this does not affect the basic principle of policy-making discretion for the Prosecutor under the watchful eye of the Courts.

Interim conclusion on the basis of the formal standpoints

6. All that which the Court of Appeal has considered and decided, leads it to the opinion that:

-one the one hand there are no formal obstacles to prosecution, but

-on the other hand, prosecution is by no means a foregone conclusion.

The Court of Appeal must therefore consider the complaint on its own substantive merits.

Substantive appraisal of the complaint

...

7.3.3 In the opinion of the Court of Appeal, the Public Prosecution Service could have carried out a more extensive investigation. A number of concrete possibilities to that end were summarized in [Ms] Zegveld's letter to the acting Chief Public Prosecutor dated 25 July 2011. The question is then: should there have been a further investigation?

7.3.4 The Plaintiffs have submitted that when a crime causing a fatality occurs, Article 2 of the [Convention] obliges the Public Prosecution Service to institute an effective investigation on its own initiative. In the view of the Plaintiffs, based on [*Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001], they should have been involved in that investigation.

...

The Plaintiffs ... ascribe too broad a scope to the [*Hugh Jordan* judgment]. In that [judgment], the European Court of Human Rights said: '*In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.*'[6] The examples given are the right to be notified of a decision not to prosecute, and access to the case file. But that does not imply that they must be involved in the *investigation*.

In addition, the jurisprudence [of] the European Court of Human Rights (on the obligation to institute an *effective official investigation*[7]) always relates to deadly force exercised by public servants *themselves*. That is not the situation in this case. The primary and heaviest responsibility lay and lies [with] the Bosnian Serbs, *not* [with] Dutchbat in general or the Defendants in particular. In the opinion of the Court of Appeal, this does not mean that the Public Prosecution Service was not under an obligation to institute an *effective investigation*[8], but this circumstance does matter when appraising the criteria that such an investigation must satisfy. Whichever way you look at it, *complicity* in a statistically minor part of a crime cannot be compared with responsibility for the crime itself.

7.3.5 As the Plaintiffs themselves state, the facts of the Srebrenica drama have been thoroughly investigated in the past. They themselves cite the NIOD report, the investigation by the Van Kemenade Commission and the parliamentary enquiry. The Court of Appeal supplements this list with the investigations carried out by the [ICTY] in a large number of cases to date, and the information which became available during the civil proceedings, including - in particular - the statements of the Plaintiffs and Defendants themselves. In her letter of 7 March 2013, the Chief Public Prosecutor gives an overview of the sources referenced by the Public Prosecution Service. The Plaintiffs argue that the Public Prosecution Service's investigation, on the basis of these sources, cannot be qualified as effective since it was based only on public information and cannot *therefore* (italicised by the Court [of Appeal]) lead to the identification and punishment of those responsible.

The Court of Appeal is unable to follow the rationale of this argument. Historical and criminal investigations are not mutually exclusive; they overlap and can have a mutually beneficial effectiveness. On the basis of these sources, they were able to submit an extensive, detailed and argumented Complaint. It is perfectly clear who they had in their sights as suspects, and why. If the Public Prosecution Service had concurred with the Plaintiffs' interpretation of the underlying facts, and with their

[6] In English in the original.
[7] In English in the original.
[8] In English in the original.

standpoint with regard to the expediency of prosecution, it would certainly have proceeded to seek a prosecution on the basis of the material available.

...

7.4 *Re c: defective decision-making*

The Plaintiffs are correct in contending that the Public Prosecution Service failed to explicitly include the advice of the National Reflection Chamber in its argumentation of the decision not to seek prosecution. It was under no obligation to do so, but it is detrimental to the depth and the testability of the ultimate decision. In particular, that failure somewhat obscures the judgement on the question of the expediency of prosecution. Accordingly, the Court cannot constrain itself to the generally requested limited judicial review of this aspect of the decision, but - *if* prosecution is technically feasible - it will need to supersede the Public Prosecution's judgement by its own.

7.5 *Re d: the feasibility of possible prosecution*

In contrast to its opinion-forming about the expediency of prosecution, the Court of Appeal must fully test the decision taken about the feasibility of prosecution.

This means that the Court of Appeal must give thorough consideration to the facts and the context surrounding them.

7.6 For a good understanding, the Court of Appeal makes the following comments. Contrary to what the Plaintiffs seem to assume, a Complaint of this nature is not a two-party dispute between the Plaintiffs and the Public Prosecution Service. The Defendants are likewise party to these proceedings; they have the right to be shielded from frivolous prosecution for very serious offences.

The [Military Chamber of the Court of Appeal] must take all these interests into account, and this calls for a more thorough testing than the Plaintiffs seem to advocate.

...

War crimes and crimes against humanity; the executions

...

9.2 In appraising the Complaint, it is particularly important to ascertain whether any executions took place *before* the Plaintiffs' family members left the compound and - if so - on what scale, and whether the Defendants knew about such acts *at the moment when the Plaintiffs' family members left the compound*.

9.3 In the opinion of the Court of Appeal, the material available does not support the assumption that the Defendants knew about the executions which had taken place elsewhere. In that respect, it can be noted that most of those executions must have taken place after the Defendants' family members left the compound on 13 July 1995.

...

The crimes of which the Defendants are accused

11.1 *Complicity in genocide*

The most far-reaching accusation that the Plaintiffs make against the Defendants is that the latter were complicit in the genocide committed by the Bosnian Serbs.

As the Plaintiffs themselves acknowledge, the settled case law of the international criminal tribunals, and the [ICTY] in particular, [is] that complicity in genocide entails actual knowledge of the genocidal intention of the principal offenders. Conditional intent or recklessness is not sufficient. The Plaintiffs submit that the Dutch criminal courts will be less stringent. ...

The [Military Chamber of the Court of Appeal] does not share the Plaintiffs' standpoint. With their case law and legal precedents, the international tribunals, which - by virtue of their composition and the large number of cases they deal with - are the foremost experts with regard to the interpretation and application of international criminal law, have developed a stable and carefully deliberated system with regard to the various forms of participation in genocide.

That case law is applied, without exception, to the suspects who are called to account for their involvement in crimes committed during the war in the former Yugoslavia before the [ICTY].

In the opinion of the Court of Appeal, this balance of the system would be disturbed if the Dutch criminal courts, which operate on the periphery of this large volume of cases, were to base their judgements on criteria that diverge from those used by the [ICTY]. With regard to a suspect, this would lead to an indefensible form of arbitrariness. The Court therefore opts to follow the judgement given by the [ICTY] on this point.

There was no actual knowledge among the Defendants of the genocidal intentions of the Bosnian Serbs, a fact that the Plaintiffs also recognize.

The Court of Appeal therefore considers conviction on the grounds of complicity to genocide to be impossible, and prosecution to be pointless. For that reason, and in that respect, the Complaint must be deemed rejected.

11.2 *Complicity in war crimes and murder*

Alternatively, the Plaintiffs argue that the Defendants are guilty of complicity in war crimes or, as a further alternative, complicity in murder.

Conditional intent - that is to say the conscious acceptance of a significant chance that someone's actions will have a particular consequence - is sufficient as a basis for complicity in war crimes.

Knowledge of the executions within Dutchbat, in particular the Defendants' knowledge

12.1 From the statements they made to the [Royal Military Constabulary], it transpires that on 13 July 1995 1st Lieutenant K., , 2nd Lieutenant R. and Sergeant Major S. found the bodies of nine men, all aged approximately 40, in a meadow near a stream. They had all apparently been executed. 2nd Lieutenant R. took some photos at the scene with a disposable camera.

2nd Lieutenant R. has testified that he came across Defendant [Lieutenant Colonel] Karremans, by coincidence, and reported the discovery to him. [Lieutenant Colonel] Karremans's reaction was lukewarm, and he said that he would report it up the chain of command.

At approximately 16.00 hours on 13 July 2013, Private G. witnessed the execution of one person near the building that was known as the 'White House'.

News of his observation was said to have reached [Lieutenant Colonel] Karremans via the normal hierarchical channels. Defendant [Major] Franken remembers this report.

12.2 Defendant [Warrant Officer] Oosterveen, in the company of Corporal D., also saw nine or ten bodies in woodland near a stream at approximately 14.45 hours on 13 July 1995. According to Corporal D., it looked like a summary execution. Corporal D. took some photos of the situation with [Warrant Officer] Oosterveen's camera. [Warrant Officer] Oosterveen afterwards discussed his findings with 2nd Lieutenant R.; In [Warrant Officer] Oosterveen's opinion, it must have been two separate locations.

The Account of the Facts also contains further observations which in all probability relate to executions : on p. 231 (12 July, afternoon, at the 'interrogation houses'), on p. 235 (that may possibly be the same incident and/or the incident reported by Private G.), on p. 233 (12 July, the transport to a house of ten Muslim men between the ages of 30 and 50, the arrival of a lorry as evening fell followed by shots heard in the immediate vicinity of the house and the departure of the lorry), on p. 240 (13 July, when male refugees were taken out of sight and pistol shots were heard from the direction in which they had been taken).

There are also a number of reports of shots, which were interpreted by the Dutchbat servicemen as being executions. Defendant [Warrant Officer] Oosterveen has declared that the servicemen who were in the compound in the evening and at night heard shots now and again. This was not the clatter of a battle, but shots spaced at intervals; to execute people. This was on 12 or 13 July. It was not necessary to report it, everyone could hear it.

It is not apparent whether or not these findings were reported to battalion command.

12.3 Generally, the Account of the Facts includes a large number of reports of deaths that are not attributable to executions but are more likely to relate to the victims observed by 2nd Lieutenant R. or [Warrant Officer] Oosterveen and their companions. It is not clear whether those observations were reported to the Defendants.

12.4 The facts set out above correspond to those established by the Court of Appeal in The Hague during the civil proceedings brought by the Plaintiffs against the State118. In those proceedings, the Court of Appeal combined all these facts (as 'the knowledge of Dutchbat') to form the basis for its opinion that Dutchbat should not have sent the Plaintiffs' family members away from the compound.

In the opinion of the [Military Chamber of the Court of Appeal], this conclusion cannot be transferred 'as is' to the appraisal of the complex of facts on their merits under criminal law. The issue here is one of each Defendant's personal responsibility, and the facts cannot simply be swept together. The situation is entirely different when establishing the civil responsibility of the State for the conduct and actions of Dutchbat.

12.5 On the grounds of the foregoing, the Court [of Appeal] feels that the following can be established in regard to the knowledge of the Defendants.

-Defendant [Lieutenant Colonel] Karremans was aware of the findings of 2nd Lieutenant R. and his companions and of Private G. He also knew of the existence of the list of able-bodied men drawn up on [Major] Franken's instructions. He was indeed aware of the segregated transport of the men.

-Defendant [Major] Franken had instructed that a list be made of all the able-bodied men among the refugees in the compound. He knew about Private G.'s report, and he knew about the findings of 2nd Lieutenant R. or those of [Warrant Officer] Oosterveen. He was also aware of the segregated transport of the men.

- Defendant [Warrant Officer] Oosterveen had himself reported the observations described in par. 12.2. He, too, was aware of the segregated transport of the men.

The departure of the Plaintiffs' family members from the compound

Muhamed Nuhanović

...

13.4 Whatever the case, there is no indication that the knowledge gained by Defendant [Major] Franken extended any further than the facts set out in par. 12.5.

The question to be answered is: should that knowledge not have made him realize that, after leaving the compound, Muhamed would have run a significant risk of being murdered.

The Court of Appeal feels that that it not the case. There was no indication at all that Muhamed had acted as if he was a war criminal vis-à-vis the Bosnian Serbs, or that they might have been targeting him for any other reason. The Court of Appeal refers to the finding of the [ICTY] cited in par. 10.4 - and adopts that judgement - that a number of 'opportunistic killings' took place in Potočari, not murder on a large scale. They took place *elsewhere* and - more importantly - at a *later* time.

On the basis of the foregoing, the Court of Appeal is of the opinion that it is highly unlikely that a criminal court dealing with the case at any later date would convict Defendant [Major] Franken. For that reason, and in that respect, the Complaint should also be rejected.

13.5 For the sake of completeness, and strictly speaking superfluously, the Court of Appeal will discuss the emergency situation invoked on behalf of Defendant [Major] Franken.

In short, [Major] Franken would not risk allowing Muhamed to pass through as a local employee, something he knew to be untrue, because this might endanger the evacuation of the other local employees. On the basis of his experience that the VRS inspected convoys meticulously, and knowing that every detail had to be completely correct, he assumed that he would be taking an enormous risk when the VRS carried out its almost inevitable inspection and found someone with no valid papers or papers that were questionable.

...

13.5.5 In the opinion of the Court of Appeal, there is a very good chance that a criminal court dealing with the case at any later date would uphold the claimed emergency if the opportunity arose. Dutchbat servicemen and any other person left in the compound were completely dependent on the VRS. The idea that Muhamed would have been safe there as long as the UN flag was raised, as Plaintiff Nuhanović claimed during the hearing, is not realistic. As evidenced by the taking over of the observation posts, the VRS had no respect at all for that flag; they came into the compound as and when it suited them, and they carried out meticulous inspections. In the Court's opinion it would indeed have been critically dangerous if the VRS had discovered that Dutchbat had tampered with a list of employees. Seen in that light, the Court of Appeal therefore concludes that it is not of decisive importance whether or not it would have been possible to make a UN pass for Muhamed on site; despite having

been discussed at length between the parties, this is not a question to which a clear-cut answer can be given.

Bearing in mind that the complaints procedure is also designed to ensure that defendants are shielded from frivolous prosecution, this would be a further reason to reject the Complaint.

13.6.1 Insofar as the Plaintiff accuses Defendant [Lieutenant Colonel] Karremans of complicity in the offences committed by Defendant [Major] Franken, the comments made above in respect of [Major] Franken apply by analogy.

Ibro Nuhanović

...

14.3 It has been established that Ibro Nuhanovic could have remained in the compound, and left together with Dutchbat. Defendant [Major] Franken explicitly told him so.

Under the difficult circumstances of that moment, Ibro chose to leave together with his wife and youngest son. That was a brave decision, one for which he deserves to be respected. But in the opinion of the Court of Appeal, it was indeed his decision, and it was not an inevitable one. He could have remained, as did the Plaintiff. It is distressing to note, but he must have had a good idea of what awaited himself and his family, and known that he would be unable to save his son by going with him.

14.4 In the civil proceedings, the Court of Appeal in The Hague decided that the State had not acted unlawfully vis-à-vis Ibro, but that his death was imputable to the State as a result of unlawful actions vis-à-vis Muhamed.

Whatever the case may be, there are insufficient grounds to hold the Defendants responsible under criminal law.

14.5 For that reason, and in that respect, the Complaint should also be rejected.

Rizo Mustafić

...

15.3 The Court of Appeal is of the opinion that [Warrant Officer] Oosterveen made a stupid mistake which had terrible consequences. But the Court can find no evidence of intent, neither direct nor indirect. In the opinion of the Court of Appeal, the Plaintiffs' assertions with regard to a duty of care and the failure to verify Mustafić's status would justify, at best, a prosecution for negligent homicide. But such an offence is already statute-barred because of the passage of time.

15.4 Insofar as the Plaintiffs argue that [Warrant Officer] Oosterveen should have told absolutely no-one that he had to leave the compound, that which the Court of Appeal considered and decided under par. 13.5 applies by analogy, assuming that [Warrant Officer] Oosterveen believed in good faith that Mustafić had no special right to remain in the compound.

15.5 The circumstance that the civil court held the State liable for the fact that 'Dutchbat' erroneously sent Mustafić away, does nothing to alter this standpoint. Under civil law, an employer can certainly be held liable for mistakes, even stupid mistakes, made by his employees, while the employee himself may not be liable under criminal law.

15.6 The punishability [i.e. criminal liability] of Defendants [Lieutenant Colonel] Karremans and [Major] Franken on the basis of [section] 9 of the War Crimes Act is

not at issue, because [Warrant Officer] Oosterveen cannot be accused of any of the offences listed in [section] 8 of the same Act.

Moreover, this was not a question of intentionally allowing some offence to be perpetrated.

15.7 The Court of Appeal responds as follows, insofar as the Plaintiffs accuse [Lieutenant Colonel] Karremans and [Major] Franken that they acted in violation of their legal duty by failing to draw up a watertight evacuation plan.

In the first place, no plausible evidence of any kind has been put forward to show that Mustafić was the victim of an administrative failure. His name was certainly on the correct list. People cannot be prevented from making stupid mistakes, neither in a civilian organisation nor in the military; in this case, [Warrant Officer] Oosterveen made the mistake of interfering in a matter which did not concern him and about which he had insufficient information.

In the second place, even if this were to be different, the maximum possible offence for which Defendants [Lieutenant Colonel] Karremans and [Major] Franken could have been prosecuted would have been negligent homicide.

15.8 On the grounds of the foregoing, and in that respect, the Complaint should be rejected.

Final conclusion

16. Given the above considerations, all components of the Complaint should be rejected."

2. Parallel civil proceedings

(a) The preliminary hearing of witnesses

49. In anticipation of civil proceedings which he intended to bring against the State of the Netherlands, Mr Hasan Nuhanović sought and obtained from the Regional Court of The Hague an order for a preliminary hearing of witnesses (*voorlopig getuigenverhoor*). Warrant Officer Oosterveen, Major Franken and Lieutenant Colonel Karremans gave evidence under oath or affirmation. None of them refused to answer any questions. Other witnesses included Major General Van Baal (by this time Lieutenant General Van Baal, Inspector General of the Armed Forces (*Inspecteur-Generaal der Krijgsmacht*)), who in 1995 had been the deputy commander of the Royal Army (*plaatsvervangend bevelhebber der landstrijdkrachten*); Dr J.J.C. Voorhoeve, who had been Minister of Defence (*Minister van Defensie*) at the relevant time; and Major De Haan of the Netherlands Royal Army (*Koninklijke Landmacht*), who had been present in the capacity of United Nations military observer (UNMO).

(b) Proceedings in the Regional Court

50. The Mustafić family and Mr Hasan Nuhanović each brought civil proceedings against the State of the Netherlands. They submitted that the State was accountable for the actions of Lieutenant Colonel Karremans,

Major Franken and Warrant Officer Oosterveen that had led to the deaths of Mr Rizo Mustafić and Mr Ibro Nuhanović and Mr Muhamed Nuhanović, respectively.

51. The two cases were considered in parallel, first by the Regional Court of The Hague and then by the Court of Appeal of The Hague.

52. At first instance, the Regional Court held that the matters complained of were imputable to the United Nations alone. Dutchbat had been under United Nations command and control; furthermore, the events complained of had taken place in Bosnia and Herzegovina, a sovereign State over which neither the United Nations nor the Netherlands had jurisdiction.

(c) Proceedings in the Court of Appeal

53. The Mustafić family and Mr Hasan Nuhanović appealed to the Court of Appeal of The Hague.

54. The Court of Appeal delivered two interlocutory judgments on 5 July 2011 (ECLI:NL:GHSGR:2011:BR0132 (*Mustafić*) and ECLI:NL:GHSGR:2011:BR0133 (*Nuhanović*)). In both cases it found, *inter alia*, that regardless of whether Dutchbat could, or should, have saved any other men, the State had committed a tort (*onrechtmatige daad*) by requiring Mr Rizo Mustafić and Mr Muhamed Nuhanović, respectively, to leave the compound instead of allowing them to be evacuated as UN staff. As relevant to the case now before the Court, the State had failed to prove, firstly, that possession of a UN pass was a necessary condition for safe passage out of the enclave; and secondly, that the State had failed to prove that such a pass could not have been created on the compound. As regards Mr Ibro Nuhanović, the Court of Appeal recognised that it had been his own decision to leave the compound with his son, but that decision was an understandable consequence of forcing Mr Muhamed Nuhanović to leave and therefore also attributable to the State. In finding that these actions constituted torts attributable to the State, the Court of Appeal applied the law of the Republic of Bosnia and Herzegovina.

55. The Court of Appeal ordered the hearing of witnesses on a point of procedure not relevant to the case before the Court.

56. In two essentially identical judgments on the merits delivered on 26 June 2012 (LJN BW9014 (*Mustafić*) and ECLI:NL:GHSGR:2012:BW9015 (*Nuhanović*)), the Court of Appeal overturned the judgments of the Regional Court and held the Netherlands State liable in tort for the damage caused to the appellants as a result of the deaths of their relatives.

(d) Proceedings in the Supreme Court

57. The State lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*).

58. On 6 September 2013 the Supreme Court delivered two judgments (*Nuhanović*, ECLI:NL:HR:2013:BZ9225, and *Mustafić-Mujić and Others*, ECLI:NL:HR:2013:BZ9228) dismissing the State's appeal and holding *obiter dictum* that the responsibility of the State under Article 1 of the Convention was engaged.

D. Domestic fact-finding

59. A plurality of investigations and reports into the Srebrenica massacre and the events surrounding it was officially ordered. Those most relevant to the case before the Court are described below, together with the official or political reactions to them.

1. The debriefing

60. After the battalion had returned to the Netherlands, its members were individually debriefed. The instruction to the officer in charge of the debriefing was to hear all Netherlands service personnel who had been present in the Srebrenica enclave between 6 and 21 July 1995 individually, the discussions to focus on all possible indications of war crimes and military-operational aspects, and the opportunity was to be offered to present matters not strictly belonging to either of those categories.

61. Twenty-five debriefing teams were formed, most of which consisted of both Royal Military Constabulary (*Koninklijke Marechaussee*) and Royal Army (*Koninklijke Landmacht*) members. Four debriefing teams consisted of Royal Army members only. They interviewed 451 individuals between late August and the end of September 1995.

62. Individual service personnel were informed beforehand that the information concerning their personal experiences would be permanently classified confidential (*Staatsgeheim confidentiëel*) and that their personal debriefing reports would never be made accessible to their colleagues and commanders.

63. The officer in charge of the debriefing team reached a prior agreement with the public prosecutor of the Arnhem Regional Court (*rechtbank*) that the debriefing team would not report any criminal acts that came to their knowledge. However, individual service personnel were informed beforehand that the debriefing team might forward to THE ICTY any statements reflecting violations of international humanitarian law which they had observed.

64. Of the statements collected, 212 were forwarded to NIOD for use in the report then under preparation (see below).

65. A condensed and anonymised summary of findings (*Feitenrelaas*, "Account of the facts") was transmitted to the Lower House of Parliament by the Minister of Defence (Lower House of Parliament, Parliamentary Year 1999-2000, 26 122, no. 18). In the covering letter, the Minister stated

that the Board of Procurators General (*College van procureurs-generaal*) had decided on the information available that no prosecutions or further criminal investigations were required.

66. In a decision given on appeal on 19 January 2011 (ECLI:NL:RVS:2011:BP1317), the Administration Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) held that the Minister of Defence was not obliged under the Government Information (Public Access) Act (*Wet Openbaarheid van Bestuur*) to publish the actual statements made by individuals.

2. The NIOD Institute for War, Holocaust and Genocide Studies

(a) The report of 10 April 2002

67. In November 1996 the Netherlands Government commissioned the State Institute for War Documentation (*Rijksinstituut voor Oorlogsdocumentatie*, "RIOD") to investigate "the events before, during and after the fall of Srebrenica". The purpose was that the materials thus collated should provide "insight into the causes and events that had led to the fall of Srebrenica and the dramatic events that followed".

68. The report was presented on 10 April 2002 by RIOD's successor institution, the NIOD Institute for War, Holocaust and Genocide Studies (*NIOD Instituut voor Oorlogs-, Holocaust- en Genocidestudies*, a body born of a merger between the Netherlands Institute for War Documentation (*Nederlands Instituut voor Oorlogsdocumentatie*) and the Centre for Holocaust and Genocide Studies (*Centrum voor Holocaust- en Genocide Studies*)). In the original Dutch it runs to 3,172 pages not including appendices. An English-language version (entitled *Srebrenica: Reconstruction, background, consequences and analyses of the fall of a 'safe' area*) exists. It is intended to be a historical account, not to offer political conclusions or judgments.

69. It is stated in the introduction to the report that the Netherlands Government granted NIOD access to all the source material in its possession (including minutes of Cabinet meetings) and Government employees were relieved of their duty of secrecy. NIOD obtained information, most of it unclassified, from foreign government sources. It attempted, with mixed success, to obtain information from authorities of countries and entities in the former SFRY. It also made use of statements by eyewitnesses including, among others, Dutchbat members and survivors of the massacre.

70. The events surrounding the departure of Mr Rizo Mustafić and Messrs Ibro and Muhamed Nuhanović from the compound at Potočari are described in detail. Persons interviewed included, among others, Lieutenant Colonel Karremans, Major Franken and Mr Hasan Nuhanović; documentary

information referred to includes letters written by Mr Hasan Nuhanović to figures in Netherlands public life.

(b) Subsequent developments

i. The resignation of the Government

71. The findings contained in the NIOD report induced the incumbent Government to take political responsibility. On 16 April 2002 it announced its resignation.

ii. The initiation of a new NIOD investigation

72. On 16 December 2015 the Minister of Defence informed the Speaker of the Lower House of Parliament (*Voorzitter van de Tweede Kamer der Staten-Generaal*) in writing that NIOD had agreed to make a survey of sources and scholarly writings on the subject of the fall of the Srebrenica enclave that had become available since the publication of its report of April 2002. According to a press release published by NIOD itself, this survey was to focus on:

> "International political decision-making about supplying air support (air strikes and close air support) to UNPROFOR, which included Dutchbat, preceding and during the fall of the Srebrenica enclave, and, specifically, possible agreements about those decisions at the end of May 1995 between France, the United Kingdom, and the United States of America;
>
> Advance knowledge by Western intelligent services about the Bosnian-Serb attack on the safe area Srebrenica and the exact goal of the attack."

NIOD expected to publish its findings in September 2016, after which the Government would decide how to proceed further.

3. The parliamentary enquiry

73. The Government's resignation led to a debate in the Lower House of Parliament (*Tweede Kamer der Staten-Generaal*), which decided to hold a parliamentary enquiry (*parlementaire enquête*) in order to establish individual political, military and official responsibility.

74. In the course of this enquiry witnesses were heard. These included Major Franken, Lieutenant Colonel Karremans, Major General Van Baal and Dr Voorhoeve. Separate transcripts of their evidence were submitted to Parliament (Parliamentary Documents, Lower House of Parliament, Parliamentary Year 2002-2003, 28 506, no. 5).

75. The report (Lower House of Parliament, Parliamentary Year 2002–2003, 28 506, nrs. 2–3) was presented on 27 January 2003. It runs to 463 pages, mostly taken up by summaries and excerpts of evidence taken from participants in the various decision-making processes, both domestic and foreign.

76. The report finds that the decision to participate in the international intervention in the former Yugoslavia was inspired partly by humanitarian motives and partly by the desire, felt by both the Government and Parliament, for the Netherlands to play an active role in promoting international peace and security. However, the decision to deploy a lightly-armed air-mobile infantry battalion to an embattled "safe area" had been inspired by wishful thinking rather than by considerations of feasibility. Moreover, the United Nations and foreign governments had not shared intelligence to the extent necessary.

77. The UNPROFOR mandate had been lacking in scope and clarity; in particular, although it had not explicitly included the protection of local populations, this had been an underlying intention. Dutchbat's light armament had been appropriate to its stated mission, namely peacekeeping, and had therefore not contributed to the disaster.

78. Over time self-defence had taken on a greater importance than the fulfilment of UNPROFOR's mandate and UNPROFOR's power to deter by its presence had been eroded. The United Nations were primarily to blame for this. Moreover, the UNPROFOR Commander was responsible for the failure to order air strikes in time for them to be effective.

79. The report finds that the battalion leadership ought to have considered allowing a greater number of civilians into the compound in Potočari. At the same time it echoes paragraph 473 of the report of the Secretary General of the United Nations in suggesting that the VRS might then have shelled the compound, killing thousands.

80. The Bosnian Serb side alone was to blame for the crimes committed. However, the Dutchbat leadership ought to have been clearer in communicating their misgivings about the possible fate of the men to the UNPROFOR commanders; similarly, the Netherlands Government ought to have kept themselves informed of developments. Dutchbat had been faced with the difficult decision whether to protect the women and children or the men. Ultimately however it was in any event unlikely that Dutchbat would have been able to prevent the massacre.

E. Relevant international materials

1. The Secretary General of the United Nations

81. On 30 November 1998 the General Assembly of the United Nations adopted a resolution (A/RES/53/35) in which, among other things, it requested the Secretary General (§ 18):

> "... to provide, by 1 September 1999, a comprehensive report, including an assessment, on the events dating from the establishment of the safe area of Srebrenica on 16 April 1993 under Security Council resolution 819 (1993) of 16 April 1993, which was followed by the establishment of other safe areas, until the endorsement of the Peace Agreement by the Security Council under resolution 1031 (1995) of

15 December 1995, bearing in mind the relevant decisions of the Security Council and the proceedings of the International Tribunal in this respect, and encourages Member States and others concerned to provide relevant information ...”

82. The Secretary General’s report was distributed to the General Assembly on 15 November 1999. The report runs to 113 pages not including its annexes.

83. The following is taken from the final section of the report, entitled “XI. The fall of Srebrenica: an assessment”:

“A. Role of the United Nations Protection Force in Srebrenica

470. In the effort to assign responsibility for the appalling events that took place in Srebrenica, many observers have been quick to point to the soldiers of the UNPROFOR Netherlands battalion as the most immediate culprits. They blame them for not attempting to stop the Serb attack, and they blame them for not protecting the thousands of people who sought refuge in their compound.

471. As concerns the first criticism, the Commander of the Netherlands battalion believed that the Bosniacs could not defend Srebrenica by themselves and that his own forces could not be effective without substantial air support. Air support was, in his view, the most effective resource at his disposal to respond to the Serb attack. Accordingly, he requested air support on a number of occasions, even after many of his own troops had been taken hostage and faced potential Serb reprisals. Those requests were not heeded by his superiors at various levels, and some of them may not have been received at all, illustrating the command and control problems from which UNPROFOR suffered throughout its history. However, after he had been told that the risk of confrontation with the Serbs was to be avoided, and that the execution of the mandate was secondary to the security of his personnel, the battalion withdrew from observation posts under direct attack.

472. It is true that the UNPROFOR troops in Srebrenica never fired at the attacking Serbs. They fired warning shots over the Serbs’ heads and their mortars fired flares, but they never fired directly on any Serb units. Had they engaged the attacking Serbs directly it is possible that events would have unfolded differently. 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.

473. As concerns the second criticism, it is easy to say with the benefit of hindsight and the knowledge of what followed that the Netherlands battalion did not do enough to protect those who sought refuge in its compound. Perhaps the soldiers should have allowed everyone into the compound and then offered themselves as human shields to protect them. This might have slowed down the Serbs and bought time for higher-level negotiations to take effect. At the same time, it is also possible that the Serb forces would then have shelled the compound, killing thousands in the process, as they had threatened to do. 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. Faced with this prospect and unaware that the Serbs would proceed to execute thousands of men and boys, Dutchbat avoided armed confrontation and appealed in the process for support at the highest levels.

474. It is harder to explain why the Dutchbat personnel 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 the members of the battalion had immediately reported in detail those sinister indications to the United Nations chain of command, the international community might have been compelled to respond more robustly and more quickly, and that some lives might have been saved. This failure of intelligence-sharing was also not limited to the fall of Srebrenica, but an endemic weakness throughout the conflict, both within the peacekeeping mission, and between the mission and Member States."

and

"**E. Role of the Security Council and Member States**

488. With the benefit of hindsight, one can see that many of the errors the United Nations made flowed from a single and no doubt well-intentioned effort: we tried to keep the peace and apply the rules of peacekeeping when there was no peace to keep. Knowing that any other course of action would jeopardize the lives of the troops, we tried to create — or imagine — an environment in which the tenets of peacekeeping — agreement between the parties, deployment by consent, and impartiality — could be upheld. We tried to stabilize the situation on the ground through ceasefire agreements, which brought us close to the Serbs, who controlled the larger proportion of the land. We tried to eschew the use of force except in self-defence, which brought us into conflict with the defenders of the safe areas, whose safety depended on our use of force.

489. In spite of the untenability of its position, UNPROFOR was able to assist in the humanitarian process, and to mitigate some — but, as Srebrenica tragically underscored, by no means all — the suffering inflicted by the war. There are people alive in Bosnia today who would not be alive had UNPROFOR not been deployed. To this extent, it can be said that the 117 young men who lost their lives in the service of UNPROFOR's mission in Bosnia and Herzegovina did not die in vain. Their sacrifice and the good work of many others, however, cannot fully redeem a policy that was, at best, a halfmeasure.

490. The community of nations decided to respond to the war in Bosnia and Herzegovina with an arms embargo, with humanitarian aid and with the deployment of a peacekeeping force. It must be clearly stated that these measures were poor substitutes for more decisive and forceful action to prevent the unfolding horror. The arms embargo did little more than freeze in place the military balance within the former Yugoslavia. It left the Serbs in a position of overwhelming military dominance and effectively deprived the Republic of Bosnia and Herzegovina of its right, under the Charter of the United Nations, to self-defence. It was not necessarily a mistake to impose an arms embargo, which after all had been done when Bosnia and Herzegovina was not yet a State Member of the United Nations. Once that was done, however, there must surely have been some attendant duty to protect Bosnia and Herzegovina, after it became a Member State, from the tragedy that then befell it. Even as the Serb attacks on and strangulation of the 'safe areas' continued in 1993 and 1994, all widely covered by the media and, presumably, by diplomatic and intelligence reports to their respective Governments, the approach of the members of the Security Council remained largely constant. The international community still could not find the political will to confront the menace defying it.

491. Nor was the provision of humanitarian aid a sufficient response to 'ethnic cleansing' and to an attempted genocide. The provision of food and shelter to people who have neither is wholly admirable, and we must all recognize the extraordinary work done by UNHCR and its partners in circumstances of extreme adversity, but the provision of humanitarian assistance could never have been a solution to the problem

in that country. The problem, which cried out for a political/military solution, was that a State Member of the United Nations, left largely defenceless as a result of an arms embargo imposed upon it by the United Nations, was being dismembered by forces committed to its destruction. This was not a problem with a humanitarian solution.

492. Nor was the deployment of a peacekeeping force a coherent response to this problem. My predecessor openly told the Security Council that a United Nations peacekeeping force could not bring peace to Bosnia and Herzegovina. He said it often and he said it loudly, fearing that peacekeeping techniques would inevitably fail in a situation of war. None of the conditions for the deployment of peacekeepers had been met: there was no peace agreement — not even a functioning ceasefire — there was no clear will to peace and there was no clear consent by the belligerents. Nevertheless, *faute de mieux*, the Security Council decided that a United Nations peacekeeping force would be deployed. Lightly armed, highly visible in their white vehicles, scattered across the country in numerous indefensible observation posts, they were able to confirm the obvious: there was no peace to keep.

493. In so doing, the Security Council obviously expected that the 'warring parties' on the ground would respect the authority of the United Nations and would not obstruct or attack its humanitarian operations. It soon became apparent that, with the end of the cold war and the ascendancy of irregular forces — controlled or uncontrolled — the old rules of the game no longer held. Nor was it sufficiently appreciated that a systematic and ruthless campaign such as the one conducted by the Serbs would view a United Nations humanitarian operation, not as an obstacle, but as an instrument of its aims. In such an event, it is clear that the ability to adapt mandates to the reality on the ground is of critical importance to ensuring that the appropriate force under the appropriate structure is deployed. None of that flexibility was present in the management of UNPROFOR."

2. The International Criminal Tribunal for the Former Yugoslavia

(a) The Statute of the International Criminal Tribunal for the Former Yugoslavia

84. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (also known as the International Criminal Tribunal for the Former Yugoslavia or ICTY) was created by United Nations Security Council Resolution 827 (1993) (UN Doc. S/RES/827 (May 25, 1993). In its present redaction, the Statute of the ICTY (annexed to that Resolution), in its relevant part, reads as follows:

Article 9
Concurrent jurisdiction

"1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to

defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

Article 10
Non-bis-in-idem

"1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

(b) Prosecutions

85. Several individuals have been charged before the ICTY in connection with the Srebrenica massacre, among them Major General Radislav Krstić who shortly after the fall of Srebrenica was appointed to command the VRS's Drina Corps.

86. Among the witnesses heard in the trial of Major General Krstić were Lieutenant Colonel Karremans and Major Franken. Neither invoked the privilege against self-incrimination or refused to answer any questions. Other witnesses included three UNMOs who had been present at the fall of Srebrenica, including Major De Haan.

87. On 2 August 2001 the ICTY's Trial Chamber delivered a 260-page judgment finding Major General Krstić guilty of genocide, persecutions and murder and sentencing him to forty-six years' imprisonment. The judgment gives a detailed description of the events surrounding the fall of Srebrenica to the VRS and the massacre that followed.

88. Major General Krstić appealed against his conviction and sentence. He did not challenge the Trial Chamber's description of events, focusing instead on the nature and extent of his criminal responsibility. Ultimately the Appeals Chamber found that, absent proof of genocidal intent, Major General Krstić had not been a principal perpetrator of the crimes committed. It did, however, find him guilty of aiding and abetting genocide and crimes against humanity and reduced his sentence to thirty-five years.

89. The ICTY has handed down final judgments convicting and sentencing several individuals besides Major General Krstić in connection

with the Srebrenica massacre, all of them former VRS members. Mr Radovan Karadžić has been convicted at first instance; his case is pending before the Appeals Chamber. The trial of General Mladić is still ongoing; judgment is expected to be delivered in November 2017.

F. Relevant domestic law and practice

1. Relevant domestic law

90. The provisions of domestic law which are relevant to the case are the following:

(a) The Military Criminal Code (*Wetboek van Militair Strafrecht*)

Article 4

"Netherlands criminal law shall apply to military personnel who commit any punishable act outside the Netherlands."

(b) The Criminal Code (*Wetboek van Strafrecht*)

Article 48

"The following persons are liable as accessories (*medeplichtigen*) to an indictable offence (*misdrijf*):

1. those who intentionally assist in the commission of the indictable offence;

2. those who intentionally provide the opportunity, means or information necessary to commit the indictable offence."

(c) The War Crimes Act (*Wet Oorlogsstrafrecht*)

Section 1

"1. The provisions of the present Act shall apply to crimes that are committed in time of war or that are criminal only in time of war, as set out in:

...

3º sections 4-9 of the present Act; ...

2. In the case of an armed conflict that cannot be described as war and in which the Netherlands is involved either for the purpose of individual or collective self-defence or to restore international order and security, sections 4-9 shall apply by analogy and We [i.e. the Crown; that is the Monarch together with the responsible Minister] may determine by order in council (*algemene maatregel van bestuur*) that the other provisions of the present Act shall apply in whole or in part.

3. The expression 'war' shall be understood to include civil war."

Section 3

"Without prejudice to the relevant provisions of the Criminal Code and the Military Criminal Code (*Wetboek van Militair Strafrecht*), Netherlands criminal law shall apply to:

1º anyone who commits the indictable offence set out in [section] 8 outside the Realm in Europe; ...

4º any Netherlands national who commits an indictable offence as referred to in section 1 outside the Realm in Europe."

Section 8

"1. Anyone who commits a violation of the laws and customs of war shall be liable to a term of imprisonment not exceeding ten years ...

2. A term of imprisonment not exceeding fifteen years ... shall be imposed:

1º if the criminal act is liable to result in someone else's death or cause them severe bodily injury;

2º if the criminal act involves inhuman treatment;

3º if the criminal act involves forcing someone else to do something, not to do something or suffer something to happen;

4º if the criminal act involves looting.

3. Life imprisonment or a temporary term of imprisonment not exceeding twenty years ... shall be imposed:

1º if the criminal act results in someone else's death or causes them severe bodily injury or involves rape;

2º if the criminal act involves violence by a plurality of persons acting in concert (*geweldpleging met verenigde krachten*) against one or more persons or violence against a dead, sick or injured person;

3º if the criminal act involves the destruction, damaging, putting beyond use or hiding, by a plurality of persons acting in concert, of any property belonging to someone else in whole or in part;

4º if the criminal act set out under 3º or 4º of the preceding paragraph is committed by a plurality of persons acting in concert;

5º if the criminal act is an expression of a policy of systematic terror or unlawful action (*wederrechtelijk optreden*) against the entire population or a particular group thereof;

6º if the criminal act involves the breaking of a promise or the breaking of an agreement entered into as such with the opposing party;

7º if the criminal act involves the misuse of a flag or emblem protected by the laws and customs of war or the military distinctive signs or uniform of the opposing party."

Section 9

"The same punishment as threatened against the acts referred to in the previous section shall be imposed on whoever deliberately allows such an act to be committed by a subordinate."

(d) The Military Criminal Procedure Act (*Wet Militaire Strafrechtspraak*)

Section 1

"...

3. The Code of Criminal Procedure shall apply unless this Act deviates from it."

Section 8

"...

2. Within the Arnhem Court of Appeal a multi-judge chamber, to be called the Military Chamber, shall have exclusive competence to consider appeals against appealable judgments of the Military Chambers of the Regional Court mentioned in section 3 [i.e. the Arnhem Regional Court]. This Chamber shall also consider complaints under Article 12 of the Code of Criminal Procedure."

(e) The Code of Criminal Procedure (*Wetboek van Strafvordering*)

Article 12

"1. If the perpetrator of a punishable act is not prosecuted, or if the prosecution is not pursued to a conclusion, then anyone with a direct interest (*rechtstreeks belanghebbende*) may lodge a written complaint with the Court of Appeal within whose area of jurisdiction the decision has been taken not to prosecute or not to pursue the prosecution to a conclusion.

..."

Article 12i

"1. If the complaint falls within the Court of Appeal's jurisdiction, the complainant can be admitted [*de klager ontvankelijk is*], and if the Court of Appeal finds that a prosecution ought to have been brought or pursued to a conclusion, the Court of Appeal shall order the prosecution to be brought or pursued in respect of the fact to which the complaint relates. ....

2. The Court of Appeal may also refuse to give such an order for reasons relating to the general interest.

3. The order may also include the direction [*last*] that the public prosecutor shall make the request referred to in Article 181 [i.e. a request to the investigating judge [*rechter-commissaris*] for investigative measures] or that the person whose prosecution is being sought shall be summoned for trial.

4. In all other cases the Court of Appeal shall ... dismiss the complaint."

Article 148

"1. The public prosecutor shall be charged with the investigation of criminal acts which are triable by the regional court to which he is appointed, as well as the investigation, within the area of that regional court's jurisdiction, of criminal acts triable by other regional courts or district courts.

2. To that end, he shall give orders to the other persons charged with [such] investigation. ..."

(f) The Civil Code (*Burgerlijk Wetboek*)

Article 6:170
Liability for faults (tortious acts) of a subordinate

"1. A person in whose service a subordinate carries out his task shall be liable for damage caused to a third party by a fault (*fout*) of the subordinate, if the likelihood of the fault has been increased by the assignment to carry out that task and the person in whose service the subordinate, by dint of the legal relationship between them and the subordinate, had authority (*zeggenschap*) over the conduct constitutive of the fault.

...

3. If the subordinate and the person in whose service he was are both liable for damage caused to a third party, then as between them the subordinate does not need to contribute in making good the damage, unless the damage was the result of a deliberate act (*opzet*) or conscious recklessness (*bewuste roekeloosheid*). [A result] different from that set out in the preceding sentence may flow from the circumstances of the case, considering also the nature of their interrelation."

(g) The Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*)

Article 165

"1. Everyone lawfully summoned for that purpose shall be obliged to give evidence.

...

3. A witness may be excused (*zich verschonen*) from answering a question put to him if in so doing he would expose himself, or one of his relatives in the ascending or the descending line or *ex transverso*, whether connected by blood or by marriage, or his spouse or former spouse, or registered partner or former registered partner, to the jeopardy of being criminally convicted of an indictable offence (*misdrijf*)."

Article 186

"In the cases in which the law permits witness evidence to be given, a preliminary hearing of witnesses can be ordered without delay at the request of the interested party before the court is seized of the case itself. ..."

Article 189

"The provisions governing the hearing of witnesses shall apply by analogy to the preliminary hearing of witnesses."

(h). The Parliamentary Enquiries Act (*Wet op de parlementaire enquête*)

Section 3

"1. From the time when [the parliamentary enquiry] is first announced, all Netherlands nationals, all Netherlands residents and all who are staying within the territory of the Kingdom, and all legal persons based within the territory of the Kingdom, shall be obliged to obey an order of the Committee of Inquiry to allow it to see, copy or otherwise take cognisance of all documents in their possession and which the Board reasonably considers it necessary to see, copy or otherwise take cognisance of in order to fulfil its task.

2. The persons mentioned in the first paragraph shall in addition be obliged to obey a summons issued by the Committee of Enquiry to be heard as a witness or an expert. ..."

Section 24

"Except in the case of section 25 [sc. perjury or subornation of perjury] statements made before a Committee of Enquiry, or on its orders, can never constitute proof in a court of law, whether against the person who made them or against third parties."

91. The Supreme Court has held that the Parliamentary Enquiries Act does not vouchsafe a right to be excused the duty to answer questions to witnesses who, by their answers, would risk prosecution (judgment of 8 July 2003, ECLI:NL:HR:2003:AF5456).

(i) The Military Chamber of the Arnhem Court of Appeal

92. Section 68(2) of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*) provides that the benches of the Military Chamber of the Arnhem Court of Appeal shall consist of two (civilian) judges of the Court of Appeal and one military member. Section 9 of the Military Criminal Procedure Act provides that the military member shall be a serving officer holding the rank of captain (*kapitein ter zee*, Royal Navy), colonel (*kolonel*, Royal Army), group captain (*kolonel*, Royal Air Force) or higher, who is also qualified for judicial office; he is promoted to the titular rank of commodore (*commandeur*, Royal Navy), brigadier (*brigadegeneraal*, Royal Army) or air commodore (*commodore*, Royal Air Force) if he does not already hold that substantive rank. Their qualifications and legal position are governed by the Judiciary (Legal Position) Act (*Wet rechtspositie rechterlijke ambtenaren*), which also applies to civilian judges.

93. Section 68(2) of the Judiciary (Organisation) Act further provides that the military members of the Military Chamber of the Arnhem Court of Appeal participate as judges on an equal footing with their civilian colleagues and are subject to the same duties of confidentiality (sections 7 and 13 of that Act) and functional independence and impartiality (section 12); and also that they shall be subject to the same scrutiny of their official behaviour as civilian judges (sections 13a–13g). The latter involves review of specific behaviour by the Supreme Court (*Hoge Raad*), initiated, at the request of an interested party or *proprio motu*, by the Procurator General (*procureur-generaal*) to the Supreme Court.

94. The military members are appointed by Royal Decree (*Koninklijk Besluit*) after nomination by the Minister of Security and Justice (*Minister van veiligheid en justitie*) in agreement with the Minister of Defence (section 9 § 1 of the Military Criminal Procedure Act).

2. Relevant domestic practice

95. In the Netherlands Public Prosecution Service, reflection chambers are informal structures convoked at the request of a public prosecutor (or on the orders of the hierarchy of the service) when a public prosecutor is faced with a particularly difficult case. Their purpose is to assist mature reflection by the public prosecutor. They have no official status and their proceedings are not public. The public prosecutor charged with the particular case remains solely responsible for his or her decision to prosecute or not as the case may be, subject to review by the Court of Appeal in the event of a complaint under Article 12 of the Code of Criminal Procedure.

G. Relevant international law

96. In its relevant part, the Agreement between the Government of Bosnia and Herzegovina and the United Nations on the status of the United Nations Protection Force (signed in Sarajevo on 15 May 1993) provided as follows:

> "VI. STATUS OF THE MEMBERS OF UNPROFOR
>
> ...
>
> *Jurisdiction*
>
> ...
>
> 45. ...
>
> (b) 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."

COMPLAINTS

97. The applicants complained under Article 2 of the Convention about the refusal of the Military Chamber of the Arnhem Court of Appeal to set aside the decision of the public prosecutor and order the prosecution of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen, or at least a criminal investigation into their involvement in the deaths of Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović.

THE LAW

A. Complaint under Article 2 of the Convention

98. It was the position of the applicants that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen should have been tried for their part in the deaths of Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović and that the refusal of the public prosecutor to bring a prosecution, followed by the refusal of the Court of Appeal to order one, had denied them justice. They also suggested that the Ministry of Defence had exercised undue influence on the Public Prosecution Service and – through the military member of the Military Chamber – on the Court of Appeal to prevent any such trial from taking place.

99. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

1. Applicable principles

100. In *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 169-182, 14 April 2015, the Court summarised the applicable principles set out in its case-law in the following terms:

> "169. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The investigation must be, *inter alia*, thorough, impartial and careful (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 161-163, Series A no. 324).
>
> 170. The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence (see, *inter alia*, *Calvelli and Ciglio v. Italy*, cited above, § 51; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII; and *Vo v. France*, cited above, § 90).

171. By requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction, Article 2 imposes a duty on that State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V; *Pereira Henriques v. Luxembourg*, no. 60255/00, § 56, 9 May 2006; and *Yotova v. Bulgaria*, no. 43606/04, § 68, 23 October 2012).

172. In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.

173. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 186, ECHR 2014; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

174. In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011).

175. In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and, where appropriate, the identity of those responsible (see *Kolevi v. Bulgaria*, no. 1108/02, § 201, 5 November 2009).

176. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV, and *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI).

177. Moreover, the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see *Anguelova v. Bulgaria*, no. 38361/97, § 138, ECHR 2002-IV).

178. A requirement of promptness and reasonable expedition is implicit in this context (see *Al-Skeini and Others*, cited above, § 167).

179. In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from

case to case (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 109, ECHR 2001-III). The requisite access of the public or the victim's relatives may, however, be provided for in other stages of the procedure (see, among other authorities, *Giuliani and Gaggio*, cited above, § 304, and *McKerr v. the United Kingdom*, no. 28883/95, § 129, ECHR 2001-III).

180. Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see *Ramsahai and Others*, cited above, § 348, and *Velcea and Mazăre v. Romania*, no. 64301/01, § 113, 1 December 2009).

181. The question of whether an investigation has been sufficiently effective must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Dobriyeva and Others v. Russia*, no. 18407/10, § 72, 19 December 2013, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 147, 17 July 2014).

182. Lastly, the Court considers it useful to reiterate that, when it comes to establishing the facts, and sensitive to the subsidiary nature of its role, it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Ataykaya v. Turkey*, no. 50275/08, § 47, 22 July 2014, or *Leyla Alp and Others v. Turkey*, no. 29675/02, § 76, 10 December 2013). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no 247-B). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio*, cited above, § 180, and *Aydan v. Turkey*, no. 16281/10, § 69, 12 March 2013)."

2. The Court's assessment

(a) General

102. The Court points out in the first place that the procedural obligations arising from Article 2 of the Convention weigh on the respondent Party as a whole, not on any particular domestic authority alone, be it a prosecutor or a court (see, *mutatis mutandis*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 319, ECHR 2004-VII). In order to decide whether those obligations have been met, this Court must therefore consider the aggregate of investigatory measures undertaken and not merely the way their results have been dealt with by the authority that has taken the final decision in the case.

103. The present case differs from most previous cases which the Court has had to consider under the procedural aspect of Article 2 in that the information that has become available over the years is unusually expansive and detailed and includes material gleaned from official sources both international and domestic.

104. At the international level, information on the Srebrenica massacre has been compiled into a report by the Secretary General of the United Nations (see paragraphs 81-83 above) and extensive findings of fact are contained in judgments of the ICTY (see paragraphs 85-89 above). That is not all: the Court notes that the trial of General Mladić is still in progress and the appeal of Mr Radovan Karadžić is currently being heard.

105. Fact-finding at the domestic level has included the debriefing of all returning Dutchbat personnel who had witnessed the fall of the Srebrenica enclave and its aftermath (see paragraphs 60-66 above); a parliamentary enquiry (see paragraph 73-80 above); an extensive and detailed report by the NIOD Institute for War, Holocaust and Genocide Studies (admitted by the applicants to be "the most complete overview of the events in Srebrenica"; see paragraphs 67-70 above); and civil proceedings brought by the applicants which involved the taking of evidence both in documentary form and through the hearing of witnesses (see paragraphs 49-56 above). It is worth pointing out that the NIOD Institute report mentions Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović by name and describes the events that led to their departure from the compound (see paragraph 70 above).

106. The composite result of all these investigations is that specific and detailed official records now exist reflecting the circumstances in which Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović fell into the hands of the VRS and there is no lingering uncertainty as regards the nature and degree of involvement of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen respectively. It is therefore not possible for the Court to find that the investigations were ineffective or inadequate.

107. The Court observes in the second place that the purpose of Article 2 is to secure the right to life. It is for this reason and this reason only that Parties to the Convention are required to put in place criminal sanctions against offences against the person and enforce them (see *Mustafa Tunç and Fecire Tunç v. Turkey*, cited above, § 171). No provision of the Convention confers any right to "private revenge" (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I, and *Öneryıldız v. Turkey* [GC], no. 48939/99, § 147, ECHR 2004-XII). The right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (*Branko Tomašić and Others v. Croatia*, no. 46598/06, § 64, 15 January 2009).

108. Furthermore, as recalled in *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, ECHR 2016:

> "259. To date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant. In fact, it has shown deference to Contracting States both in organising their prosecutorial systems

and in taking individual prosecutorial decisions. In [*Kolevi v. Bulgaria*, no. 1108/02, § 208, 5 November 2009], the Court made it clear that

> '[it] is not oblivious to the fact that a variety of State prosecution systems and divergent procedural rules for conducting criminal investigations may be compatible with the Convention, which does not contemplate any particular model in this respect ... Independence and impartiality in cases involving high-ranking prosecutors or other officials may be secured by different means, such as investigation and prosecution by a separate body outside the prosecution system, special guarantees for independent decision-making despite hierarchical dependence, public scrutiny, judicial control or other measures. It is not the Court's task to determine which system best meets the requirements of the Convention. The system chosen by the member State concerned must however guarantee, in law and in practice, the investigation's independence and objectivity in all circumstances and regardless of whether those involved are public figures.'

260. Likewise, in *Brecknell v. the United Kingdom*, no. 32457/04, § 81, 27 November 2007, although the Court held that the initial investigative response lacked the requisite independence (and was therefore in breach of the procedural limb of Article 2), it found no grounds on which to criticise a decision not to prosecute where it was not 'apparent that any prosecution would have any prospect of success' and where it could not 'impugn the authorities for any culpable disregard, discernible bad faith or lack of will'. In *Brecknell* the application was lodged nearly three decades after the death in issue; nevertheless, it clearly demonstrates the Court's reluctance to interfere with a prosecutorial decision taken in good faith following an otherwise effective investigation.

261. That being said, the Court has, on occasion, accepted that 'institutional deficiencies' in the criminal justice or prosecutorial system may breach Article 2 of the Convention. In *Kolevi* (cited above, § 209) the Court found that such deficiencies in the prosecutorial system resulted in the absence of sufficient guarantees for an independent investigation into offences potentially committed by the Chief Public Prosecutor. In particular it found that the centralised structure of the prosecutorial system made it 'practically impossible to conduct an independent investigation into circumstances implicating [the Chief Public Prosecutor]'. Although there was no such obstacle to an effective investigation in the present case, the applicant has argued that there were other obstacles preventing any meaningful prosecutions. If such obstacles existed, they could enable life-endangering offences to go unpunished and, as such, give rise to the appearance of State tolerance of – or collusion in – unlawful acts. Consequently, it will be necessary for the Court to consider each of the applicant's submissions in turn in order to determine whether there were any 'institutional deficiencies' giving rise to a procedural breach of Article 2 of the Convention."

109. In the third place, and with particular reference to the series of conflicts that engulfed the former Yugoslavia after 1991, the Court reiterates that the respondent State's procedural obligation under Article 2 can be discharged through its contribution to the work of the ICTY, given that the ICTY has primacy over national courts and can take over national investigations and proceedings at any stage in the interest of international justice (see Articles 9 and 10 of the Statute of the ICTY, paragraph 84 above; see also *Fazlić and Others v. Bosnia and Herzegovina* (dec.), nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10, § 36, 3 June 2014; *Zuban and Hamidović v. Bosnia and Herzegovina* (dec.),

nos. 7175/06 and 8710/06, § 31, 2 September 2014; *Muratspahić v. Bosnia and Herzegovina* (dec.), no. 31865/06, § 30, 2 September 2014; and *Demirović and Others v. Bosnia and Herzegovina* (dec.), no. 35732/09, § 31, 2 September 2014). It is significant in this respect that the ICTY Trial Chamber has heard Lieutenant Colonel Karremans and Major Franken as witnesses in the *Krstić* case. The Court notes that the ICTY Prosecutor has not proceeded against them as suspects.

(b) The applicants' complaints

110. Against the background thus drawn, the Court will now consider the separate complaints about the Court of Appeal's proceedings and decision in the order in which the applicants have synthesised them. Their synthesis may be paraphrased in the following terms:

(a) the Military Chamber of the Court of Appeal could not, in the circumstances, be deemed independent given the presence of a military judge;

(b) the Military Chamber of the Court of Appeal applied a different legal framework to accessory crimes, as distinct from the principal crime, whereas the relevant test was whether the responsibility of the state agents concerned was triggered;

(c) the Military Chamber of the Court of Appeal had found several shortcomings in the decision-making of the Public Prosecution Service, noting that it had not submitted the opinion of the reflection chamber and that it could have undertaken further investigations, but had not attached any consequences to these failings on the ground that further investigation would not lead to new findings;

(d) the Military Chamber of the Court of Appeal had overstretched its competence under Article 12 of the Code of Criminal Procedure by not limiting itself to the question whether a prosecution should be ordered but giving what amounted to a ruling on their guilt;

(e) the Military Chamber of the Court of Appeal had misrepresented some of the facts and arguments, finding in particular that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen had not been aware of the extent of the killings whereas in fact they had and accepting their defence of *force majeure*.

(i) The military member of the Military Chamber of the Arnhem Court of Appeal

111. The applicants submitted that the independence and impartiality of the Military Chamber of the Court of Appeal were tainted by the presence of a serving military officer in its midst.

112. In *Jaloud v. the Netherlands* [GC], no. 47708/08, § 196, ECHR 2014, the Court dismissed a similar complaint in the following terms:

> "... [T]he Court has had regard to the composition of the Military Chamber as a whole. It sits as a three-member chamber composed of two civilian members of the

> Arnhem Court of Appeal and one military member. The military member is a senior officer qualified for judicial office; he is promoted to titular flag, general or air rank if he does not already hold that substantive rank (...). In his judicial role he is not subject to military authority and discipline; his functional independence and impartiality are the same as those of civilian judges (...). That being so, the Court is prepared to accept that the Military Chamber offers guarantees sufficient for the purposes of Article 2 of the Convention."

113. Minor changes in the applicable legislation notwithstanding, identical considerations apply in the present case (see paragraphs 92-94 above).

114. The applicants have not offered any evidence to support their insinuation that the Military Chamber of the Court of Appeal was biased.

(ii) The test applied by the Military Chamber of the Court of Appeal

115. The applicants submit that the Military Chamber of the Court of Appeal applied a different legal framework to accessory crimes, as distinct from the principal crime, whereas the relevant test was whether the responsibility of the state agents concerned was triggered.

116. The Court notes that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen are not themselves accused of having taken the lives of Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović. Indeed, it is beyond dispute that the applicants' relations were put to death by the VRS or by their paramilitary henchmen. Nor is it the applicants' case that the three defendants handed the three men over to the VRS intending them to be killed. Rather, the applicants' argument is that the defendants were aware of the fate that awaited the three men outside the compound at Potočari but nonetheless made them leave. It is for this reason, in the applicants' submission, that the three defendants are to be seen as complicit in genocide, war crimes or common murder and it is on this ground that their prosecution ought to have been ordered.

117. An examination of the Court of Appeal's decision shows that there was no misapplication of the applicable standards. It is beyond dispute that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen themselves had no hand in the killing of Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović. Furthermore, Article 2 does not entail the right to have third parties prosecuted – or convicted – for a criminal offence; the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by Article 2 of the Convention (see *Armani Da Silva v. the United Kingdom*, cited above, § 275).

(iii) The decision-making process of the Public Prosecution Service

118. The applicants argue that although the Court of Appeal found that the Public Prosecution Service could have undertaken further investigations but did not, it did not attach any consequences to this finding; in particular, it did not order any further investigative measures. It is apparent from the application that the applicants would have wished to give evidence as witnesses themselves and Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen to have been heard as suspects.

119. The Court has already referred above to the sheer quantity of information available to the Court of Appeal. It included statements made by the applicants themselves and numerous other witnesses in the parallel civil proceedings and by Mr Hasan Nuhanović in the written press; moreover, the applicants were at liberty to adduce what additional facts they liked in their complaints to the public prosecutor and the Court of Appeal. The details of the involvement of Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen were already well known; the applicants have not pointed to any additional benefit that hearing them as suspects – which anyway would have entitled them to the right of silence – would have brought.

120. The applicants' assertion that the reflection chamber appointed in the present case recommended prosecuting Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen cannot be verified. The applicants' sole source of information is a journalist's report in the media in which no details are given nor any source named.

121. Reflection chambers are informal structures convoked from time to time when a public prosecutor is presented with a particularly difficult case; their advice is not made public (see paragraph 95 above). The Court of Appeal expressed the view that it would have been helpful for it to have been supplied with the reflection chamber's advisory opinion. The fact is, however, that it was not; and so the Court of Appeal, an independent and impartial tribunal charged with reviewing the public prosecutor's decision not to bring a prosecution, responded by undertaking its own detailed assessment of the case, which it substituted for that of both the reflection chamber and the public prosecutor (see paragraph 7.4 of the Court of Appeal's decision, paragraph 48 above).

(iv) The Court of Appeal's allegedly ruling on the substance of the case

122. The applicants submitted that the decision of the Court of Appeal, instead of being limited to whether or not to order a prosecution, was in effect an acquittal. They argued that Article 12 of the Code of Criminal Procedure required the Court of Appeal to apply a double test: firstly, whether there was sufficient *prima facie* evidence against the persons concerned; and secondly, whether there were sufficient public policy reasons to bring a prosecution.

123. As a matter of domestic law, the test is in fact broader than the applicants suggest: in particular, it is not limited to whether there is enough *prima facie* evidence to proceed. As relevant to the case, Article 12i of the Code of Criminal Procedure provides that the Court of Appeal shall order the prosecution to be brought or pursued in respect of the fact to which the complaint relates if the Court of Appeal finds that a prosecution ought to have been brought or pursued to a conclusion (see paragraph 90 above). At all events, whether under domestic law or under Article 2 of the Convention, it cannot be that the Court of Appeal is required to order a prosecution if, as in the present case, it takes the considered view that application of the appropriate criminal legislation to the known facts will not result in a conviction.

(v) The Court of Appeal's alleged misrepresentation of facts and arguments

124. The applicants dispute the Court of Appeal's findings, firstly, that Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen had been unaware of the extent of the imminent massacre and, secondly, that they were entitled to the defence of *force majeure*. In their submission the latter finding, in particular, flies in the face of the findings of the civil courts.

125. Mindful of the subsidiary nature of its role, the Court normally declines to substitute its own findings of fact for those of the domestic courts unless there are cogent reasons to do so (*Mustafa Tunç and Fecire Tunç*, cited above, § 182). In the present case, it finds none.

126. Turning to the facts, the Court observes that the Court of Appeal found it established – referring to the judgment of the Trial Chamber of the ICTY in the *Krstić* case – that there were a limited number of "opportunistic killings" in Potočari, but that "murder on a large scale" took place elsewhere, and more importantly, commenced only after Mr Rizo Mustafić, Mr Ibro Nuhanović and Mr Muhamed Nuhanović had left the compound (see paragraph 13.4 of the decision, paragraph 48 above).

127. The finding construed by the applicants as acceptance of a defence of "*force majeure*" appears in the decision *obiter dictum* (see paragraphs 13.5-13.5.5 of the decision, paragraph 48 above). After describing the efforts the VRS went to in order to identify potential victims (and some were found hiding among the wounded), it dismisses as unrealistic the suggestion that Mr Muhamed Nuhanović would have been "safe there as long as the UN flag was raised".

128. The judgments of the civil courts do not incline the Court to call these findings into question. Firstly, the civil proceedings outlined above involved different parties, namely the applicants as plaintiffs and the State as defendant (i.e. not Lieutenant Colonel Karremans, Major Franken and Warrant Officer Oosterveen); secondly, and leaving aside the fact that the Court of Appeal in the civil proceedings applied the law of the Republic of

Bosnia and Herzegovina, a different legal test applies to the State's liability in tort for tortious acts of its subordinates (see paragraph 90 above) than to the criminal responsibility of the individual.

129. Finally, regard must be had to the vast amount of information examined by the Court of Appeal, which moreover the applicants could – and did – place in context in proceedings of a type found in previous cases to offer appropriate guarantees (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 354, ECHR 2007-II, and *Jaloud v. the Netherlands* [GC], no. 47708/08, § 224, ECHR 2014).

130. It follows that the Court cannot find that there was any misrepresentation of facts or arguments by the Military Chamber of the Court of Appeal.

(c) Conclusion

131. Having regard to the proceedings as a whole, "it cannot be said that the domestic authorities have failed to discharge the procedural obligation under Article 2 of the Convention to conduct an effective investigation ... which was capable of leading to the establishment of the facts, ... and of identifying and – if appropriate – punishing those responsible" (see *Armani Da Silva*, cited above, § 286). The application is accordingly manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı
Deputy Registrar

Luis López Guerra
President

APPENDIX

Nº.	Firstname LASTNAME	Birth date	Birth year	Nationality	Place of residence
1.	Mehida MUSTAFIĆ-MUJIĆ	19/10/1956	1956	Bosnia and Herzegovina	Srebrenica
2.	Alma MUSTAFIĆ	18/06/1981	1981	Netherlands	Utrecht
3.	Damir MUSTAFIĆ	26/11/1979	1979	Netherlands	Veenendaal
4.	Hasan NUHANOVIĆ	02/04/1968	1968	Bosnia and Herzegovina	Sarajevo