

Case 12/03329

Session of 3 May 2013

(expedited)

Mr P. Vlas

Opinion in the case of:

the State of the Netherlands
(Ministry of Defence and Ministry
of Foreign Affairs),
(below: the State)
appellant in the appeal in cassation

v.

1. Mehida Mustafić-Mujić,
 2. Damir Mustafić,
 3. Alma Mustafić,
- (below: Mustafić and Others)

respondents in the appeal in
cassation

1. Introduction

1.1 The dramatic events connected with the fall of the Srebrenica enclave on 11 July 1995 have already led to a judgment of the Supreme Court. On 13 April 2012 the Supreme Court held that the United Nations (below: the UN) was entitled to immunity from jurisdiction and that the Dutch courts were therefore not competent to hear the actions brought by the Mothers of Srebrenica Foundation and Others against the UN.¹ The aim of the actions was to seek a declaratory judgment to the effect that the UN had acted wrongfully in failing to fulfil undertakings given by it before the fall of the Srebrenica enclave and failing to discharge other obligations, including treaty obligations, to which it was subject. The Supreme Court is now confronted once again by the sad consequences of the fall of Srebrenica and, in particular, the mass executions of mainly Muslim men of military age by units of the Bosnian-Serb army, including paramilitary units, in the days following the fall of the enclave. In these mass executions Rizo Mustafić was murdered. Mustafić and Others have sued the State and

¹ Supreme Court (HR) 13 April 2012, LJN: BW1999, RvdW 2012/579.

sought, among other things, a declaratory judgment that the State is liable for the damage caused as a result of the wrongful act committed against them by sending Rizo Mustafić – the husband of Mehida Mustafić-Mujić and the father of Damir and Alma – away from the compound on 13 July 1995 and not taking him along when Dutchbat was evacuated on 21 July 1995. The central issue in the cassation proceedings is whether the fact that Rizo Mustafić was not protected by Dutchbat from the units of the Bosnian-Serb army referred to above constitutes an act or omission of the State and/or whether it amounts to a wrongful government act. The present opinion is given simultaneously with an opinion in a parallel case (no. 12/03324) which deals with the same issues.

1.2 After setting out the facts of importance to the present case (section 2), I will briefly summarise the course of the proceedings (section 3). Before discussing the grounds for the appeal in cassation, I will consider more generally the issue of the attribution of responsibility under international law (section 4). Afterwards I will discuss the appeal in cassation in section 5 and give my opinion in section 6.

2. Facts

2.1 The following facts, as set out in detail in findings of law 2.1 to 2.34 inclusive of the judgment of The Hague Court of Appeal of 5 July 2011 (referred to below as the interim judgment)², can be taken as established for the purposes of the appeal in cassation. I think it is useful to repeat these facts here, albeit in slightly abridged form.

2.2 In 1991 the republics of Slovenia and Croatia declared their independence from the Socialist Federal Republic of Yugoslavia. When fighting then broke out, especially in Croatia, the UN Security Council decided by Resolution 743 of 21 February 1992 to establish a United Nations Protection Force (UNPROFOR), with its headquarters in Sarajevo.

2.3 On 3 March 1992 the republic of Bosnia and Herzegovina also declared its independence from the Socialist Federal Republic of Yugoslavia. Ethnic groups of both Muslims and Serbs were living in Bosnia and Herzegovina. After the Bosnian Serbs had declared the independence of the Republika Srpska (Serb Republic), fighting broke out between the army of Bosnia and Herzegovina and the Bosnian-Serb army. As a result of this

² LJN:BR0132, NJF 2011/290.

fighting, the UN Security Council adopted Resolution 758 of 8 June 1992 strengthening UNPROFOR and enlarging its mandate to include Bosnia and Herzegovina.

2.4 Srebrenica is a city situated in eastern Bosnia and Herzegovina. Due to the armed conflict, a Muslim enclave came into existence in Srebrenica and its surrounding areas. From the beginning of 1993, the Srebrenica enclave was surrounded by the Bosnian Serb Army.

2.5 On 16 April 1993, the UN Security Council adopted Resolution 819, which provided among other things that Srebrenica and its surrounding areas must be treated as a 'safe area' and requested the UN Secretary-General to increase the presence of UNPROFOR in Srebrenica. The Resolution also provided as follows:

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

6. Condemns and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of ‘ethnic cleansing’; (...).

2.6 In Resolutions 824 of 6 May 1993 and 836 of 4 June 1993 the UN Security Council increased the number of safe areas and called upon the Member States to contribute forces, including logistic support, to UNPROFOR. On 15 May 1993 the UN and Bosnia and Herzegovina signed the Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina.

2.7 In his report of 14 June 1993 the UN Secretary-General provided an analysis of the options for implementing Resolution 836. The analysis indicated that implementation could start with a 'light option' involving a minimal troop reinforcement. The UN Security Council adopted this recommendation in Resolution 844 of 18 June 1993.

2.8 To implement the proposals, particularly Resolution 836, the Netherlands offered a battalion of the Airborne Brigade to the UN. This offer was accepted by the Secretary-General on 21 October 1993.

2.9 On 3 March 1994 this battalion (known by the name 'Dutchbat') relieved the Canadian regiment that was present in Srebrenica. The main force of Dutchbat was stationed in the Srebrenica enclave. One infantry company was quartered in the city of Srebrenica, and the other units were quartered outside the city at an abandoned industrial site in Potočari (referred to below as the compound).

2.10 On 5 and 6 July 1995 the Bosnian-Serb army under the command of General Mladić mounted an attack on the Srebrenica enclave. Srebrenica was captured by the Bosnian-Serb army on 11 July 1995. The Dutchbat troops who were still in town withdrew into the compound. Subsequently a stream of refugees started leaving the town. Dutchbat allowed more than 5,000 of these refugees to enter the compound, including 239 men of military age (i.e. men between the ages of 16 and 60). The refugees within the compound were accommodated in an abandoned factory. A far larger number of refugees (probably around 27,000) had to stay in Potočari outside the compound in the open air.

2.11 In the period relevant to this case, the following persons held the following positions:

- (i) the (French) Lieutenant General Janvier was the Force Commander of UNPF, which had been the new name of what was originally known as UNPROFOR since 1 April 1995; the UNPF headquarters were located in Zagreb, Croatia;
- (ii) the (British) Lieutenant General Smith was Commander of BH Command, which had been known as UNPROFOR HQ since May 1995. This division was stationed in Sarajevo, Bosnia and Herzegovina;
- (iii) the (French) General Gobillard was Deputy Commander of UNPROFOR HQ;
- (iv) the (Dutch) Brigade General Nicolai was Chief of Staff of UNPROFOR HQ; his Military Assistant was the (Dutch) Lieutenant Colonel De Ruiters;
- (v) the (Dutch) Lieutenant Colonel Karremans was Commander of Dutchbat;
- (vi) the (Dutch) Major Franken was Deputy Commander of Dutchbat.

2.12 Dutchbat was bound by the rules of conduct and instructions set out by the UN: the Rules of Engagement (drawn up by the Force Commander), the Standing Operating Procedures and the Policy Directives. The Ministry of Defence adopted these rules of conduct and instructions, as well as a number of existing rules drawn up especially for this mission, in Standing Order 1 (NL) UN Infbat, which was in Dutch. This Standing Order included the instruction that after the provision of aid no persons might be sent away if this would expose

them to physical danger.

2.13 After the seizure of Srebrenica on 11 July 1995 the Dutch Defence Minister Voorhoeve telephoned General Nicolai in the late afternoon. Nicolai told Voorhoeve that the only solution they could see in Sarajevo was to evacuate the refugees. Voorhoeve agreed to that.

2.14 On 11 July 1995 at 18.45 hours Lieutenant Colonel Karremans received a fax message from General Gobillard instructing him to enter into negotiations with the Bosnian-Serb army for an immediate ceasefire and to take 'all reasonable measures to protect refugees and civilians in your care'.

2.15 In the evening of 11 July 1995 General Janvier received Dutch Chief of the Defence Staff Van den Breemen and Deputy Commander of the Royal Netherlands Army Van Baal, who had travelled from the Netherlands to Zagreb for consultations on the situation that had arisen in Srebrenica. The persons who took part in that meeting agreed that both Dutchbat and the refugees needed to be evacuated and that UNHCR would have primary responsibility for the evacuation of the refugees.

2.16 In the evening of 11 July 1995 Lieutenant Colonel Karremans held two meetings with Mladić and was accompanied at the second meeting by Nesib Mandžić as representative of the local population. During the first meeting Mladić said that the Muslim civilian population were not the target of his action and that he actually wanted to help them. He asked Karremans if he could request Nicolai to send buses and Karremans replied that he thought he could make the necessary arrangements. For a transcript of the video recordings made of the first of these conversations between Karremans and Mladić I would refer to finding of law 2.19 of the interim judgment.

2.17 In the early morning of 12 July 1995, Karremans spoke on the telephone to Defence Minister Voorhoeve. During this phone conversation Voorhoeve instructed Karremans to 'save whatever you can be saved'.

2.18 During one of his conversations with Mladić Lieutenant Colonel Karremans said that he wanted to take the local personnel along with Dutchbat. Mladić agreed to that. Dutchbat

then drew up a list of approximately 29 persons who belonged to their local personnel and who would be evacuated along with Dutchbat.

2.19 After Minister Voorhoeve had been informed about this last meeting, he instructed his staff to inform UNPROFOR that under no circumstances was Dutchbat allowed to cooperate in separate treatment of the men.

2.20 In the early afternoon of 12 July 1995, buses and lorries of the Bosnian Serbs started to arrive outside the compound to pick up the refugees. According to Mladić who was present at around that time, the refugees had nothing to fear and would be taken to Kladanj in the Muslim-Croat Federation. From 14.00 hours onwards the refugees who were outside the compound and wanted to leave because of their hopeless situation were taken away in these vehicles. The transfers continued in the morning of 13 July 1995 and in due course the refugees who had been in the compound were also carried away in vehicles of the Bosnian Serbs.

2.21 During the period in which the refugees (both from outside and inside the compound) were being removed in the vehicles, the Dutchbat troops received indications at various times that the Bosnian Serbs were committing crimes against the male refugees in particular (see finding of law 2.27 of the interim judgment).

2.22 For the purposes of the present case it is important to note that Rizo Mustafić had worked as an electrician for Dutchbat since early 1994. He was in the employment of the Srebrenica municipal authority (the Opština) and had been seconded to Dutchbat. After the fall of Srebrenica, Rizo Mustafić, together with his wife and children, had sought refuge in the compound. There they stayed in the office from which he usually worked.

2.23 On 13 July 1995 Rizo Mustafić stated that he and his family wished to remain in the compound. Oosterveen, the (Dutch) adjutant responsible for personnel affairs, told him that this was not possible as everyone – with the exception of the UN personnel – had to leave. At the end of the afternoon of 13 July 1995, after the other refugees had left the compound, Rizo Mustafić and his family also left. Outside the gate of the compound he was separated from his family, taken away and murdered by the Bosnian-Serb army or related paramilitary groups; his family survived.

2.24 On 13 July 1995, Karremans received a fax message from Lieutenant Colonel De Ruiters ('releasing officer': Nicolai) on the subject of 'Guidelines for negotiations with General Mladić'. This fax included the following passage:

'Regarding the negotiations between CO-Dutchbat and General Mladić about the possible conditions for the evacuation of Dutchbat from the enclave of Srebrenica the following guidelines will apply:

6. Locals employed by the UN must be evacuated with Dutchbat; (..)
8. If the negotiations become deadlocked contact should be immediately sought with General Nicolai (negotiator authorised to act on behalf of the Dutch Government and UNPROFOR).'

2.25 Karremans then sent a fax message to Mladić, also on 13 July 1995. This included the following passages [translator's note: original in English]:

'1. At 2000 hrs, I did receive a message from the authorities of the Netherlands thru HQ UNPROFOR in SARAJEVO concerning the evacuation of Dutchbat. I have been ordered to pass the following guidelines to you.

2. Guidelines:

a. Dutchbat should leave POTOČARI with (...)
(...)

d. Personnel assigned to the UN and to Dutchbat such as interpreters and the people from MSF and UNHCR.'

2.26 On 19 July 1995 General Smith concluded an agreement [translator's note: original in English] with Mladić that included the following provision:

'7. To provide the UNPROFOR displacement (including all military, civilian and up to thirty locally-employed personnel) from Potočari with all UNPROFOR weapons, vehicles, stores and equipment, through Ljubovija, by the end of the week, according to following displacement order:

a. Evacuation of wounded Moslems from Potočari, as well as from the hospital in Bratunac.

b. Evacuation of women, children and elderly Moslems, those who want to leave.

c. Displacement of UNPROFOR to start on 21 July 95 at 1200 hrs.

The entire operation will be supervised by General Smith and General Mladic or their representatives.'

2.27 Dutchbat left the compound on 21 July 1995. The Bosnian Serbs did not carry out any inspections of the convoy. The great majority of the men of military age removed by the Bosnian Serbs were murdered by them. It is thought that the actions of the Bosnian Serbs caused the deaths of over 7,000 men in total, many of them by mass executions.

3. Course of the proceedings³

3.1 The relief sought by Mustafić and Others at first instance, in so far as still relevant in the cassation proceedings, was as follows:

- (i) a declaratory judgment that the State is responsible for the damage suffered by them as a result of the wrongful act committed against them in that Rizo Mustafić was sent from the compound and was not evacuated with Dutch bat on 21 July 1995;
- (ii) a declaratory judgment that the State is liable to pay damages to Mustafić and Others for the damage they have suffered and may yet suffer in consequence of this.

3.2 In a judgment of 10 September 2008 (LJN: BF0187) The Hague District Court rejected the application for relief on the ground, in brief, that the conduct of Dutchbat during the evacuation of the refugees on 12 and 13 July 1995 had to be treated as conduct of the UN.

3.3 The District Court held, in brief, that the question of whether the conduct of Dutchbat should be attributed to the State in the present case had to be answered according to the standards of public international law since the Dutch military personnel present in Srebrenica were there pursuant to a mandate of the UN Security Council. In the opinion of the District Court, the conduct of Dutchbat had to be exclusively attributed to the UN. The District Court held on this point, inter alia, that when the State places troops at the disposal of the UN for participation in peace operations under Chapter VII of the Charter of the United Nations (UN Charter) the operational control and command of these troops is transferred to the UN.

3.4 Mustafić and Others lodged an appeal with the Court of Appeal and sought additional relief and supplemented their claims at first instance as follows:

- (i) a declaratory judgment that the State had violated the Genocide Convention, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) by failing to institute criminal proceedings in respect of the violations by

³ See findings of law 3.1-3.10 of the interim judgment.

Dutch military personnel of articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively);

(ii) a declaratory judgment that the State was liable for the damage which Mustafić and Others had suffered as a consequence of the violation of their right to a fair trial, or in any event a declaratory judgment that this right had been violated as described in ground of appeal 15, which took issue with the fact that Judge Punt, the District Court judge who presided over the hearing of the parties in person, had been taken off the case.

3.5 In the interim judgment now challenged in the cassation proceedings, The Hague Court of Appeal has given a number of final rulings on the responsibility of the State. Unlike the District Court, the Court of Appeal has ruled, in brief, that the conduct of Dutchbat during the evacuation of the refugees on 12 and 13 July 1995 should be treated as conduct of the State on the basis of the ‘effective control’ criterion discussed below. The Court of Appeal has also held that the State acted wrongfully towards Mustafić and Others on account of a violation of fundamental standards which apply under both national and international law.

3.6 As regards the submission at (ii) of 3.4 above, the Court of Appeal has given Mustafić and Others the opportunity to furnish evidence in support of the allegation that Judge Punt was taken off the case at first instance in order to influence the outcome of the case.

3.7 In its final judgment of 26 June 2012 the Court of Appeal set aside the judgment of the District Court, gave a declaratory ruling that the State was responsible to Mustafić and Others for the damage they had suffered on account of the wrongful conduct in consequence of the death of Rizo Mustafić and dismissed the additional claim for relief at 3.4 (ii) above.

3.8 The State has appealed in good time in cassation against both the interim judgment and the final judgment. In the cassation proceedings, the final rulings given by the Court of Appeal in its interim judgment, as set out above at 3.5, are of relevance. The case was argued orally by the parties on 18 January 2013 before the Supreme Court, with a written reply and rejoinder on 15 February 2013.

4. Attribution of liability under international law

4.1 The basic issue in this case is whether the conduct of the Dutchbat military personnel

in the days immediately following the fall of the Srebrenica enclave on 11 July 1995 can be attributed to the State. The District Court rejected the submission of State liability on the grounds that the Dutchbat military personnel were under the ‘command and control’ of the UN. By contrast, the Court of Appeal has held that the question of whether command and control of Dutchbat had been transferred to the UN and what should be understood by this can remain unanswered since the decisive criterion for attribution is not who exercised command and control but who had effective control.⁴

4.2 In its advisory report of 8 May 2002 on ‘Responsibility for wrongful acts during UN peace operations’ the Advisory Committee on Issues of Public International Law (CAVV) commented that certain activities in the context of peace operations entailed the risk that standards of private and public law might be infringed and thus give rise to wrongful acts under domestic law.⁵ In findings of law 5.3 and 5.4 of the interim judgment, the Court of Appeal has held that the question whether the conduct of which Dutchbat is accused could be attributed to the State should be judged according to international law. As the fact that Dutchbat’s conduct should be judged according to international law has not been disputed in the cassation proceedings, this must be treated as an established fact for the purposes of the consideration of the appeal in cassation.

4.3 When a State (the sending State) places troops at the disposal of the UN for peace operations in the context of Chapter VII of the UN Charter, the command and control of these troops is transferred to the UN.⁶ In its advisory report (see above) the CAVV distinguishes between the operational command which is transferred to the UN and the organic command which remains vested in the sending State. Organic command covers matters relating to pay, promotions and disciplinary and criminal law.⁷ The transfer of command and control is arranged by agreement between the sending State and the UN. No such agreement has been lodged by the State in the present case.

4.4 Command and control of the troops of the sending State is not transferred to the UN in all cases. In the CAVV’s advisory report, to which reference has already been made, it is

⁴ See finding of law 5.7 (conclusion) of the interim judgment.

⁵ See CAVV report, p. 11.

⁶ A detailed account of command and control in the context of UN peace operations is given by Terry D. Gill, *Legal Aspects of the Transfer of Authority in UN Peace Operations*, NYIL 2011, pp. 37-68.

⁷ See CAVV report, pp. 6-7. Also: B. van Lent, *Command and Control in VN-vredesoperaties* (Command and control in UN peace operations), Traktatie 1995, pp. 18-22

pointed out that where the UN authorizes a peace operation by the sending States, command and control remains vested in the sending States.⁸ This does not arise in the present case as it concerned the protection of ‘safe areas’ created by the UN, as indicated in the various resolutions of the UN Security Council, and troops placed at the disposal of the UN by the State in order to implement these resolutions, which therefore results in the transfer of command and control to the UN.

4.5 Where command and control is transferred to the UN, two special situations can occur where the sending State acts *ultra vires*. I quote from the CAVV’s advisory report:

‘The first is that a contingent or a member of a contingent acts on the instructions of national authorities rather than of the UN.

The second exceptional situation is where a national contingent – or a member of a national contingent – acts on its own initiative outside the powers conferred by the UN or contrary to the instructions of the UN. In both cases the actions are *ultra vires*’.⁹

4.6 The basic premise in international law is that each State is liable under international law for its own conduct if there is a breach of an international obligation of that State (‘independent responsibility’).¹⁰ An international organization is liable for the conduct of one of its Member States only if the State concerned must be regarded as an organ of that international organization (‘exclusive responsibility’). The term responsibility refers in this case to the legal consequences of a breach of an obligation under international law,

‘including liability for wrongful acts and forms of reparation. It is a subset of the notion accountability. Responsibility consists of two key elements: (i) the breach of an obligation under international law through an act or omission (ii) which is attributable or imputable to a State or an international organization possessing legal personality under international law’.¹¹

⁸ See CAVV report, p. 7, with reference, for example, to the Desert Storm Operation (Gulf War 1990-1991); also: Terry D. Gill, op. cit., NYIL 2011, pp. 53-54.

⁹ CAVV report, p. 7. See also Terry D. Gill, op. cit. NYIL 2011, p. 55.

¹⁰ On this subject see André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, SHARES Research Paper 03 (2011), ACIL 2011-07 (www.sharesproject.nl), pp. 35-36; André Nollkaemper, *Issues of Shared Responsibility before the International Court of Justice*, SHARES Research Paper 01 (2011), ACIL 2011-01 (www.sharesproject.nl), p. 6 (also published in: E. Rieter & H. de Waele (eds.), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, 2012, p. 199 et seq.).

¹¹ Terry D. Gill, op. cit., NYIL 2011, p. 52.

Legal concepts such as strict liability and joint and several liability are absent from or underdeveloped in public international law, unlike private law.

4.7 The principle of independent responsibility has been laid down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS) drawn up by the International Law Commission (ILC).¹² The DARS set out the conditions on which responsibility can be attributed to the State (the secondary rules of State responsibility), while the responsibility itself (the breached standard) follows from other sources of international law.¹³ In 2001 the UN General Assembly requested the ILC to draw up provisions regulating the responsibility of international organizations under international law. During its 63rd session in Geneva in 2011 the ILC adopted the text of the Draft Articles on the Responsibility of International Organizations (DARIO) and made recommendations to the UN General Assembly for the conclusion of a convention on the basis of this draft.¹⁴ In general, it can be said that the ILC's (non-binding) recommendations can be accepted as a reflection of unwritten international law.¹⁵

4.8 The DARIO are based on the principle that an international organization has exclusive responsibility for its internationally wrongful acts. Unlike the independent responsibility of States for their own acts, it cannot be said that the principle of exclusive responsibility of international organizations for the acts of a State that has acted as an organ of the organization concerned has evolved into customary international law. The sparse international *opinio iuris* on this subject explains the ILC's heavy reliance on the principles of the DARS in drawing up the DARIO.¹⁶

4.9 The question of the extent to which the acts of a military contingent of the sending

¹² The ILC adopted the DARS during its 53rd session in 2001. Commentary on the DARS was published in the Yearbook of the International Law Commission 2001, vol. II, Part Two.

¹³ CAVV report, p. 2.

¹⁴ Commentary on the DARIO was published in the Yearbook of the International Law Commission 2011, vol. II, Part Two. See also UN Doc. A/CN.4/L.778 of 30 May 2011, data can be found on the official website of the ILC (<http://untreaty.un.org/ilc/summaries.htm>).

¹⁵ CAVV report, p. 1.

¹⁶ On this subject see Noemi Gal-Or & Cydric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN*, German Law Journal 2012, p. 513; Alain Pellet, *The Definition of Responsibility in International Law*, in: James Crawford, Alain Pellet, Simon Olleson (eds.), *The Law of International Responsibility*, 2010, p. 7. More generally, as regards the *opinio iuris* see: Jan Wouters, *Bronnen van het internationaal recht* (Sources of international law), in: Nathalie Horbach, René Lefeber, Olivier Ribbelink (eds.), *Handboek Internationaal Recht*, 2007, pp. 85-86.

State in the course of a UN peace operation must be exclusively attributed to the UN or are deemed to constitute (parallel) acts by both the sending State and the UN cannot be inferred from either the DARS or the DARIO. The issue of the extent to which the member States of an international organization can be responsible for wrongful acts of the organization is not dealt with in the DARIO. However, the converse question, namely the extent to which the international organization is responsible for acts of its member states, is regulated. Article 7 of the DARIO provides as follows:

‘The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct’.

4.10 Article 7 DARIO therefore provides that the conduct of an organ of an international organization is considered to be conduct of that organization if it exercises effective control over the conduct. According to the commentary on article 7, the provision relates to peacekeeping operations in which a seconding State places a military contingent (the organ) at the disposal of the UN to operate under a UN mandate.¹⁷ Since the judgment of the International Court of Justice (ICJ) in the Nicaragua case of 27 June 1986, the exercise of effective control is a criterion that has been created for cases where there is no formal link between the groups actually acting and the relevant State.¹⁸ The ‘effective control’ criterion departs from the strictly normative requirements for attribution of wrongful acts, such as having legal authority over the persons who actually commit the acts in question.

4.11 The basic premise of the Nicaragua case has been confirmed by the ICJ in its more recent decision of 26 February 2007 in the case of Bosnia and Herzegovina v. Serbia and Montenegro.¹⁹ This dealt with the question of whether Serbia was liable for the mass executions of Bosnian Muslims in Srebrenica, which were mainly or partly carried out by paramilitary units that were not formally part of the Federal Republic of Yugoslavia (FRY), the predecessor of Serbia. After establishing that the Serbian Republic (which was itself not a sovereign State) and the Bosnian-Serb army could not be considered to be organs of the FRY,

¹⁷ DARIO with commentaries, Yearbook of the ILC, 2011, vol. II, Part Two, Art. 7, par. 1.

¹⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Merits, Judgment, ICJ Reports 1986, p. 14, paras. 110-116.

¹⁹ Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

the ICJ had to determine whether conduct of these units and paramilitary groups could be attributed to the FRY. This would have required actual influence on the part of Belgrade (in particular the then President Milošević) over the decisions of the rulers in Bosnia and Herzegovina (in particular Karadžić and Mladić). As it could not be proved, according to the ICJ, that the decision to exterminate Muslim men of military age was known to Belgrade in advance, the argument that the FRY was liable was rejected.²⁰ Nonetheless, the FRY was considered liable for its failure to prevent genocide and its failure to extradite the two Bosnian leaders referred to above to the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.²¹

4.12 Unlike in the Nicaragua and Bosnia & Herzegovina cases, the question of whether the national contingent can formally be considered as an organ of the UN within the meaning of article 7 DARIO is not at issue in these cassation proceedings. Article 7 DARIO assumes the exclusive liability of the international organization, since this provision relates to the determination of whether the conduct in question can be considered as an act of the organization or of the seconding State. According to article 7, the conduct of the national contingent of the seconding State is considered to be an act of the international organization if its operational control over the contingent was such in the given circumstances that it also exercised effective control over that conduct. I quote authoritative writers on this point:

‘(...) the purpose of this rule [Art. 7 DARIO, A-G] is not to determine *whether* particular conduct is attributable as such, but rather it addresses the question of to which of two entities (the ‘borrowing’ international organization or the ‘lending’ State (or international organization)), the conduct is to be attributed.

That provision is of particular relevance in the context of the attribution of the conduct in breach of applicable international obligations of national contingents assigned to United Nations peacekeeping missions. Whether or not the conduct in question is to be attributed to the United Nations or to the contributing State turns on the relative degree of ‘effective control’ in fact exercised by those entities over the conduct in question. That in turn depends upon a number of factors, including the mandate under which the peacekeeping mission has been set up, any agreements between the United Nations and the contributing State as to the terms on which troops were to be placed at the disposal of the United Nations, the extent to

²⁰ Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, paras. 413-415.

²¹ Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, paras. 425-450.

which the troops remain subject to the command and jurisdiction of the contributing State, and whether (operational) United Nations command and control was effective'.²²

4.13 Under article 7 DARIO the international organization has exclusive responsibility and the seconding State does not at the same time have independent responsibility on the grounds of its own acts. Where the conduct can be attributed to both the organization and the seconding State according to the rules on responsibility under international law, this is termed 'dual attribution', which would lead to what in private law is termed joint and several liability. Dual attribution is a doctrine that has evolved in international scholarly works in connection with the attribution of conduct to international organizations in the context of peacekeeping operations, as the basic premise is that the international organization has exclusive responsibility and the seconding State no responsibility. However, dual attribution has not been generally accepted in public international law. The following is stated in the literature on this subject:

'The principle of independent responsibility is directly related to the principle of exclusive responsibility. The latter principle in fact involves two separate points. The first is that conduct is in principle attributed to one actor only. Dual attribution, if possible at all, is very rare. Although a few scholars have defended the possibility of dual attribution, in particular in the context of peacekeeping operations, this is a minority opinion and there is little practice to support it. The commentary in Article 6 of the ARIO [DARIO; Advocate General's note] emphasizes that in principle the attribution of wrongful conduct is made on an individual basis and that attribution is an exclusive operation'.²³

4.14 It follows from the above that if the UN does not have effective (operational) command and control the seconding State is responsible for its own conduct. In other words,

²² See James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in: M.D. Evans (ed.), *International Law*, 2010, p. 444.

²³ See André Nollkaemper & Dov Jacobs, op. cit., in: SHARES Research Paper 03 (2011), ACIL 2011-07, pp. 38-39, with further references. Writers have taken issue with the view taken by scholars such as Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, (2010) 51 *Harvard International Law Journal*, p. 113. See also André Nollkaemper, *Dual Attribution*, *Journal of International Criminal Justice* 9 (2011), pp. 1143-1175, in particular pp. 1152-1153, where he points out that paragraph 5.9 of the interim judgment that is now the subject of the appeal in cassation contains an 'overstatement' in that the Court of Appeal comments that 'it has been generally accepted that it is possible for more than one party to have effective control, with the result that the possibility of attribution to more than one party, cannot be excluded'. According to Nollkaemper, 'the proper basis for such dual attribution (is) not well established'. See also the written notes lodged by the State, nos. 5.2.15 and 5.3.16, together with the literature mentioned there.

if the UN was unable to exercise operational control because the organization could not in fact prevent or have prevented the conduct in the given circumstances, the seconding State has independent responsibility for its own acts and it is irrelevant whether the seconding State had effective control over its contingent. This contingent is considered, after all, to be an organ of the seconding State, which is accordingly responsible for its own actions. As I have tried to show above, the criterion of effective control has been created precisely to cover the eventuality that there is no formal connection between the groups that in fact perform the acts and the State concerned. It can be argued that the provisions governing the independent responsibility of the State in the DARS and the provisions governing the exclusive responsibility of the international organization in the DARIO are interconnected.²⁴ Whereas the DARS is based on the principle of the State's independent responsibility, the DARIO provides for exclusive attribution to the international organization.

4.15 At the end of these notes on the attribution of international responsibility, I would point out that the *Behrami* and *Saramati* cases, which led to a decision of the European Court of Human Rights (ECtHR) and concerned peace missions of UNMIK and KFOR in Kosovo, differ significantly from the present case.²⁵ In the *Behrami* and *Saramati* cases the UN Security Council had delegated operational powers to KFOR, which in turn had to be considered part of another international organization (in this case NATO).²⁶ The ECtHR described UNMIK as a 'subsidiary organ' of the UN having 'ultimate authority and control'.²⁷ By applying this criterion the ECtHR pre-empted any discussion of whether the member States concerned exercised effective control. Since the UN therefore had both *de facto* and *de jure* 'ultimate control', it was impossible for the seconding State to have effective control.

4.16 After this general overview I will now discuss the grounds submitted by the State for

²⁴ See André Nollkaemper & Dov Jacobs, *op. cit.*, p. 38.

²⁵ ECtHR 2 May 2007, *Behrami v. France* (Appl. No. 71412/01) and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), ECtHR 2007, 111, LJN:BB3180, par. 135. For a detailed consideration of this case see Cedric Ryngaert, *The Accountability of International Organizations for Human Rights Violations: The Cases of the UN Mission in Kosovo (UNMIK) and the UN 'Terrorism Blacklist'*, in: *The interpretation and application of the European Convention of Human Rights: legal and practical implications*, 2013, pp. 73-91.

²⁶ Noemi Gal-Or & Cydric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN*, 13 *German Law Journal*, 2012, pp. 530-531; Ulf Häusler, *Human Rights Accountability of International Organizations in the Lead of International Peace Missions*, in: Jan Wouters, Eva Brems, Stefaan Smis, Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, 2010, pp. 230-231 and pp. 237-243.

²⁷ ECtHR 2 May 2007, par. 133. See also Kjetil Mujezinović Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, EJIL 2008, p. 522; DARIO with commentaries, *Yearbook of the ILC*, 2011, vol. II, Part Two, Art. 7, par. 10.

appeal in cassation.

5. Discussion of grounds for appeal in cassation

5.1 The appeal in cassation lodged by the State consists of eleven parts, some of which are divided into subparts. Parts 1-4 relate to the question of whether Dutchbat's conduct can be attributed to the State. Parts 5-11 challenge the Court of Appeal's finding that the State acted wrongfully.

5.2 The submissions about the attribution of Dutchbat's conduct to the State can be split into four parts, of which parts 2 and 3 consist of various subparts.

5.3 Part 1 argues that the Court of Appeal has failed to recognize in findings of law 5.7 and 5.8 of its interim judgment that Dutchbat must be classified as an organ of the UN and had been put under the command and control of the UN. The State argues that, under article 6 DARIO, Dutchbat's conduct should, in principle, always be attributed to the UN and that article 7 DARIO, on which the Court of Appeal has based its ruling, is not applicable in this case.²⁸

5.4 This part of the appeal is based on an incorrect interpretation of articles 6 and 7 DARIO. According to the commentary on article 7 DARIO this provision is expressly intended to cover peacekeeping operations such as the present one. I quote from the ILC's commentary on article 7 DARIO:

‘Article 7 deals with the different situation [i.e. different from article 6 DARIO; Advocate General's note] in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as an organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the seconded organ or agent is to be attributed to the receiving

²⁸ The Court of Appeal refers in finding of law to article 6 DARIO, as this article was numbered in the draft published at the time. In the 2011 draft article 6 has been renumbered as article 7, but the wording has remained unchanged.

organization or to the seconded State or organization’.²⁹

The fact that the State retained organic command of Dutchbat (in the sense of disciplinary powers and criminal jurisdiction), as noted in paragraph 4.3 of my opinion, is not at issue in this case. I therefore consider that this part of the appeal must fail.

5.5 Part 2 challenges the Court of Appeal’s interpretation of the criterion of effective control in findings of law 5.8-5.20 of the interim judgment. This part is subdivided into seven subparts (numbered (a) to (g)).

5.6 In part 2 (a) the State submits, in brief, that the Court of Appeal has failed to recognize that after transferring ‘command and control’ of Dutchbat to the UN the State was no longer competent to issue operational commands to Dutchbat and that the UN in principle always exclusively exercised effective control over Dutchbat. According to this part, the State could be said to have effective control over the acts and omissions of Dutchbat only if it had given instructions to Dutchbat that countermanded the command or command structure of the UN. The State also submits that in so far as there has been no misinterpretation by the Court of Appeal, the finding of the Court of Appeal has been insufficiently (comprehensibly) reasoned since the Court of Appeal has not established that the circumstances mentioned by it would mean that the State had countermanded the command structure of the UN in relation to the conduct of which Dutchbat was accused. It is argued in part 2 (b) that the Court of Appeal has wrongly proceeded on the assumption in finding of law 5.9 of the interim judgment that it is generally accepted that it is possible for more than one party to exercise effective control, so that the possibility is not excluded that by applying this criterion particular conduct can be attributed to more than one party. According to this part of the appeal, this premise is not generally accepted and there is no rule under international law as it stands that upon application of the ‘effective control’ criterion more than one party can exercise effective control over that conduct.

5.7 The two parts can be discussed together. In paragraph 4.12 of my opinion I pointed out that according to article 7 DARIO the conduct of the national contingent of the seconding State is considered to be the conduct of the international organization if, in the given circumstances, its operational control over the contingent was such that this organization also

²⁹ DARIO with commentaries, Yearbook of the ILC, 2011, vol. II, Part Two, Art. 7, par. 1.

exercised effective control. In other words, the (operational) command and control must have been effective.³⁰ In the context of UN peacekeeping operations, it is therefore not so much a question of who had effective control, as held by the Court of Appeal at the end of finding of law 5.7 of the interim judgment ('that the decisive criterion for attribution is not who exercised command and control but who in fact had effective control'), but rather a question of whether the UN's operational control was such that the UN also in fact exercised effective control. The basic premise should be that the UN has exclusive responsibility as soon as it is established that it in fact also had effective control after the transfer of command and control. In principle, it must be assumed that this is the case in UN peacekeeping operations in which command and control over the national troop contingent has been transferred to the UN.³¹ However, the Court of Appeal should not have left open the question of whether, in retrospect, the UN in fact exercised effective control. Once it has been established that the UN did not have effective control, the principle is, as I indicated in paragraph 4.14 of this opinion, that the seconding State is responsible for its own conduct (in this case the disputed conduct of Dutchbat as an organ of the State) and whether the seconding State had effective control over its troop contingent is no longer material. At the end of finding of law 5.9 the Court of Appeal held that it was only necessary to examine whether the State had effective control over the conduct and that the issue of whether the UN too had effective control could be left open. The Court of Appeal has left this open because, in its view, the attribution of conduct to more than one party (dual attribution) is generally accepted in the context of responsibility under public international law. As I indicated in paragraph 4.13 of my opinion, the principle of dual attribution is not generally accepted in public international law. The references to international law literature in finding of law 5.8 of the contested interim judgment do not support the finding that dual attribution is generally accepted.³² The grounds of appeal against the finding of the Court of Appeal as raised in both parts are therefore well-founded.

5.8 The submission in part 2 (a) that inadequate reasons have been given for the decision fails because the question whether the State countermanded the command and control transferred to the UN relates to *ultra vires* conduct, which does not arise in this case. I will

³⁰ See the Crawford and Olleson quotation in paragraph 4.12 above.

³¹ See also Terry D. Gill, *op. cit.*, NYIL 2011, p. 55.

³² It should incidentally be noted that Tom Dannenbaum points out in his article (also quoted by the Court of Appeal (*op. cit.*, Harvard International Law Journal 2010, electronic copy of <http://ssrn.com/abstract=1391617>, p. 40)) that it is disappointing that responsibility for breaches of human rights by 'peacekeepers' has been attributed to the UN in recent decisions 'with very little thought or deliberation on what "effective control" means with respect to the specific case before the court'.

merely refer here to my comments in paragraph 4.5 of this opinion. Clearly, the District Court applied the same test in this case since it held that, as it had not been established that the conduct was contrary to the instructions of the UN, it was therefore not *ultra vires*.³³

5.9 Although the grounds of appeal on points of law have been rightly put forward in both these parts, this cannot in my opinion lead to the setting aside of the contested interim judgment owing to want of interest. The following applies in this connection. In my view, the ruling of the Court of Appeal can be upheld if: (i) the inescapable conclusion to be drawn from the facts and documents in the action³⁴ is that the UN did not in fact have effective control in the critical days of 12 and 13 July 1995, or (ii) the State had its own formal (parallel) power or legal authority over Dutchbat in the context of the evaluation of the refugees and the withdrawal from the mission after the fall of enclave. The latter basically concerns the scope of the command and control.

5.10 As regards the former point, I would observe as follows. The inescapable conclusion to be drawn from the established facts is that the UN did not have effective control over the disputed acts of Dutchbat on the critical days of 12 and 13 July 1995 and that Dutchbat was left to deal with matters on its own in those days. This is evident, for example, from the documents in the action, including the report of the Dutch National Institute for War Documentation (NIOD) lodged before the court of fact. The following quote is from the report:

‘The day after the meeting with Janvier [i.e. on 12 July 1995; Advocate General’s note] and upon his return to The Hague, Van den Breemen reported on the meeting to General Nicolai in Sarajevo. Van den Breemen said that he was concerned about the fate of the refugees, but even more about the fate of Dutchbat’s civilian personnel as the Netherlands was responsible for them. The two generals also discussed the conditions that should apply to the evacuation of Dutchbat itself. Van den Breemen took the position that the staff officers in Sarajevo had to do whatever they could to be a partner in the negotiations with Mladić and should take over the negotiations from Karremans. Everyone in Sarajevo was convinced that after the fall of the enclave Karremans was in no position to take a firm line with Mladić. But this did not happen: Karremans was left to deal with matters on his own. Only a few days later, however, Smith did

³³ See paragraph 4.16.5 of the judgment of the District Court of 10 September 2008.

³⁴ See Asser *Procesrecht/Veegens-Korthals Altes-Groen* (2005), pp. 111 and 354.

indeed take over the conduct of the negotiations about Dutchbat's departure with Mladić.³⁵

The report also includes the following passage:

'It became clear in the morning of 13 July that Mladić did not wish to receive a UN delegation from Zagreb and instead wanted to do business solely with Karremans. UNPROFOR acquiesced in this as it would otherwise have been necessary to make the journey to Srebrenica without the permission of the Bosnian Serbs and hence with all the risks this would entail. Nicolai communicated this message to Van den Breemen. They agreed that Nicolai would try to support Karremans as much as possible.'³⁶

5.11 On appeal Mustafić also submitted that 'it was not possible to get there from Sarajevo', which was a reference to the UN commanders.³⁷ It was not until 19 July 1995 – slightly less than a week after Rizo Mustafić had been taken away by the Bosnian Serbs – that General Smith entered into negotiations on behalf of the UN with Mladić (see finding of law 2.32 of the contested interim judgment and paragraph 2.26 of my opinion). The only possible conclusion that can therefore be drawn from the facts established by the Court of Appeal is that the UN did not have effective control on the critical days of 12 and 13 July 1995. This means, as I have explained above in paragraph 4.14, that if the (operational) command and control of the UN is not effective the UN does not have exclusive responsibility. As effective control over the contingent could not be exercised by the UN, the seconding State necessarily 'retook' command and control. Under international law, the State is therefore responsible for the conduct of Dutchbat as an 'organ' of the State (independent responsibility) since Dutchbat's actions can be treated as the State's own conduct. The question of effective control is immaterial in this connection.³⁸

5.12 The second question which I mentioned above in paragraph 5.9 to show that the contested judgment of the Court of Appeal can be upheld concerns the scope of command and control, namely to what extent the State had its own (parallel) powers in the context of the evacuation of the refugees and the withdrawal of the mission following the fall of the

³⁵ NIOD report, Srebrenica: a Safe Area, part III, The fall of Srebrenica, chapter 9: Departure of Dutchbat from Srebrenica, pp. 2441-2442. The report of more than 6,000 pages can be downloaded from <http://www.srebrenica.nl/Pages/OOR/23/313.bGFuZz1OTA.html>.

³⁶ NIOD report, op. cit., pp. 2444-2445.

³⁷ See memorandum of oral pleading on behalf of Nuhanović, no. 123.

³⁸ See also article 4 DARS, Yearbook of the ILC 2001, vol. II, Part Two.

enclave.³⁹ Various factors are relevant in determining the scope of command and control, namely the strength or weakness of the UN mandate, the agreements made between the sending State and the international organization and the special circumstances of the case. Naturally, the transfer of command and control should never result in the infringement of fundamental standards.⁴⁰ This can be illustrated by the following quotation:

‘That which one cannot control, one cannot prevent. And that which one cannot prevent, should not and cannot engage one’s responsibility. In practical terms, as far as UN peace operations are concerned, this theoretical premise should yield the result that, if, due to the command structure of a UN operation, sufficient discretion is granted to Member States to exercise control over acts of their troops contributed to the operation, liability should lie with Member States. Should, in contrast, the UN tightly supervise the conduct of Member State troops at an *operational* level by expansively limiting the powers of the national force commander and strengthening the powers of the UN command, then the UN will be deemed to be exercising effective control, hence incurring liability. If, due to the circumstances, both the UN and the Member State exercise joint, parallel, and/or roughly equal control, both will incur joint and several liability (shared responsibility)’.⁴¹

5.13 After the fall of the enclave the nature of Dutchbat’s peace mission changed quite radically, since the safety of both the Dutchbat military personnel and of the refugees was in jeopardy. In finding of law 5.11 of the contested interim judgment, the Court of Appeal has held that once the enclave fell on 11 July 1995 the mission to protect Srebrenica had failed and there was no longer any question of Dutchbat – or UNPROFOR in any other composition – continuing or resuming the mission. According to the Court of Appeal, ‘it was from then on just about evacuating Dutchbat and the refugees and doing this in such a way that the refugees would not remain unprotected’.

5.14 It can be argued that after the fall of the enclave the peace mission involved on the one hand the complete withdrawal of the Dutchbat military personnel (individual self-defence) and, on the other, the evacuation of refugees in defence of the mission (extended self-

³⁹ Cf. Terry D. Gill, *op. cit.*, NYIL 2011, p. 39, who points out that the sending State retains the authority to withdraw from the mission.

⁴⁰ See also the CAVV report, p. 22: ‘As regards the question of the responsibility of troop-contributing States in a general sense for breaches of fundamental norms committed by troops which operate under the command and control of the UN, the CAVV takes the position that, despite the transfer of powers by the troop-contributing States to the UN, there is still scope for these States to have their own responsibility vis-à-vis third States.’

⁴¹ See Noemi Gal-Ort & Cedric Ryngaert, *op. cit.*, German Law Journal 2012, p. 530.

defence).⁴² There is all more reason for this conclusion because, in the words of the report of the National Institute for War Documentation (NIOD), the mission concerned had ‘a very unclear mandate’.⁴³ From 11 July 1995 there was a ‘transitional period’ (see finding of law 5.17 of the interim judgment) during which the interests of the State and the interests of the UN operation were inextricably linked together and could not, in the given circumstances, be clearly separated from one another. Reference may be made in this connection to the fax messages quoted in findings of law 2.30 and 2.31 of the interim judgment, from which it is apparent that the State had assumed responsibility for the possible conditions for the evacuation of Dutchbat from the enclave. It can therefore be argued that in such circumstances both the UN and the State together exercised (parallel) control and that, in the event of a breach of a standard under international law, this could result in shared responsibility⁴⁴ with the State being liable for its own conduct (through Dutchbat) and the UN too being responsible for its own conduct.

5.15 In view of the above, I consider that although the State has rightly put forward the ground of appeal contained in parts 2 (a) and 2 (b) above it does not have an interest in having the contested interim judgment set aside. The inescapable conclusion to be drawn from the facts of the case is, after all, that as the UN could not in fact exercise effective control on the days immediately following the fall of the enclave and in that period the State in any event exercised (parallel) command and control, the conduct of Dutchbat can be attributed to the State.

5.16 In part 2 (c) the State submits that findings of law 5.9 and 5.18 of the interim judgment are incorrect in law in so far as the Court of Appeal has held that it is also important that it was within the power of the State to prevent the relevant conduct of Dutchbat. In this part it is argued that to determine whether the State had effective control over the conduct the sole criterion is whether the State actually gave instructions to Dutchbat about that specific conduct and not whether the State could have given instructions to Dutchbat about that conduct and whether in that case those instructions would have been obeyed. Part 2 (d) challenges the adequacy of the reasoning given for finding of law 5.10 of the interim

⁴² See also Ulf Häusler, op. cit., in: *Accountability for Human Rights Violations by International Organizations*, 2010, pp. 259-261; André Nollkaemper, op. cit., *Journal of International Criminal Justice* 2011, pp. 1150-1151;

⁴³ See the authorized summary of the conclusions from the epilogue to the main report, at 3 (<http://www.srebrenica.nl/Pages/OOR/20/057.bGFuZz1OTA.html>).

⁴⁴ See Noemi Gal-Ort & Cedric Ryngaert, op. cit., *German Law Journal* 2012, p. 530.

judgment and also raises an issue of law. In this finding of law the Court of Appeal held that for the purposes of the ‘effective control’ criterion it is important whether – in brief – the troop-contributing State retains the ‘organic’ command over its troops and also retains at all times the power to withdraw the troops and break off the operation. According to this part of the appeal in cassation, the maintenance of these powers is not relevant to the question of whether the State had effective control over the conduct of which Dutchbat is accused and it cannot be concluded from this that this conduct should be attributed to the State. Part 2 (e) also takes issue with finding of law 5.10 of the interim judgment in so far as the Court of Appeal held here that Dutchbat’s conduct was something that came within the scope of Dutchbat’s personnel affairs.

5.17 The State lacks any interest in these grounds of appeal since the contested interim judgment can be upheld solely on the ground that in the days immediately following the fall of the enclave the UN’s operational control was not such that the UN was actually able to exercise effective control and that, in brief, the scope of the command and control transferred to the UN had become limited or more limited in the given circumstances. I would refer here to paragraphs 5.7-5.14 of this opinion. The distinction that is still made in part 2 (e) between the complete withdrawal of the military personnel who had been made available and a transfer of troops within UNPROFOR’s operational area fails, in my view, to do justice to the fact that the Srebrenica enclave had fallen and that there were fears for the safety of both the Dutchbat military personnel and the refugees.

5.18 Part 2 (f) raises issues of law and reasoning to challenge findings of law 5.11 and 5.17 of the interim judgment in which the Court of Appeal has outlined the context of Dutchbat’s actions and attached importance to the fact that the peace mission had ‘failed’ and that there was no question of Dutchbat continuing the peace mission. According to this part of the appeal, the mission was not yet over and Dutchbat was still under the command and control of the UN even after 11 July 1995.

5.19 Nor can this part of the appeal in cassation succeed either since it fails to recognise that transfer of command and control to the UN is not absolute and that the scope of the transfer depends on various factors as explained above in paragraph 5.12. In addition, the State lacks any interest in this ground of appeal since the conduct of Dutchbat can be attributed to the State because in the days immediately following the fall of the enclave the

UN was unable to actually exercise effective control.

5.20 Part 2 (g) basically submits that the Court of Appeal failed to recognise in finding of law 5.18 that the rules of international law on attribution are applicable if the military personnel transferred by the State to the command and control of the UN acted in the course of implementing their mandate, even if the conduct was contrary to the mandate. It is argued that this finding of law of the Court of Appeal is *obiter dicta*.

5.21 This part fails because the State did not countermand the command structure of the UN in the sense that actions were *ultra vires*. The State issued its own instructions to Dutchbat in these very trying circumstances and in the days that followed the fall of the enclave, precisely because the UN no longer exercised effective control in those days. I would merely refer you to the explanation I have given at paragraphs 5.7-5.14.

5.22 Part 3 relates to findings of law 5.8-5.20 of the interim judgement, in which the Court of Appeal held that the State had effective control over the conduct of which Dutchbat is accused. This part is divided into five subparts (numbered (a) to (e)).

5.23 These parts can be disposed of together in view of what has been said above in paragraphs 5.7-5.14 of this opinion. The appellant lacks an interest in these grounds of appeal in so far as they take issue with the Court of Appeal's ruling that the State had effective control and could therefore be held responsible under international law (the Court of Appeal has left open whether the UN had effective control). In paragraph 5.7 I have indicated that although the ground of appeal against this ruling of the Court of Appeal is well-founded, the State has no interest in having the contested judgment set aside because the judgment can be upheld on other grounds.

5.24 Part 4 concerns a catch-all ground of appeal and need not be discussed separately.

5.25 Parts 5-11 take issue with the ruling of the Court of Appeal that the State acted wrongfully (findings of law 6.3-6.21 of the interim judgment).

5.26 Part 5 basically takes issue with the fact that the Court of Appeal assessed the wrongful act alleged by Mustafić and Others by reference to the legal principles enshrined in

articles 2 and 3 ECHR and articles 6 and 7 ICCPR (right to life and prohibition of inhuman treatment). According to part 5 (a), the Court of Appeal has failed to recognise that these articles would apply only if the State had had jurisdiction in Srebrenica and in the compound in Potočari as referred to in article 2 ICCPR (and article 1 ECHR), which meant, according to this subpart, that the State had total and exclusive control there or could in any event exercise effective control. According to part 5 (b) the Court of Appeal has failed to recognise, by holding that articles 6 and 6 (ICCPR) (and articles 2 and 3 ECHR) were part of international customary law and had universal operation, that in applying these principles there must also be jurisdiction in the sense of the effective exercise of control. Part 5 (c) challenges the reasoning of the judgment.

5.27 The subparts can be dealt with together. The key question is whether the State had jurisdiction within the meaning of article 2 (1) ICCPR over the compound in Potočari and can therefore be held liable for an infringement of articles 6 and 7 ICCPR for failing to protect Rizo Mustafić. The concept of ‘jurisdiction’ within the meaning of article 2 (1) ICCPR (and the same concept in article 1 ECHR) points to the territorial/extraterritorial scope of the obligations imposed by the ICCPR (and the ECHR) on the State Parties.⁴⁵ Article 2 (1) ICCPR reads as follows:

‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Article 1 ECHR contains a similar provision:

‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.’

The concept of ‘jurisdiction’ is therefore basically about determining the circle of persons subject to the human rights obligations of the States Parties.⁴⁶ Article 2 (1) ICCPR differs to

⁴⁵ See Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2009, p. 804 ff.

⁴⁶ See M. den Heijer, *Procedural Aspects of Shared Responsibility in the European Court of Human Rights*, SHARES Research Paper 17 (2012), ACIL 2012-6 (www.sharesproject.nl), p. 5. See also ECtHR 7 July 2011, no. 55721/07, LJN: BU7943, NJ 2012/430, with note by N. Keijzer at NJ 2012/431 (Al-Skeini et al. v. United Kingdom), par. 130.

this extent from article 1 ECHR in that talks about ‘within its territory and subject to its jurisdiction’.⁴⁷ However, it is clear from article 1 of the Optional Protocol 1966 that the Human Rights Committee has promoted the development of human rights protection outside the territory of the States Parties.⁴⁸ In the present case the jurisdiction under the ICCPR is relevant and the State has not contended that article 2 (1) ICCPR should be applied more strictly than article 1 ECHR. In the written notes lodged by the State, the case-law of the ECtHR on the interpretation of article 1 ECHR is taken as the criterion for interpreting and applying article 2 (1) ICCPR.⁴⁹

5.28 The premise in the case-law of the ECtHR is that the jurisdiction (within the meaning of article 1 ECHR) of a Contracting State is in principle limited to the territory of the State concerned and that it can be deemed to have jurisdiction over acts committed outside its territory only in exceptional cases. The case-law of the ECtHR on article 1 of the ECHR is based expressly on the public international law literature on jurisdiction,⁵⁰ in particular the premise that the extraterritorial operation of the ECHR is limited by the sovereign rights of the States in which the human rights violations take place.⁵¹ In its judgment in the *Al-Skeini* case the ECtHR held as follows on the subject of these exceptional circumstances:

‘132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts’.⁵²

In this judgment the ECtHR repeated the exceptions accepted in its previous decisions,

⁴⁷ See also M. Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, *Human Rights Law Review* 8 (2008), p. 415. And see ECtHR 21 December 2001, *Banković and Others v. Belgium and Others*, no. 52207/99, ECtHR 2001-XII, par. 26.

⁴⁸ See the above-mentioned judgment of the ECtHR in the *Banković* case, paras 26-27. Also: M. Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in: F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp. 73-74; Noëlle Quénivet, *Human Rights Law and Peacekeeping Operations*, in: Marco Odello, Ryszard Piotrowicz (eds.), *International Military Missions and International Law*, 2011, p. 104.

⁴⁹ Written commentary by the State, no. 6.1.6 ff.

⁵⁰ See the stated judgment of the ECtHR in the *Banković* case, with references to previous case-law, paras. 57 and 59.

⁵¹ On this point, see D. McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in: F. Coomans, M.T. Kamminga (eds.), *op. cit.*, p. 69.

⁵² ECtHR 7 July 2011, no. 55721/07, NJ 2012/430, par. 130 (*Al-Skeini et al. v. the United Kingdom*). This case concerned incidents involving British soldiers in Iraq who had killed Iraqi civilians in 2003.

including:

‘133. (...) the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (...).’

‘137. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. (...).’

Whereas paras. 133-137 of this judgment involve cases of the one-off exercise of State authority, paras. 138-140 concern the effective control of a State over foreign territory.⁵³ I quote:

‘138. Another exception to the principle that jurisdiction under Article 1 is limited to a State’s own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State’s own armed forces, or through a subordinate local administration (...). The controlling State has the responsibility to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (...).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State’s military presence in the area (...). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region’.⁵⁴

5.29 The ECtHR’s judgment in the Al-Skeini case and its previous decisions have no bearing on the situation that occurs in the present case. The ECtHR’s judgments always concerned cases in which a State carried out one-off acts on the territory of another State or cases involving occupation (such as the attack on and occupation of Iraqi in the Al-Skeini

⁵³ See also the note of M. den Heijer to the judgment of the ECtHR, ECtHR 2011/156, at 4.

⁵⁴ ECtHR 7 July 2011 no. 55721/07, NJ 2012/430 (Al-Skeini and Others v. the United Kingdom).

case). The question therefore arises of whether the ‘effective control’ criterion as developed by the ECtHR should be applied in the context of UN peace operations. In his note on Al-Skeini judgment Keijzer notes as follows:

‘The ECtHR has stated that the question of whether there is effective control over an area is a question of fact. Although the present case takes into consideration that the United Kingdom was an occupying power, the Netherlands should therefore allow for the fact that victims of the conduct of its military personnel during peace missions or other foreign operations will be deemed to be subject to the jurisdiction of the Netherlands within the meaning of article 1 ECHR simply by virtue of the actual existence of effective control and that the Netherlands can therefore be held responsible for such conduct in proceedings before the ECtHR. The fact that the operations have been authorized by the Security Council does not detract from this responsibility.’⁵⁵

In his note Keijzer makes no distinction between, on the one hand, peace operations in which the actions of the military contingents are authorised by the UN Security Council and command and control therefore remains vested in the sending States and, on the other, peace operations by military contingents of the sending States in which command and control is transferred to the UN. In his view, where effective control over an area exists there is jurisdiction within the meaning of article 1 ECHR in the case of both forms of peace operations.

5.30 For a proper understanding, I would point out that the concept of effective control in the present cassation proceedings has various meanings.⁵⁶ In so far as the issue of effective control occurs in relation to the attribution of international responsibility, it concerns the question of whether the UN has exercised effective control over the conduct of (national) troop contingents made available to the UN. The concept of effective control as developed in the case-law of the ECtHR involves defining the extent of the extraterritorial effect of the human rights conventions (the question of jurisdiction within the meaning of article 1 ECHR).

⁵⁵ See the note by N. Keijzer, in: NJ 2013/431, re 7.

⁵⁶ For the various meanings see also M. Milanovic, *op. cit.*, pp. 446-447, who notes as follows: “‘Effective control’ is also a homonym – there is the effective control test for the purposes of attribution, as developed by the ICJ in *Nicaragua*; there is effective control of an area as sometimes used in humanitarian law to describe the threshold of the beginning of a belligerent occupation of a territory; there is effective (overall) control of an area as a test developed by the European Court for the purposes of determining a state’s jurisdiction over a territory; finally, there is also effective control as used in international criminal law to describe the relationship a superior has to have over a subordinate so his command responsibility could be engaged. Same words different concepts’.

This concerns the question of the control over persons who are within the jurisdiction of the State Party, taking into account the fact that the jurisdiction can in certain circumstances extend to areas beyond the territory of the State concerned.⁵⁷ Or, to put it another way, jurisdiction within the meaning of the human rights conventions concerns the relationship between the victim of the human rights violation and the sued State.

5.31 In the present case the relationship between Rizo Mustafić and the State consisted in the fact that Mustafić and his family were in Dutchbat's compound. It has been established in this case that Dutchbat formally had the authority to act in Srebrenica since Dutchbat was part of UNPROFOR. UNPROFOR derived its authority to act in Srebrenica from the Status of Force Agreement (SOFA) concluded between the UN and Bosnia and Herzegovina.⁵⁸ This legitimated not only the actions of UNPROFOR but also those of Dutchbat in Srebrenica. This legitimation means that the question whether there is jurisdiction within the meaning of article 2 (1) ICCPR (and article 1 ECHR) must be answered in the affirmative. The persons who were in the compound in Potočari were subject to the jurisdiction of the State within the meaning of article 2 (1) ICCPR since the State was formally authorised to act there. Where the State has formal authority as, in this case, on the basis of the SOFA, the 'effective control' test serves as a form of force majeure defence for the sued State in the sense that, despite having jurisdiction, it could not exercise actual control over the victims as a result of the situation on the spot. In essence, the position of the State is that it had no jurisdiction within the meaning of the ICCPR since it had no actual control. There is no evidence – or it has in any event not been alleged by the State – that it was absolutely impossible for Dutchbat to exercise its formal authority.⁵⁹ Moreover, it can be assumed that Dutchbat exercised effective control over Rizo Mustafić since he had sought refuge in the Dutch compound after the fall of the enclave. It has, after all, been established the compound was Dutchbat's camp, that Dutchbat had allowed 5,000 refugees (including 239 men of military age) to enter the compound, that Mladić had given Dutchbat the opportunity to withdraw from the compound (which was respected by Mladić), and that Mladić had allowed Dutchbat to take the local personnel with them (the 'list of 29'), see findings of law 2.14 and 2.22 of the interim

⁵⁷ See also Michal Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?*, NILR 2005, p. 371; M. Milanovic, op. cit., p. 446.

⁵⁸ See finding of law 2.6 of the interim judgment, and paragraph 5.1.3 of the written notes lodged by the State.

⁵⁹ Cf. M. den Heijer, op. cit., ACIL 2012-16, p. 9: '(...) also in the exceptional situation where a State is effectively prevented from exercising authority in part of its territory, the Court has held the territorial State not to be discharged of its positive obligations to take the steps within its power to stop a human rights violation from occurring'.

judgment.

5.32 In finding of law 6.3 of the interim judgment, the Court of Appeal held that Dutchbat's conduct should be assessed first of all by reference to the provisions of national Bosnian law, since it was not in dispute that under Dutch private international law the alleged wrongful act is governed by the law of Bosnia and Herzegovina. The Court of Appeal held that it should 'also' be assessed by reference:

'to the principles of law laid down in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively) since these principles, which are among the most fundamental legal principles of civilized nations, must be regarded as rules of customary international law which have universal operation and are binding on the State'.

Clearly, the Court of Appeal has adopted a two-pronged approach in this finding of law: first, the application of the law of Bosnia and Herzegovina in accordance with the rules of Dutch private international law, and, second, the direct application of the fundamental rights on the basis of customary international law.⁶⁰ Whatever else may be said about this, in so far as the State still submits that account must be taken in this connection of article 2 (1) ICCPR this cannot result in cassation. Pursuant to section 79, subsection 1, opening words and (b), Judiciary (Organization) Act (RO) the application of the law of Bosnia and Herzegovina cannot be reviewed in cassation proceedings. Nor is this application incomprehensible in other respects since the Court of Appeal has not held that the jurisdiction rule of article 2 (1) ICCPR can be considered to be a rule of customary international law and has universal effect.⁶¹

5.33 Part 5 of the appeal must fail in view of the above.

5.34 Part 6 (a) is directed against finding of law 6.11 of the interim judgment in which the Court of Appeal held that all other refugees had already left the compound when Mustavić was still there (with his family). The State argues that it is hard to follow the reasoning in the judgment in the light of the State's submission that most but not all of the 5,000 refugees had

⁶⁰ Cf. CAVV report, p.10, where it is noted that a number of human rights are norms of customary law, such as the right to life and the prohibition of torture.

⁶¹ See paragraph 6.1.23 of the written notes lodged by the State.

left the compound by that time and in the light of the submissions of Mustafić and Others that Mustafić and his family had left the compound with the refugees.

5.35 The submission concerning the reasoning for this finding must fail because at the end of finding of law 6.14 of the interim judgment the Court of Appeal has held that the State has not disputed this. The Court of Appeal would refer in this connection to the submission of Mustafić and Others that the agreement of 19 July 1995 between General Smith and Mladić basically meant that all those people present in the compound with Dutchbat could leave. The fact that Rizo Mustafić and his family were the last to leave the compound is therefore not the sole basis for holding that this constituted a wrongful act. Moreover, Dutchbat was bound by the rules of conduct and instructions set out by the UN, as referred to in finding of law 2.13 of the interim judgement, which, together with a number of existing rules specially drawn up for this mission, were adopted by the Ministry of Defence in Standing Order 1 (NL) UN Infbat, which was in Dutch. This Standing Order included the instruction that after the provision of aid no persons might be sent away if this would expose them to physical danger.

5.36 The question whether Rizo Mustafić did or did not leave the compound simultaneously with the majority of the 5,000 refugees is not relevant to the present issue of wrongfulness. The question is, after all, whether Dutchbat, as an organ of the State, had an obligation to protect persons who had been placed in its charge and were in danger. The State's submission in its reply in the cassation proceedings to the effect that Rizo Mustafić was not the only person who performed work for Dutchbat and was in the service of the Srebrenica municipal authority fails on the basis of what the Court of Appeal has held in finding of law 6.11 of the interim judgment, namely that the Court of Appeal merely needs to express an opinion on the position of Rizo Mustafić. This finding of the Court of Appeal is not incomprehensible.

5.37 Part 6 (b) of the appeal is directed against findings of law 6.7 and 6.8 of the interim judgment. Essentially the State submits here that, in the light of the judgment of the International Court of Justice (ICJ) of 26 February 2007, the Court of Appeal's finding that the Muslim men ran a real risk of being killed or subjected to inhuman treatment if they left the compound is incomprehensible and that this could have been foreseen by Dutchbat. As the ICJ held in its judgment of 26 February 2007 that the decision of the Bosnian-Serb army to kill the male population of the Muslim community was taken in a short space of time between

13 and 16 July 1995, it is hard to see, according to this part of the appeal, how Dutchbat could have foreseen on 13 July 1995 a decision of the Bosnian Serbs that had not yet been taken.

5.38 The argument based on the ICJ's judgment of 26 February 2007 does not hold good as the present case is not about knowledge of the Bosnian Serbs' decision to kill the Muslim men of military age but about suspicion that such a decision had been taken and the failure to make (adequate) attempts to prevent genocide. In the ICJ's judgment, the FRY was, after all, considered responsible for the failure to prevent genocide (see paragraph 4.11 of my opinion). In its judgment the ICJ held that in view of 'all the given international concern about what looked likely to happen at Srebrenica' the FRY should have taken measures to prevent genocide. The ICJ points out that the Genocide Convention⁶² also has a wide scope, which means that the responsibility under international law for violation of this convention is not dependent solely on the issue of whether the sued State had knowledge of the actual decision taken by its organs or by entities over which it exercised effective control.⁶³ The State wrongly puts the emphasis on the moment at which the decision was taken to conduct mass executions. This part of the appeal therefore fails.

5.39 Part 7 is directed against findings of law 6.8, 6.11-6.14 and 6.18 of the interim judgment. It is argued in subpart 7 (a) that the Court of Appeal failed to recognise, partly in view of the legal principles laid down in articles 6 and 7 ICCPR, that the question of whether Dutchbat could have taken better decisions and/or could have acted with greater care towards the refugees and Mustafić should not have been assessed with the benefit of hindsight. According to part 7 of the appeal, it is appropriate for the court to observe judicial restraint in its assessment since (i) there was a war situation; (ii) Dutchbat had no jurisdiction locally, and (iii) the Dutchbat command also needed to secure the safety of the persons working for Dutchbat. Part 7 (b) maintains that if the Court of Appeal has decided that Dutchbat could not reasonably have taken the decisions on the basis of the knowledge it possessed at that time, this finding is incomprehensible. Part 7 (c) submits that if it were to appear from finding of law 6.18 of the interim judgement that the Court of Appeal did not fail to recognise the matters raised in part 7 (a), this finding too is incomprehensible.

⁶² Convention on the Prevention and Punishment of the Crime of Genocide, done in New York on 9 December 1948, Dutch Treaty Series 1960, 32 and 1966, 179.

⁶³ Case concerning the application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, ICJ Reports (2007), p. 43, par. 438. See also M. Milanovic, *op. cit.*, p. 442.

5.40 The various subparts of part 7 can be disposed of together. In general, a certain degree of judicial restraint is appropriate in assessing in retrospect the acts or omissions of Dutchbat (and its commanders) in the light of the knowledge we now have and then answering the question of whether Dutchbat (and its commanders) could reasonably have taken the decisions that were taken at that time under the pressure of war conditions. The court cannot put itself in the shoes of the operational commander(s) and assess in retrospect all aspects of the decisions they took at that time in the heat of the moment, but this does not alter the fact that it is most certainly the task of the court to assess whether orders given at that time resulted in a violation of fundamental and universally applicable human rights, in particular the right to life and the prohibition of inhuman treatment. If the court were not allowed to rule on this, lawlessness might be our lot.

5.41 In its memorandum of oral pleading in the cassation proceedings the State has pointed out that the consequences of the Court of Appeal's ruling are far-reaching in the sense that the decision may make countries less inclined to place troops at the disposal of UN peace operations. The State also argues that the decision may be 'an obstacle to the UN's ability to operate entirely independently and as a unit in situations of this kind'.⁶⁴ Although the State may admittedly be right in saying that countries may be less inclined to place troops at the disposal of UN peace operations, this objection cannot result in the State being discharged from its responsibility for its own actions where there is a violation of fundamental human rights. Moreover, as noted in the NIOD report, the mission was undertaken with 'a very unclear mandate'. Dutchbat was deployed to an area 'to maintain peace where there was no peace' and the deployment took place 'without adequate training for the specific task in those specific circumstances'.⁶⁵ Furthermore, Dutchbat was deployed to an area where it was known that ethnic cleansing was taking place and hence that fundamental rights were possibly being violated.⁶⁶

5.42 In its interim judgment the Court of Appeal has taken account of the circumstances of the present case and of the advisability of restraint. It has, after all, considered not what

⁶⁴ See the State's memorandum of oral pleading in the cassation proceedings, nos. 2.7 and 2.8.

⁶⁵ See the NIOD report, authorized summary of the submissions, *loc. cit.* Reference may also be made here to results of the Srebrenica parliamentary inquiry, Dutch House of Representatives, 2002-2003 session, 28 506, nos. 2-3, which regularly refers to the NIOD report.

⁶⁶ See Resolution 819 of the UN Security Council, as referred to in paragraph 2.5 of my opinion.

Dutchbat should have done, but what could reasonably be expected of Dutchbat in the given circumstances. Although there was a war situation and Dutchbat also had to defend its own personnel, this did not discharge it from its fundamental human rights obligations to Rizo Mustafić. What could reasonably be expected of Dutchbat naturally depends in part on the knowledge that existed at that time about the intentions of the Bosnian Serbs regarding the fate of the Muslim men of military age. As it maintains that Dutchbat could not have known of the decision of the Bosnian-Serb army to exterminate the male Muslim population, the State has accordingly based its arguments on the ICJ's above-mentioned judgment of 26 February 2007. This case turned on the distinction between ethnic cleansing and genocide. It has been established that ethnic cleansing was in any event known internationally at that time and that this also led the UN Security Council to adopt Resolution 819 on 16 April 1993.⁶⁷ In its judgment of 26 February 2007 the ICJ acknowledged that ethnic cleansing has no legally relevant meaning for the purposes of the Genocide Convention since the term can also refer to the creation of an ethnically homogenous group (Bosnian Serbs) in a given region by the transfer or removal of another group (Muslims) from that region, but this is not itself sufficient to constitute genocide.⁶⁸ However, according to the ICJ acts of ethnic cleansing may coincide or occur in parallel with prohibited acts within the meaning of article II of the Genocide Convention and may be significant as indicative of the presence of a specific intent (*dolus specialis*) to perform prohibited acts of this kind.⁶⁹

5.43 The findings contested in this part of the appeal must be read in conjunction with finding of law 6.7, in which the Court of Appeal points out that it has been established at 2.27 of the interim judgment that it was in any event apparent to the Dutchbat commanders at the end of the afternoon of 13 July 1995 that the Bosnian Serbs had specific plans for the Muslim men of military age. In view of all the circumstances, a less restrained approach by the court is therefore appropriate. The court can therefore conclude that Dutchbat should have done everything to take Rizo Mustafić with them (with or without a UN pass) and should accordingly have accepted certain risks and dangers (for example, that the convoys would be checked by the Bosnian Serbs). I therefore consider that the Court of Appeal's ruling is

⁶⁷ See finding of law 2.4 of the interim judgment, also referred to in paragraph 2.5 of my opinion.

⁶⁸ Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, par. 190, with reference to the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Stakić, IT-97-24-T, Trial Chamber Judgment 31 July 2003, par. 519.

⁶⁹ Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, par. 190.

correct and comprehensible and that this part of the appeal must therefore fail. In other respects, this part of the appeal builds on previous parts and therefore shares the same fate.

5.44 Part 8 is directed against finding of law 6.13 of the interim judgment, in which the Court of Appeal held that the State's defence that evacuation could not have been stopped because of the great risk to the women and children cannot succeed. According to the Court of Appeal, the women and children had already left the compound at the moment when Rizo Mustafić left it and the State has in no way substantiated its claim that the women and children would have been at risk if Mustafić had been allowed to remain in the compound. This part of the appeal submits that this finding is incomprehensible without further reasons being given.

5.45 This part of the appeal fails in view of what I have already said in the discussion of part 7. Finding of law 6.13, which is challenged by part 8 of the appeal, is not essential to the final ruling of the Court of Appeal. The ruling on the wrongfulness of the conduct is based on the fact that the fundamental human rights that were violated (namely the failure to protect Rizo Mustafić when it was known or could reasonably have been suspected that he would be murdered by the Bosnian Serbs) were of such a nature that the possible risks that would have been run if Mustafić had been taken along by Dutchbat are immaterial. Nor is the ruling of the Court of Appeal incomprehensible in other respects.

5.46 Part 9 is directed against finding of law 6.18 of the interim judgment. In this finding the Court of Appeal has held that the risk to Mustafić could have been reduced if a UN pass had been made for him and he had been put on the list of local personnel (the 'List of 29'). In addition, the Court of Appeal has held that the State has not adduced sufficient evidence to warrant the conclusion that account had to be taken of any risk other than the fact that in the event of a check by the Bosnian Serbs Mustafić would have been taken away and murdered. This part of the appeal basically asserts that it is not possible to establish in retrospect that Dutchbat had no reasonable grounds for deciding to avoid that risk.

5.47 In finding of law 6.18 the Court of Appeal has held that the State has not disputed the assertion that the list of local personnel (the 'list of 29') had been thinned out and that names could therefore have been added to it. Nor is this point disputed by the State in part 9 of the appeal. The detailed submissions by the State in paragraphs 1.6-1.12 of its written reply of 15

February 2013 in the cassation proceedings about the background to the list and the rules applicable to Dutchbat – namely that only personnel with a UN pass could be taken along with Dutchbat (since there were some 40-50 other men of military age who worked for Dutchbat and they, like Mustafić, did not belong to the personnel with a right to a UN pass) – can therefore be disregarded. In finding of law 6.11 of the interim judgment, the Court of Appeal has merely assessed the position of Mustafić and concluded in finding of law 6.18 that it would have been possible to put Mustafić on the ‘list of 29’ and that the State could have reduced any risk of taking Mustafić along by making a UN pass for him. This part of the appeal therefore fails.

5.48 Part 10 is directed against findings of law 6.20-6.22 of the interim judgment on the basis of the grounds of appeal raised in parts 5-9. As the grounds of appeal of these parts fail, part 10 must share their fate.

5.49 Part 11 argues that if one or more of the grounds of appeal in parts 1-10 are held to be well-founded, this will also vitiate the rulings of the Court of Appeal in findings of law 2.1-2.4 of the final judgment. As none of the grounds of appeal raised can result in cassation, this part too fails.

6. Opinion

My opinion is that the appeal should be dismissed.

The Procurator-General at the
Supreme Court of the Netherlands

Advocate General