

LJN: BF0181, Rechtbank 's-Gravenhage , 265615 / HA ZA 06-1671(english translation)

Print uitspraak

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Rechtsgebied: Civiel overig

Soort procedure: Eerste aanleg - meervoudig

Inhoudsindicatie: Also see LJN BF0182. In this case the claimant is H. N. He was employed by the United Nations as an interpreter and also worked for Dutchbat. His parents and younger brother had sought refuge in the compound. They too were killed after their departure from the compound. H. N. was part of the local staff who were allowed to stay with Dutchbat. The claimants in both cases argue that Dutchbat and 'The Hague' committed wrongful acts by offering insufficient protection to the victims and exposing them to the enemy. According to the claimants, the State of the Netherlands is liable for this. The State's defence is essentially that the actions of Dutchbat should be attributed exclusively not to the State of the Netherlands but to the United Nations, as this organization exercised operational command and control over the Dutch battalion. The court has allowed this claim. According to the court Dutchbat's actions should be assessed in the context of the UNPROFOR operation they formed part of. The court rejects the assertion that after the transfer of the relevant powers of control and command to the United Nations it still needs to be tested whether the State complied with its obligations under the human rights treaties, the Genocide Convention and the Red Cross conventions (Geneva conventions). If in the execution of powers which the State no longer has standards are violated, then the point of departure should be that these violations cannot be attributed to the State. The European Convention on Human Rights (ECHR) is not applicable according to the court because the United Nations are not a contracting party and the citizens of Srebrenica did not come under the jurisdiction of the Netherlands. Only if those in charge of the armed forces and/or members of National Government had cut across the United Nations command structure, undermining the factual basis in July 1995 for attribution to the United Nations, there would be scope for attribution to the State of the Netherlands. Therefore, the court investigated whether instructions were given to Dutchbat by the Dutch authorities to ignore or go against United Nations orders. Also, the court considered whether Dutchbat with the agreement of the persons in authority in the Netherlands had, to a greater or lesser extent, backed out of the UN command structure. On the basis of the facts and assertions put forward by the claimants, however, the court could not find for attribution to the State of the Netherlands. The court denies the claim.

Vindplaats(en): Rechtspraak.nl

Uitspraak

Judgment

District Court in The Hague

Civil law section

Case number / cause-list number: 265615 / HA ZA 06-1671

Judgment of September 10, 2008

in the case of

[H. N.],
living in [...], Bosnië-Herzegovina,

claimant,
counsel Mr H.J.A. Knijff, LL.M.,

versus

THE STATE OF THE NETHERLANDS (Ministry of Defence and Ministry of Foreign Affairs), established in The Hague,
respondent,
counsel Mr G.J.H. Houtzagers, LL.M.

The claimants shall be referred to hereinafter as [N.].

The respondent shall be referred to hereafter as the State.

As the function of procurator litis has ceased to exist as of September 1, 2008 and no other lawyers have presented themselves as counsel, the procurators litis who acted on behalf of the parties until then are quoted as their counsels in the heading of this judgment. [N.]’s procedural documents were prepared by the counsels referred to under 1.2.

1. The proceedings

1.1 The court has taken note of the following documents:

- The writ of summons dated May 8, 2006, with exhibits;
- The statement of defence, with exhibits;
- The deed of deposit drafted on the State’s request, together with the NIOD report (1), the final report and the inquiries of the Parliamentary Committee of Inquiry on Srebrenica (2) and the judgment of the International Criminal Tribunal for the former Yugoslavia of August 2, 2001 in the case against R. Krstic;
- The statement of reply, with exhibits;
- The deed of submission of exhibits by [N.] dated July 25, 2007, with two exhibits;
- The rejoinder, with an exhibit;
- The deed of submission of exhibits from the State, with two exhibits (first sent by letter of June 2, 2008 and replaced by completed versions by letter of June 13, 2008);
- The productions sent on behalf of [N.] sent by letter, dated June 3 and June 5 (exhibits A through E and F through I, respectively) for the benefit of the oral pleadings;
- The second deed of submission of exhibits by [N.] with an addendum to exhibit 62;
- The correspondence between the counsels representing the parties, i.e. a letter by Ms L. Zegveld, LL.M., dated June 4, 2008 and a letter by Mr G.J.H. Houtzagers, LL.M., dated June 12, 2008;
- The deed containing a change of claim;
- The official record of the hearing dated June 16, 2008 when the oral pleadings were held;
- The memorandum of oral pleading of [N.], with exhibits;
- The memorandum of oral pleading of the State;
- The letter by the State dated June 17, 2008 concerning the costs of the proceedings.

1.2 The course of the proceedings appears from the documents of the case. At the hearing of June 16, 2008, the parties had their cases pleaded; the claimants by Ms L. Zegveld, LL.M. and Mr M.J.G. Uiterwaal, LL.M., lawyers in Amsterdam; the State by Messrs G.J.H. Houtzagers, LL.M., M. Dijkstra, LL.M. and A. van Blankenstein, LL.M., lawyers in The Hague. [N.] also addressed the court in person. A summary record of what was dealt with during the hearing was made subsequently. At the end of the hearing the date of today’s judgment was set.

1.3 In order to meet the provisions of article 155, sub 2 of the Code of Civil Procedure, and in response to what the counsels for the claimants argued in their oral pleadings, the court sets out the following about its composition for dealing with this case as well as the case of [M. M.-M.], [D. M.] and [A. M.] versus the State, cause-list number 06-1672 (hereafter: the [M.] case).

In May and June 2005 provisional examinations of witnesses preceded the summons. The examinations were held, in turn, by Ms A.C. van Dooijeweert, LL.M. and Mr B.C. Punt, LL.M. The latter in the [M.] case also acted as judge before whom the parties were ordered to appear in person on April 25, 2007. Neither are part of the panel of three judges that was formed in late 2007, early 2008 to hear the pleadings in this case and the [M.] case and deal with them further. Ms Van Dooijeweert, who presided over the civil law

section in 2005, was appointed presiding judge of another section in 2006 and has not worked in the civil law section since. Mr Punt does not form part of the department within this section dealing with proceedings commencing with a writ of summons concerning liability of the State. This was already so when he was asked at the time to conduct the provisional examinations of witnesses. Originally, it was strictly for this purpose, and later also to sit at the hearing where the parties were ordered to appear that he was appealed to, due to understaffing of the department in question. Subsequently, in mid 2007, he was asked whether he would remain involved in this case and, possibly, others concerning Srebrenica. The consultations held with him resulted in the decision, fully subscribed to by him, that he would refrain from further involvement. Entering into this was also - apart from the fact that he was and is not working for the said department - that his number of hours to be worked had been reduced, on his own request, as of February 2007, upon reaching the age of 65, whereas the Srebrenica case was expected to be exceptionally time-consuming. The hearing where the parties had to appear in person was another case, in view of its limited extent: establishing (irrespective of the legal merits) whether settlement was possible.

In response to certain specific remarks put forward by counsels on behalf of the claimants in their oral pleadings the court adds the following. The fact that Mr Justice Punt is not part of the section of the court now dealing with the case has nothing to do with his assessment of the merits of the case. The allegation that this judge was “taken off the case” due to his opinion on the dispute, even “just before the oral pleadings” as the counsels on behalf of the claimants suggested or even presumed, is far from the truth.

2. The facts

2.1 On March 3, 1992 the Republic of Bosnia-Herzegovina declared its independence from the Socialist Federal Republic of Yugoslavia, following the Republics of Slovenia and Croatia. Subsequently, on March 27, 1992 the Bosnian-Serb leaders declared the independence of territories within Bosnia-Herzegovina previously declared autonomous by them under the name of Republika Srpska (Serbian Republic). Round the same time hostilities broke out between the Yugoslav People’s Army (JNA) and Serb militias on the one hand, and Croatian and Muslim militias on the other hand. On April 7, 1992 Bosnia-Herzegovina was recognized by, among others, the member states of the European Union and the United States of America. On July 5, 1992 the official army of Bosnia-Herzegovina was founded.(3)

2.2 Srebrenica is a city in eastern Bosnia. After Bosnia-Herzegovina had been declared independent eastern Bosnia became the scene of combat, first between Muslim fighters and Serbian militias and later between the army of Bosnia-Herzegovina and the Bosnian-Serb army. As a result, in the course of time Muslim enclaves came into existence, including that of Srebrenica and environs.(4)

2.3 Due to continuing armed conflict in Bosnia-Herzegovina the United Nations Security Council, in resolution 758 of June 8, 1992 extended the mandate of the United Nations Protection Force (UNPROFOR) from the war in Croatia to include that in Bosnia-Herzegovina.

2.4 On April 16, 1993 the UN Security Council, in resolution 819, called on all combatants to turn Srebrenica, besieged by the Bosnian Serbs, into a safe area (‘safe area which should be free from any armed attack or any other hostile act’). In resolution 824 of May 6, 1993 this summons was repeated and the number of safe areas was extended.

2.5 On May 15, 1993 the United Nations and Bosnia-Herzegovina signed an agreement in Sarajevo about the status of UNPROFOR in Bosnia-Herzegovina (‘Status of Forces Agreement’, abridged to SOFA). In it, in article 6, the exclusively international nature of UNPROFOR was laid down. The SOFA provided, in articles 48 and 50, a special procedure for dealing with disputes and claims of a private-law nature in which UNPROFOR or a member would be a party and in which the courts of Bosnia-Herzegovina would have no jurisdiction on the basis of any provision in SOFA.

2.6 In resolution 836 of June 4, 1993 the UN Security Council extended the UNPROFOR mandate on the basis of chapter VII of the Charter (‘action with respect to threats to the peace, breaches of the peace, and acts of aggression’) in order to enable UNPROFOR to counter attacks on the safe areas by deterrence.

In execution of the mandate UNPROFOR was given the authority to take measures necessary for self-defence, including the use of violence. Member states and regional organizations (what was meant was: NATO) were given permission to support UNPROFOR in the implementation of its task to deploy air power, under the command of the Security Council and in close co-operation with the Secretary-General of the United Nations and UNPROFOR. Afterwards, this mandate was described as follows by the Secretary-General:

“to protect the civilian populations of the designated safe areas against armed attacks and other hostile acts, through the presence of

its troops and, if necessary, through the application of air power, in accordance with agreed procedures.” (5)

2.7 On November 12, 1993 the Dutch government, on the request of the Secretary-General of the United Nations, complied with the proposal to send a battalion of the Airborne Brigade of the Royal Netherlands Army to Bosnia-Herzegovina. (6)

2.8 The main force of the Dutch battalion (‘Dutchbat’) was stationed in the enclave Srebrenica. Dutchbat relieved the Canadian detachment deployed there on March 3, 1994. (7) With the exception of an infantry company quartered in town, the Dutchbat units were stationed approximately 5 kilometres outside town, on an abandoned factory site in Potocari (the ‘compound’) along the road to Bratunac. (8)

2.9 On July 11, 1995, Srebrenica was taken by force of arms by the Bosnian-Serb army under the command of general Ratko Mladic (hereafter: Mladic). The Dutchbat troops stationed in town at the time then retreated to Potocari.

2.10 During the fall of Srebrenica lieutenant-colonel Th.J.P. Karremans (hereafter: Karremans) was in charge of Dutchbat as its commander, and major R.A. Franken (hereafter: Franken) as his deputy. The French general H. Gobillard (hereafter: Gobillard) was then in charge of the ‘Bosnia-Herzegovina Command’ of UNPROFOR in Sarajevo as deputy commander. Chief of staff there was the Dutch brigadier C.H. Nicolai (hereafter: Nicolai), who in those days also acted as liaison officer for the Dutch government.

2.11 After the fall of Srebrenica a stream of refugees got going from the city to Potocari. Amongst them were comparatively few men, and even fewer of fighting age. Of the refugees over 5,000 were admitted into the compound according to later counts. A far larger number of refugees had to stay outside the compound.(9)

2.12 On July 11, 1995 Gobillard in effect instructed Karremans in view of the new situation, amongst other things, to take measures to protect refugees and civilians (“Take all reasonable measures to protect refugees and civilians in your care”).

2.13 Amongst the refugees who were admitted into the compound were [N.]’s parents. [N.] was employed as an interpreter by the United Nations and working for the mission of military observers for the United Nations (‘United Nations Military Observers’, abridged to ‘UNMO’s’), later also for Dutchbat. When it became evident that the enclave would fall into the hands of the Bosnian Serbs [N.] accommodated his younger brother, [M. N.], in the compound. Later also his father, [I. N.], and his mother, [N. N.-M.], found refuge there. [I. N.] was part of the committee of three refugees representing the Muslim population in negotiations with Mladic. In the compound [N.]’s family stayed in the temporary UNMO office set up there in the preambles to the fall of the enclave.

2.14 On July 12 and 13, 1995 the refugees who were inside the compound were taken away by the Bosnian Serbs, during which operation the able-bodied men were almost immediately separated from the rest. Women, children and senior men were taken to safety by coach or truck. A few individuals with a special status or special protection were allowed to stay in the compound. The individuals staying behind included local staff of Dutchbat or of the mission of military observers of the UNMOes who were employed by the United Nations and had a UN identity card (the interpreters and the hairdresser). (10)

2.15 [N.]’s mother and brother left the compound under compulsion on July 13, 1995, together with [N.]’s father. They were amongst the very last refugees still staying within the compound. At the very last minute Franken had offered [I. N.] to remain behind in the compound, because he enjoyed special protection as a representative of the refugees. [I. N.] chose not to take up this offer but stay with his wife and his son [M.].

2.16 Dutchbat and the United Nations military observers were evacuated from the compound to Croatia, together with the others remaining behind including [N.], on July 21, 1995.

2.17 Nothing has ever been heard of [N.]’s mother and brother since. In 2007 [N.] learned that [I. N.]’s mortal remains were found in a mass grave.

2.18 By letter of February 14, 2003 the State declared it is not prepared to acknowledge any wrongfulness or liability towards [N.] or his deceased relatives.

2.19 In May and June 2005 provisional witness examinations have been conducted by this court on the request of [N.] and of the

claimants in the [M.] case). The names of the individuals examined are listed here in the order in which they were examined. Where necessary the functions they had in July 1995 are indicated. They were:

- Aide-de-camp B.J. Oosterveen, Dutchbat personnel officer (hereafter: Oosterveen);
- A.de Haan, UNMO (hereafter: De Haan);
- Franken;
- Karremans;
- Nicolai;
- Major General A.P.P.M. van Baal, deputy commander of the Royal Netherlands Army);
- J.J.C. Voorhoeve, Minister of Defence (hereafter: Voorhoeve).

3. The dispute

3.1 [N.] demands after change of claim:

- to rule that the State is liable for the damages resulting from breach of contract with [N.], or alternatively from a wrongful act against [M. N.] and/or [I. N.] and/or [N. N.-M.] and/or [N.] himself;
- to rule that the State is liable to pay compensation to [N.] for damages that he suffered as a result and will yet suffer;
- to order the State to pay the costs of these proceedings, or at least to compensate the costs;
- to rule, if possible, that the judgment is immediately enforceable.

3.2.1 [N.] bases his claim on the assertion that the Dutch troops and those in charge in the Netherlands (those in charge within the armed forces and members of National Government) acted wrongfully toward [M. N.] and/or [I. N.] and/or [N. N.-M.] and/or [N.] himself according to written and unwritten standards of national and international law by not including [M. N.] in a list of local staff and/or by sending [M.] and [I. N.] off the compound and/or by failing to intervene when [M.] and [I. N.] were separated from their mother and wife by the Bosnian Serbs and deported and/or by failing to report in time and completely about the separation, probable abuse and imminent execution of [M.] and [I. N.].

The State is liable for this pursuant to national and international law. Any liability of the United Nations under international law does not detract from the State's own liability. Because of the State's wrongful acts and omissions [N.] suffered material and immaterial damages, the exact scope of which has yet to be assessed. The grounds for this claim are argued in the manner presented hereafter under 3.2.2 through 3.2.8.

3.2.2 The names of the local staff had been recorded on a list of originally 29 persons whom Dutchbat could evacuate together with its own troops. On [N.]'s request De Haan asked Franken to include [M. N.]'s name on the list. After a while Franken denied this request on incorrect grounds. On all levels Dutchbat was aware of the imminent threat to the men. Nevertheless, on July 13, 1995 [M. N.] was sent off the compound, where he was safe. The same was true for [I. N.], who under the circumstances had no realistic choice. When [M.] and [I. N.] were separated outside the gate from their mother and wife, Dutch troops did not intervene. Even after the last Muslim refugees had left the compound on July 13, 1995, the United Nations were not reported on the separation of the Muslim men and the violation of human rights that had either been observed personally by soldiers of the Dutch battalion or that they had learned about from others.

3.2.3 The law of Bosnia-Herzegovina is applicable to these actions pursuant to the Wrongful Act (Conflict of Laws) Act. In 1995 in Bosnia-Herzegovina the 'Act on Obligations' (Zakon o obligacionim odnosima, abridged to ZOO) was in force, which had come into force in Yugoslavia in 1978. Article 154 ZOO includes a general provision on liability for causing damage. The person held liable may prove the damage is not his fault, the wrongful act is a fact. (11) Also applicable are articles 173 and 174 ZOO, on (amongst other things) the liability for damage resulting from dangerous acts. Further, [N.] invokes articles 157 and 199 ZOO, which offer protection in case of infringement on personal rights. Article 182 ZOO (12) invoked by [N.] refers to denying aid to people in emergencies.

3.2.4 Besides, the State impaired [M.] and [I. N.]'s right to life and their right to physical integrity. These rights are protected by articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and articles 6 and 7 of the International Convention on Civil and Political Rights (ICCPR). The State also impaired the right to family life, protected by article 8 ECHR, of each of the four members of the [N.] family, considering that both [I. N.] and [N.] himself were entitled to remain within the compound.

The State's actions also constitute a violation of international humanitarian law, of which the obligation to protect the civilian

population is a key principle. A large number of provisions of the fourth Geneva Convention of 1949, including article 3, and of the supplementary protocols of 1977 concern this subject. Also of importance are articles 12 and 13 of the third Geneva Convention of 1949, on the treatment of prisoners of war.

For the UNPROFOR mission the standards of international humanitarian law and human rights are detailed in UN Security Council resolution 836 of June 4, 1993, extending the mandate to include deterrence of attacks on the safe areas, by 'Standing Operating Procedures' nos. 206 ('Protection of persons seeking urgent assistance') and 208 ('Human rights and war crimes') and by Standing Orders in the Dutch language to the battalion, which include, amongst other things, the provision that after the provision of aid no persons may be sent away if this results in physical threat. Even the specific instruction that Karremans received on July 11, 1995 after the fall of the enclave from Gobilard was aimed at protecting the Muslim refugees.

In his reply [N.] extended the basis of his claim with the assertion that the State violated the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: the Genocide Convention) of 1948 by making insufficient efforts to prevent genocide.

The violation of international rules constitutes a wrongful act according to Bosnian and/or Netherlands law as well as international law. The ECHR provisions are applicable as they were applicable at the time under Bosnian law, also because the State had jurisdiction in Bosnia at the time and, finally, because the provisions constitute priority rules (standards which are applicable irrespective of the law designated by rules of referral of Netherlands international private law). The obligations ensuing from the ICCPR are also generally applicable and in 1995 formed part of the law of Bosnia-Herzegovina. During oral pleading [N.] substantiated his claim that international rules are immediately enforceable within Bosnian law by reference to article 3 of chapter VII of the Constitution of the Federation of Bosnia-Herzegovina (13).

3.2.5 In his pleadings [N.] also equated the wrongful acts claimed to be committed by the State with exposure to the enemy, which under Dutch law constitutes to a crime (article 5 of the Criminal Law in Wartime Act).

3.2.6 Under Bosnian law the State's liability for the conduct of its own troops ensues from articles 170-172 ZOO and under Dutch law from article 6:170 Civil Code. The Dutch troops in Srebrenica were employed by the State. The State exercised control over them, both formally and effectively. The 'full command' (the ultimate power of command) over the acts and omissions of one's own troops always rests with the State, who according to article 97, subsection 2 of the Constitution has the supreme authority over the armed forces. The 'operational command and control' of the Dutch battalion were not transferred to the United Nations. In any case, such a transfer of command does not affect in any way personnel matters such as the withdrawal of a battalion. Moreover, the United Nations in those critical days in July 1995 did not function properly any longer and the State took charge again. Lack of clarity about the division of powers between the State and the United Nations should not be for the account of [N.].

Under international law, too, which is applicable either directly or by corresponding interpretation of the national law, the State is liable for the acts and omissions of its troops in Srebrenica in 1995. In this context [N.] asserts primarily that any liability of the United Nations does not detract from the State's liability towards them. Pursuant to article 34 of the Vienna Convention on Treaties the agreement that the Netherlands entered into with the United Nations cannot have any legal consequences for the citizens of Bosnia-Herzegovina. Any transfer of operational powers by the State to the United Nations cannot set aside the conventions on human rights and international humanitarian law to which the State is a party. Alternatively, [N.] asserts that the State remains liable for violations of the standards committed in the execution of the powers transferred by the State to the United Nations, as the protection of human rights offered by the United Nations is not on a par with the protection under the ECHR. Both on an abstract level as in this particular case the protection by the United Nations does not come up to the mark of that by the State which is subject to the jurisdiction of the European Court of Human Rights. As a second alternative [N.] asserts that the State remains responsible for its own acts due to gross negligence, insufficient monitoring of the compliance with fundamental standards and interference in (cutting across) the command structure of the United Nations.

3.2.7 [N.] is entitled to compensation pursuant to articles 155, 200 and 201 ZOO for the mental distress he suffered due to the death of his next of kin. Not just the immaterial damage he suffered as a consequence of the death of his parents, but also that caused by the death of his brother, with whom [N.] lived together all his life.

3.2.8 Under Bosnian law the United Nations' obligation to recompense the damage suffered by the claimants, if any, does not detract from the State's joint and several liability. This follows from article 206 ZOO.

3.3 The State puts forward a reasoned defence. This is addressed where necessary hereinafter.

4 The assessment

4.1 The fates of [M. N.], [I. N.] and [N. N.-M.] and the grief of their brother and son are not isolated. What happened to them is part of an even larger tragedy which ended in the massacre of Muslim men in the weeks following the fall of Srebrenica. Estimates of the number of victims vary. The correct number is hard to establish for independent investigators. By no means all bodies have been found. Sometimes mass graves were opened and the bodies found were scattered. Some of the missing persons may have succumbed to exhaustion. According to the NIOD report, which was also quoted in relation to this by the parties, the number of casualties and missing persons may be set at 7,000 to 8,000, mostly able-bodied men.⁽¹⁴⁾ In part this concerned men who had first fled to Potocari. According to the NIOD report presumably around 2,000 men stayed there, of whom three quarters were between 16 and 60 years of age. Of the able-bodied men approximately 300 had been admitted to the compound.⁽¹⁵⁾ Amongst them were also [N.]’s brother and father. The court assumes, like the parties, that they were subsequently killed by the Bosnian Serbs, and that [N.]’s mother was also killed in this manner.

4.2 The question whether the State could have prevented the massacre of the Muslim men need not be addressed in these proceedings. In the context of the asserted violation of the Genocide Convention [N.] calls this question irrelevant. His claim that the convention was violated is based on the judgment pronounced by the International Court of Justice of February 26, 2007 in the case of Bosnia-Herzegovina versus Serbia and Montenegro, in which the massacre is qualified as genocide, and in which it was ruled that the obligation under the convention was not an obligation to guarantee a certain result but one to perform to the best of one’s ability. By not reporting human rights violations it had observed, the State failed to meet its obligations under the Genocide Convention according to [N.]. Whether meeting these obligations could have prevented the execution of [N.]’s next of kin, however, can no longer be established according to [N.].

In all his assertions, the court understands, [N.] is concerned with the question whether the State attempted to prevent the death of his next of kin to the best of its ability. In providing an answer to this question the Genocide Convention has nothing to add to the ECHR and the ICCPR, for it can already be inferred from those two human rights conventions that the State has a positive obligation to protect the right to life. The claim that the State violated the three conventions quoted here shall be dealt with later on in this judgment.⁽¹⁶⁾

4.3 The issue of these proceedings is the State’s responsibility, if any, for the death of [N.]’s brother and parents. [N.] sues the State for wrongful act, having in mind that the Dutchbat troops and those in charge in the Netherlands (those in charge in the armed forces and members of National Government) offered deficient protection. The court will first address, in 4.4, this reproach of wrongful acts by these authorities. Next, the acts and omissions by Dutchbat will be dealt with.

4.4 One of [N.]’s assertions is that the State cut across the UN command structure. Insofar as this claim refers to, possibly, taking incorrect action of those in charge toward the United Nations, the State cannot be held liable by [N.] as this does not constitute a wrongful act as such in respect of [N.] or his next of kin who were killed. Here, the issue is strictly the question whether the said authorities acted unlawfully toward [N.]’s brother or parents or toward [N.] from the Netherlands, for instance by giving specific instructions in regard of the evacuation of the able-bodied men or the local staff.

It is an established fact that from the part of the Dutch Government in the days around the fall there was concern with the fate of the local population. Voorhoeve stated as a witness both to the Parliamentary Committee of Inquiry on Srebrenica and to the court that on July 12, 1995 he instructed Dutchbat via Sarajevo not to co-operate with the separation of men and women.⁽¹⁷⁾ Nicolai confirmed as a witness that this concern was expressed in The Hague. This is not an instance of unlawful influencing, however. Furthermore, no submission was made nor evidence produced that the evacuation of local staff was raised as a separate issue by the ministers. It was discussed during the telephone conversation referred to above under 4.4.2 between Karremans and Van Baal. It must be assumed, however, that this conversation did not take place until after [M.] had left the compound already, so that this cannot have influenced his departure. For the claim that those in charge in the armed forces and members of National Government acted wrongfully toward [N.]’s brother and parents or toward [N.] himself the court all in all expected further substantiation, but this was not provided. This claim is therefore dismissed.

4.5 The court will now address whether the State can be held liable for a wrongful act committed by Dutchbat. The State’s first defence was the claim that the actions by Dutchbat must be attributed exclusively to the United Nations, and therefore not (also) to the State. If this defence is successful, the State’s further defences do not need to be addressed.

4.6 The State’s primary defence must be assessed according to standards of international public law, for the parties agree that the

Dutch troops in Srebrenica were charged with the implementation of an order by the UN Security Council. The Dutchbat mandate was based on a Security Council resolution ensuing from chapter VII of the UN Charter. If the mandate offers no scope for particular action, or if this leads to action beyond existing powers ('ultra vires' action), this does not mean that attribution should occur according to rules of national law. The latter is only the case if mere personal behaviour of troops 'off-duty' is concerned, or when agreements of a private-law nature are concerned which are subject to indigenous (in this case: Bosnian) law. However, neither is the case here. On the contrary, [N.] reproaches Dutchbat that it failed to fulfil its primary public duty of protecting the civilian population. Therefore, not just national law is applicable. Always, it will have to be assessed first according to the standards of international law which actor is / or actors are liable on an international level: the United Nations or the State.

4.7 The court will now address whether the State is liable for the actions of Dutchbat pursuant to the standards of international public law. First, under 4.8, the international-law consequences of supplying armed forces to an international organization such as the United Nations will be dealt with. In 4.9 the question will be addressed to what extent in the case of Dutchbat this is a matter of supplying to the United Nations, and 4.10 will discuss the claim that the conduct with which Dutchbat is reproached can be limited to powers that were not transferred. In 4.11 an interim conclusion is presented about the defence of attribution. 4.12 then discusses whether exclusive attribution to the United Nations is compatible with international obligations (whether or not ensuing from international conventions) the Netherlands are bound by, including those pursuant to the European Convention on Human Rights. 4.13 deals with the issue whether gross negligence committed by Dutchbat can lead to attribution to the State. Finally, 4.14 goes into the question whether the State cut across the UN command structure, and by doing so undermined the actual basis for attribution of Dutchbat's conduct to the United Nations. The conclusion regarding the State's primary defence follows under 4.15.

4.8 If a public body of state A or (another) person or entity with public status (according to the law of state A) is made available to state B in order to implement aspects of the authoritative power of state B, then the actions of that body, person or entity are considered as actions of state B. This rule, considered international common law, is part of the articles accepted by the International Law Commission (ILC) under the auspices of the United Nations concerning the liability of states. According to this rule the attribution should concern acting with the consent, on the authority and 'under direction and control' of the other state and for its purposes.

This rule of attribution also applies to the armed forces deployed by a state in order to assist another state, provided that they are placed under the 'command and control' of that other state. In accordance with the existing international practice and the 'draft articles' of the ILC concerning the liability of international organizations, the court applies this rule by means of analogy to the attribution of the actions of armed forces made available by states to the United Nations. (18) The court therefore considers incorrect [N.]'s assertion that the making available of Dutchbat to the United Nations can have no legal consequences under international law for the citizens of Bosnia-Herzegovina.

4.9 In view of the exclusive responsibility of the UN Security Council for maintaining international peace and security, participation in a UN peacekeeping operation on the basis of chapter VII of the Charter implies that the 'operational command and control' over the troops made available is transferred to the UN. This transfer does not include, or at least not necessarily, the personnel matters of the troops and the material logistics of the deployed detachment, nor the decision about whether or not to retreat ('full command', in the Netherlands the supreme command with which the government is invested constitutionally). If transfer is subject to further restrictions then express reservations must be made. [N.] has not submitted anything in this respect.

On the other hand, he does invoke the 'Standing Operating Procedures' applying to UNPROFOR and the specific instruction given by Gobillard on July 11, 1995, which could only have pertained to Dutchbat if this battalion ranked within the UN command structure. His challenge, that the Netherlands did not transfer 'operational command and control' in the context of the UN mission in Bosnia-Herzegovina, will therefore not be addressed.

4.10 [M.] and [I. N.] were not employed by Dutchbat. The reproach that Dutchbat offered inadequate protection to them has no bearing on personnel matters reserved to the Netherlands or on the power reserved to the Netherlands to decide whether to withdraw Dutchbat from the authority of the United Nations, for Moreover, the Netherlands' ultimate right to withdraw Dutchbat from Bosnia-Herzegovina should be distinguished from the right at issue here to decide about the evacuation of UNPROFOR units from Srebrenica, which was up to the United Nations. All this means that the acts or omissions Dutchbat is reproached for should be assessed as actions of a contingent of troops made available to the United Nations for the benefit of the UNPROFOR mission.

4.11 To the conclusion that the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent the court

attaches the conclusion, with reference to the legal framework for assessment given under 4.6 and 4.8, that these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations. [N.] argued that this principle in their case does not prejudice attribution to the State. The court will address the possible exceptions put forward by them under 4.12, 4.13 and 4.14.

4.12.1 The claimants' assertion, phrased as a general rule, that in the event of violations of standards committed in the execution of powers of control and command transferred to the United Nations, it should still be tested whether the State fulfilled its obligations under the ECHR, the ICCPR, the Genocide Convention and conventions pertaining to international humanitarian law to which the Netherlands is a party, does not hold. When in the execution of powers that are no longer the State's standards are violated then the point of departure must be that those violations cannot be attributed to the State. The same is true when fundamental standards are involved. The question whether obligations from the aforesaid conventions should prevail over the obligations that the State is subject to pursuant to the UN Charter, including the obligation of article 25 concerning the acceptance and implementation of binding decisions by the Security Council is not an issue here, for the making available of troops to the United Nations for a particular mission, as is the case here, is a nonobligatory act. The problem of possibly conflicting contractual obligations ensuing from conventions is therefore not under discussion. The ECtHR jurisprudence relating to this on the question whether an international organization to which sovereignty has been transferred offers equal protection of human rights as the ECHR (19) is irrelevant.

4.12.2 Without detracting from the considerations under 4.12.1 the court will address [N.]'s position under the ECHR, for this convention has a special position amongst the international conventions that the Netherlands is a party to, amongst other things because of the application of the right of complaint of individuals.

[N.] argues that Dutchbat's actions should be tested against the ECHR. On the basis of the same jurisprudence of the ECtHR the parties have arrived at opposite conclusions.

4.12.3 First and foremost it must be said that the United Nations are not a contracting party to the ECHR. If the State's primary defence succeeds therefore the ECHR is not applicable. This opinion is supported by rulings of the ECtHR of May 31, 2007 in the cases of A. Behrami and B. Behrami vs. France and Saramati vs. France, Germany and Norway (20), in which actions by citizens of Kosovo were not allowed because the conduct of foreign troops present there was attributable to the United Nations (inadmissibility 'ratione personae'). Without attribution to a signatory of a treaty, of course no violation of an obligation under a treaty could be established. The complaints by A. Behrami, B. Behrami and Saramati did not stand up due to article 34 of the ECHR, in which the right of complaint of individuals is linked to claimed violations by signatory states.

In deciding the 'Behrami' and 'Saramati' cases the ECtHR did not address the question whether the citizens of Kosovo, a territory of which the international-law status has been controversial since the falling apart of the former Yugoslavia, were subject to the jurisdiction of the contracting parties to the ECHR. The ECtHR did establish, however, that the international community (in this case NATO and the United Nations) had not only assumed military tasks in Kosovo, but also legislative, executive and judiciary (government) tasks. This was not so in the UNPROFOR mission.

The events regarded as violations of the ECHR by [N.] occurred in the sovereign state of Bosnia-Herzegovina. Neither the United Nations nor the State had 'effective overall control' over part of that state's territory. Dutchbat was in Bosnia-Herzegovina with the agreement of the lawful government of that country. The comparison implied by [N.] to the presence of Turkey in northern Cyprus and that of Russia in Transdnjestria (Dniester Moldavian Republic) does not hold. Although the compound enjoyed diplomatic protection by the United Nations, the area was not an extraterritorial pocket.

The applicability of the ECHR in the case of [N.]'s next of kin who were killed/[N.] fails already, in the court's opinion, on the ground of article 1 ECHR, in which the scope of the convention is limited to those who come under the jurisdiction of a high contracting party. The term jurisdiction in this article should, according to an ECtHR ruling of December 19, 2001 in the case of Bankovic et al. v. Belgium and sixteen other high contracting parties(21), be interpreted as an essentially territorial concept. In this ruling complaints by citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) on airborne attacks in their country were disallowed because they were carried out outside the territory of those contracting parties (inadmissibility 'ratione loci'). Later, the ECtHR adopted the same approach in the case of Issa et al. v. Turkey (22) . In this case the ECtHR ruled that for the finding that the violations of the convention in the north of Iraq (that were the subject of the complaint) came under the jurisdiction of Turkey it was insufficient that large-scale Turkish military operations took place in the area at the time.

4.13 With his factual assertions [N.] wants to demonstrate that the members of Dutchbat have seriously defaulted and that there was insufficient supervision within Dutchbat on compliance with fundamental standards. On those grounds, according to [N.], the State remains liable. Contrary to [N.]'s suggestion, however, the rule of attribution explained in 4.8 is not set aside. The consequence of attribution to the United Nations is that even gross negligence or serious failure of supervision on the part of the forces made available

to the UN must in principle be attributed exclusively to this organization. In the context of making available troops by member states the United Nations may, however, agree that in the event of gross negligence the state deploying the troops is liable toward the United Nations.(23) The term gross negligence may by extension also include violations of human rights or international humanitarian law. It is also conceivable that on the UN's proposal a stipulation is agreed in which the state deploying the troops assumes third-party liability in the event of such violations.

No submissions were made on possible exceptions to this rule of exclusive attribution, however, so that the court assumes none occurred. Attribution of acts and omissions by Dutchbat to the United Nations therefore excludes attribution of the same conduct to the State.

4.14.1 The court will now address the question whether the State cut across the United Nations command structure. If Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests. This then creates scope for attribution to the State. The same is true if Dutchbat to a greater or lesser extent backed out of the structure of UN command, with the agreement of those in charge in the Netherlands, and considered or shown themselves as exclusively under the command of the competent authorities of the Netherlands for that part. If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution.

4.14.2 In the final report of the Parliamentary Committee of Inquiry on Srebrenica three different moments are mentioned when the Dutch Government, represented by Voorhoeve, affected the commanding of Dutchbat.(24) Two of them relate to the preambles to the fall of Srebrenica. The third moment was discussed above under 4.4.

4.14.3 [N.] based his claim of the State's cutting across the UN command structure mainly on Nicolai's double role. In this context he argues as follows.

Because in these knife-edge days in July 1995 the United Nations did not function (properly) anymore, the State took over again. Dutch policy and UN policy became separate matters. At the time Nicolai also received instructions from the Netherlands, which he carried out. Karremans had omitted to inform Nicolai about the number of men in the compound. On the basis of this deficient information Nicolai gave orders to co-operate with the Bosnian Serbs on the deportation of the Muslim refugees. No permission was given for this by a higher-ranking UN commander; understandably so, because within the UN organization the evacuation of refugees is a matter for the 'United Nations High Commissioner for Refugees' (UNHCR). In his first meeting with Mladic on July 11, 1995 Karremans said he spoke on behalf of Nicolai and the Dutch authorities. The next morning Karremans on behalf of the Dutch Ministry of Defence offered Mladic assistance by his troops in the evacuation, which can be construed, still according to [N.], as facilitating deportation.

4.14.4 The State argued with regard to this that Nicolai's duty as a liaison officer just entailed passing information on to the Dutch Government. It occurs more often that the UN in peacekeeping operations places militaries of the same nationality as the executive detachments in the command structure in order to leave intact lines of communication as much as possible. Dutchbat's departure from Srebrenica balances between the powers transferred to the UN and those retained by the State, for the State remained responsible for logistic matters in connection with the mission. The assertion that the United Nations were not involved in the evacuation of the refugees is wholly incorrect, according to the State.

4.14.5 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, for even if Nicolai ordered 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. What Nicolai stated as a witness to this court, i.e. that Voorhoeve on July 11, 1995 in a telephone conversation "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 same statement given by Nicolai, Voorhoeve, contrary to UN policies, thus provided political cover for assisting ethnic cleansing, for Nicolai also stated that the basic decision to evacuate came from Sarajevo, so from Gobillard. Nicolai made the same statement to the Parliamentary Committee of Inquiry on Srebrenica.(25)

Moreover, Voorhoeve's approval put forward by Nicolai strictly referred to the basic resolution to evacuate, and not to the conditions under which this should take place. Karremans was aware of this approval, considering what he said to Mladic. There is no evidence whatsoever that the State gave any instructions as to the manner of evacuation. On the contrary, Nicolai stated during his provisional examination as a witness that as soon as it became clear the Serbs intended to take charge of the evacuation of the refugees

themselves – and the evacuation was not going to be organized and implemented by the United Nations as was assumed originally – “The Hague” worried about the men’s fate and was on the phone to say that care should be taken to see to it that the men were under no circumstances treated as a separate group (cf also 4.4 of this ruling).

On the basis of all this the court establishes that there can be no matter of any actions taken in contravention of UN policies initiated or approved by the State. In view of the criteria formulated in 4.14.1 for the assessment of the asserted cutting across the UN structure of command, the court concludes that during the evacuation of the Muslim population the factual basis for attribution of Dutchbat actions to the United Nations was fully in place.

4.14.6 It should be recognized that the circumstances in the compound, due to lack of food and medical facilities and with high temperatures were desperate at the time. Nevertheless, the court considers, needless to say, that there are good arguments in support of the claim that the passive attitude of Dutchbat toward the separate deportation on July 12 and 13, 1995 of the able-bodied men by the Bosnian Serbs was not in keeping with the specific instruction to protect civilians and refugees in the altered circumstances to the utmost, an instruction Karremans received from Gobillard – so from the UN structure of command - on July 11, 1995. This is of no avail to [N.], however, because the acts and omissions of Dutchbat during the evacuation should be considered as those of the United Nations.

4.15 From the considerations presented in 4.6 through 4.14 it must be concluded that the reprehended Dutchbat actions must be attributed exclusively to the United Nations, so that the State’s primary defence succeeds. This means that the State cannot be held responsible for any breach of contract or wrongful act committed by Dutchbat. As follows from 4.4 of this ruling, neither is the State liable for wrongful action taken by those in charge of the armed forces or members of National Government. This means that [N.]’s claim must be denied.

4.16 [N.] as the party declared to be at fault will be ordered to pay the costs of the proceedings. This does not include the costs of the provisional examinations of witnesses, as the State stated expressly under 1.1, last sentence(s) of its letter of June 17, 2008 that it would not lay claim to that. The costs of the proceedings will, however, be increased by the statutory interest due as of fourteen days from today and the order to pay the costs of the proceedings will be declared immediately enforceable, in conformity with the State’s requests. There are no grounds, however, for the requested order to pay subsequent costs.

5 The ruling

The court:

- denies the claim;
- orders [N.] to pay the costs of the proceedings, which until this ruling are assessed at € 248 in advances and € 1,808 in lawyer’s fees on the part of the State;
- orders that [N.] is to pay the statutory interest due for these costs after the expiry of fourteen days from the date of this judgment;
- declares the order to pay the costs immediately enforceable.

This judgment was passed by Messrs Justices H.F.M. Hofhuis, LL.M., P.A. Koppen, LL.M. and D. Aarts, LL.M. and delivered in public on September 10, 2008.

1 Srebrenica, een 'veilig' gebied. Reconstructie, achtergronden, gevolgen en analyses van de val van een Safe Area [Srebrenica, a 'safe' area. Reconstruction, background, consequences and analyses of the fall of a Safe Area], Netherlands Institute for War Documentation, Amsterdam, 2002.

2 Missie zonder vrede, Parlementaire enquête Srebrenica, eindrapport en verhoren, Kamerstukken II, 2002-2003, 28 506, nos 2-3 and nr 5 [Mission without peace, Parliamentary Committee of Inquiry on Srebrenica, final report and inquiries, Parliamentary documents II, etc.]

3 NIOD report, pp. 519, 526-527, 530 and 534.

4 NIOD report, pp. 908-918.

- 5 This quote is from a report of the UN Secretary-General to the UN Security Council of May 9, 1994 and taken from his report submitted to him by the parties 'The fall of Srebrenica', dated November 15, 1999, paragraph 150.
- 6 NIOD report, p.1076.
- 7 NIOD report, p. 1453.
- 8 NIOD report, p.1364.
- 9 NIOD report, p. 2620.
- 10 NIOD report, pp. 2749-2763.
- 11 The First subsection of article 154 ZOO reads, in an English translation by the 'Office of the High Representative, Legal Department' in Sarajevo: "(1) A person who causes damage to the other is obliged to reimburse it, unless he proves that the damage is not his fault."
- The German translation by J. Radišić (Landesberichte Jugoslawien, in: Von Bar, Deliktsrecht in Europa) reads as follows: "(1) Wer einem anderen einen Schaden zufügt, schuldet dem anderen ihn zu ersetzen, sofern er nicht beweist, dass der Schaden ohne sein Verschulden entstanden ist."
- 12 The First subsection of article 182 ZOO reads, in the English translation of this act quoted above: "(1) A person who, without danger for himself/herself, denies aid to a person whose life or health is in obvious danger, shall be liable for the damage occurring due to such an action, if he/she could have foreseen such damage based on the circumstances of the case." According to the State the word 'could' in English should be substituted by the word 'should'. In the German translation quoted above this reads as follows: "(1) Wer ohne Gefahr für sich selbst einer Person, deren Leben oder Gesundheit offenbar gefährdet ist, die Hilfe verweigert, haftet für den daraus entstehenden Schaden, sofern er diesen nach den Umständen des Falles Voraussehen musste."
- 13 Also referred to as the Muslim-Croatian Federation, one of the two entities of which Bosnia-Herzegovina consists. The other entity is the Republika Srpska.
- 14 NIOD report, pp. 2532-2539.
- 15 NIOD report, p. 2620.
- 16 See hereafter paragraph 4.14.1.
- 17 NIOD report, p. 2753.
- 18 Cf also the advice dated February 14, 2002 of the Commissie van Advies voor Volkenrechtelijke Vraagstukken (Advisory Committee on Questions pertaining to International Law) on the liability arising from a wrongful act during UN peacekeeping operations (hereafter: CAVV advice), pp. 10-14.
- 19 Cf , for instance, the ruling of June 30, 2005 of the Grand Chamber of the European Court Human Rights in the case of *Bosphorus Airways v. Ireland* (no. 45036/98).
- 20 Ruling of the Grand Chamber of the ECtHR of May 2, 2007 (no. 71412/01 and no. 78166/01).
- 21 Ruling of the Grand Chamber of the ECtHR of December 12, 2001 (no. 52207/99).
- 22 Ruling of the ECtHR of November 16, 2004 (no. 31821/96).
- 23 Cf also the CAVV advice referred to in note 23 [the advice of the Advisory Committee on Questions pertaining to International Law].
- 24 Parliamentary Documents II, 2002-2003, 28 506, nos. 2-3, pp. 235-236.
- 25 Parliamentary Documents II, 2002-2003, 28 506, no. 5, p. 258.
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