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Part Three. Judicial decisions on questions relating the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

A. The Netherlands

*1. Judgment of the Court of Appeal of The Hague, LJN: BR5386 of 5 July 2011 (Mustafić et al.)**

Attribution of responsibility for acts towards third parties—Draft Articles on the responsibility of international organizations of the International Law Commission (ILC)—If a State places troops at the disposal of the United Nations for purposes of a peacekeeping mission, the question as to whom wrongful conduct of such troops should be attributed depends on which party exercises "effective control" over the relevant conduct—Violation of the right to life and prohibition on inhuman treatment— Interpretation of article 171 (1) of the Act on Obligations of Bosnia and Herzegovina— Failure to institute criminal proceedings

[. . .]

Assessment of the appeal

[. . .]

1.3 The Court proceeds on the assumption that the following facts, which have been argued and have not or not sufficiently been contested or that resulted from the exhibits which were not contradicted, have been established between the parties. In chronological order these facts will be mentioned below.

The facts

2.1 In 1991, the Republics of Slovenia and Croatia declared their independence from the Socialist Federal Republic of Yugoslavia. As a result from the fighting that started especially in Croatia, the Security Council of the United Nations decided to set up the United Nations Protection Force (hereinafter: UNPROFOR), with its headquarters in Sarajevo.

2.2 On 3 March 1992, the Republic of Bosnia and Herzegovina also declared its independence from the Socialist Federal Republic of Yugoslavia. Population groups of Muslims and Serbs were both living in Bosnia and Herzegovina. After the Bosnian Serbs had declared their independence from the Republika Srpska (Serb Republic), fighting started among others between the army of Bosnia and Herzegovina on the one

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hand and the Bosnian-Serb army on the other. In relation to these fights the Security Council increased the presence of UNPROFOR and extended its mandate to Bosnia and Herzegovina by Resolution 758 of 8 June 1992.

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

2.4 On 16 April 1993, the UN Security Council adopted Resolution 819, that among other matters included the following:

> "1. Demands that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act;
>
> 2. Demands also to that effect the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica;
>
> (. . .)
>
> 4. Requests the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end; and requests the Secretary-General to report urgently thereon to the Security Council;
>
> 5. Reaffirms that any taking or acquisition of territory by the threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable;
>
> 6. Condemns and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of 'ethnic cleansing';"

2.5 Pursuant to Resolution 824 of the Security Council of 6 May 1993, the number of safe areas was increased.

2.6 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 (hereinafter: SOFA). Art. 6 of the SOFA stipulated that "the Government [Court: of Bosnia and Herzegovina] undertakes to respect the exclusively international nature of UNPROFOR."

2.7 In Resolution 836 of 4 June 1993, the UN Security Council decided among other matters:

> "4. Decides to ensure full respect for the safe areas referred to in Resolution 824 (1993);
>
> 5. Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in Resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in

addition to participating in the delivery of humanitarian relief to the population as provided for in Resolution 776 (1992) of 14 September 1992;

(. . . .)

8. Calls upon Member States to contribute forces, including logistic support, to facilitate the implementation of the provisions regarding the safe areas, expresses its gratitude to Member States already providing forces for that purpose and invites the Secretary-General to seek additional contingents from other Member States;

9. Authorizes UNPROFOR, in addition to the mandate defined in Resolutions 770 (1992) of 13 August 1992 and 776 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defense, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys;

10. Decides that, notwithstanding paragraph 1 of Resolution 816 (1993), Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 above;".

2.8 In his report dated 14 June 1993, the UN Secretary-General provided an analysis of the options for the implementation of Resolution 836. The report includes the following:

"5. A military analysis by UNPROFOR has produced a number of options for the implementation of Resolution 836 (1993), with corresponding force levels. In order to ensure full respect for the safe areas, the Force Commander of UNPROFOR estimated an additional troop requirement at an indicative level of approximately 34,000 to obtain deterrence through strength. However, it would be possible to start implementing the Resolution under a "light option" envisaging a minimal troop reinforcement of around 7,600. While this option cannot, in itself, completely guarantee the defense of the safe areas, it relies on the threat of air action against any belligerents. Its principle advantage is that it presents an approach that is most likely to correspond to the volume of troops and material resources which can realistically be expected from Member States and which meet the imperative need for rapid deployment. (. . .)

6. This option therefore represents an initial approach and has limited objectives. It assumes the consent and cooperation of the parties and provides a basic level of deterrence, with no increase in the current levels of protection provided to convoys of the Office of the United Nations High Commissioner for Refugees (UNHCR). It does however maintain provision for the use of close air support for self-defense and has a supplementary deterrent to attacks on the safe areas. (. . .)".

2.9 In Resolution 844 of 18 June 1993, the Security Council decided to strengthen UNPROFOR according to the recommendation of the Secretary-General in his report of 14 June 1993 under 6.

2.10 On 3 September 1993, the Dutch Permanent Representative to the United Nations offered a battalion of the Airborne Brigade to the Military Adviser of the UN Secretary-General mainly for the implementation of Resolution 836 regarding the safe areas. That proposal was repeated to the Secretary-General by Defense Minister Ter Beek on 7 September 1993. The Secretary-General accepted this proposal on 21 October 1993.

2.11 On 3 March 1994, the Dutch battalion of the Airborne Brigade ("Dutchbat") relieved the Canadian detachment 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, the other units were quartered outside of the city at an abandoned industrial premises in Potocári (the "compound").

2.12 In the period that is relevant for this case, the following persons held the positions outlined below.

The (French) Lieutenant General Janvier was Force Commander of UNPF, since 1 April 1995 the new name of the original UNPROFOR. The UNPF-headquarters were located in Zagreb, Croatia.

The (British) Lieutenant General Smith was Commander of BH Command, since May 1995 named HQ UNPROFOR. Deputy Commander of HQ UNPROFOR was the (French) General Gobillard. The (Dutch) Brigade General Nicolai was Chief of Staff of HQ UNPROFOR. His Military Assistant was the (Dutch) Lieutenant Colonel De Ruiter. HQ UNPROFOR was situated in Sarajevo, Bosnia and Herzegovina.

Three regional headquarters resorted under HQ UNPROFOR, including the North East Sector in Tuzla. The (Norwegian) Brigade General Haukland was in charge of North East Command. The (Dutch) Colonel Brantz was Chief of Staff/Deputy Commander of North East Command. The North East Sector included Tuzla, Zepa and Srebrenica.

Commander of Dutchbat was Lieutenant Colonel ('overste') Karremans. Major Franken was Deputy Commander.

2.13 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 Defense laid down these rules of conduct and instructions, as well as a number of existing rules set out especially for this mission, in the (Dutch) Standing Order 1 (NL) UN Infbat. This Standing Order includes the instruction that after the provision of aid no persons may be sent away if this results in physical threat.

2.14 On 5 and 6 July 1995, the Bosnian Serb Army under the command of General Mladić started an attack on the Srebrenica enclave. On 11 July 1995, Srebrenica was taken by force of arms by the BSA forces. The Dutchbat troops who were still in town withdrew into the compound in Potocari. Subsequently a stream of refugees started leaving the city of Srebrenica. More than 5000 of these refugees were admitted into the compound by Dutchbat, including 239 able-bodied men (in other words between the ages of 16 and 60). The refugees within the compound were accommodated in an abandoned factory hall. A

far larger number of refugees (probably around 27,000) had to stay in Potocari outside the compound in open air.

2.15 On 11 July 1995, at the end of the afternoon Defense Minister Voorhoeve telephoned General Nicolai. Nicolai told Voorhoeve that they did not see any other solution in Sarajevo than to evacuate the refugees. Voorhoeve agreed to that.

2.16 On the same day at 18.45 hours, Karremans received a fax from General Gobillard, with the following instructions:

> "a. Enter into local negotiations with BSA forces [the Bosnian Serb Army, Court] for immediate cease-fire. Giving up any weapons and military equipment is not authorized and is not a point of discussion.
>
> b. Concentrate your forces into the Potacari Camp, including withdrawal of your OPs. Take all reasonable measures to protect refugees and civilians in your care.
>
> c. Provide medical assistance and assist local medical authorities.
>
> d. Continue with all possible means to defend your forces and installation from attack. This is to include the use of close air support if necessary.
>
> e. Be prepared to receive and coordinate delivery of medical and other relief supplies to refugees."

2.17 In the evening of 11 July 1995, General Janvier received the Dutch Defense Chief of Staff Van den Breemen and Deputy Commander of the Royal Netherlands Army Van Baal, who had travelled from the Netherlands to Zagreb in order to hold 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, whereby first of all the UNHCR would be responsible for the evacuation of the refugees.

2.18 In the evening of 11 July 1995, Karremans held two meetings with Mladić, the second time he was accompanied by Nesib Mandžic as representative of the local population. During the first meeting Mladić said that the Muslim civilian population was not the target of his action, but actually that he wanted to offer them help. He asked Karremans if he could request Nicolai to send buses and Karremans replied that he thought that he could arrange for that.

2.19 According to the script of the video recordings that were made of the first of these talks between Karremans and Mladić, among other things Karremans said the following:

> "I had a talk with general Nicolai 2 hours ago.
>
> And, also with the national authorities.
>
> About the request on behalf of the population.
>
> It's a request, because I'm not in a position to demand anything.
>
> We, the Command in Sarajevo has said that the enclave has been lost.
>
> And that I've been ordered by BH Command . . .
>
> To take care of all the refugees.
>
> And are now approximately 10,000 women and children within the compound of Potocari.

And the request of the BH Command is to let's say to negotiate or ask for withdraw of the Battalion and withdraw of those refugees and if there are possibilities to assist that withdrawal.

(. . .)

So, that's why I've been asked by General Nicolai

and more by General Janvier

In Sarajevo

And also by the national authorities

To stop on behalf of the population what has been done, let's say, in the last six days."

2.20 In the early morning of 12 July 1995, Karremans spoke on the telephone to Voorhoeve. Voorhoeve said to Karremans: "save as much as possible".

2.21 In the morning of 12 July 1995, Karremans held a third and final meeting with Mladić, whereby this time Karremans was not only accompanied by Mandžic but also by Ibro Nuhanović and Camila Omanovic. During this meeting Mladić said that he could arrange for vehicles himself. He also mentioned the order in which the refugees were to be evacuated: first the wounded, then the weaker persons, next the stronger women, children and elderly and finally the men between the ages of 17 and 70. The men would first be screened by the Bosnian Serbs to see whether there were any war criminals among them.

2.22 During one or more of his talks with Mladić, Karremans said that he wanted to take the local staff along with Dutchbat. Mladić agreed to that. Consequently Dutchbat drew up a list of approximately 29 persons that belonged to their local staff and who would be evacuated along with the Dutch battalion.

2.23 After Minister Voorhoeve had been informed about this last meeting, Voorhoeve instructed his staff to inform UNPROFOR that under no circumstances Dutchbat was allowed to cooperate in a separate treatment of the men. According to Nicolai he also reported this last instruction to Karremans, but Karremans never confirmed this. According to Karremans this did not present any problems because there would be hardly any able-bodied men on the compound. Voorhoeve gave the same instruction to Lt. Col. De Ruiter in Sarajevo.

2.24 At the beginning of the afternoon of 12 July 1995, buses and trucks of the Bosnian Serbs started to arrive outside the compound in order to pick up the refugees. According to Mladić, who was present around that time, the refugees had nothing to fear, they would be taken to Kladanj [in the Muslim Croatian Federation, Court]. As of 14.00 hours the refugees that were staying outside the compound and that wanted to leave because of their hopeless situation (there was a 'run' on the buses) were deported by these vehicles.

2.25 On 12 July 1995, the UN Security Council adopted Resolution 1004 (1995), that included the following:

"1. Demands that the Bosnian Serb forces cease their offensive and withdraw from the safe area of Srebrenica immediately;

(. . .)

6. Requests the Secretary-General to use all resources available to him to restore the status as defined by the Agreement of 18 April 1993 of the safe area of Srebrenica in

accordance with the mandate of UNPROFOR, and calls on the parties to cooperate to that end;".

2.26 In the morning of 13 July 1995, the transport of the refugees by buses and trucks was continued. Towards the end of that morning all refugees that were staying outside the compound had been deported. Subsequently that afternoon the refugees that were staying inside the compound were also transported by the vehicles provided for by the Bosnian Serbs.

2.27 During the period in which the refugees (both from outside and inside the compound) were deported, the Dutchbat troops received signals at different points in time that the Bosnian Serbs were committing crimes against the male refugees in particular. The testimonies rendered by the persons involved are not identical in every way, but nevertheless they do provide an adequate basis for the Court to be able to conclude that before the end of the afternoon of 13 July 1995 in any case the following had been observed:

(i) Lieutenants Rutten and Oosterveen (adjutant personnel officer) each found 9 or 10 bodies of murdered men and reported this to Karremans in the afternoon of 12 July, although it has not become evident whether both of them had seen the same dead bodies;

(ii) In the evening of 12 July 1995, it had become clear to Franken and Karremans that the buses transporting the male refugees did not arrive in Kladanj;

(iii) The (able-bodied) male refugees were separated from the others and taken to the "white house" at 300 or 400 metres outside the compound; Franken increasingly received reports that the men were interrogated there by use of physical violence;

(iv) Oosterveen heard gun shots with pauses in between, "to execute people", according to him no rattling action fire or normal sounds; it was not necessary to report this because everybody was able to hear this;

(v) On 12 or 13 July 1995, Franken had ordered to draw up a list with the names of the 239 men, hoping this list would have a protective effect;

(vi) In the morning of 13 July 1995, Rutten discovered that outside the "white house" where the men had been taken, all their personal belongings, including identity papers, had been lumped together in a pile; inside the "white house" he found Muslim men with mortal fear in their eyes; Rutten reported this to Karremans;

(vii) Karremans also received a report on the execution of an individual Muslim man.

2.28 Rizo Mustafić (hereinafter: Mustafić) was Mehida Mustafić's husband and the father of Damir and Alma. From the beginning of 1994, Mustafić was working as an electrician for Dutchbat. He was employed by the municipal administration of Srebrenica (Opština) and had been seconded by the Opština to Dutchbat. After the fall of Srebrenica, Mustafić had sought refuge in the compound together with Mehida Mustafić, Damir and Alma. They were staying in the office from where Mustafić used to work.

2.29 On 13 July 1995, Mustafić expressed his intention that he wanted to stay at the compound together with his family. Aide-de-camp Oosterveen reacted to this by saying that that was not possible because everybody had to leave, with the exception of UN personnel. At the end of the afternoon on 13 July 1995, after the remaining refugees had left the compound, Mustafić also left with his family. Outside the gate of the compound

Mustafić was separated from his family by the Bosnian Serbs, he was deported and killed by the Bosnian Serb Army or related paramilitary groups; his family survived.

2.30 On 13 July 1995, at 20.00 hrs, Karremans received a fax from Lieutenant Colonel De Ruiter ("releasing officer": Nicolai) with the subject: Guidelines for negotiations with General Mladić. This fax includes the following:

> "Regarding the negotiations between CO-Dutchbat and Gen Mladić about the possible conditions in relation to the evacuation of Dutchbat from the enclave of Srebrenica the following guidelines will apply.
>
> (. . . .)
>
> 6. Taking along of locals employed by the UN is required.
>
> (. . . .)
>
> 8. In case of a deadlock in the negotiations give immediate feedback to Gen Nicolai (authorized negotiator on behalf of NL Government and UNPROFOR."

2.31 Subsequently, also on 13 July 1995, Karremans sent a fax to Mladić in which he wrote among other matters:

> "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 POTOCARI with (. . .)
>
> (. . . .)
>
> d. Personnel assigned to the UN and to Dutchbat such as interpreters and the people from MSF and UNHCR."

2.32 On 19 July 1995, General Smith signed an agreement with Mladić that included the following:

> "7. To provide the UNPROFOR displacement (including all military, civilian and up to thirty locally-employed personnel) from Potocari 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 Muslims from Potocari, as well as from the hospital in Bratunac.
>
> b. Evacuation of women, children and elderly Muslims, 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 Mladić or their representatives."

2.33 Dutchbat left the compound on 21 July 1995. The Bosnian Serbs did not submit the convoy to any inspections.

2.34 The largest part of the able-bodied men that were deported by the Bosnian Serbs was killed by them. In total the Bosnian Serb actions caused the death of probably over 7.000 men, many of them by mass executions.

The claim and the judgment of the District Court

3.1 Mustafić et al. believe that the State failed in the performance of its agreement with Mustafić, which implied that the Dutch troops would protect Mustafić by letting him stay inside the compound and subsequently evacuate him together with the Dutch battalion. In addition Mustafić et al. hold the opinion that the State acted wrongfully. In the first instance they argued that these wrongful acts consisted of the following elements: (i) the State sent Mustafić away from the compound and did not take him along when Dutchbat was evacuated; (ii) the State should have intervened when Mustafić was separated from his wife and children; (iii) the State failed to report about the human rights violations of which it was aware. According to Mustafić et al. the State's conduct constitutes a breach of the protection agreement between Mustafić and the State and moreover they argue that it is wrongful since it is contrary to the law of the Federal Republic of Bosnia and Herzegovina, as laid down in the "Act on Obligations", and contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Convention on Civil and Political Rights (ICCPR), the Genocide Convention, art. 1 of the Geneva Conventions, as well as the applicable instructions for UNPROFOR.

3.2 Mustafić et al. demanded in the first instance: (i) to rule that the State is liable for the damages resulting from breach of contract with Mustafić, alternatively from a wrongful act towards Mustafić and/or Mehida Mustafić, and/or Alma and/or Damir; (ii) to rule that the State is liable to pay compensation to Mehida Mustafić, and/or Alma, and/or Damir for damages that they have suffered and will yet suffer; and (iii) to order the State to pay the costs of the proceedings, or at least to compensate the costs.

3.3 The District Court disallowed the claims of Mustafić et al. The judgment of the District Court can be summarized as follows.

[. . .]

3.5 As to the merits of the case the District Court considered in the first place that in all their allegations Mustafić et al. are concerned with the question whether the State made enough efforts to prevent the death of Mustafić and that when answering this question no specific significance should be attributed to the Genocide Convention, besides the ECHR and the ICCPR. The fact that a positive obligation is vested in the State to protect the right to life can already be inferred from these last two human rights conventions.

3.6 The District Court concluded from the records of the provisional witness examinations and the NIOD report that already shortly after the fall of Srebrenica a list was drafted of persons who, together with Dutchbat and the UN mission of military observers (UNMO), would receive a special status during the evacuation. However, the criteria for admission to this list, which later became known as "the list of 29", were not absolutely clear or were not applied quite consistently. The District Court deemed that without providing any further evidence no definite decision could be given on the appearance of Mustafić's name on the "list of 29".

3.7 Furthermore, the District Court took the grounds that Mustafić et al. did not sufficiently substantiate their claim that the Dutch authorities (consisting of military force commanders and members of the Government) acted wrongfully towards Mustafić, for example by giving special instructions regarding the evacuation of able-bodied men. It is true that the Dutch Government did have involvement in the fate of the population (e.g.

on 12 July 1995, Minister Voorhoeve gave the instruction to Dutchbat not to cooperate in the separation of men and women), but according to the District Court this does not give evidence of wrongful manipulation.

3.8 Subsequently, the District Court assessed whether the State could be attributed liability for the conduct of Dutchbat. In its primary defense the State argued that Dutchbat's conduct must be attributed exclusively to the United Nations and therefore not (also) to the State. The District Court considered that this question had to be judged in accordance with international public law standards, because the Dutch troops in Srebrenica were charged with the implementation of an order by the UN Security Council. Only in case of mere individual behaviour by members of the troops "off-duty" or when agreements of purely private law nature are concerned, attribution in accordance with national law should be applicable, but in the opinion of the District Court these situations did not occur.

3.9 The defense which was put forward by the State that the actions of Dutchbat must exclusively be attributed to the UN, was allowed by the District Court. The arguments that served as a basis for its judgment can be summarized as follows:

(i) In accordance with the existing international practice and the "draft articles" of the International Law Commission (ILC), the conduct of troops, that are assigned to the UN within the scope of participation in a peacekeeping mission based on chapter VII of the United Nations Charter, must be attributed to the UN, because the "operational command and control" over those troops is transferred to the UN (4.10);

(ii) This transfer does not include personnel matters of the dispatched troops or the material logistics of the deployed detachment, nor the decision about whether or not to withdraw these troops (4.11);

(iii) However, Mustafić had not been deployed by the Netherlands, and the ultimate right of the Netherlands to withdraw Dutchbat from Bosnia and Herzegovina should be distinguished from the right of the United Nations at issue here to decide about the evacuation of UNPROFOR units from Srebrenica (4.12);

(iv) Therefore, the reprehended acts or omissions of Dutchbat should be attributed strictly to the UN (4.13); possible exceptions to this rule of exclusive attribution did not occur (4.16.5);

(v) In relation to this attribution there is no difference in the event of a violation of 'common' standards or of fundamental standards as laid down in the EHCR, the ICCPR, the Genocide Convention and conventions pertaining to international humanitarian law to which the Netherlands is a party (4.14.1);

(vi) The question whether obligations based on the aforesaid conventions should prevail over the obligations that the State is subject to, pursuant to the UN Charter, is not an issue here because making troops available to the UN for a particular mission is a non-obligatory act (4.14.1);

(vii) The UN are not a party to the ECHR; moreover, Mustafić did not come under the jurisdiction of a contracting party in the terms of article 1 ECHR, since the events that Mustafić et al. represent as violations of the ECHR took place in the sovereign state of Bosnia and Herzegovina and neither the UN nor the State exercised "effective overall control" over a part of the territory of that state (4.14.3);

(viii) Even if it were true that the members of Dutchbat seriously defaulted or that there was insufficient supervision within Dutchbat on compliance with fundamental standards, this does not mean that Dutchbat's conduct must not be attributed to the UN; it was not argued that the United Nations and the State had agreed that the State would assume liability towards third-parties (like Mustafić) in the event of violations of fundamental standards, therefore the attribution to the UN of Dutchbat's conduct rules out attribution to the State of the same conduct (4.15);

(ix) There could be a reason for attribution of Dutchbat's conduct to the State in case the State had violated the UN command structure, if Dutchbat had been instructed by the Dutch authorities to ignore UN orders or to go against them and Dutchbat had behaved in accordance with this instruction from the Netherlands, or if Dutchbat to a greater or lesser extent had backed out of the structure of UN command, with the consent of those in charge in the Netherlands, and considered or demonstrated themselves for that part as exclusively under the command of the competent authorities in the Netherlands; however, there are insufficient grounds for attribution to the State in case of parallel instructions (4.16.1);

(x) There are insufficient grounds for the point of view that Dutchbat, by assisting in the evacuation of the citizens of Srebrenica, obeyed an order given by the State which should be considered as an infringement of the UN command structure; even if Nicolai did order the evacuation of the civilians, this does not mean that he did so strictly or for the most part on the authority of the Netherlands; the fact that Voorhoeve agreed that the citizens of Srebrenica who had fled would be evacuated, rather indicates that the UN structure of command was respected; at most, parallel instructions were issued; this does not detract from the fact that, according to the statement given by Nicolai, Voorhoeve thus provided political cover for providing assistance in ethnic cleansing "contrary to UN policy", for Nicolai also stated that the basic decision to evacuate came from Sarajevo, so from Gobillard; moreover, there is no evidence whatsoever that the State gave any instructions as to the manner of evacuation (4.16.5).

3.10 Finally, the District Court considered that it is true that the circumstances on the compound, due to the lack of food and medical facilities and with high temperatures, were hopeless at the time. Nevertheless, there are good arguments in support of the claim that the passive attitude of Dutchbat toward the separate deportation of the able-bodied men by the Bosnian Serbs on 12 and 13 July 1995, was not in conformity with the specific instruction to protect civilians and refugees as much as possible in the altered circumstances, an instruction Karremans had received from Gobillard—so from the UN structure of command—on 11 July 1995. However, the District Court considers that this is of no avail to Mustafić et al., because the acts and omissions of Dutchbat during the evacuation should be considered as those of the United Nations.

3.11 On appeal Mustafić et al. increased their claim. They now demand:

I. To rule:

— That the State is liable for the damages resulting from breach of contract between the State and Mustafić and alternatively from a wrongful act towards Mustafić and/or Mustafić et al.;

— That the State is liable to pay compensation to Mustafić et al. for damages that they have suffered or will yet suffer;

II. To rule that the State violated the Genocide Convention, the ECHR and the ICCPR by not instituting criminal proceedings regarding the violations of these conventions committed by the Dutch troops as put down in ground for appeal 14;

III. To rule that the State is liable for the damage that Mustafić et al. suffered by the violation of Mustafić et al.'s right to a fair trial, in any case to rule that the State violated this right as put down in ground 15;

IV. To order the State to pay the costs of the proceedings in both instances, at least to compensate the costs of the parties.

Outline of the grounds for appeal

4.1 Ground 1 relates to the facts established by the District Court and has been discussed in the above. In so far as this ground presents certain facts that the Court of Appeal deems important in relation to its judgment, it will address these matters below.

4.2 In ground 2, Mustafić et al. argue that the District Court's interpretation of their allegations against the State was far too limited. Therefore, the Court of Appeal will start from the grievances as phrased by Mustafić et al. in the appeal proceedings and which have been summarized hereafter under 6.1.

4.3 Grounds 3 through 9 and 11 through 13 are directed against the judgment of the District Court that the conduct of Dutchbat must be attributed exclusively to the UN, whereby ground 14 also relates to the protection agreement that the State concluded with Mustafić according to Mustafić et al. . The Court of Appeal will first of all discuss these grounds for appeal jointly, in so far as possible, in the section below.

4.4 In ground 10, Mustafić et al. argue that the District Court was wrong in its consideration that no individual significance should be attributed to the Genocide Convention, besides the ECHR and the ICCPR; according to the appellants, the State is liable for being an accessory to genocide and also for having neglected its duty to prevent genocide.

4.5 In ground 14 Mustafić et al. argue additionally that the State violated the Genocide Convention, the ECHR and the ICCPR by not instituting criminal proceedings with respect to the actions of the Dutch troops that sent Mustafić away from the compound.

4.6 Ground 15 regards the substitution of mr. Punt. Mustafić et al. argue that by replacing mr. Punt, the District Court violated a legal principle that was so fundamental that one can no longer consider that the hearing of this case by the District Court constituted a fair and impartial trial.

Attribution of the conduct of Dutchbat; grounds 3–9 and 11–13

5.1 Grounds 3–9 and 11–13 put forward the question whether the acts or omissions (herinafter also: the conduct) of Dutchbat which Mustafić et al. attribute to the State, should be attributed to the UN (opinion State and District Court) or to the State (opinion Mustafić et al.), whereby Mustafić et al. also consider the possibility that this conduct is to be attributed both to the UN and the State.

5.2 Primarily, Mustafić et al. argue (ground 4) that the Dutch troops entered into a protection agreement with Mustafić by telling Mustafić repeatedly that his name was on the list of local personnel and by doing so they offered him to stay at the compound on behalf of the State, which offer was accepted by Mustafić. According to Mustafić et al., pursuant to art. 4 paragraph 1 of the European Convention on the Law Applicable to Contractual Obligations of 19 June 1980, Dutch law is applicable to this agreement. By informing Mustafić that he had to leave the compound, the Dutch troops failed the performance of that contract which contained a special obligation to provide protection. Being the employer of the Dutch troops, the State is liable for this breach of contract. Alternatively, if the Court would not assume the breach of contract, the State is liable on the basis of a wrongful act. Attribution of this wrongful act should not take place in accordance with the practices of international customary law, but according to national Bosnian law. Mustafić et al. therefore argue that the parties agree to the fact that the legal relationship between Mustafić and the State resulting from a wrongful act, is governed by the law of Bosnia and Herzegovina. According to Mustafić et al., international customary law has no direct effect under the law of Bosnia and Herzegovina. Consequently Mustafić et al. believe that this means that based on the Bill on Conflicts of Law in Tort (WCOD) [Wet Conflictenrecht Onrechtmatige Daad] Bosnian law is applicable to the legal relationship between Mustafić and the State resulting from a wrongful act. Pursuant to the WCOD, the only law that can be applied is the national law of a state and not international (customary) law, according to Mustafić et al.

5.3.1 This argument fails. The Court puts first that the facts as represented by Mustafić et al. cannot form the basis for drawing the conclusion that a "protection agreement" had been concluded between Mustafić and the State. Even if it were true that Mustafić's name appeared on the "list of 29", that he had been informed about this and that both Dutchbat Command and Mustafić on the basis of that information assumed that Mustafić was allowed to stay on the compound and would be given special protection, this does not imply that an agreement to that effect had been concluded, because there is nothing to show that Dutchbat or the State had wanted to undertake any legally binding obligation towards Mustafić and considering the circumstances, this was not obvious either. In reasonableness, Mustafić should not have interpreted this course of events in such a way that the State had the intention to conclude such an agreement with him.

5.3.2 Regarding the attribution of the alleged wrongful act, the Court holds the opinion that the argument of Mustafić et al., that attribution of this wrongful act should be done according to the rules of national Bosnian law, fails. The question here is not whether the Dutchbat troops acted wrongfully with respect to Mustafić, but whether, based on an agreement concluded or not between the State and the UN (whether that agreement had indeed been concluded, at least what the contents of this agreement were, is the subject of ground 5) for the deployment of troops, the actions of these troops that are placed at the disposal of the UN should be attributed to the State, the UN or possibly to both. The question whether such an agreement between a sovereign state and an international organization like the UN (which are both legal persons under international law) had been concluded, under which terms and what consequences this had, and also the question which party was liable under civil law for the conduct of Dutchbat, should be judged according to international law. In this respect it has no importance that international law has no direct effect under the national law of Bosnia and Herzegovina.

5.4 However, even if the attribution of Dutchbat's conduct should exclusively be assessed according to national law (in this case the law of Bosnia and Herzegovina), this ground does not succeed. Also in that case the question arises which party in the given context, where a state makes troops available to the UN within the scope of an operation under chapter VII of the UN Charter, is liable under civil law for the conduct of those troops. Since no submission was made by Mustafić et al. and the advice from the International Judicial Institute did not produce any evidence to the Court that the law of Bosnia and Herzegovina contains a specific rule for that situation, the Court finds it obvious and in accordance with Bosnian law that in providing an answer to the above mentioned question harmonization is sought with international law, under which the troops were placed at the disposal of the United Nations.

5.5 In connection with ground 4, the State pointed out that it pleaded in the first instance that the actions of Dutchbat in Bosnia and Herzegovina should only be judged in accordance with international law and therefore not according to any national law, and that it maintains this point of view in the appeal proceedings. The Court deems that this point of view is not correct. The actions of Dutchbat in Bosnia and Herzegovina, notwithstanding the scope of possible immunities, which in this case do not occur with regards to the State, are not released from the scope of the national law of that country and may in principle give rise to (among other matters) liability resulting from a wrongful act under Bosnian law. In its report submitted as evidence by the State (exhibit 29 State), the Advisory Committee on Questions pertaining to International Law (CAVV) [Commissie van Advies voor Volkenrechtelijke Vraagstukken] also proceeds on the assumption that such liability may arise (paragraph 2.5.2). For that matter, Mustafić et al. placed the violations of international law standards at the basis of their claims as well. As will appear hereinafter, an examination according to these last standards does not lead to a substantially different judgment as opposed to an assessment only according to the law of Bosnia and Herzegovina. This means that the State does not have any interest in this argument.

5.6 In ground 5, Mustafić et al. contest the opinion of the District Court that participation in a peacekeeping mission of the United Nations pursuant to chapter VII of the UN Charter implies the transfer of "command and control" over the troops that have been placed at the disposal of the UN. According to Mustafić et al. "command and control" can only be transferred by an explicit act based on an agreement and they claim that there was no such agreement in this case. No submission was made by the State, nor did they produce sufficient evidence to substantiate that such a transfer of "command and control" had taken place. For that reason Mustafić et al. conclude that the wrongful acts of Dutchbat must be attributed to the State.

5.7 The ground fails, for such an agreement is included in the facts as described in the above under 2.10. After all, this paragraph shows that on behalf of the Dutch Government a battalion of the Airborne Brigade was offered to the Military Adviser of the UN Secretary-General and afterwards to the Secretary-General himself, in particular for the implementation of Resolution 836 and that this offer was accepted by the Secretary-General. No special procedural requirements are applicable to this kind of agreement and that is not the argument put forward by Mustafić et al. From an agreement concluded in this manner, no other reasonable conclusion can be drawn than that it was the intention of the parties that the Dutch battalion would operate according to the UN command

structure and would therefore, for the execution of the peacekeeping mission, be placed under the ultimate authority of the Security Council. In Resolution 743 (1992) (exhibit 13 State) of the Security Council, which provided for the creation of UNPROFOR, it was stipulated that UNPROFOR would be resorting under the "authority" of the Security Council. This is confirmed because subsequently Dutchbat was indeed placed under UN command and operated accordingly. For that reason the Court concludes that Dutchbat was placed under the command of the United Nations. Whether this also implies that "command and control" had been transferred to the UN, and what this actually means, can remain an open question because, as will appear hereafter, Mustafić et al. are right in asserting that the decisive criterion for attribution is not who exercised "command and control", but who actually was in possession of "effective control".

5.8 In ground 9, Mustafić et al. argue that in relation to the criterion for the attribution of the conduct of Dutchbat to the UN or the State, the question should be who had "effective control" and not, as assumed by the District Court, who exercised "command and control". This ground for appeal is correct. In international law literature, as also in the work of the ILC, the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has "effective control" over the relevant conduct.

Cf. M. Hirsch, The Responsibility of International Organizations Towards Third Parties: Some Basic Principles (1995) p. 64; F. Messineo, NILR 2009 p. 41–42; A. Sari, Human Rights Law Review 2008 p. 164; T. Dannenbaum, Harvard International Law Journal 2010 p. 140–141. This opinion has also found expression in the draft articles on the Responsibility of international organizations of the ILC, of which Article 6 reads 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."

Although strictly speaking this provision only mentions "effective control" in relation to attribution to the "hiring" international organization, it is assumed that the same criterion applies to the question whether the conduct of troops should be attributed to the State who places these troops at the disposal of that other international organization.

5.9 The question whether the State had "effective control" over the conduct of Dutchbat which Mustafić et al. consider to be the basis for their claim, must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned. Moreover, the Court adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised "effective control" over the alleged conduct and will not answer the question whether the UN also had "effective control".

5.10 When applying the "effective control" criterion it is important to establish that it is not disputed that the state that provides the troops keeps control over the personnel matters of the assigned soldiers, who are and will remain employed by the state, as well as the power to take disciplinary action and start criminal proceedings against these soldiers. It is not disputed either that the state that provides the troops at all times preserves the power to withdraw the troops and to discontinue their participation in the mission.

5.11 Furthermore, the Court attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate, as was the issue at stake in the cases Behrami v. France, No. 71412/01 and Saramati v. France, Germany and Norway, No. 78166/01 of the ECtHR (LJN: BB 7360 and BB 3180). After 11 July 1995, the mission to protect Srebrenica had failed. Srebrenica had fallen that day and it was out of the question that Dutchbat, or UNPROFOR in any other composition, would continue or resume the mission. There is no evidence that Resolution 1004 (1995) (see the above under 2.25) resulted in any order to Dutchbat to take up their positions in and around Srebrenica again, nor did the Bosnian Serb Army comply with the Resolution's call to withdraw their troops from Srebrenica. On the contrary, in the evening of 11 July 1995, in joint consultation with Dutch Defense Chief of Staff Van den Breemen, Deputy Commander Van Baal and General Janvier it was decided that there was no sense in using any further violence; see Parliamentary Inquiry Committee Srebrenica, examinations p. 736 (letter from Van den Breemen). The only option was to evacuate Dutchbat and the refugees, and to proceed in such a way that the refugees would not remain unprotected. As Van Baal put it (record of preliminary examination p. 3):

> "Rather leave all at once, not Dutchbat first, possibly one after the other but under the supervision of Dutchbat",

and before the Parliamentary Inquiry Committee (examinations p. 344):

> "Based on this, a few agreements were made by mutual consultation with General Janvier. Dutchbat was going to evacuate with the battalion. The evacuation of 27.000 people was a major operation."

Van den Breemen wrote to the Parliamentary Inquiry Committee (examinations p. 736):

> "So a cease-fire is needed. Dutchbat stays; humanitarian aid; preparations for evacuation. All this had the purport, given the humanitarian situation and the threat from the Serbs, who were capable of doing anything at any moment, that eventually the refugees as well as Dutchbat had to be evacuated."

5.12 The Court can only conclude that the decision for the evacuation of Dutchbat and the refugees resulting from the consultations between Janvier, Van den Breemen and Van Baal was actually taken by mutual agreement between Janvier on behalf of the UN on the one hand and by Van den Breemen and Van Baal on behalf of the Dutch Government on the other. In the opinion of the Court it is not plausible that two of the highest ranking Dutch military officers had only travelled to Zagreb to be informed about what General Janvier, after being told about their wishes, would decide regarding the evacuation. The Court interprets the background of the consultations of that evening in such a manner that, considering the concerns that existed in The Hague for the safety of both Dutchbat and the refugees, in practice they could only take a decision on the evacuation that not

only The Hague but also (the Force Commander of) the UN would approve of. The fact that Gobillard and Nicolai also took the decision to evacuate does not detract from the above conclusion, because what has been decided at the highest level must be decisive. Apparently both the UN and the Dutch Government considered this decision to be of such importance that they left it up to the Force Commander Janvier and two of the highest Dutch military officers. The Dutch Government participated in that decision-making at the highest level. For that matter, as appears from the statement of Nicolai during the preliminary witness examination, the decision taken in Sarajevo only regarded the evacuation of the refugees, not the evacuation of Dutchbat.

5.13 During the preliminary witness examination (court record p. 2), General Nicolai stated the following about the order of 13 July 1995 attached to the court record of his witness examination, which in paragraph 8 refers to Nicolai as "authorized negotiator on behalf of NL Government and UNPROFOR":

> "It was a turning point; Dutchbat's mission had ended and we were going to focus on getting the battalion back to the Netherlands. In itself this is also a national affair, but apart from that there were additional UN interests and that is why I also acted as the authorized representative for UNPROFOR. In that sense, I kind of had a double role.
>
> In this case things went a little further. Normally I did not receive any orders from the Netherlands, but only from the UN. At this moment the Netherlands also participated in the decision-making. I faxed this order to the Infantry Staff and also to DCBC (Crisis Control Centre at the Ministry of Defense) on the 13th in the course of the day, asking whether the Dutch Government could live with this. (. . .) At that moment, the evacuation of the Bosnian population had already been concluded."

Nicolai stated furthermore (court record p. 6):

> "The Hague phoned me, because The Hague was concerned about the fate of the men and that is why we had to make sure in any case that they would not be treated as an individual group. I told them that we had another priority regarding the order in which the evacuation would have to take place, and that we had not actually taken that into account, but that I would pass it on to Karremans. Subsequently, Karremans said that in fact it was not a relevant problem because there were hardly any men. In my opinion it would [the Court reads: be] completely different if the UN would have been in charge of the transport and not the Serbs. This does not matter, because when the Dutch Government says something like that, as a military officer you just carry it out. By the end of the morning of the 12th it became clear to me that the Serbs would be in charge of the transport."

5.14 Former Minister of Defense Voorhoeve stated as a witness (court record p. 6):

> "My telephone call with Karremans on 12 July took place around eight o'clock in the morning. Based on the conversations held before that time, I told Karremans to save as much as possible."

5.15 In connection with page 206 of exhibit 4, attached to the court record of the preliminary witness examination (Court: the examination conducted by the Parliamentary Inquiry Committee) the following question was put to Voorhoeve about the subject of the "Double role of Mr. Nicolai, representative of the UN and the Netherlands" (court record of preliminary witness examination p. 8):

"You said that the UN command structure did not function. What is the relationship between the double role of Nicolai and the non functioning of the UN command structure?"

Voorhoeve answered:

"There was no direct relationship. My observation that the command structure did not function was based on a long period, a whole year, of noticing that certain parts of the command structure in particular did not function. Pointing at the highest national military officer is common use, also in peacekeeping operations that are proceeding well. I don't know whether I expressed my concerns about the Muslim men to Colonel Brantz on the 11th. I remember that the conversation was about the refugees, the population of Srebrenica."

The aforesaid exhibit 4 (the examination of Voorhoeve by the Parliamentary Inquiry Committee, p. 207), includes the following:

"Mr. Rehwinkel: How could Mr. Nicolai in the fax with the guidelines refer to himself as the authorized negotiator for the Netherlands? How was it possible that in the letter to Mladić they spoke of 'a message from the authorities of the Netherlands'?

Mr. Voorhoeve: Because Mr. Nicolai was given a double role as a result of the circumstances. He was the highest in rank of all military officers in the UNPROFOR organization who were located close to the problem. The situation in Srebrenica fell under UNPROFOR Sarajevo. It was logical that the Dutch concerns about the situation were communicated to Mr. Nicolai."

5.16 From what has been established in the above under 2.30 and 2.31 appears furthermore that Karremans received instructions about the evacuation that were jointly issued by Nicolai in his capacity of "authorized negotiator of the NL Government and UNPROFOR", so also on behalf of the Dutch Government. Karremans also interpreted it in this way, given his fax to Mladić in which he wrote:

"(. . .) 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 (. . .)".

(Section underlined by the Court)

5.17 Based on the above, the Court concludes the following. On 11 July 1995, the UN and the Dutch Government took the decision to evacuate Dutchbat together with the refugees. This implied that Dutchbat, after the evacuation had been concluded, would be withdrawn to the Netherlands in the near future. As of 11 July 1995, a transition period started in which matters in Potocari were being completed. An important part of the completion was the aid to and the evacuation of the refugees. Although, as stated by Van Baal during his preliminary witness examination (court record p. 2), at that moment Dutchbat was not being withdrawn from UNPF yet, there could not be any doubt about the fact that this would certainly take place after the evacuation. Nowhere is it suggested in the documents that Dutchbat would have any role to fulfil within UNPF after the evacuation. The distinction made by the District Court between the right invested in the Netherlands to withdraw Dutchbat from Bosnia and Herzegovina and the right of the UN to decide about the evacuation of the UNPROFOR units from Srebrenica is formally correct, but does not do enough justice to the fact that the one formed an integral part of the other.

5.18 An important part of Dutchbat's remaining task after 11 July 1995 consisted of the aid to and the evacuation of the refugees. During this transition period, besides the UN, the Dutch Government in The Hague had control over Dutchbat as well, because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina. In this respect Nicolai fulfilled a double role because he acted on behalf of the UN and also on behalf of the Dutch Government. The fact that The Netherlands had control over Dutchbat was not only theoretical, this control was also exercised in practice: the Government in The Hague, represented by two of its highest military officers, Van den Breemen and Van Baal, together with Janvier took the decision for the evacuation of Dutchbat and of the refugees, Minister Voorhoeve gave the instruction that Dutchbat was not allowed to cooperate in a separate treatment of the men, and he told Karremans that he had to save as much as possible. Through the intermediary of Nicolai in his double role, the Dutch Government also gave orders to Karremans regarding the evacuation (see 5.16 above). According to the judgment of the Court, in all these cases it was a matter of orders being given and not just transmitting the wishes or expressing the concerns, which Nicolai understood very well ("if the Dutch Government says something like that, as a military officer you just carry it out"). Nicolai sent the order by fax on 13 July 1995 to the Crisis Control Centre at the Ministry of Defense (DCBC) [Defensie Crisisbeheersingscentrum] in The Hague to find out whether the Dutch Government could live with this (see 5.13 above). Karremans also held the view that he was now (jointly) under command of the Dutch Government and acted accordingly (see 5.16 above). In the opinion of the Court it is beyond doubt that the Dutch Government was closely involved in the evacuation and the preparations thereof, and that it would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time. The facts do not leave room for any other conclusion than that, in case the Dutch Government would have given the instruction to Dutchbat not to allow Mustafić to leave the compound or to take him along respectively, such an instruction would have been executed. Moreover, in this respect it is important that, as will appear below, the alleged conduct was contrary to the instruction given by General Gobillard to protect the refugees as much as possible, and that the State held it in its power to take disciplinary actions against that conduct.

5.19 The allegations brought against the conduct of Dutchbat by Mustafić et al. are directly related to the Dutch Government's decisions and instructions. The allegation that Dutchbat sent Mustafić away from the compound is related to the manner in which the evacuation of the refugees was carried out. The allegation that Dutchbat failed to take action when Mustafić was separated from his wife and children is related to the way in which the instruction given by Minister Voorhoeve to prevent a separate treatment of the men, was carried out. The latter also applies to the allegation that Dutchbat did not report immediately about the separation of the men and women and the other human rights violations that were observed.

5.20 The Court concludes therefore that the State possessed "effective control" over the alleged conduct of Dutchbat that is the subject of Mustafić et al.'s claim and that this conduct can be attributed to the State. In so far, grounds 3–9 and 11–13 have been put forward successfully.

Assessment of the substance of the allegations

6.1 The Court will now proceed to discuss the question whether the allegations made by Mustafić et al. hold ground. After increase of the claim on appeal, the following allegations are involved:

(i) The State sent Mustafić away from the compound;

(ii) The State failed to take action when Mustafić was separated from his wife and children which took place before the eyes of the Dutch battalion;

(iii) The State did not report the separation between the men and women and the other violations of human rights that it observed and that were a harbinger for genocide;

(iv) The State failed to institute criminal proceedings regarding the conduct of the Dutch military officers that sent Mustafić away from the compound;

(v) By replacing mr. Punt, the State violated Mustafić et al.'s right to a fair trial.

6.2 According to Mustafić et al. the State acted contrary to the following standards:

– Articles 154, 173, 157 and 182 Act on Obligations of Bosnia and Herzegovina;

– Articles 2, 3 and 8 ECHR and (as the Court understands: in particular) articles 6 and 7 of the ICCPR;

– Art. 1 Genocide Convention;

– Common article 1 of the Geneva Conventions;

– The specific instruction by General Gobillard to Dutchbat [to] "take all reasonable measures to protect refugees and civilians in your care";

– The Resolution of the Security Council that ordered Dutchbat "to deter by presence" (the Court assumes this refers to: Resolution 836) and Standing Operating Procedure 206 and 208.

6.3 The Court will first discuss allegation (i). In the first place the Court will test the alleged conduct of Dutchbat against the provisions of national Bosnian law. Apart from the State's opinion—which has been considered to be incorrect in the above—that the Court should judge Dutchbat's conduct strictly in accordance with international law, it is not disputed that based on Dutch international private law the alleged wrongful act must be tested against the law of Bosnia and Herzegovina. Additionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound. The Court assumes that, by advancing the argument in its defense that these conventions are not applicable, the State did not mean to assert that it does not need to comply with the standards that are laid down in art. 2 and 3 ECHR and art. 6 and 7 ICCPR in peacekeeping missions like the present one.

6.4 In addition, as pleaded by Mustafić et al. and not challenged by the State, pursuant to art. 3 of the Constitution of Bosnia and Herzegovina, provisions from treaties to which the Republic of Bosnia and Herzegovina is a party have direct effect and constitute a part of the law of Bosnia and Herzegovina. Because the ICCPR was in force in any case in 1995, the articles 6 and 7 ICCPR constitute a part of Bosnian law that the Court must

apply in accordance with international private law and consequently these provisions have priority over the law of Bosnia and Herzegovina, in so far as this law were to deviate from the provisions of this treaty.

6.5 Allegation (i) implies that Dutchbat should not have sent Mustafić away from the compound. If Dutchbat had not done this, Mustafić would have been evacuated together with the Dutch battalion, according to Mustafić et al.

6.6 Mustafić was not employed by the UN nor by Dutchbat, but had been working for Dutchbat continuously. After the fall of the enclave of Srebrenica, Mustafić had sought refuge at the compound, together with his wife and children.

6.7 During the hearing of the Court of Appeal, when asked about this matter Mustafić et al. answered that Mustafić was still staying at the compound together with his wife and children after the other refugees had already left the compound, and the State did not deny this statement. So from this statement the Court concludes that Mustafić was still staying within the compound at the beginning of the evening. The kind of knowledge that Dutchbat had (in any case) at the beginning of that evening regarding the incidents that had taken place outside the camp has been established in the above under 2.27. Those incidents, especially when taken into consideration together, were alarming to such an extent that Karremans and Franken reasonably could not have drawn any other conclusion than that the able-bodied men that were going to leave the compound from that moment to be "evacuated" by the Bosnian Serbs, ran the real risk of being killed or at least of being subjected to inhuman treatment. In other words: at the latest, from that moment on, Dutchbat should have known that, at least concerning the able-bodied men, it was not (any longer) a matter of evacuation because they were deported in order to be killed or to suffer serious physical abuse. The fact that especially Major Franken was aware of this situation appears from his statements before the Parliamentary Inquiry Committee and the International Criminal Tribunal for the former Yugoslavia (ICTY), which show that he (although the situation regarding the "white house", i.e. the way in which the Bosnian Serbs treated the men became worse and he feared for the men) had consciously taken the decision to continue the evacuation for the purpose of not putting the women and children into danger (Examinations Parliamentary Inquiry Committee p. 76 and exhibit 52 p. 1056 sentences 1–7). In another examination before the ICTY, Franken testified that on the evening of the 12th:

> "He (Court: Ibro Nuhanović) asked me to stop the evacuation, because he feared everybody would be killed by the Serbs. I answered that I feared, in fact, for the men as well but that, in fact, he asked me to make the choice between thousands of women and children and the men. And then he answered that he understood what I meant, and he agreed and went away."
>
> (Exhibit 13 to summons p. 2021)

These statements can only mean that Franken was conscious of the fact that the men ran a real risk of being killed or of being subjected to inhuman treatment if they were to leave the compound.

6.8 The Court observes for that matter that although the UN and the Netherlands had decided to evacuate the refugees in the evening of 11 July 1995, whereby the UNHCR would take the lead, it is less evident whether Dutchbat at any moment received the instruction to cooperate in the evacuation by the Bosnian Serbs. Whatever the case may

be, the fact cannot be assumed that such an instruction would have implied that they also would have had to support the evacuation if the able-bodied men that were staying at the compound would therefore risk to be killed or to suffer inhuman treatment by the Bosnian Serbs. For that reason it would not be contrary to the instruction of the UN or the Dutch Government if Dutchbat had decided not later than the end of the afternoon of 13 July 1995 to no longer cooperate in the evacuation because of the above mentioned risks. This meant that Dutchbat, according to the standards of the law of Bosnia and Herzegovina and under the legal principles (with binding effect on the State) that are laid down in art. 6 and 7 ICCPR, did not have the right to send Mustafić away from the compound. According to those standards it is not allowed to surrender civilians to the armed forces if there is a real and predictable risk that the latter will kill or submit these civilians to inhuman treatment. By doing so, Dutchbat also acted contrary to the instruction given by General Gobillard "to take all reasonable measures to protect refugees and civilians in your care". For when it had become clear at the latest at the end of the afternoon on 13 July 1995 that the evacuation of the men was (had become) life-threatening, Dutchbat could no longer put up as a defense that it was obeying the instruction to support the evacuation. In comformity with the instruction issued by General Gobillard, from that moment on Dutchbat should have stopped its assistance to the evacuation as it was carried out by the Bosnian Serbs, in any case where it concerned the able-bodied men.

6.9 The judgment that Dutchbat did not have the right to send Mustafić away from the compound could only be different in case Mustafić was not sent away from the compound, as argued by the State but contested by Mustafić et al., or in case there was sufficient ground for justification for sending him away. The Court will now examine whether one of these cases presents itself.

6.10 The Court holds the opinion that the State accomplished that Mustafić left the compound against his will. Oosterveen testified that on 13 July 1995 he had a quick word with Mustafić and that Mustafić then said to him: "we stay here", from which Oosterveen understood that he wanted to stay with his family. According to his statement, Oosterveen then said: "that is not possible, everybody has to leave, with the exception of UN personnel." The Court believes that this remark by Oosterveen in the given context could not in all reasonableness be interpreted by Mustafić in any other way than as a signal to leave the compound. The State does not take the position that Mustafić could have stayed, on the contrary, the State asserts that Oosterveen did not make a mistake because Mustafić did not belong to the UN staff and did not possess a UN-pass. Under these circumstances, the consequences of the fact that Mustafić left the compound that same day must be borne by the State.

6.11 Furthermore, the State put forward in its defense that Mustafić et al. are wrong in isolating Mustafić's position from the other refugees in and outside the compound. The Court also rejects this defense. The Court does not need to give an opinion on the position of the refugees that were staying outside the compound or the other refugees inside the compound. The Court only needs to express its opinion on the position of Mustafić. The Court deems that Dutchbat should not have ensured that Mustafić left the compound at the beginning of that evening, because of the knowledge Dutchbat had gathered in the meantime about the risks that Mustafić would be exposed to upon leaving the compound. This conclusion is regarded apart from the question whether the same applies to the other refugees that had already left the compound earlier and the Court will not express any

opinion regarding that question. The time when Mustafić left the compound is different from the period within which the other refugees left the compound. Also the fact that Mustafić left the compound involuntarily could be different from the other refugees. The Court will not pronounce its opinion on that either. Mustafić, together with his family, was still staying at the compound after the other refugees (possibly with the exception of the Nuhanović family) had already left. Therefore, Dutchbat had the possibility at that time to make an individual assessment of Mustafić's situation and to consider whether, in spite of the earlier notification by Oosterveen, he should be allowed to stay at the compound after all. Considering the serious consequences—apparent to Dutchbat—that were ahead of Mustafić if he were to leave the compound and in view of the apparent wish expressed by Mustafić earlier that day to be allowed to stay at the compound ("we stay here"), Dutchbat should have reconsidered that decision according to the current situation at that time.

6.12 The above also implies that it is not relevant for this case whether Dutchbat could have allowed all the other refugees that had sought shelter at the compound to stay there, in relation to the food, water and other facilities available. The only thing that matters is whether Dutchbat had enough supplies and facilities to let Mustafić stay at the compound. The Court believes this to be plausible beyond any doubt and the State has not denied this fact either. The State's defense that the Bosnian Serb Army checked everything and that the departure of the refugees had become inevitable due to the attitude of the Bosnian Serbs fails in the case of Mustafić; there is nothing to show that the Serbs forced Dutchbat to send Mustafić away from the compound.

6.13 The State's defense that the evacuation could not be stopped because of the great risk for women and children does not succeed either. At the time when Mustafić left the compound, the women and children had already left the compound. The fact that the women and children would have run a risk if Mustafić had been allowed to stay at the compound has not been substantiated in any way and the Court does not consider that to be plausible anyway.

6.14 The Court concludes that the State acted wrongfully towards Mustafić by ensuring that he left the compound against his will. The Court also believes that Mustafić would still be alive (except for special circumstances that are not under discussion) if the State had not acted wrongfully towards him. Although the State disputes that Dutchbat had the obligation to take Mustafić along to a safe area, in establishing the causal relationship it is not relevant—also under Bosnian law—whether the State had the obligation to take him to a safe area, but to find out what would have happened if the State had not acted wrongfully. In this respect, Mustafić et al. have argued that if Mustafić had not been forced to leave the compound, he would still be alive today, which they further substantiated by pointing out that everybody who was still alive and well at the compound on the evening of 13 July has arrived in Tuzla alive. In that respect Nuhanović [translation note: for "Nuhanović" read "Mustafić"] also asserted that the agreement between General Smith and Mladić came down to the decision that all persons that were present at the compound were allowed to leave with Dutchbat. Finally, Mustafić et al. have pointed out that the departing Dutchbat convoy was never submitted to any inspections whatsoever. The State has not contested all of this and has not put forward in particular that Mustafić would have been left behind in Potocari. So with the above, the causal relationship between the compulsory departure of Mustafić from the compound and his death has been demonstrated.

6.15 Although the above can independently support Mustafić et al.'s claim under I, nevertheless the Court will address the State's defense that Dutchbat did not have the obligation to take Mustafić along to a safe area. Briefly summarized, what this defense boils down to is that Mustafić was not employed by the UN, that he was not in the possession of a UN-pass while only persons who had a UN-pass were allowed to be evacuated together with Dutchbat, that the Serbs knew exactly who was working for Dutchbat, that Dutchbat took into account and, considering the experiences of the past, had reasons to take into account that the Bosnian Serbs would closely inspect the departing convoy and that the taking along of persons without or with a false UN-pass would imply enormous risks for the remaining participants in the convoy. On the other hand, briefly summarized, Mustafić et al. have objected to this by stating that a UN-pass was not necessary, that in addition a UN-pass could be made at the compound, that there was room left on the "list of 29" because that list had slightly "thinned out" and, finally, that it has not been substantiated that taking Mustafić along would involve such large risks, especially risks to other persons than Mustafić personally, which would have given Dutchbat the right to refrain from taking him along.

6.16 The Court holds the opinion that it has not been demonstrated sufficiently that the possession of a UN-pass was a requirement that had been demanded by the Bosnian Serbs. Karremans and Mladić had agreed that the local personnel was allowed to leave with Dutchbat. It has not become apparent that during the consultations the possession of a UN-pass had been set as a condition for departure together with Dutchbat. Karremans himself did not state anything about that, he only stated that it was logical that this would be necessary (court record of preliminary witness examination p. 10) and that the possession of a UN-pass clearly had been an issue during the meetings with the representatives of Mladić. However, the Court cannot conclude from this that having a UN-pass had been explicitly or implicitly been stipulated as a condition by the Bosnian Serbs. Furthermore, the Court attaches importance to the fact that the agreement between General Smith and Mladić of 19 July 1995, two days before Dutchbat left the compound, refers to "up to thirty locally-employed personnel", but that this agreement does not mention the requirement of the UN-pass, whereas that would have been logical if the possession of a UN-pass really was a condition stipulated by Mladić. Franken's statement shows that the possession of a UN-pass was not necessary. For Franken has tesitified that Mladić had granted permission for the people employed by the Opština, who were not employed by the UN, to leave with Dutchbat and that on the list that was drawn up subsequently appeared both local personnel employed by the Opština and persons with UN-passes, as far as still present (court record of preliminary witness examination p. 7–8).

6.17 In addition, the Court takes the position that it would have been possible to make a UN-pass for Mustafić at the compound. Mustafić et al. have substantiated this argument, among other matters, by referring to the statements of Oosterveen and Karremans (court record of preliminary witness examination Oosterveen p. 6 and Karremans p. 10), whereas the State has only indicated that it is not sure whether this was indeed possible, because the statements that have been rendered about this issue are contradictory. The State has not put forward a reasoned defense against the argument of Mustafić et al. and therefore this assertion has been established as a fact between the parties. For that matter, the Court deems that the correctness of this assertion is proven conclusively by the quoted statement of Oosterveen because, as appears from his statement, he had personal

experience in producing UN-passes at the compound. The latter is not true of to the other witnesses who gave evidence about this subject.

6.18 In conclusion, the Court believes that, considering the great interests of Mustafić that were at stake, the possible risks that were related to taking Mustafić along with or without a UN-pass in reasonableness should not have resulted in the decision not to take him along. The Court admits that Dutchbat, given the earlier experiences, had to take into account that the convoy that would leave the compound would be thoroughly inspected by the Serbs. The Court also accepts that taking Mustafić along, who was not employed by the UN, would have implied a certain risk, but that this risk could have been reduced by making a UN-pass for him and by placing him on the list of local personnel, in so far as he did not appear on that list already. The State has not disputed the assertion that there was enough room on that list because it had "thinned out". In addition, the Court takes into consideration that Mustafić had been working for Dutchbat for quite some time, which could have been used as an argument towards the Bosnian Serbs to justify his place on the list of locally-employed personnel. Moreover, the defense failed to demonstrate sufficiently that Dutchbat, in all reasonableness, had to take into account any other risk than the one which implied that Mustafić, if checked by the Bosnian Serbs, would have been stopped and killed after all. The State has not brought forward any incidents from the past which reasonably could lead to the conclusion that in case of an inspection, not only the persons against which the Bosnian Serbs objected but also the other participants in the convoy would be in danger. The incident mentioned by the State, when a Bosnian Minister had been taken out of a convoy and had been executed, rather points out the contrary. The State quoted from a statement made by Major De Haan, who thought it would be conceivable that, on the occasion of an inspection by the Serbs, personnel (including Dutchbat) would be pulled from the buses and shot summarily. Apart from the fact that it is not clear whether the State adopts De Haan's view, matters that are conceivable do not, in reasonableness, have to be taken into account. Furthermore, it has not become apparent whether De Haan's statement, about matters being conceivable, was actually based on facts.

6.19 The State also brought forward that based on standing orders Dutchbat was not allowed to take along other civilians than those who were personnel members of the UN. The Court disregards this defense because it believes that the specific order by General Gobillard to protect the refugees as much as possible had priority over the standing order referred to by the State.

6.20 The Court concludes that the State, by ensuring that Mustafić left the compound and by not taking him along to a safe area, which resulted in the death of Mustafić, acted wrongfully towards Mustafić et al., under the provisions of art. 154 Act on Obligations of Bosnia and Herzegovina as well as based on a violation of the right to life and the prohibition on inhuman treatment. Pursuant to art. 171 paragraph 1 Act on Obligations of Bosnia and Herzegovina, the State is liable for the conduct of the Dutchbat members, who were employed by the State and who caused the damage "in the course of their work or in connection with work" (from the translation of exhibit 62 to the summons). The opinion of the State that liability would only exist if Dutchbat were under "direct control" of the State is not correct. This is not supported by the text of art. 171 and has not been substantiated by the State either. The liability of the State also results from the principle of "effective control", as considered in the above. Pursuant to art. 155 Act on Obligations of Bosnia and

Herzegovina, the State is liable for immaterial damage which Mustafić et al. have suffered consequently and will possibly yet suffer.

6.21 The above means that the claim under I in that sense will be allowed and that the Court in its final judgment will rule that on account of the wrongful act the State is liable for damages that Mustafić et al. have suffered and will yet suffer as a result from the death of Mustafić.

6.22 Since the claim under I has been declared allowable based on the allegations and grounds as discussed in the above, the Court will not need to address the allegations (ii) and (iii). The other standards which Mustafić et al. relied upon, including the Genocide Convention referred to in ground for appeal 10, will not need to be discussed either. After all, Mustafić et al. did not base a separate claim on these allegations and infractions of legal standards.

6.23 However, the Court will address allegations (iv) and (v), because Mustafić et al. do claim separate rulings on these.

The allegation that the State failed to institute criminal proceedings

7.1 Mustafić et al. reproach the State that it failed to institute criminal proceedings regarding the conduct of the Dutch troops that sent Mustafić away from the compound (ground 14). They demand the Court to rule that the State violated the Genocide Convention, the ECHR and ICCPR by not starting a criminal investigation into the violations of these conventions committed by the Dutch troops. From the explanation of that ground for appeal, the Court understands that Mustafić et al.'s ground is about the conduct of Oosterveen and other military officers, which they qualify as assisting to genocide.

7.2 Mustafić et al. lodged a complaint with the public prosecutor against [X], [Y] and [Z] in July 2010. Subsequently, the Public Prosecution Service started an inquiry into the facts, which inquiry had not yet been concluded at the time of the oral pleadings before this Court. The Court understands that the allegation of Mustafić et al. now is that during 15 years the State failed to start such an inquiry. Mustafić et al. assert that because of this negligence they suffered immaterial damages.

7.3 The Court judges as follows. The inquiry that Mustafić et al. desire is presently taking place. Therefore they no longer have an interest in a ruling on that issue.

7.4 The State rightfully pointed out that if the Public Prosecution Service, after concluding their inquiry, decides to refrain from prosecution, Mustafić et al. have the right to lodge a complaint pursuant to art. 12 Code of Criminal Procedure (Sv.). The argument that the Public Prosecution Service and therefore the State acted unlawfully by failing to institute proceedings during 15 years, cannot be judged in the present case without dealing with questions such as the possible punishability of the alleged conduct of the Dutch troops brought forward by Mustafić et al., which questions are closely related to matters that are to be adjudicated in a complaints procedure under art. 12 Sv. and that are the exclusive prerogative of the criminal court judge. If the Court would permit itself to judge these questions, it would inadmissibly be prejudging a complaints procedure under art. 12 Sv.

7.5 The conclusion is that ground 14 fails and that the claim based on that ground for appeal will be dismissed.

[. . .]

This ruling was passed by Justices mr. A. Dupain, mr. S.A. Boele and mr. G. Dulek-Schermers and delivered at the public hearing of 5 July 2011, in the presence of the Clerk of the Court.

B. The Republic of the Philippines

1. Decision of the Supreme Court of the Philippines: Bayan Muna, as represented by Rep Satur Ocampo, et al., Petitioners, v. Alberto G. Romulo in his capacity as Executive Secretary and Blas F. Ople, in his capacity as Secretary of Foreign Affairs, Respondents, GR No. 159618

(1 February 2011)

Non-surrender bilateral agreement—Exchange of diplomatic notes can constitute a legally binding agreement under international law—Rome Statute of the International Criminal Court—Signatories only obliged to refrain from defeating object and purpose of Rome Statute—Doctrine of incorporation—Abuse of discretion

Summary

In 2003, the Department of Foreign Affairs (DFA) Secretary accepted the terms of a non-surrender bilateral agreement between the United States and the Republic of the Philippines (RP-US Non Surrender Agreement) through an exchange of diplomatic notes with the United States Ambassador at that time. The Agreement provided that no persons of one Party, in the territory of the other, shall be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council. *In esse,* the Agreement aimed to protect what it referred to and defined as "persons" of the Republic of the Philippines and the United States from frivolous and harassment suits that might be brought against them in international tribunals. The petitioner imputed grave abuse of discretion to respondents in concluding and ratifying the Agreement and prayed that it be struck as unconstitutional, or at least declared as without force and effect.

The foregoing issues were summarized as follows: (i) whether or not the RP-US Non Surrender Agreement was contracted validly, which resolved itself into the question of whether or not the respondents gravely abused their discretion in concluding it; and (ii) whether or not the RP-US Non Surrender Agreement, which was not submitted to the Senate for concurrence, contravened and undermined the Rome Statute of the International Criminal Court (ICC) and other treaties.

The petitioner's initial challenge against the Agreement related to form, its threshold posture being that Exchange of Notes [. . .] cannot be a valid medium for concluding the Agreement. Petitioner's contention—perhaps taken unaware of certain well-recognized international doctrines, practices and jargons—was untenable. One of these was the doctrine of incorporation, as expressed in Section 2, Article II of the Constitution, wherein the Philippines adopted the generally accepted principles of international law and international jurisprudence as part of the law of the land and adhered to the policy of peace,

cooperation, and amity with all nations. An exchange of notes falls "into the category of inter-governmental agreements", which is an internationally acceptable form of international agreement. International agreements may be in the form of (1) treaties that require legislative concurrence after the executive ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal ad [sic] deal with a narrower range of subject matters than treaties. In thus agreeing to conclude the Agreement through the exchange of notes, the then President, represented by the DFA Secretary, acted within the scope of authority and discretion vested in her by the Constitution.

The respondents also raised some issues concerning whether the President and the DFA Secretary gravely abused their discretion amounting to lack or excess of jurisdiction for concluding the Agreement by means of exchange of notes dated 13 May 2003 when the Philippines had already signed the Rome Statute of the ICC although this was pending ratification by the Philippine Senate. A question was also raised whether the Agreement constituted an act which defeated the object and purpose of the Rome Statue of the ICC and contravened the obligation of good faith inherent in the signature of the President affixed on the Rome Statue of the ICC, and if so whether the Agreement was void and unenforceable on the ground.

The Supreme Court ruled that the Non-Surrender Agreement did not defeat the object and purpose of the Rome Statute which was to ensure that those responsible for the worst possible crimes were brought to justice in all cases, primarily by states, and as a last resort, by the ICC. Far from going against each other, one complemented the other; Article 1 of the Rome Statute pertinently provided that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The provision indicated that primary jurisdiction over the so-called international crimes rested, at the first instance, with the State where the crime was committed; and secondarily, with the ICC in appropriate situations contemplated under Art. 17, para 1 of the Rome Statute. The Court found that nothing in the provisions of the Agreement, in relation to the Rome Statute, tended to diminish the efficacy of the Statute, let alone defeat the purpose of the ICC. Furthermore, the Court stressed that the Philippines was only a signatory to the Rome Statute and not a State party. Thus, it was only obliged to refrain from acts which would defeat the object and purpose of the Rome Statute as the articles were not considered legally binding on signatories.

The Supreme Court of the Republic of the Philippines upheld the validity of the RP-US Non Surrender Agreement.

2. *Decision of the Supreme Court of the Philippines: Prof. Merlin Magallona, et al., Petitioners, v. Eduardo Ermita, et. al., Respondents, GR No. 187167*

(16 July 2011)

United Nations Convention on the Law of the Sea (UNCLOS III)— Interpretation of "regime of islands"—UNCLOS III plays no role in territorial claims—Determining maritime zones—Norms regulating the conduct of States in the world's oceans and submarine areas—Treaty of Paris—Delineating of Archipelagic baselines and internal waters —*Locus Standi* — Sovereignty

Summary

The original action for writs of certiorari and prohibition in this case assailed the constitutionality of Republic Act No. 9522 (R.A. 9522), adjusting the country's archipelagic baselines and classifying the baseline regime of nearby territories.

Among others, the United Nations Convention on the Law of the Sea (UNCLOS III), which the Philippines ratified on February 27, 1994, prescribes the water-land ratio, length, and contour of baselines of archipelagic states like the Philippines and sets the deadline for the filing of applications for the extended continental shelf. Complying with these requirement [sic], R.A. 9522 shortened one baseline, optimized the location of some basepoints around the Philippine archipelago, and classified adjacent territories namely, the Kalayaan Island Group (KIG) and the Scarborough Shoal, as "regimes of islands" whose islands generate their own applicable zones.

The Court gave short shift [sic] to petitioners' contention that R.A. 9522 "dismembers a large portion of the national territory" for allegedly not following the pre-UNCLOS III demarcation of Philippine territory under the Treaty of Paris and related treaties and defined under the 1935, 1973 and 1987 Constitutions. It explained that UNCLOS III and its ancillary baselines laws played no role in the acquisition, enlargement or diminution of territory.

> "Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription, not by exhausting multilateral treaties on the regulations of sea-use rights or enacting statues to comply with the treaty's terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law".

It noted that baselines laws such as R.A. 9522 were enacted by UNCLOS III States parties to mark specific basepoints along their coasts from which baselines are drawn, either straight or contoured, to serve as geographic starting points to measure the breadth of the maritime zones and continental shelf. It found that R.A. 9522, by optimizing the location of basepoints, even increased the Philippines' total maritime space (covering its internal waters, territorial sea and exclusive economic zone) by 145,216 square nautical miles.

Contrary to petitioners' claims, the Court also held that R.A. 9522's use of regime of islands framework of UNCLOS III to draw the baselines was not inconsistent with the Philippines' claim of sovereignty over the KIG and Scaborough [sic] Shoal. It pointed out that Section 2 of the law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the KIG and Scarborough Shoal.

> "Far from surrendering the Philippines' claim over the KIG and Scarborough Shoal, Congress' decision to classify the KIG and the Scarborough Shoal as "'Regime(s) of Islands' under the Republic of the Philippines consistent with Article 121" of UNCLOS III manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS III."

Under Article 121 of UNCLOS III, any "naturally formed area of land, surrounded by water, which is above water at high tide" such as positions of the KIG, qualified under the category of "regime of islands" whose islands generate their own applicable maritime zones.

The Court upheld the constitutionality of R.A No. 9552 [sic] demarcating the maritime baselines of the Philippines as an archipelagic state in compliance with UNICLOS III. In an unanimous En Banc decision penned by Justice Antonio T. Carpio, the Court stressed that R.A. 9552's [sic] enactment "allows an internationally-recognized delimitation of the breadth of the Philippines' maritime zones and continental shelf (and is) therefore a most vital step on the part of the Philippines safeguarding its maritime zones, consistent with the Constitution and our national interest." The case is awaiting entry of judgment after the Court denied with finality the petitioners' motion for reconsideration of the decision.