

6 September 2013

First Chamber

12/03329

LZ/TT

Supreme Court of the Netherlands

Judgment

in the case of:

THE STATE OF THE NETHERLANDS (Ministry of
Defence and Ministry of Foreign Affairs),
which has its seat in The Hague,

APPELLANT in the appeal in cassation,

counsel: G.J.H. Houtzagers,
M.W. Scheltema and
K. Teuben,

v.

1. Mehida MUSTAFIĆ-MUJIĆ,
residing in Veenendaal,

2. Damir MUSTAFIĆ,
residing in Veenendaal,

3. Alma MUSTAFIĆ,
residing in Utrecht,

RESPONDENTS in the appeal in cassation,

counsel: R.P.J.L. Tjittes and
G.R. den Dekker.

The parties will be referred to below as the State and Mustafić and Others respectively; the respondents in the cassation proceedings will be referred to individually as Mehida, Damir and Alma.

1. The proceedings before the courts of fact

For an account of the course of the proceedings before the courts of fact, the Supreme Court would refer to the following documents:

- a) the judgments in case 265618/HA ZA 06-1672 of The Hague District Court of 10 January 2007 and 10 September 2008;
- b) the judgments in case 200.020.173/01 of The Hague Court of Appeal of 5 July 2011 and 26 June 2012.

The judgments of the Court of Appeal have been attached to this judgment.

2. The cassation proceedings

The State has appealed in cassation against the judgments of the Court of Appeal of 5 July 2011 and

26 June 2012. The notice of appeal in cassation has been attached to this judgment and forms part of it.

Mustafić and Others have applied for the appeal to be dismissed.

The case has been pleaded orally on behalf of the parties by their counsel and also by L. Zegveld, attorney-at-law in Amsterdam, on behalf of Mustafić and Others.

In his advisory opinion Advocate-General P. Vlas has recommended that the appeal be dismissed.

Houtzagers, counsel for the State, has responded to this advisory opinion by letter of 31 May 2013. Tjittes and Den Dekker, counsel for Mustafić and Others, have also commented on this opinion by letter of 31 May 2013.

3. Assessment of the grounds of appeal in cassation

3.1 This case concerns events that occurred shortly after the fall of the Srebrenica enclave on 11 July 1995.

Rizo Mustafić was in the employment of the Srebrenica municipal authority and had been seconded by this authority to Dutchbat to work as an electrician in the compound in Potočari where Dutchbat was stationed. After the fall of the enclave he, together with his wife Mehida and children Damir and Alma, had sought refuge in

the compound. The family was informed on 13 July 1995 that they had to leave the compound. Shortly afterwards Mustafić was murdered by the Bosnian-Serb army or related paramilitary groups. His wife and children (below: Mustafić and Others) are holding the State responsible for the harmful consequences. According to Mustafić and Others, Dutchbat acted wrongfully by sending Mustafić away from the compound.

The proceedings before the Supreme Court turn on two central issues: (i) Can Dutchbat's conduct be attributed to the State? And (ii) Was Dutchbat's conduct wrongful?

3.2 In the cassation proceedings the facts as described in findings 2.1-2.34 of the interim judgment of the Court of Appeal of 5 July 2011 can be taken as established. In summary, these facts are as follows:

(i) In connection with the fighting which had broken out in the former republic of Yugoslavia in 1991 the Security Council of the United Nations (below: the Security Council) resolved in 1992 to establish the United Nations Protection Force (below: UNPROFOR), with its headquarters in Sarajevo.

(ii) Srebrenica is a city situated in the east of Bosnia and Herzegovina. As a result of the armed conflict a

Muslim enclave was created in Srebrenica. From early 1993 the Srebrenica enclave was surrounded by the Bosnian-Serb army.

(iii) In Resolution 819 of 16 April 1993 the Security Council designated Srebrenica as a 'safe area' and demanded that the Bosnian-Serb army withdraw from the surrounding areas. In Resolution 836 of 4 June 1993 the Security Council called upon the Member States to contribute armed troops and logistic support to UNPROFOR.

(iv) The Netherlands placed a battalion of the Airborne Brigade at the disposal of UNPROFOR. The main force of this battalion (below: 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). The commander of Dutchbat was Lieutenant Colonel Karremans. The Deputy Commander was Major Franken.

(v) 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. 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.

(vi) On 11 July 1995, in the late afternoon, Dutch Defence Minister Voorhoeve agreed to the evacuation of the refugees in a telephone conversation with General Nicolai, Chief of Staff of UNPROFOR HQ (the headquarters of UNPROFOR in Bosnia and Herzegovina, previously known as 'BH Command'). Later that day, at 18.45 hrs., Karremans received a fax message from General Gobillard, Deputy Commander of UNPROFOR HQ, instructing him to enter into negotiations with the Bosnian-Serb army and to protect the refugees.

(vii) In the evening of 11 July 1995 General Janvier (Force Commander of UNPF, which was the new name from 1 April 1995 of what had originally been known as UNPROFOR) 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.

(viii) In the evening of 11 July 1995 Karremans held two meetings with Mladić. In the first meeting Karremans stated, among other things, that he had been requested by BH Command and by the national authorities to negotiate, in connection with the fall of the enclave, on the withdrawal of the Dutch battalion and to arrange for the (safe) withdrawal of the refugees.

(ix) In the early morning of 12 July 1995, Karremans spoke on the telephone to Defence Minister Voorhoeve. During this phone conversation Voorhoeve told Karremans to 'save whatever can be saved'. In the course of that morning Karremans had a last meeting with Mladić about the evacuation of the refugees. Mladić agreed that Karremans would take the local personnel along with Dutchbat. Dutchbat then drew up a list of approximately 29 persons who belonged to their local personnel and who would be evacuated along with Dutchbat.

(x) 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.

(xi) In the early afternoon of 12 July 1995 the first refugees who had remained outside the compound were taken away by buses of the Bosnian-Serbs. By the end of the morning of 13 July 1995 all refugees who had remained outside the compound had been taken away. Subsequently, the refugees who had been in the compound were also taken away that afternoon in vehicles of the Bosnian Serbs.

(xii) During the period in which the refugees were being removed, the Dutchbat troops received reports at various times that the Bosnian Serbs were committing crimes against the male refugees in particular. Before the end of the afternoon of 13 July 1995 it was learned, among other things, that the bodies of murdered men had been discovered, that the male refugees (of military age) had been taken to what was referred to as the 'white house' some 300-400 metres outside the compound, where they had been interrogated using physical force, and that outside the house the possessions of the male refugees, including their identity papers, had been thrown on to a pile and that Muslim men with a look of mortal fear in their eyes had been seen in the house.

(xiii) Rizo Mustafić was the husband of Mehida and the father of Damir and Alma. 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, Mustafić, together with his wife and children, had sought refuge in the compound. There they stayed in the office from which he usually worked.

(xiv) On 13 July 1995 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, Mustafić and his family also left. Outside the gate of the compound he was murdered by the Bosnian-Serb army or related paramilitary groups; his family survived.

(xv) Dutchbat left the compound on 21 July 1995.

(xvi) The great majority of the men of military age removed by the Bosnian Serbs were murdered by them. It is thought that the Bosnian Serbs killed over 7,000 men in total, many of them in mass executions.

3.3 The relief sought by Mustafić and Others in these proceedings includes a declaratory ruling that the State is responsible for the damage suffered as a result of the

wrongful conduct towards Rizo Mustafić and Mustafić and Others, and that the State is liable to pay damages to Mustafić and Others for the damage they have suffered and will continue to suffer in consequence of this. In so far as relevant to the cassation proceedings, Mustafić and Others have based their claim on the allegation that the State (Dutchbat) sent Mustafić away from the compound.

3.4 The District Court rejected the application for relief sought by Mustafić and Others. It upheld the State's defence that Dutchbat's conduct was exclusively attributable to the United Nations, and hence not (even partly) to the State, and held that this meant that the State could not be held responsible for any wrongful act committed by Dutchbat.

3.5.1 The Court of Appeal has set aside the judgment of the District Court and held, in a declaratory ruling, that the State is responsible to Mustafić and Others on account of wrongful conduct for the damage they have suffered and will continue to suffer as a consequence of the death of Mustafić. The Court of Appeal held that the disputed conduct of Dutchbat could be attributed to the State.

3.5.2 The Court of Appeal gave the following reasons for this attribution (findings of law 5.1-5.20 interim judgment).

The criterion for determining whether Dutchbat's conduct should be attributed to the United Nations or to the State is which of them had effective control over Dutchbat at the time of the conduct referred to in these proceedings. The generally accepted view is that where a State has placed troops at the disposal of the United Nations to carry out a peace mission, the answer to the question as to which of them specific conduct of such troops must be attributed depends on which of them had effective control over the conduct in question. As it is generally accepted that more than one party can have effective control, the possibility cannot be excluded that application of this criterion could result in attribution to more than one party. This led the Court of Appeal to examine only whether the State had effective control over the disputed conduct and to leave open whether the United Nations too had effective control.

The Court of Appeal then concluded that the State had effective control over the conduct of which Dutchbat

is accused by Mustafić and Others and that this conduct could therefore be attributed to the State.

3.5.3 As regards the alleged unlawfulness of Dutchbat's conduct, the Court of Appeal has held, *inter alia*, as follows (findings of law 6.1-6.21 interim judgment).

Dutchbat should not have caused Mustafić to leave the compound in the early evening of 13 July 1995 since it already knew of the risks to which Mustafić would thereby be exposed. This does not mean that the same applies to the other refugees who had left the compound earlier. The Court of Appeal has not given a ruling on this. In view of the grave consequences for Mustafić of leaving the compound - which were known to Dutchbat - and also in view of the clear wish of Mustafić earlier that day to be allowed to remain in the compound, Dutchbat should have reassessed the matter separately in the light of the situation at that time. There is insufficient evidence that possession of a UN pass was a condition set by the Bosnian Serbs for evacuation with Dutchbat. The Court of Appeal has also assumed that a UN pass could have been made for Mustafić at the compound.

The Court of Appeal has concluded that by causing Mustafić to leave the compound and by not arranging for

him to be taken with Dutchbat to a safe area, thereby resulting in Mustafić's death, the State acted wrongfully towards Mustafić and Others both under the domestic law of Bosnia and Herzegovina and on the grounds of a violation of rights under treaty law, namely the right to life and the prohibition of inhuman treatment. The State is responsible under the law of Bosnia and Herzegovina for the conduct of the members of Dutchbat. Attribution to the State also follows from the principle of effective control.

Can Dutchbat's conduct be attributed to the State?

3.6.1 Parts 1-3 of the grounds of appeal in cassation are directed against the findings and decisions of the Court of Appeal in findings of law 5.7-5.20 of the interim judgment in relation to the attribution of Dutchbat's conduct to the State.

3.6.2 The Court of Appeal has rejected the submission of Mustafić and Others that this attribution should take place in accordance with the rules not of international law but of national Bosnian law. It has held in this connection that the question is not whether Dutchbat

military personnel acted wrongfully towards Mustafić but whether the conduct of troops placed at the disposal of the United Nations, whether or not pursuant to an agreement concluded between the State and the United Nations, should be attributed to the State, the United Nations or possibly to both. The question of whether such an agreement has been concluded and, if so, what it involves and what consequences it has, for example in relation to the issue of which party is liable under civil law for Dutchbat's conduct, should be judged according to international law (finding of law 5.3.2 interim judgment).

These rulings have not been disputed in the cassation proceedings. This means that, when the State's grounds for challenging the ruling that Dutchbat's disputed conduct must be attributed to the State are assessed, it must be assumed that the question of attribution should be answered solely in accordance with the rules of international law.

3.7 In establishing the rules developed in unwritten international law for deciding on what conditions conduct can be attributed to a State or to an international organization, the Supreme Court will refer to two sets of

rules drawn up by the International Law Commission (ILC) of the United Nations, namely the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (below: DARS) and the Draft Articles on the Responsibility of International Organizations of 2011 (below: DARIO).

3.8.1 What is of importance in the first place in determining whether Dutchbat's disputed conduct can be attributed to the State is the provisions of DARS, Part One 'The internationally wrongful act of a State', Chapter II 'Attribution of conduct to a State', of which articles 4 and 8, in so far as relevant here, read as follows:

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. (...)

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

3.8.2 It follows from articles 4 and 8 DARS that Dutchbat's conduct can be attributed to the State if Dutchbat should be considered as an organ of the State (art. 4 (1) DARS) or if Dutchbat in fact acted on the instructions or under the direction or control of the State (art. 8 DARS).

3.9.1 In the proceedings before the Court of Appeal the debate between the parties focused on the question of whether the circumstance that Dutchbat had been placed at the disposal of the United Nations by the State meant that Dutchbat's conduct could be attributed not to the State pursuant to article 4 (1) or article 8 DARS but only to the United Nations. The provisions of the DARIO are of relevance in connection with the latter point.

3.9.2 Articles 6 and 7 DARIO, which are contained in Part Two 'The internationally wrongful act of an international organization', Chapter II 'Attribution of conduct to an international organization', read as follows:

Article 6

Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law,

whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization shall apply in the determination of the functions of its organs and agents.

Article 7

Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

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.

Article 48 DARIO, which is contained in Part Four 'The implementation of the international responsibility of an international organization', Chapter I 'Invocation of the responsibility of an international organization', reads, in so far as relevant here, as follows:

Article 48

Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. (...)

3.9.3 The commentary on article 7 DARIO (at 1) explains how this provision relates to article 6 DARIO as follows:

'When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable

only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 6 would apply. Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as 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 organization or to the seconding State or organization.'

3.9.4 The Commentary on Part Two, Chapter II DARIO (at 4) notes that articles 6-9 DARIO do not necessarily mean that conduct must be exclusively attributed to an international organization - thereby resulting in exclusive responsibility of the international organization - but instead leave open the possibility of conduct being attributed to an international organization and a State, which would then result in dual attribution to the international organization and the State concerned:

'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international

organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.'

Article 48 (1) DARIO therefore expressly leaves open the possibility of more than one State or organization being held responsible for the consequences of an internationally wrongful act.

3.9.5 Finally, the Commentary notes as follows in respect of article 7 DARIO (at 4):

'The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. As was noted in the comment by one State, account needs to be taken of the "full factual circumstances and particular context".'

3.10.1 Part 1 of the cassation appeal submits that in findings of law 5.7 and 5.8 of the interim judgment the Court of Appeal has failed to recognise that a UN troop contingent that has been established in accordance with Chapter VII of the UN Charter and has been placed under the command and control of the United Nations - in this case UNPROFOR, of which Dutchbat formed part - is an organ of the United Nations. This means that attribution of the conduct of such a troop contingent should be made

by reference to article 6 DARIO and not by reference to article 7 DARIO. According to this part of the appeal, application of article 6 DARIO means that Dutchbat's conduct should, in principle, always be attributed to the United Nations.

3.10.2 It is apparent from the Commentary on article 7 DARIO (see above at 3.9.3) that this attribution rule applies, *inter alia*, to the situation in which a State places troops at the disposal of the United Nations in the context of a UN peace mission, and command and control is transferred to the United Nations, but the disciplinary powers and criminal jurisdiction (the 'organic command') remain vested in the seconding State. It is implicit in the findings of the Court of Appeal that this situation occurs in the present case. After all, in finding of law 5.10 of the interim judgment the Court of Appeal has held - and this has not been disputed in the cassation appeal - that it is not at issue that the Netherlands, as the troop-contributing State, retained control over the personnel affairs of the military personnel concerned, who had remained in the service of the Netherlands, and retained the power to punish these military personnel under disciplinary and

criminal law. The submission in part 1 of the cassation appeal that the Court of Appeal has failed to apply the attribution rule of article 6 DARIO and has instead wrongly applied the attribution rule of article 7 DARIO therefore fails.

3.11.1 Part 2 of the cassation appeal consists of a series of submissions directed against findings of law 5.8-5.20 of the interim judgment, in which the Court of Appeal has defined the criterion of effective control in applying the attribution rule of article 7 DARIO to the present case.

3.11.2 In so far as these grounds of appeal are based on the submission that international law excludes the possibility that conduct can be attributed both to an international organization and to a State and that the Court of Appeal therefore wrongly proceeded on the assumption that there was a possibility that both the United Nations and the State had effective control over Dutchbat's disputed conduct, they are based on an incorrect interpretation of the law. As held above at 3.9.4, international law, in particular article 7 DARIO in conjunction with article 48 (1) DARIO, does not

exclude the possibility of dual attribution of given conduct.

It follows that the Court of Appeal was able to leave open whether the United Nations had effective control over Dutchbat's conduct in the early evening of 13 July 1995. Even if this was the case, it does not necessarily mean that the United Nations had exclusive responsibility.

3.11.3 In so far as it is submitted in these grounds of the cassation appeal that the Court of Appeal has applied an incorrect criterion in assessing whether the State had effective control over Dutchbat at the moment of the disputed conduct, they too are based on an incorrect interpretation of the law. For the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently. It is apparent from the Commentary on article 7 DARIO as referred to above at 3.9.5 that the attribution of conduct to the seconding State or the international organization is based on the factual control over the specific conduct, in which all factual

circumstances and the special context of the case must be taken into account. In the disputed findings of law the Court of Appeal has examined, in the light of all circumstances and the special context of the case, whether the State had factual control over Dutchbat's disputed conduct. The Court of Appeal has not therefore interpreted or applied the law incorrectly.

3.12.1 Part 3 of the cassation appeal consists of a series of submissions directed against findings of law 5.8-5.20 of the interim judgment that the State had effective control over Dutchbat's disputed conduct.

3.12.2 This finding of the Court of Appeal is based on, among other things, the following facts and circumstances:

- The context in which Dutchbat's disputed conduct took place differs in one important respect from the normal situation in which troops made available by a State function under the command of the United Nations. After 11 July 1995 the mission to protect Srebrenica had failed. There was no longer any question of Dutchbat - or UNPROFOR in any other composition - continuing or

resuming the mission (finding of law 5.11 of the interim judgment).

- On 11 July 1995 the decision was taken in mutual consultation by the United Nations (i.e. by the UN Force Commander) and the Dutch government to evacuate Dutchbat with the refugees (findings of law 5.11-5.16).

- From 11 July 1995 there was a transitional period in which the business in Potočari was wound up. An important element of Dutchbat's residual task after 11 July 1995 was the help to and evacuation of the refugees (finding of law 5.17).

- During this transitional period not only the United Nations but also the Dutch government in The Hague had control over Dutchbat and also actually exercised this in practice. The Dutch government was closely involved in the evacuation of Dutchbat and of the refugees as well as in the preparations for this, and it could have prevented the conduct in question if it had been aware of this in good time (finding of law 5.18).

- The allegation made by Mustafić and Others, as described above at 3.3, is connected with the manner in which Dutchbat carried out the evacuation of the refugees (i.e. the instructions of the Dutch government about this evacuation) (finding of law 5.19).

3.12.3 The Court of Appeal's ruling that the State had effective control over the conduct of which Dutchbat and hence the State as well are accused by Mustafić and Others does not reveal an incorrect interpretation or application of the law on the concept of effective control. Moreover, the reasons given for this ruling are couched in perfectly clear terms, given the findings on which it has been based by the Court of Appeal, as indicated above at 3.12.2. Although the mission had in fact failed and Dutchbat could therefore no longer exert any influence outside the compound, this does not detract from the fact that the State had effective control over Dutchbat's conduct in the compound. The grounds of appeal of part 3 therefore fail for this reason.

3.13 The above findings lead to the conclusion that parts 2 and 3 of the cassation appeal oppose in vain the Court of Appeal's ruling that the State had effective control over the conduct of which Dutchbat - and hence the State as well - is accused by Mustafić and Others. Given this position, the Court of Appeal was able to find on the basis of the attribution rule of article 7 DARIO, which is applicable to this case, partly in view of what is

provided in the attribution rule of article 8 DARS - that Dutchbat's disputed conduct can be attributed to the State.

3.14 Nor can the other grounds of appeal of parts 2 and 3 result in cassation. Pursuant to section 81, subsection 1, of the Judiciary (Organization) Act no further reasons need be given for this, since these grounds of appeal do not warrant the answering of questions of law in the interests of the uniform application of the law or the development of the law.

Part 4 builds on parts 1-3 and must share their fate.

Was Dutchbat's conduct wrongful?

3.15.1 Parts 5-9 of the grounds of appeal in cassation are directed against the findings and decisions of the Court of Appeal in findings of law 6.3-6.21 of the interim judgment relating to the assessment of the allegation made by Mustafić and Others against the State.

3.15.2 The allegation is that Dutchbat sent Mustafić away from the compound. According to finding of law 6.3 of the

interim judgment the Court of Appeal has assessed this allegation by reference to two sets of rules. First, the Court of Appeal has assessed Dutchbat's disputed conduct by reference to the provisions of the domestic law of Bosnia and Herzegovina, which is the law that is applicable to the alleged wrongful act according to Dutch private international law. Second, the Court of Appeal has assessed this conduct by reference to the legal principles implicit in articles 2 and 3 of the European Convention on Human Rights (ECHR) and articles 6 and 7 International Covenant on Civil and Political Rights (ICCPR) (the right to life and the prohibition of inhuman treatment respectively), as these principles should be regarded as rules of customary international law which have universal operation and are binding on the State.

3.15.3 According to finding of law 6.20 of the interim judgment, the Court of Appeal has found that by causing Mustafić to leave the compound and by not taking him along to a safe area, as a result of which Mustafić died, the State acted wrongfully towards Mustafić and Others both under section 154 of the Law of Obligations Act of Bosnia and Herzegovina and on the basis of violation of

the right to life and the prohibition of inhuman treatment.

The Court of Appeal went on to hold that under section 171, subsection 1, of the Law of Obligations Act of Bosnia and Herzegovina the State was responsible for the conduct of the members of Dutchbat, who had caused the damage 'in the course of their work or in connection with work'. According to the Court of Appeal, attribution to the State also followed from the above-mentioned principle of effective control.

In addition, the Court of Appeal has held that the State is responsible under section 155 of the Law of Obligations Act of Bosnia and Herzegovina for the non-pecuniary damage Mustafić and Others have suffered and may possibly still be suffering as a result of Mustafić's death.

3.15.4 In finding of law 6.21 of the interim judgment the Court of Appeal has come to the conclusion that the claim of Mustafić and Others for relief should be granted in the sense that the Court of Appeal will issue a declaratory ruling that the State is responsible on the grounds of wrongful conduct for the damage which Mustafić

and Others have suffered and will continue to suffer as a consequence of the death of Mustafić.

3.15.5 Parts 5-9 of the grounds of appeal in cassation do not challenge the decision of the Court of Appeal, as described above at 3.15.2, to assess Dutchbat's disputed conduct by reference, on the one hand, to the provisions of the domestic law of Bosnia and Herzegovina and, on the other, to the legal principles implicit in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively).

Nor do parts 5-9 allege that the findings of the Court of Appeal at 3.15.3 above are incorrect in so far as they imply that application of the domestic law of Bosnia and Herzegovina means (i) that the State acted wrongfully towards Mustafić and Others by causing Mustafić to leave the compound and by not taking him along to a safe area, as a result of which Mustafić went to his death, (ii) that the State is responsible for the conduct of the members of Dutchbat, and (iii) that the State is responsible for the non-pecuniary damage which Mustafić and Others have suffered and may possibly still be suffering as a consequence of Mustafić's death. It should be noted incidentally that section 79, subsection

1, opening words and (b), of the Judiciary (Organization) Act prevents the Supreme Court from examining in the cassation proceedings the correctness of these rulings of the Court of Appeal in so far as they are based on application of the domestic law of Bosnia and Herzegovina.

In so far as parts 5-9 challenge the reasoning given for assessing the disputed conduct of Dutchbat by reference to the domestic law of Bosnia and Herzegovina, it should be noted that such arguments cannot be assessed in this case without including the correctness of the ruling of the Court of Appeal on the content and interpretation of that law, which means that these arguments about the reasoning also fail on account of section 79, subsection 1, opening words and (b), of the Judiciary (Organization) Act.

The above means that the Court of Appeal's conclusion as set out above at 3.15.4 is independently based on the rulings of the Court of Appeal concerning the domestic law of Bosnia and Herzegovina which have either not been disputed or have been disputed in vain in the cassation proceedings. The submissions in parts 5-9 challenging the assessment of Dutchbat's disputed conduct by reference to the legal principles implicit in articles

2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively) can also therefore not result in cassation.

3.16 The Supreme Court would observe, by way of *obiter dictum*, in respect of parts 5-9 as follows.

3.17.1 Part 5 submits that any assessment of Dutchbat's disputed conduct by reference to the legal principles implicit in articles 2 and 3 ECHR and articles 6 and 7 ICCPR is prevented by the fact that the State did not have jurisdiction as referred to in article 1 ECHR and article 2 (1) ICCPR either in Srebrenica or in the compound in Potočari. This submission fails.

3.17.2 According to the case law of the European Court of Human Rights (ECtHR), the possibility is not excluded that a Contracting State may, in exceptional circumstances, have the jurisdiction referred to in article 1 ECHR even outside its territory (cf. ECtHR 7 July 2011, no. 55721/07, NJ 2012/430 (Al-Skeini and Others v. the United Kingdom)).

3.17.3 In this case Dutchbat's presence in Srebrenica and in the compound in Potočari resulted from the participation of the Netherlands in UNPROFOR, and UNPROFOR derived its right to take action in Srebrenica from the Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina concluded between the United Nations and Bosnia and Herzegovina (see finding of law 2.6 of the interim judgment). This means that the State was competent, through Dutchbat, to exercise jurisdiction within the meaning of article 1 ECHR in the compound.

Nor can it be said that, after the fall of the enclave on 11 July 1995 and, in particular, at the moment of Dutchbat's disputed conduct, it was *de facto* impossible for the State to exercise jurisdiction as referred to above in the compound. According to the facts on which it has based its judgment, the Court of Appeal has assumed that the Bosnian Serb army respected Dutchbat's authority over the compound to which it had withdrawn until the departure of Dutchbat on 21 July 1995. These facts provide a sufficient basis for the view that the State, through Dutchbat, was actually able to ensure compliance with the human rights enshrined in

articles 2 and 3 ECHR and articles 6 and 7 ICCPR in relation to Mustafić.

3.18.1 Parts 7 and 9 submit that in findings of law 6.8 and 6.11-6.14 of the interim judgment the Court of Appeal wrongly assessed Dutchbat's conduct with the benefit of hindsight. They go on to argue that the Court of Appeal should have assessed whether the actual decisions and actions of Dutchbat were reasonable in the light of what was known to its commanders at the moment of the disputed conduct, which is in fact the criterion actually laid down by the Court of Appeal in finding of law 6.18 of the interim judgment. In this respect parts 7 and 8 advocate judicial restraint by the court in its review, particularly as there was a war situation, Dutchbat had no jurisdiction locally, and the Dutchbat command also needed to secure the safety of the persons working for Dutchbat.

3.18.2 These parts of the appeal in cassation lack any factual basis in so far as they argue that the Court of Appeal assessed Dutchbat's conduct with the benefit of hindsight. It is apparent from findings of law 6.8, 6.11-6.14 and 6.18 of the interim judgment that in each case

the Court of Appeal has applied the criterion advocated in these parts of the cassation appeal, namely whether the actual decisions and actions of Dutchbat were reasonable in the light of what was known to Dutchbat at that time.

3.18.3 In so far as these parts of the cassation appeal allege that the Court of Appeal has failed to take account of the need for judicial restraint in its review of what happened, they too must fail since no basis for the exercise of judicial restraint of this kind can be found in unwritten international law, the ECHR or the ICCPR, or indeed in the domestic law of the Netherlands.

The exercise of judicial restraint of this kind in such a review, as advocated in these parts of the appeal, would mean that there would be virtually no scope for the courts to assess the consequences of the conduct of a troop contingent in the context of a peace mission, in this case the conduct of which Dutchbat and hence the State are accused. Such far-reaching restraint is unacceptable. Nor is this altered by the fact that the State expects this to have an adverse effect on the implementation of peace operations by the United Nations, in particular on the willingness of member States to

provide troops for such operations. This should not, after all, prevent the possibility of judicial assessment in retrospect of the conduct of the relevant troop contingent. The court should indeed make allowance for the fact that this concerns decisions taken under great pressure in a war situation, but this is not something that has been disregarded by the Court of Appeal.

3.19 Parts 10 and 11 build on the previous parts and must therefore share their fate.

4 Decision

The Supreme Court:

dismisses the appeal;

orders the State to bear the costs of the cassation proceedings, those of Mustafić and Others having been estimated up to the time of this judgment at €373.34 in disbursements and €2,200 in fees.

This judgment has been given by vice-president F.B. Bakels as presiding justice and by justices C.A. Streefkerk, M.A. Loth, C.E. Drion and M.V. Polak, and pronounced in public by vice-president F.B. Bakels on 6 September 2013.