decision

COURT OF APPEAL, ARNHEM-LEEUWARDEN
venue: Arnhem

K14/0339

Decision of the Military Complaints Tribunal
(final decision)

ìn the matter of

Mehida Mustafïć-Mujic,
Alma Mustafić,
Damir Mustafić,
and
Hasan Nuhanović,
assisted by L. Zegveld LL.M and G.K. Sluiter LL.M, lawyers practising in Amterdam,
Plaintiffs

vs

Thomas Jacob Peter Karremans,
assisted by G.G.J. Knoops LL.M and M.C. van Woudenberg LL.M, lawyers practising in Amsterdam,
Robert Alexander Franken,
assisted by C.M.H. van Vliet LL.M and S.M. Diekstra LL.M, lawyers practising in The Hague.
and
Berend Jan Oosterveen,
assisted by M.P.K. Ruperti LL.M, lawyer practising in Baarn.
Defendants.

Course of the proceedings

1.1
On 5 July 2010, on behalf of the Plaintiffs, Zegveld brought charges against the Defendants for criminal offences. The Plaintiffs consider the Defendants to be jointly responsible for the death of Rizo Mustafić, husband respectively father of Mehida, Alma and Damir Mustafić, and for the death of Ibro and Muhamed Nuhanović, father respectively brother of Hasan Nuhanović. According to the charges, these family members of the Plaintiffs were murdered by the Bosnian-Serbian army or allied paramilitary groups after they had to leave the Dutchbat compound on 13 July 1995 following the fall of the Srebrenica enclave on 11 July 1995. At the time, defendant Karremans was the Commander of Dutchbat III, with the rank of Lieutenant-Colonel; defendant Franken was the deputy Battalion Commander, with the rank of Major; and defendant Oosterveen was personnel manager, with the rank of senior sergeant.

In a letter dated 7 March 2013, the Chief Public Prosecutor for the district Oost-Nederland (Eastern Netherlands) announced that she was of the opinion that no further criminal or civil investigation needed to be instituted.

On 3 April 2014, Zegveld and Sluiter submitted a written complaint as referred to in Article 12 of the Dutch Code of Criminal Procedure [*Wetboek van Strafvordering*][1]. Pursuant to the provisions of Article 68 (3) of the Judiciary Act [*Wet op de rechterlijke organisatie*], the Military Division is the proper forum to consider such a complaint. The Plaintiffs made objection to the fact that a member of the armed forces should have seat in the Tribunal, and this eventually led to the recusal of the military member. In its decision of 23 October 2014[2], the Recusal Chamber[3] rejected the request for recusal.

At the request of the Chairman, the lawyers for the Defendants and the Advocates General submitted their provisional standpoints to the Court of Appeal and to the other lawyers.

An oral hearing of the complaints was held in camera on 13 November 2014.
All the Plaintiffs and Defendants were present, accompanied by their lawyers.
The lawyers for the Plaintiffs, respectively for the Defendants, set out their standpoints on the basis of the written pleadings they had submitted.
The Advocates General, W.V. Gerretschen LL.M and S.A. Minks LL.M, put forward the standpoint of the Public Prosecution Service, also on the basis of the pleadings already submitted.
Mr Nuhanović, Ms Alma Mustafić and Mr Karremans also made personal statements. Their words had also been committed to paper and submitted to the Court of Appeal.

At the end of the hearing, the Chairman announced that in this complex and serious case it would probably not be possible to make the decision known within the usual six-week period allowed for complaints. On request, he agreed to inform the lawyers of the proposed decision one week before it would be made generally known.

1.2
The Court of Appeal announced an interim decision[4] on 5 December 2014. In this decision, the Court of Appeal:
- reopened the investigation;
- ordered the Advocate General to produce the official report with No. P13/1995-JD and the Account of the Facts in connection with the Srebrenica debriefing [*Feitenrelaas debriefing Srebrenica*];
- determined that the Court Registry would send a copy of these documents to the lawyers for both the plaintiffs and the defendants;
- determined that those lawyers could, if desired, make their comments on the documents known to the Court of Appeal in writing, with a copy to the other lawyers and the Advocate General;
- determined that this must be done within four weeks of the distribution of the documents by the Court Registry; and

postponed any further decision.

Reactions to the interim decision

2.
Advocate General Gerretschen complied with the Court of Appeal's request in good time, submitting the requested documents to the Court in electronic form on 9 December 2014. At the request of the

[1] The complaint was submitted on behalf of the Plaintiffs jointly, and the argumentation does not differentiate between the individual Plaintiffs. The Court assumes that the intention was to restrict the complaint to those offences whereby the respective Plaintiffs can be deemed to have a direct interest.
[2] ECLI:NL:GHARL:2014:8063; (Ruling of the Court of Appeal, Arnhem-Leeuwarden, March 2017, p. 236).
[3] The Recusal Chamber consisted solely of civilian members of the Court.
[4] ECLI:NL:GHARL:2014:9242 (Ruling of the Court of Appeal, Arnhem-Leeuwarden).

Chairman, the advocate general also subsequently submitted the missing page (p. 129) from the Account of the Facts concerning the Srebrenica debriefing.

In a letter sent on behalf of the Plaintiffs on 10 December 2014, Zegveld asked that the period allowed for reactions should begin on the deadline originally imposed upon the Public Prosecution Service. In reply, an email was sent to all parties on behalf of the Chairman saying that the deadline for the submission of comments had now been set to 28 January 2015.

In an email dated 19 December 2014, the lawyer for defendant Oosterveen, Ruperti, asserted that the Court of Appeal must respect the agreement between the Public Prosecution Service and the Ministry of Defence - as set out in par. 1.1.4 of the Account of the Facts: the Account of the Facts may not, therefore, be included in the appraisal of the complaint.

In an email dated 16 January 2015, the Advocate General indicated that the Public Prosecution Service is of the opinion that the Account of the Facts can certainly be included in the Court's appraisal of the complaint under Article 12 of the Code of Criminal Procedure.

In a letter dated 26 January 2015, the Plaintiffs' lawyers argue against the standpoint taken by Ruperti (who they - plainly in error - refer to as defendant Franken's lawyer). In addition, they further underpin their standpoints with location references in the additional documentation submitted.

In an email dated 27 January 2015, Knoops, on behalf of Defendant Karremans, asked the Court of Appeal to "consider the question of immunity after all", now that this aspect has been raised for the defence in the case of Oosterveen. In all other respects, Defendant Karremans persists in the conclusions developed previously in his own defence.

On 27 January 2015, Ruperti sent an email on behalf of his client, Oosterveen, in which he persists in the standpoint that the military personnel concerned had - at the time - been granted immunity from criminal prosecution.

Defendant Franken's lawyer, Van Vliet, responded in an email dated 28 January 2015. The enclosed letter[5] disputes the further arguments of the Plaintiffs.
Finally, in an email dated 2 February 2015, the Advocate General commented on the question of immunity or exemption from prosecution.

Procedural documents

3.1 *Overview of the documents*
Both the original charges and the complaint are accompanied by many appendices. The written responses and pleadings from the lawyers of the Defendants have also been accompanied by many exhibits. The Advocates General has only submitted an official message from the Chief Public Prosecutor for the district Oost-Nederland dated 28 August 2014.

In addition, a great deal of relevant information is available in the public domain via internet. In particular, the Court of Appeal mentions the following information, but this list is not exhaustive:
- the report entitled "Srebrenica: een 'veilig' gebied" (Srebrenica: a "safe" area), from the National Institute for War Documentation (NIOD), with the accompanying component studies;
- the parliamentary documents on the subject of "Srebenica" (*Parliamentary Papers II*, 1997-2003, 26122);

[5] Apparently erroneously dated 30 October 2014.

- documentation from the parliamentary enquiry into the course of events in Srebrenica (*Parliamentary Papers II*, 2001-2003, 28506);
- statements made by witnesses before the International Criminal Tribunal for the former Yugoslavia (ICTY);
- pronouncements of the ICTY and the International Court of Justice (ICJ);
- pronouncements in the civil cases brought by the Plaintiffs against the Kingdom of the Netherlands;
- pronouncements in the civil case brought by the Mothers of Srebrenica Foundation and others against the Kingdom of the Netherlands and the United Nations.

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

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

- the testimony of witnesses J.H.A. Rutten, F. van Schaik, E.C.M.J. Koster, B.J. Oosterveen and R.W. Dorst given before the Royal Marechaussee Zuid-Holland/Zeeland District on 2 August 1995 (official record no. P13/1995-JD);
- "The Account of the Facts in connection with the Srebrenica debriefing", with appendices, dated 22 September 1995

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

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

3.2 *Admissibility of the Account of the Facts*

The Court of Appeal rejects the objection made by Ruperti against the inclusion of the Account of the Facts in its appraisal of the complaint.

Par. 1.1.4 of the Account of the Facts includes the following:

> *1.1.4. Indemnity for the military personnel to be debriefed*
>
> *Before the debriefing took place, all the debriefed military personnel were sent a written notification which included the following:*
> *"(...) that:*
> *A. All information in the file with your personal experiences will be permanently classified as "State Secret - Confidential'" .*
> *B. None of your colleagues or your commanding officers will ever have access to your personal debriefing report.*
> *C. Only the members of the debriefing organisation will have knowledge of your personal experiences. We are all subject to the official obligation to maintain confidentiality."*
>
> *Before the investigation started, it was agreed between the leader of the investigation and the public prosecutor's office in Arnhem that the investigating team would not report any possible criminal offences that came to light.*
>
> *Prior to the debriefing, all the military personnel involved were informed by the debriefing team about the possibility that their personal observation of crimes against the humanitarian law of war might be reported to the International Criminal Tribunal for war crimes in the former Yugoslavia (ICTY) by the investigating team. The debriefing report in question also contains the text: "After (name + initials) had been informed about the purpose of the debriefing and told that the statement(s) made concerning the observation of crimes against the humanitarian law of war or humanitarian law would be made available to the ICTY war crimes tribunal (...)".*

First and foremost, the Court of Appeal is of the opinion that an independent Court, whether civil or criminal, should not be hindered in its task - to determine whether or not serious or even very serious criminal offences have been committed by persons who are subject to its jurisdiction - by arrangements such as those made in this case between the Public Prosecutions Service and the Ministry of Defence. As an independent body, the Court is not bound by any such agreement.

In addition, the Court of Appeal finds that the confidentiality of the personal debriefing reports has been and is being respected. In its 19 January 2011[6] judgement, the Administrative Jurisdiction Division of the Council of State upheld the Minister of Defence's refusal to produce the debriefing reports. The Court of Appeal is of the opinion that the Account of the Facts as now submitted, in which the results of the individual debriefings have been anonymised and aggregated, is not included in the undertaking given to the servicemen who were debriefed. That is already clear from the fact that the first original copy of this document was provided to (among others) the Commander-in-chief of the Royal Netherlands Army, who had given the original order for the debriefing.

Similarly, it can be concluded that the non-reporting of criminal offences was not intended to cover the possible perpetration of war crimes.

Finally, but this is a more practical than fundamental argument, the Court notes that the Account of the Facts was made public as long ago as 21 December 1999. It was added, as Appendices 18A - 18O, to the letter from the Minister of Defence to the President of the House of Representatives [*Tweede Kamer]*[7].Even though a number of passages have been redacted and replaced by "@", on account of the undertaking given to the military personnel who were debriefed in regard to the confidentiality of their reports and their own privacy, that is of no relevance when invoking the agreement between the Public Prosecution Service and the Ministry of Defence.

Immunity / exemption from prosecution

4.1 *Defendant Franken's standpoint*
Van Vliet submitted that the Defendants could expect to be accorded immunity from criminal prosecution, given the immunity from prosecution enjoyed by the State. She invoked two rulings given in the Netherlands in recent years: ground pollution at Volkel airbase[8] in combination with the fire at Schiphol detention centre[9].

The consequences of this argument would be that military personnel, as part of the regular armed forces, could *never* be prosecuted in that capacity for any war crimes and/or crimes against humanity that they committed. The Court of Appeal considered that result to be absurd.
There must therefore be something wrong with the underlying principles, or with the reasoning, or with both.

The Court of Appeal determined that it was accepted, in the Volkel ruling, that "the underlying principle has to be that the actions of the State must be deemed to promote the general interest". Contrary to what is assumed in that ruling, the actions of the State in this case - which, in the view of the Plaintiffs, should lead to the prosecution of the Defendants - are *not* such actions in the general interest. The perpetration of war crimes and crimes against humanity cannot and should not be deemed to fall into this category, and cannot *on those grounds* lead to immunity for the State.

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6 ECLI:NL:RVS:2011:BP1317 (Council of State Jurisprudence, 2011).
7 *Parliamentary Papers II*, 1999-2000, 26122, no. 18.
8 Supreme Court, 25 January 1994, Dutch Law Reports 1995, 598, March 1995, p. 209.
9 Court of Appeal, Amsterdam, 16 December 2009, ECLI:NL:GHAMS:2009:BK6788.

Similarly unfounded is the following argument by Van Vliet: "It is precisely in the Ministry of Defence where the public servants have to follow the orders of the State closely, on penalty of disciplinary or criminal proceedings and where - given the strict hierarchy - subordinates and individual servicemen have little or no option to deviate from such orders."

This argument has the smack of "Orders are orders", and cannot be accepted as fitting. And that is fortunately not the case. The Court of Appeal refers in this context to:

- Article 131 of the Military Penal Code [*Wetboek van Militair Strafrecht*]:
  An offence as referred to in Artt.126-130 (failure to carry out an order, under onerous circumstances; note added by Court) *is not punishable if compliance requires conduct that is unlawful;*
- Article 16 of the Military Disciplinary Law Act [*Wet militair tuchtrecht*]:
  the preceding article (failure to carry out an order; note added by Court) *is not applicable if the required conduct is unlawful or if the person receiving the order considers it, in good faith, to be unlawful.*
- Article 10 (1) of the Wartime Offences Act [*Wet Oorlogsstrafrecht*, in force until 1 October 2003]:
  The provisions of Artt. 42 and 43 of the Criminal Code (no prosecution for an offence committed as the result of carrying out a lawful regulation or official order; note added by Court) *are not applicable with regard to the offences referred to in Artt. 8 and 9* (in brief: war crimes; note added by Court).
- Article 3 of the Genocide Convention (Implementation) Act [*Uitvoeringswet genocideverdrag*] that contains a similar provision, as does
- Article 3 of the Torture Convention (Implementation) Act [*Uitvoeringswet folteringverdrag*].

Moreover, the conclusion in the civil cases, that the State is liable for the unlawful actions of Dutchbat because the State could exercise "effective control", cannot then be reversed since it cannot be determined that such "effective control" actually meant that the Defendants carried out the actions of which they are accused pursuant to orders from higher authority.

The Court of Appeal comes to the conclusion that the arguments are unsound and can not lead to a successful claim for immunity.

4.2 *Defendant Karremans' standpoint*

Defendant Karremans' lawyer put forward the following arguments to underpin their demand for immunity:

> *It was remarked that when Karremans was asked by Karadžić to give testimony at the latter's trial before the Yugoslavia Tribunal, he referred to the underlying UN agreement, through which he had been given an undertaking for immunity in connection with the Srebrenica question. At the time it was given, this undertaking was based on privileges and immunities that were also applicable to Karremans on the basis of the UN Status of Forces Agreement (SOFA) with Bosnia. Karremans put this argument to the Ministry of Defence in 2014. The Ministry responded that, according to Dutch criminal law, Karremans could not - in principle - derive immunity from this, and that it was ultimately the responsibility of this Court to make a decision on prosecution in this matter as well.*

The reasoning is not very clear. It seems, on the one hand, that the Defendant is having recourse to the *SOFA*[10] prevailing at the time the relevant events occurred, and to a later undertaking in the context of the ICTY proceedings against Karadžić on the other hand.

[10] Status of Forces Agreement, i.e. Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina. Signed at Sarajevo on 15 May 1993, UN Treaty Series, No. 30006. This document was submitted by the Plaintiffs as appendix 32 to the formal complaint dated 5 July 2010.

As is customary[11], any immunity derived from the *SOFA* can only apply to the jurisdiction of the host country, but not to the jurisdiction of the Netherlands as the participating State. The *SOFA* itself includes the following point:

> *(par. 26):*
> *Military personnel of national contingents assigned to the military component of UNPROFOR shall enjoy the privileges and immunities specifically provided for in the present Agreement, (par. 45, (b)):*
> *Military members of the military component of UNPROFOR shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in Bosnia and Herzegovina.*

No further details were given of the undertaking in the context of the Defendant's conduct as a witness in the case against Karadžić. The Court of Appeal can therefore do no more than make two observations:
a. a person cannot derive any legitimate expectation that he will not be prosecuted from any undertaking given by a body other than the Dutch government, in particular by the Public Prosecution Service;
b. his testimony to the ICTY played no part in the request to instigate a prosecution against Karremans.

In the opinion of the Court of Appeal, this standpoint cannot lead to a successful immunity defence.

4.3 *Defendant Oosterveen's standpoint*
It is not entirely clear what Defendant Oosterveen's standpoint actually is. The email from Ruperti dated 27 January 2015 speaks in general terms of an undertaking for immunity under criminal law said to have been given to the military personnel concerned during the debriefing.
The points made in par. 3.2 above also apply insofar as the Defendant argues that the Account of the Facts should not be included in the Court of Appeal's judgement. The following applies as far as the question of whether immunity from prosecution is applicable:

The Advocate General has submitted that no such undertaking was given. The servicemen were given an assurance that no-one would have access to their *personal* (italicized by the Court) debriefing report. There was also an arrangement made between the Public Prosecution Service and the leader of the investigation that the investigating team would not report any criminal offences that might have been perpetrated.

The Court of Appeal has already cited the relevant passages from the Account of the Facts in par. 3.2. Moreover, the Court has already determined that the undertakings given to the servicemen individually have been upheld and that the non-reporting of possible criminal offences did not extend to possible war crimes. It has not been asserted, nor has it become apparent, that - contrary to the agreement - other criminal offences have been reported.
The Court of Appeal has found no evidence in the agreement for further or other undertakings, particularly with regard to blanket immunity from criminal prosecution. This means that the defence argument is not founded on fact.

But there is more. Even taking into account that it is easy to judge in retrospect, no other conclusion can be drawn but that, in drawing up the agreement between the Public Prosecution Service and the Ministry of Defence, the interests of the Ministry of Defence in an optimum debriefing added more weight to the balance than the interests of the Public Prosecution Service in the prosecution of criminal

[11] See J.E. Voetelink, 'Status of Forces, Criminal jurisdiction over military personnel serving abroad, Doctoral thesis, University of Amsterdam, p. 108.

offences, some of which may have been serious. This immediately raises general constitutional objections, but can also be particularly disadvantageous to the interests of victims and their surviving relatives.
Whatever the case, it is sufficient to note that an agreement of this kind is in no way binding on an independent Court. Any other persuasion would turn the entire complaints procedure into a non-issue.

Expediency

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

On behalf of the Plaintiffs, Sluiter has argued that this is an improper ground for non-prosecution. There is no scope for a discretionary dismissal, since International law obliges the Netherlands to prosecute the most serious crimes.

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

Interim conclusion on the basis of the formal standpoints

6.
All that which the Court of Appeal has considered and decided, leads it to the opinion that:
- one the one hand there are no formal obstacles to prosecution, but
- on the other hand, prosecution is by no means a foregone conclusion.

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

Substantive appraisal of the complaint

7.1
The Plaintiffs argue that the way their complaint has been handled goes against the principles of diligence and a fair and reasonable weighing of interests. They argue that:
a. it took an unreasonably long time for the Public Prosecution Service to come to a definite decision on the complaint;
b. there are serious defects in the investigation of facts; more particularly, the Public Prosecution Service should not have restricted itself to already existing sources, but it should have supplemented these by interviewing witnesses and carry out further investigation specifically aimed at the prosecution of possible offenders;
c. the decision-making has been defective, since - in making its negative decision - the Public Prosecution Service has completely ignored the dissenting advice of the National Reflection Chamber.

And with regard to the *content* of the decision, the Plaintiffs are of the opinion:
d. that the Public Prosecution Service made an incorrect assessment of the feasibility of possible prosecution.

7.2. *Re a: period of time*
The complaint was made in a letter dated 5 July 2010; the decision of the Chief Public Prosecutor was set out in her letter dated 7 March 2013. The Plaintiffs have repeatedly pressed for the complaint to be dealt with expeditiously, or more expeditiously[12].
The Plaintiffs' standpoint on this matter is only contradicted in the official message of 28 August 2014 from the Chief Public Prosecutor, referring to the complexity and sensitivity of the case, the extensive investigation of the facts that has taken place and the "various rounds of consultations, carried out with the utmost care" within the Public Prosecution Service.

The Court of Appeal finds that the Public Prosecution Service has given very little insight into the nature of this investigation of the facts and the rounds of consultations. It can only therefore be assumed that this investigation of the facts consisted of studying (once again) the material collected by third parties; all that has become known about the consultations is that the National Reflection Chamber was asked to give advice. In the opinion of the Court of Appeal, this cannot represent sufficient justification for the lapse of almost three years.
Nonetheless, the Court of Appeal feels that this is not a circumstance that can contribute to the substantive appraisal of the complaint, let alone that it is a circumstance which dictates that prosecution of the Defendants should be recommended. The focus in a complaints procedure is on whether the Public Prosecution Service made the *correct* decision, not whether it made a *timely* decision.

7.3 *Re b: the investigation of the facts*

7.3.1
As far as the Court of Appeal is aware[13], no further independent investigation of the facts was carried out by way of exploratory investigation, beyond the interviewing of five military witnesses to ascertain what they had observed in regard to possible war crimes. This resulted in official report no. P13/1995-JD drawn up by P.H. Rutten, Captain of the Royal Marechaussee on 2 August 1995[14].
The extensive debriefing of Dutchbat III, which took place in Assen from 30 August to 22 September 1995, was explicitly *not* carried out for the purposes of ascertaining the truth in terms of criminal law. The Court of Appeal has already noted (see par. 4.3) that the interests of the Ministry of Defence in an optimum debriefing were given more weight than the interests of the Public Prosecution Service in the prosecution of criminal offences, some of which may have been serious, when the agreement was drawn up between the Public Prosecution Service and the leader of the investigation. In fact, this "separation of criminal law"[15] obstructed the reporting of criminal offences to the Public Prosecution Service. Apparently[16], the Public Prosecution Service only knew of the existence of the Account of the Facts in September 1998.

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[12] The correspondence was appended to the written complaint.
[13] Some caution is advisable after the failure in the Jaloud case (Jaloud vs the Netherlands, no. 47708/08, Grand Chamber of the European Court of Human Rights, 20 November 2014, Dutch Law Reports 2015, 142).
[14] To avoid any misunderstanding: this official report did ensue from the investigation carried out by the "Kodak team" into the flawed development of a roll of film for photos (NIOD report, p.3011), but has no relation to it. The history of *that* roll of film is of no significance for the complaint being considered here.
[15] NIOD report, p. 2973.
[16] Official message dated 28 August 2014 from the Chief Public Prosecutor for the Oost-Nederland district to the Advocate General, p. 4.

In all other respects, the investigation carried out by the Public Prosecution Service seems to have been restricted to studying the material that had been collected by third parties. Such "investigations" took place at various times: in 1998 after the Account of the Facts became available, in 2002 after the publication of the NIOD report, and in 2010 following the charges laid by the Plaintiffs[17]. Those investigations did not prompt the Public Prosecution Service to institute further criminal enquiries, nor to proceed to prosecution. On the last occasion this was allegedly[18] against the advice of the Public Prosecution Service's own National Reflection Chamber.

In this context, the Court of Appeal feels it is important to note that the idea of Dutchbat servicemen being involved in war crimes - as the Plaintiffs now accuse the Defendants - was one that only occurred at a later date. At first, the only criminal offences thought to have been committed by Dutchbat servicemen was giving firelighters[19] to children as if they were sweets and accidents whereby refugees were run over by military vehicles (on several occasions)[20]. Rutten's investigation concerned what Dutch military personnel had *observed*, not what they had *done* in terms of possible war crimes. It should be noted that the Yugoslavia Tribunal did not consider the Defendants Karremans and Franken as suspects; they were heard as witnesses[21].

7.3.2
In the opinion of the Court of Appeal, the concrete question under criminal law - was there any reason for the Public Prosecution Service to assume that members of Dutchbat had perpetrated or assisted in the perpetration of war crimes - needs to be separated from the broader political, military and moral question of whether Dutchbat (or UNPROFOR in general, or the NATO, or the United Nations) could have done more to prevent or to limit the massacre that followed the fall of Srebrenica. Answering that last question falls outside the Court of Appeal's remit. Nonetheless, it will become clear from the historical context now to be discussed that the restrictions in the mandate, the troop strength, the armaments available and the *Rules of Engagement* were all obstacles that made it impossible through military might alone to guarantee the safety of the enclave and all those who lived there or had sought refuse there[22].

7.3.3
In the opinion of the Court of Appeal, the Public Prosecution Service *could have* carried out a more extensive investigation. A number of concrete possibilities to that end were summarized in Zegveld's letter to the acting Chief Public Prosecutor[23] dated 25 July 2011. The question is then: *should* there have been a further investigation?

7.3.4
The Plaintiffs have submitted that when a crime causing a fatality occurs, Art. 2 of the ECHR obliges the Public Prosecution Service to institute an effective investigation on its own initiative. In the view

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[17] Letter dated 7 March 2013 from the Chief Public Prosecutor in the Oost-Nederland district to Zegveld (appendix 1 to the Complaint); official message from Chief Public Prosecutor to Advocate General.

[18] The Public Prosecution Service did not want to make its advice public; for the reasons set out in the interim decision, the Court of Appeal did not consider the production of this advice to be necessary.

[19] NIOD report, p. 1616 et seq.

[20] NIOD report, p. 3071.

[21] After this complaint had been made against him, Defendant Karremans refused to give further voluntary testimony in the case against Karadžić; cf. ICTY, (IT-95-5/18-T), Trials Chamber, Decision on accused's motion to subpoena Thomas Karremans, 29 May 2013.

[22] Cf. the Report of the Secretary-General to General Assembly resolution 53/35, *The fall of Srebrenica* (1999), A/54 549, §§ 470-473.

[23] Appendix 11 to the Complaint.

of the Plaintiffs, based on the judgement in the case of Hugh Jordan vs the United Kingdom[24], they should have been involved in that investigation.

In the official message to the Advocate General, the Chief Public Prosecutor contests the applicability of the ECHR. She neglects to mention, however, that in its judgements in the civil cases involving the State, dated 6 September 2013, the Supreme Court found that the State had argued in vain against the Court's view that the State had *effective control* over the conduct ascribed by the Plaintiffs to Dutchbat[25]. The Advocate General has adopted the standpoint of the Chief Public Prosecutor; in doing so he approached the establishment of facts in the civil proceedings with a critical tone and argued that a different decision must be reached in these criminal proceedings.

The Court of Appeal is of the opinion that the Public Prosecution Service is making the case unnecessarily complicated[26]. In this case it is not a question of jurisdiction, based on *effective control* over the compound in Potočari or over the Plaintiffs' family members. Nor is it a question of the civil liability of the State for unlawful acts carried out by Dutch servicemen, over which acts the State probably had little or no control. The focus in this case is jurisdiction over the Defendants. On the basis of Article 4 of the Military Penal Code [*Wetboek van Militair Strafrecht*], the State of the Netherlands has full criminal jurisdiction over any person in the armed forces who commits a punishable crime outside the Netherlands. In par. 4, the Court of Appeal has already considered and decided that the applicable *SOFA* does not affect this jurisdiction and that there is no immunity from criminal prosecution. This being so, any decision to prosecute must fulfil all the criteria that can reasonably be required. And these include the requirements[27] set out in the European Convention on Human Rights and by the European Court of Human Rights.

The Plaintiffs, on the other hand, ascribe too broad a scope to the Jordan judgement. In that judgement, the European Court of Human Rights said: *"In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."* The examples given are the right to be notified of a decision not to prosecute, and access to the case file[28]. But that does not imply that they must be involved in *the investigation*.

In addition, the jurisprudence from the European Court of Human Rights (on the obligation to institute an *effective official investigation*) always relates to deadly force exercised by public servants *themselves*. That is not the situation in this case. The primary and heaviest responsibility lay and lies on the Bosnian Serbs, *not* on Dutchbat in general or the Defendants in particular. In the opinion of the Court of Appeal, this does not mean that the Public Prosecution Service was not under an obligation to institute an *effective investigation*, but this circumstance does matter when appraising the criteria that such an investigation must satisfy. Whichever way you look at it, *complicity* in a statistically minor part of a crime[29] cannot be compared with responsibility for the crime itself[30].

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[24] The case of Jordan vs the UK, no. 24746/94, European Court of Human Rights, 4 May 2001.

[25] Supreme Court, 6 September 2013, ECLI.NL.HR.2013:BZ9225 (State/Nuhanović) resp. Supreme Court, 6 September 2013, ECLI:NL:HR:2013:BZ9228 (State/Mustafić).

[26] The Military Division has previously indicated that it considers this undesirable in military criminal law. See Court of Appeal, Arnhem, 4 May 2005, ECL1:NL.GHARN:2005:AT4988 ("Eric O."), MRT XCVIII (2005), p. 213, additional considerations a.

[27] Cf. Jaloud vs the Netherlands, no. 47708/08, Grand Chamber of the European Court of Human Rights, 20 November 2014, § 155; Dutch law reports 2015, 142.

[28] The case of Jordan vs the UK, no. 24746/94, European Court of Human Rights, 4 May 2001, .§ 109.

[29] In this context, NIOD speaks of "executions on a small scale"; NIOD report, p. 2558. ICTY, on the other hand, speaks of "opportunistic killings"; ICTY, (IT-98-33-T), Krstić case, Trial Chamber, Judgement 2 August 2001, § 546.

7.3.5
As the Plaintiffs themselves state, the facts of the Srebrenica drama have been thoroughly investigated in the past. They themselves cite the NIOD report, the investigation by the Van Kemenade Commission and the parliamentary enquiry[31]. The Court of Appeal supplements this list with the investigations carried out by the Yugoslavia Tribunal[32] in a large number of cases to date, and the information which became available during the civil proceedings, including - in particular - the statements of the Plaintiffs and Defendants themselves. In her letter of 7 March 2013, the Chief Public Prosecutor gives an overview of the sources referenced by the Public Prosecution Service. The Plaintiffs argue that the Public Prosecution Service's investigation, on the basis of these sources, cannot be qualified as effective since it was based only on public information and cannot *therefore* (italicized by the Court) lead to the identification and punishment of those responsible.

The Court of Appeal is unable to follow the rationale of this argument. Historical and criminal investigations are not mutually exclusive; they overlap and can have a mutually beneficial effectiveness[33]. On the basis of these sources, they were able to submit an extensive, detailed and argumented Complaint. It is perfectly clear who they had in their sights as suspects, and why. If the Public Prosecution Service had concurred with the Plaintiffs' interpretation of the underlying facts, and with their standpoint with regard to the expediency of prosecution, it would certainly have proceeded to seek a prosecution on the basis of the material available.

In her letter dated 7 March 2013, the Chief Public Prosecutor sets out the following considerations:

> *On the basis of an intensive and careful investigation of the facts it was possible to make a good reconstruction of the events surrounding Rizo Mustafić and Ibro and Muhamed Nuhanović. Enough insight had been gained into the role that Karremans, Franken and Oosterveen played in these events to be able to judge whether there are any indications that would necessitate further investigation, criminal or otherwise.*
> *Further investigation of any nature will not produce any really new information. It is possible that further statements will provide extra details to clarify the existing perspective on the course of events, but that will not have any impact on the legal conclusions that can be drawn.*

The Court of Appeal is of the opinion that this justification for not instituting any further investigation is sufficiently sound. The Court notes in that context that the considerable period of time that has passed and the extensive public debate about this matter give rise to serious misgivings as to the reliability of any such "new" evidence. A striking example of this is the statement of an anonymous member of Dutchbat that the Plaintiffs recently submitted. The statement describes Corporal Raymond Dorst taking photos and includes a detailed report about how the photos were suppressed (the "dirty games" played by the Military Intelligence and Security Service (MIVD) and the Royal Marechaussee (KMar)). However: *those* photos *never* disappeared; they can be found among the exhibits[34].

7.4 *Re c: defective decision-making*
The Plaintiffs are correct in contending that the Public Prosecution Service failed to explicitly include the advice of the National Reflection Chamber in its argumentation of the decision not to seek prosecution. It was under no obligation to do so, but it is detrimental to the depth and the testability of the ultimate decision. In particular, that failure somewhat obscures the judgement on the question of

[30] In the Orić case, ICTY refers to "a less grave mode of participation"; ICTY, (IT-03-68-T), Trial Chamber, Judgement 30 June 2006, § 281.
[31] Complaint, § 31.
[32] Other than the NIOD, the ICTY had a set of copies of all the full statements made during the debriefing; NIOD report, p. 17.
[33] Cf. the NIOD report, p. 2352, where the NIOD considers the ICTY's reconstruction of the executions for the Krstić case to be of great value to its own historical investigation.
[34] See further par. 12.2.

the expediency of prosecution. Accordingly, the Court cannot constrain itself to the generally requested limited judicial review of this aspect of the decision[35], but - *if* prosecution is technically feasible - it will need to supersede the Public Prosecution's judgement by its own.

7.5 *Re d: the feasibility of possible prosecution*
In contrast to its opinion-forming about the expediency of prosecution, the Court of Appeal must fully test the decision taken about the feasibility of prosecution[36].
This means that the Court of Appeal must give thorough consideration to the facts and the context surrounding them.

7.6
For a good understanding, the Court of Appeal makes the following comments. Contrary to what the Plaintiffs seem to assume, a Complaint of this nature is not a two-party dispute between the Plaintiffs and the Public Prosecution Service. The Defendants are likewise party to these proceedings; they have the right to be shielded from frivolous prosecution for very serious offences.
The Military Complaints Tribunal must take all these interests into account, and this calls for a more thorough testing than the Plaintiffs seem to advocate[37].

The relevant historical context - not translated

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35 Cf. Corstens/Borgers "Dutch Criminal Law", 2014, pp. 625-626.
36 Cf. Corstens/Borgers "Dutch Criminal Law", 2014, p. 625.
37 Written pleadings, point 13.
38 (footnotes 38 to 84 not translated)

War crimes and crimes against humanity; the executions

9.1
The judgement given by the ICTY and the International Court of Justice indicates that all the combatant parties in the conflict in the former Yugoslavia were guilty of war crimes or of crimes against humanity. It will suffice here to mention just a couple of examples.

In the case against Naser Orić, the Trial Chamber of the ICTY established that during their advance, up to January 1993 (described in par. 8.3)[85], the Bosnian Muslims had been guilty of the wilful destruction of towns and villages. The events of that campaign incited strong feelings of revenge among the Serbs[86].

In its judgement on the case between Bosnia-Herzegovina and Serbia and Montenegro dated 26 February 2007, which is largely based on the investigation of the facts and the legal precedents of the ICTY, the International Court of Justice comes to the conclusion - testing its judgement against the Genocide Convention - that:
"The Court is fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre."[87]
and
"The court concludes that the acts committed at Srebrenica falling within Article II (a) en (b) of the Convention were committed with the specific intent to destroy in part the group of Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995."[88]

The executions began on 13 July; the largest number took place between 14 and 17 July, with the locations moving gradually northwards[89].
The estimated 1,000 men (according to ICTY's estimate in the Krstić case) who had been separated in Potočari were moved to Bratunac and combined with the men taken prisoner from the column going to Tuzla[90].
A recent judgement given by the ICTY *Appeals Chamber*, in the case against Vujadin Popović et al., confirmed the opinion of the *Trials Chamber* that this was a case of both genocide and murder as a crime of war[91].

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

9.3
In the opinion of the Court of Appeal, the material available does not support the assumption that the Defendants knew about the executions which had taken place elsewhere. In that respect, it can be

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85 ICTY, (IT-03-68-T), Trial Chamber, Judgement 30 June 2006, §§ 608, 619, 633 and 676. Orić himself was not actually held criminally responsible for these events.
86 NIOD report, pp. 2671-2676.
87 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, I.C.J. Reports 2007, p. 43, § 291.
88 As above, § 297.
89 NIOD report, p. 2545.
90 ICTY, (IT-98-33-T), Trial Chamber, Judgement 2 August 2001, § 66.
91 ICTY, (IT-05-88-A), Appeals Chamber, Judgement 30 January 2015.

noted that most of those executions must have taken place *after* the Defendants' family members left the compound on 13 July 1995.

9.4
On the basis of statements from Dutchbat servicemen, survivors, staff of NGOs and other parties involved, the NIOD estimates that approximately 400 able-bodied men disappeared from Potočari[92]. Between 100 and 400 men were said to have been murdered in Potočari[93].

Separation of the (able-bodied) men from the women, children and elderly persons

10.1
The able-bodied men were systematically separated from the other refugees before they were moved out[94].
According to *Bosnia & Herzegovina Commander* General Smith, this was normal practice in Bosnia. According to Smith, the ABiH did exactly the same when they invaded and occupied larger villages[95].
In his testimony for the ICTY in the cases against Karadžić and Mladić, Defendant Karremans said that general Mladić had told him during their third meeting on the morning of 13 July that he wanted to see all the men between the ages of 17 and 60. Allegedly, there were many war criminals among their number, and he wanted to speak to them[96]. His suspicions were not entirely unfounded; one young man who was known as "the butcher" had found his way into a group of wounded casualties[97].
One VRS military lawyer told UNMO Major Kingori that the men were being kept separate with a view to exchanging them for their own men who had been taken prisoner by the Muslims[98].
The protected witness known only as "B", apparently a member of the Dutch armed forces, told the ICTY that Serbian military personnel had told him that the male refugees were being picked out to check whether they had been in the military during the war. If so, they would become prisoners of war.[99]

10.2
The men were usually first taken to what was known as the "White House". Because there were suspicions that improper practices were taking place there, the house was kept under surveillance by Dutchbat military personnel; they had visited the "White House" a number of times, and made reports about those visits.

In a statement to the KMar, Second Lieutenant Rutten said that on 13 July he and Sgt.Major Van Schaik had entered the "White House", where the Muslim men had been gathered together for what was referred to as "interrogation". Two Dutch servicemen stood in front of the house; Rutten instructed them to go inside and wait. In the house he saw rooms, both on the ground floor and upstairs, into which Muslim men had been tightly packed. Rutten could hear voices emanating from one room, which was apparently in use as an interrogation room. VRS combatants prevented him from entering this room. Rutten saw at least one Muslim who had been hung from the stairs using handcuffs. On the upper floor, he spoke to a few Muslim men. He could see that they were terribly afraid. Rutten got the impression that they knew what was going to happen to them. An estimated

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92 For a good understanding: this is besides the 1,000 men who were deported according to the ICTY's estimate in the Krstić case.
93 NIOD report, pp. 2657-2668.
94 Various sources, including the Account of the Facts, pp. 168-170.
95 NIOD report, p. 2580.
96 ICTY, (IT-95-5 11-95-18), interview held on 4 July 1996, transcript p. 654, 655
97 Account of the Facts, p. 207.
98 ICTY (IT-98-33) Krstić case, interview held on 3 April 2000, transcript without page numbers.
99 ICTY (IT-98-33) Krstić case, interview held on 21 March 2000, transcript p. 899.

hundred Muslims were present in the house. Later that day, he saw what he estimated to be 300 Muslim men in the house[100].
Rutten told NIOD investigators that he had found a number of photos, set out on the floor in one of the rooms of the "White House": "They were looking for known faces".[101]
Van Schaik made no mention of the visit to the "White House" in his testimony to the KMar.

One serviceman declared that there was a military presence at a dwelling (apparently the "White House"; Court) during the entire day on 13 July so as to prevent rough treatment of the men who were present there; for the most part, they were successful. They entered the building and went into all the rooms. The rooms were crammed full of Muslim men. Men were continuously being transported out by bus/coach; the vehicle would return between 45 and 60 minutes later. Additional busses/coaches were used between 13.00 and 17.00 hours, but in spite of this there were ever more people in the building. In the period between 09.00 and 11.00 hours, he estimated that 130 Muslim men were present. After that, the building became more and more crowded. The last bus left at approximately 19.30 hours. A number of Muslim men offered him various possessions, including money, as they believed they would not survive the day[102].

UNMO Major De Haan stated that he had observed no irregularities with regard to the people who were entering the "White House". The Muslim men that he saw taken into the house were all calm and he saw no aggression directed at them. He had been into various parts of the house; at the time he was there, no aggression was evident[103].

10.3
On the evening of 12 July 1995 it became clear to Karremans and Franken that the busses with male refugees were not arriving in Kladanj where the refugees were crossing the border with the Muslim-Croat Federation[104]. Instead, they were being transported to Bratunac.

10.4
In the case against Krstić, the Yugoslavia Tribunal considered the following:
"At the Hotel Fontana meeting on 12 July 1995, General Mladić had said that military-aged men in the crowd at Potočari would be screened for war crimes. The Prosecution's military experts accepted that it was not inherently unreasonable or criminal for the Bosnian Serbs to conduct such screening given widespread and plausible allegations that Bosnian Muslim raiders from Srebrenica had committed war crimes against Bosnian Serb villages. Indeed, the Drina Corps Bratunac Brigade had prepared a list, dated 12 July 1995, of387 suspected Bosnian Muslim war criminals in the Srebrenica enclave. Throughout the war, large-scale prisoner exchanges were conducted between the Bosnian Serbs and Bosnian Muslims and a new infusion of Bosnian Muslim prisoners would have been a potentially useful bargaining tool for the Bosnian Serbs in future exchange negotiations."[105]

"[Mladić] also announced, for the first time, that the Bosnian Muslim men of military age would be separated and screened for war crimes. The experts all agreed that this would have been a legitimate undertaking and the Prosecution did not dispute the existence of a list of suspected Bosnian Muslim

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100 Official report P13/1995-JD, statement made by 2nd Lt. J.H.A. Rutten on 28 July 1995. This statement from Rutten corresponds with the statement included on p. 237 of the Account of the Facts.
101 NIOD report, p. 2676.
102 Account of the Facts, p. 236.
103 Provisional hearing of witnesses, District Court of The Hague, 12 May 2005; appendix 14 to the Complaint.
104 Testimony given by Franken: ICTY, (IT-98-33-T) Krstić case, interview held on 4 April 2000, transcript with page numbers. Provisional hearing of witness Karremans, District Court of The Hague, 16 June 2005; appendix 8 to the Complaint.
105 ICTY, (IT-98-33-T), Krstić case, Trial Chamber, Judgement 2 August 2001 § 156

war criminals in the enclave drawn up by the Bratunac Brigade on 12 July 1995. The Defence also pointed out that notes from interrogations of Bosnian Muslim men from Srebrenica were subsequently seized during a search of the Bratunac Brigade offices by the OTP."[106]
The evidence shows that the mass executions mainly took place between 13 and 16 July, while executions of smaller scale continued until 19 July. All of the executions systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers. The military aged men who fled to Potočari were systematically separated from the other refugees. They were gathered in the "White House" and were forced to leave their identification papers and personal belongings outside the house. While opportunistic killings occurred in Potočari on 12 and 13 July, most of the men detained in the White house were bussed to Bratunac, from the afternoon of 12 July throughout 13 July, and were subsequently led to execution sites.[107]

The crimes of which the Defendants are accused

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

As the Plaintiffs themselves acknowledge, the settled case law for the international criminal tribunals, and the Yugoslavia Tribunal in particular, that complicity in genocide entails *actual knowledge* of the genocidal intention of the principal offenders. Conditional intent or recklessness is not sufficient.
The Plaintiffs submit that the Dutch criminal courts will be less stringent. They referred to the judgement of the Court of Appeal in The Hague in the "Van Anraat" case[108], in which that Court expressly avoided this question. In addition, they cite the standpoint taken by the Public Prosecution Service in the "Vos" case, whereby the Public Prosecutors advocated a broader scope of criminal responsibility than that conceded by the tribunals.[109]

The Military Complaints Tribunal does not share the Plaintiffs' standpoint. With their case law and legal precedents, the international tribunals, which - by virtue of their composition and the large number of cases they deal with - are the foremost experts with regard to the interpretation and application of international criminal law, have developed a stable and carefully deliberated system with regard to the various forms of participation in genocide.
That case law is applied, without exception, to the suspects who are called to account for their involvement in crimes committed during the war in the former Yugoslavia before the Yugoslavia Tribunal.
In the opinion of the Court of Appeal, this balance of the system would be disturbed if the Dutch criminal courts, which operate on the periphery of this large volume of cases, were to base their judgements on criteria that diverge from those used by the Tribunal. With regard to a *suspect*, this would lead to an indefensible form of arbitrariness. The Court therefore opts to follow the judgement given by the Yugoslavia Tribunal on this point.

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106 As above, § 360.
107 As above, § 546.
108 Court of Appeal, The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676, point 7 re B of the grounds for decision. The issue was not broached during the appeal on points of law [*cassatie*]; see Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822.
109 For the ruling on this case, see District Court of the Hague, 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292. The Court, which sets out what should be understand under complicity in Chapter 13, points 6 and 7 of the grounds for the decision, made no pronouncement on this question.

There was no actual knowledge among the Defendants of the genocidal intentions of the Bosnian Serbs, a fact that the Plaintiffs also recognize.
The Court of Appeal therefore considers conviction on the grounds of complicity to genocide to be impossible[110], and prosecution to be pointless. For that reason, and in that respect, the Complaint must be deemed rejected.

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

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

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

12.1
From the statements they made to the Royal Marechaussee, it transpires that on 13 July 1995 1st Lt. Koster, 2nd Lt. Rutten and Sgt.Major Van Schaik found the bodies of nine men, all aged approximately 40, in a meadow near a stream. They had all apparently been executed. Rutten took some photos at the scene with a disposable camera[111].
Rutten has testified that he came across Defendant Karremans, by coincidence, and reported the discovery to him. Karremans reaction was lukewarm, and he said that he would report it up the chain of command.

At approximately 16.00 hours on 13 July 2013, private Groenewegen witnessed the execution of one person near the building that was known as the "White House".[112]
News of his observation was said to have reached Karremans via the normal hierarchical channels[113].
Defendant Franken remembers this report[114].

12.2
Defendant Oosterveen, in the company of Cpl. Dorst, also saw nine or ten bodies in woodland near a stream at approximately 14.45 hours on 13 July 1995. According to Dorst, it looked like a summary execution. Dorst took some photos of the situation with Oosterveen's camera[115]. Oosterveen afterwards discussed his findings with Rutten; In Oosterveen's opinion, it must have been two separate locations.

The Account of the Facts also contains further observations which in all probability relate to executions: on p. 231 (12 July, afternoon, at the "interrogation houses"), on p. 235 (that may possibly be the same incident and/or the incident reported by Groenewegen), on p. 233 (12 July, the transport to a house of ten Muslim men between the ages of 30 and 50, the arrival of a lorry as evening fell followed by shots heard in the immediate vicinity of the house and the departure of the lorry), on p.

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110 Where there is no conflict of opinion as to the facts of the case, and only a point of law is at issue, the Court of Appeal need not be reticent in its appraisal.
111 This concerns the allegedly failed roll of film. This is immaterial in this complaints case, since the eye witness statements provide a satisfactory starting point for the establishment of the facts.
112 Account of the Facts, pp. 287-288; NIOD report, p. 2696. Groenewegen, however, mentioned different dates; NIOD report, p. 2720.
113 NIOD report, p. 2720.
114 Report of the parliamentary enquiry, p. 209.
115 Those photos were added to the official report (P13-1995-JD, statement made by Cpl. R.W. Dorst on 1 August 1995), but the quality is poor.

240 (13 July, when male refugees were taken out of sight and pistol shots were heard from the direction in which they had been taken).

There are also a number of reports of shots, which were interpreted by the Dutchbat servicemen as being executions. Defendant Oosterveen has declared that the servicemen who were in the compound in the evening and at night heard shots now and again. This was not the clatter of a battle, but shots spaced at intervals; to execute people. This was on 12 or 13 July. It was not necessary to report it, everyone could hear it[116].

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

12.3
Generally, the Account of the Facts[117] includes a large number of reports of deaths that are not attributable to executions but are more likely to relate to the victims observed by Rutten or Oosterveen and their companions. It is not clear whether those observations were reported to the Defendants.

12.4
The facts set out above correspond to those established by the Court of Appeal in The Hague during the civil proceedings brought by the Plaintiffs against the State[118]. In those proceedings, the Court of Appeal combined all these facts (as "the knowledge of Dutchbat"[119]) to form the basis for its opinion that Dutchbat should not have sent the Plaintiffs' family members away from the compound[120].

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

12.5
On the grounds of the foregoing, the Court feels that the following can be established in regard to the knowledge of the Defendants.
- Defendant Karremans was aware of the findings of Rutten and his companions and of Groenewegen. He also knew of the existence of the list of able-bodied men drawn up on Franken's instructions[121]. He was indeed aware of the segregated transport of the men.
- Defendant Franken had instructed that a list be made of all the able-bodied men among the refugees in the compound. He knew about Groenewegen's report, and he knew about the findings of Rutten or those of Oosterveen[122]. He was also aware of the segregated transport of the men.
- Defendant Oosterveen had himself reported the observations described in par. 12.2. He, too, was aware of the segregated transport of the men.

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116 Provisional hearing of witnesses, District Court of The Hague, 12 May 2005; appendix 6 to the Complaint.
117 Account of the Facts, pp. 275-280.
118 Court of Appeal, The Hague, 5 July 2011, ECLI:NL:GHSGR:2011:BR0133 (Nuhanović/State) resp. ECLI:NL:GHSGR:2011:BR0132 (Mustafić/State), point 2.27 of the grounds for decision.In this respect, the Court of Appeal in The Hague also mentioned the list of "able-bodied men" drawn up on the instructions of Defendant Franken, as noted in the footnote to point 8.7 of the grounds for decision.
119 As above, point 6.7 of the grounds for decision.
120 As above, point 6.9 of the grounds for decision.
121 Provisional hearing of witness Karremans, District Court of The Hague, 16 June 2005, p. 7; appendix 8 to the Complaint.
122 Hearings of the parliamentary enquiry, pp. 77-78.

The departure of the Plaintiffs' family members from the compound

Muhamed Nuhanović

13.1
Muhamed was the younger brother of Plaintiff Hasan Nuhanović. He was born on 23 July 1974[123] and was therefore 20 years of age on 13 July 1995. Muhamed was not serving with UNPROFOR and did not have a UN pass.
The Plaintiff, who was himself an interpreter for the UNMOs, was employed by the UN; he did everything he could to get Muhamed put on the list of local personnel and/or to obtain a UN pass for him. Defendant Franken refused this. The UNMOs and the Dutch servicemen said that Muhamed had to leave the compound along with the other "ordinary" refugees. Muhamed, with his father Ibro and his mother, was one of the last to leave the compound. He did so under protest because Franken had refused a last request to have him put on the list of local personnel.

13.2
Plaintiff Nuhanović accuses Franken of sending Muhamed away from the compound. He considers Defendant Karremans responsible for this on the grounds of Art. 9 of the Wartime Offences Act [*Wet Oorlogsstrafrecht*]. He does not hold Oosterveen responsible for this.

13.3
In his various statements, Franken made no effort to portray matters any rosier than they were. On 21 May 2001, he told the NIOD investigator that he had taken a conscious decision that boiled down to "sending that family to its death. That is correct."[124]

In the opinion of the Court of Appeal, this statement - made almost six years after the events took place - must be seen against the background that it is now known what terrible fate awaited the men who were taken away. That point was also made on behalf of Defendant Franken during the hearing: that he had no knowledge, suspicion or idea that murders were routinely being carried out. The worst scenario that he could have assumed was detention. The Court cannot rid itself of the impression that the Defendant Franken's defence team is trying to put things in a very positive light.

Some support for the Defendant's standpoint can, however, be found in the case file. The Court of Appeal refers to the circumstances described in par. 10.1 of the grounds for the decision, that it was not unusual for the men to be separated, that Mladić had said that the group was to be screened for war criminals, the announcement by Kingori that the men were being kept separate so as to be able to exchange them for Bosnian prisoners of war, and the announcement from VRS soldiers that any servicemen among the refugees would be made prisoners of war. The Court of Appeal points out that Mladić's announcement corresponds with the findings of Rutten that he had found photos set out on the floor of one of the rooms in the "White House", where people were apparently being interrogated, which gave him the impression that they were specifically looking for certain persons.

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

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

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[123] Statement made by Plaintiff during the hearing. In the Complaint he is referred to as a minor (p. 27), in the letter from the Chief Public Prosecutor dated 7 March 2013, as a 19 year old (p. 9).
[124] NIOD report, p. 2756.

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

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

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

In short, Franken would not risk allowing Muhamed to pass through as a local employee, something he knew to be untrue, because this might endanger the evacuation of the other local employees.
On the basis of his experience that the VRS inspected convoys meticulously, and knowing that every detail had to be completely correct, he assumed that he would be taken an enormous risk when the VRS carried out its almost inevitable inspection and found someone with no valid papers or papers that were questionable[125].

13.5.1
It is painful to have to note that the VRS evinced no respect whatsoever for Dutchbat and took little or no notice of them: "Another striking observation was that VRS saw UNPROFOR as just so much air. The operational plan took no account at all of the presence of Dutchbat." [126] They took over observation posts[127] at will, relieved Dutchbat of vehicles and weapons[128], even personal pieces of equipment, down to uniforms and footwear, leaving the Dutch servicemen standing in their underclothes[129].

13.5.2
The process of moving out the refugees was also entirely dictated by the VRS, in particular by General Mladić. One of his demands was a list of the names of men between the ages of 17 and 60, supposedly so that the list could be screened for war criminals[130]. They further determined that the evacuation would take place in five "batches":
1. the severely wounded and wounded
2. the weak/less weak
3. the stronger ones (children/women)
4. the men between the ages of 17 and 60, with an annotation: "to be debriefed by BSA [VRS]"
5. the Dutchbat contingent itself[131].

13.5.3

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125 NIOD report, p. 2756.
126 NIOD report, p. 2071.
127 OP-E, NIOD report, p. 2005; OP-F, NIOD report, p. 2116; OP-U, NIOD report, p. 2125; OP-S, NIOD report, p. 2131; etc.
128 NIOD report, p. 2647.
129 NIOD report, p. 2685, observation made by a (female) employee of Artsen zonder Grenzen [*Medicins Sans Frontières*].
130 NIOD report, p. 2639.
131 NIOD report, p. 2641.

VRS military personnel inspected[132] the compound at approximately 11.00 hours on 13 July; once all the refugees had left, and there were only a few wounded persons in the compound, a group of Serbs arrived in the compound with an escort to see if any refugees were still present[133].
When a convoy of wounded persons had been inspected on the previous evening, the VRS had found a number of men who were supposedly wounded while there was nothing wrong with them[134].

13.5.4
The VRS also wanted to have a list of local employees. Besides the usual details such as name, sex and date of birth, the period that the person had worked there also had to be given[135].

13.5.5
In the opinion of the Court of Appeal, there is a very good chance that a criminal court dealing with the case at any later date would uphold the claimed emergency if the opportunity arose.

Dutchbat servicemen and any other person left in the compound were completely dependent on the VRS. The idea that Muhamed would have been safe there as long as the UN flag was raised, as Plaintiff Nuhanović claimed during the hearing, is not realistic. As evidenced by the taking over of the observation posts, the VRS had no respect at all for that flag; they came into the compound as and when it suited them, and they carried out meticulous inspections. In the Court's opinion it would indeed have been critically dangerous if the VRS had discovered that Dutchbat had tampered with a list of employees. Seen in that light, the Court of Appeal therefore concludes that it is not of decisive importance whether or not it would have been possible to make a UN pass for Muhamed on site; despite having been discussed at length between the parties, this is not a question to which a clear-cut answer can be given.

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

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

13.6.2
The text of Article 9 of the Dutch Wartime Offences Act [*Wet Oorlogsstrafrecht*] valid in July 1995 read as follows: *Any person who intentionally permits a subordinate to commit any of the offences referred to in the previous article* [violation of the law and customs of war; note added by Court] *will be liable to similar punishment*.

Any intentional permission has been refuted on behalf of Defendant Karremans.

The Court of Appeal feels that this defence is inadequate. Unlike the situation in the case which the defence team seems to be referring to[136] (involving the Afghan General F), the command relationship

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132 NIOD report, p. 2640.
133 Account of the Facts, p. 205.
134 NIOD report, p. 2755.
135 Notes made by Sgt.Major B. Rave; NIOD report, p. 2755.
136 The reference made by the defence team to the judgement of the Court of Appeal, The Hague, is rather sketchy. Reference is made to a judgement of 25 June 2007 and to a judgement of 25 July 2007. However, the reference code given, ECLI:NL:GHSGR:2009:BJ2796 (Court of Appeal, The Hague), relates to a judgement of 16 July 2009; it is to this judgement that the conclusion of the Supreme Court's Procurator General refers; ECLI:NL:PHR:2011:BR6598 (Supreme Court). The date 25 June

between Karremans and Franken is not at issue here. It has also been established that Karremans was aware of the why's and wherefore's of the decision taken by Franken. The phrase "intentionally permitting" in Art. 9 of the Wartime Offences Act also includes "neglecting to intervene where possible"[137]. The Court of Appeal notes that Karremans had the opportunity to overrule Franken's decision.

Nonetheless, that does not alter the fact that the complaint with regard to Defendant Karremans should be rejected.
With regard to Defendant Franken, the Court of Appeal has considered and decided that it is highly unlikely that a criminal court dealing with the case at any later date would convict Defendant Franken. There is then no subordinate who *commits any of the specified offences*, and that renders a conviction on the basis of Article 9 of the Wartime Offences Act out of the question.

The same could be said if such a subordinate were to invoke grounds for justification, since that would also nullify the punishability of the offence.

Ibro Nuhanović

14.1
Ibro, the father of Muhamed and the Plaintiff, was one of the three representatives of the refugees who attended a meeting[138] between the Dutchbat commander(s) and General Mladić. Because of this involvement, he was permitted to leave together with the Dutchbat contingent. Defendant Franken told him this, in so many words[139], when he was on the point of leaving the compound with his son Muhamed and his wife. Despite this, Ibro left the compound.

14.2
The Plaintiff accuses Defendant Franken of forcing him (Ibro) to leave the compound as well, by sending Muhamed away. He considers Defendant Karremans responsible for this on the grounds of Art. 9 of the Wartime Offences Act. He does not hold Oosterveen responsible for this.

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

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

14.4

2007 is the date of a ruling on the underlying court judgement; ECLI:NL:RBSGR:2007:Ba7877 (District Court of The Hague).

[137] In par. 132 of the grounds for decision, the Court of Appeal, The Hague, concurred. The Court established that "failure to *punish a subordinate*" is not an offence under Article 9 of the Wartime Offences Act. By omitting the italicized words, the defence team reduces the potency of the Court's standpoint.

[138] NIOD report, p. 2637.

[139] Statement made by the Plaintiff during the hearing.

In the civil proceedings, the Court of Appeal in The Hague decided that the State had not acted unlawfully vis-à-vis Ibro, but that his death was imputable to the State as a result of unlawful actions vis-à-vis Muhamed[140].

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

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

Rizo Mustafić

15.1
Rizo Mustafić was employed by Dutchbat as an electrician. He was on the list of 29 local employees who would have been allowed to leave with the Dutchbat contingent.
Defendant Oosterveen, who was not aware of this fact, told Mustafić that he, just like the other "ordinary" refugees, had to leave the compound.
Defendants Karremans and Franken only heard about this mistake on Oosterveen's part after Mustafić had already left.

15.2
The Mustafić Plaintiffs accuse Defendant Oosterveen of sending Rizo Mustafić away from the compound. They consider Defendants Karremans and Franken responsible for this on the grounds of Art. 9 of the Wartime Offences Act.

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

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

15.5
The circumstance that the civil court held the State liable for the fact that "Dutchbat"[141] erroneously sent Mustafić away, does nothing to alter this standpoint. Under civil law, an employer can certainly be held liable for mistakes, even stupid mistakes, made by his employees, while the employee himself may not be liable under criminal law.

15.6

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[140] Court of Appeal, The Hague, 5 July 2011, ECLI:NL:GHSGR:2011:BR0133 (Nuhanović/State), par 6.20 of the grounds for decision.
[141] The Court of Appeal in The Hague makes exclusive use of this general designation; Court of Appeal, The Hague, ECLI:NL:GHSGR:2011:BR0132 Mustafić/State), par. 6.5 to 6.21 of the grounds for decision.

The punishability of Defendants Karremans and Franken on the basis of Article 9 of the Wartime Offences Act is not at issue, because Oosterveen cannot be accused of any of the offences listed in Article 8 of the same Act.
Moreover, this was not a question of intentionally allowing some offence to be perpetrated.

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

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

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

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

Final conclusion

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

Ruling
The Court of Appeal (Military Complaints Tribunal):

rejects the Complaint.

The decision was given by R. van den Heuvel LL.M, Presiding Judge, R.H. Koning LL.M., member, and Commodore R.R.J. Laurens LL.M., military member,
in the presence of J.R.M. Roetgerink, Clerk of the Court, on 29 April 2015 and signed by the Presiding Judge and by the Clerk of the Court.

[two signatures]

Certified as a true copy
The Clerk of the Court of Appeal
Arnhem-Leeuwarden
[initials]