IN THE NAME OF THE QUEEN

COURT RULING

DISTRICT COURT OF THE HAGUE

Civil law sector

case number / docket number: 354119 / HA ZA 09-4171

Court ruling of 14 September 2011

in the case of

1. **WISAH BINTI SILAN,**
2. **WANTI BINTI DODO,**
3. **LASMI BINTI KASILAN,**
4. **CAWI BINTI BAISAN,**
5. **TASWI,**
6. **TIJENG BINTI TASIM,**
7. **LAYEM BINTI MURKIN,**
8. **TAIJSI BINTI TIKIN,**
9. **SAIH BIN SAKAM,**

all of whom were residing in Balongsari, Indonesia at the time the originating summons was issued,

and

10. the foundation
FOUNDATION KOMITE UTANG KEHORMATAN BELANDA (COMMITTEE OF DUTCH HONORARY DEBT),
With its registered office and principal place of business in Heemskerk,
plaintiffs,
attorney L. Zegveld LL.M., in Amsterdam,

vs.

THE STATE OF THE NETHERLANDS (MINISTRY OF FOREIGN AFFAIRS),
whose seat is established in the Hague,
defendant,
attorney G.J.H. Houtzagers LL.M., in The Hague.

Plaintiffs sub 1 to 10 shall be referred to hereinafter as “plaintiffs”, plaintiff sub 9 separately as “Sakam” and plaintiff sub 10 separately as “the Foundation”. Defendant shall be referred to hereinafter as “the State”.

1. The procedure

The course of the procedure is evidenced by:
- the summons of 30 November 2009, with exhibits;
- the statement of defence, with exhibits;
- the statement of reply, with exhibits;
- the rejoinder, with exhibits;
- the record of the case argued on 20 June 2011 and the documents referred to there within and attached thereto.

Finally, a date for judgement was scheduled.

2. The facts

2.1. Indonesia formed part of the Kingdom of the Netherlands under the name of the Dutch East Indies until 1949.

2.2. On 17 August 1945 the nationalist Indonesian leaders Soekarno and Hatta proclaimed the Republic of Indonesia. That republic was not acknowledged by the Netherlands, initially.

2.3. On 25 March 1947, the Netherlands and the Republic of Indonesia concluded the Linggadjati Agreement where it was determined that the Republic of Indonesia would become independent no later than 1 January 1949.

2.4. Disagreement over the interpretation and the execution of the Linggadjati Agreement led to military intervention by the Netherlands in the Republic of Indonesia in July 1947 (the so-called 'first police action'). This action lasted until 5 August 1947. During this action, the Dutch military occupied the lowland plains surrounding the city of Krawang. This city is located a couple of kilometers south of the Rawagedeh settlement, which is now known as Balongsari, where plaintiffs sub 1 to 9 reside, or else resided.

2.5. On 9 December 1947 Dutch soldiers under the command of major Wijnen carried out an attack on Rawagedeh in the scope of the fight against the Indonesian forces that had become active in that area. During this attack, a large part of the male population, including the spouses of plaintiffs sub 1 to 7, were executed without trial by Dutch soldiers. Sakam was injured in this attack.

2.6. On 12 January 1948 the report of the 'Committee of Good Offices on the Indonesian Question' of the UN Security Council was published. In this report, the action of the Dutch military in Rawagedeh was investigated and was designated as *"deliberate and ruthless"*.

2.7. By letter of 22 July 1948, lieutenant-general S.H. Spoor, commander of the army (hereinafter: "Spoor"), submitted the following request to Mr. H.W. Felderhof, procurator-general at the Supreme Court of the Dutch East Indies (hereinafter: "Felderhof"):

"I hereby forward to you a dossier about the Krawang event, which I spoke to you about earlier. It concerns the matters of execution by the major [illegible]. I am rather worried about this: the man is liable under criminal law and if tried by Court Martial he will irrevocably be convicted, which will cost him his further career. On the other hand, from the part of the Court Martial, the inclination is to rather not take legal action because the circumstances under which matters occurred will cause this legal action a posteriori to place the person in question to be put in a much more unfavourable light, than the actual situation when it occurred. (…) I would appreciate your opinion on this case, because it would be very easy to decide to take up legal action, but I wonder as to whether the case and justice will be served therewith. I myself am in doubt and I am also inclined to dismiss (…)"

2.8. By way of a letter from 29 July 1948, Felderhof responded to Spoor:

"Now that apparently every outside interference and interest have disappeared I would prefer to dismiss. This does not alter the fact that the actions of Maj. [illegible], in themselves comprehensible and explicable, nevertheless must be disapproved of, because he was not placed in an absolute dilemma (…) Where Maj. [illegible] did not commit excesses such as abuse and he, not entirely unjustly, assessed that these boenja's would turn the area into an insecure region within the foreseeable future, I ask you to consider not to take legal action in this case."

2.9. On 3 August 1949 the Dutch government and the government of the Republic of Indonesia declared a cease-fire. The transfer of sovereignty was effected on 29 December 1949.

2.10. On 7 September 1966 the 'Agreement between the Kingdom of the Netherlands and the Republic of Indonesia concerning the financial problems still outstanding between the two countries' was concluded. (hereinafter: "the Financial agreement"). Article 3, paragraph 1 of this agreement provides that the parties agree that payment by the Indonesian government of an amount of six hundred million Dutch guilders to the Dutch government would settle all existing financial problems.

2.11. In 1969, the 'Note concerning the investigation of the records into data regarding excesses committed by Dutch soldiers in Indonesia in the period 1945 – 1950 (hereinafter: "Note on Excesses") was adopted. In this note, the Dutch government took up the position that the Dutch forces in the Republic of Indonesia had committed acts of excessive violence , but that these acts must be seen in the situation of an unregulated guerilla war, where the Indonesian ambushes and acts of terror instigated Dutch mopping-up operations and acts of counter-terror. Among other things, the Note on Excesses contains the following investigative account of the events in Rawagedeh:

"Following a complaint from the side of the Republic, observers of the Security Council Committee of Good Offices on the Indonesian Question conducted an on-site investigation. In a report published on 12 January 1947, the team of observers concluded that an underground terrorist movement had developed in the area in question, with Rawahgedeh as its presumptive center. Nevertheless, the actions aimed against Rawahgedeh by the Dutch troops was referred to as "deliberate and ruthless". After all, among other things, following an initial denial, the Dutch side admitted to having executed several prisoners after interrogation without any judicial process, despite the fact that during and after the act, which according to Dutch information cost the lives of a total of 150 Indonesians, no weapons were found in the kampong and no deaths or injuries were recorded on the Dutch side. After consultations between the Army Commander and the Procurator-General, the major who was in charge of the action and who was responsible for the execution of an approximate total of 20 prisoners was not prosecuted for considerations of opportunity."

2.12. In the Parliamentary Debate which followed in 1969 after the Note on Excesses was published, the then prime minister De Jong used the following terms to declare that there will be no prosecution for crimes not prescribed, committed by Dutch soldiers in Indonesia in the period of 1945 – 1950:

"The conclusion reached by the Government is therefore that in the majority of cases, and for the greater part, the most serious ones, prosecutions are no longer possible and that the sole case where prosecution may yet be considered, must be dismissed, because a prosecution policy for that purpose will be dependent on a coincidental availability of a sufficiently complete dossier and the applicability of a single statutory provision not yet superseded by expiry of the time limit will be arbitrary. It is not the seriousness of the crime that would be decisive, the time limit on the serious crimes have already expired, for that matter. Coincidence would rule over the policy too much and this will not lead to fair administration of justice. (…)"

2.13. Arising from Parliamentary questions following a documentary on Rawagedeh broadcast by RTL in 1995, the then prime minister Kok promised that the Public Prosecution Service would conduct an exploratory investigation, where information that recently became available would be examined against the content of the existing dossier, in order to see as to whether it is appropriate to as yet decide to prosecute the responsible Dutch soldiers.

2.14. By way of a letter dated 28 August 1995 the Procurator-General of the Arnhem Public Prosecutor's Office forwarded an official report to the Minister of Justice containing the outcomes of an exploratory investigation conducted by public prosecutor B.F.A. van der Krabben, LL.M., and lieutenant-colonel A. van Gorp, LL.M., into the punishability of the acts committed by the Dutch soldiers in Rawagedeh on 9 December 1947 and the question as to whether or not the time limit of these acts has expired. The official report contains the following conclusions:

"I on 9 December 1947 criminal acts were committed by Dutch soldiers in Rawagedeh.

II the criminal acts committed may possibly be qualified as violations of former Section 148 of the Dutch Military Criminal Justice Act.

III we are not entirely convinced that the prescription of these acts is extinctive.

IV in the event that we assume that the matters are not prescribed, in our opinion a possible prosecution will be barred by the Public Prosecutor's Office on the grounds of

- *a) the 1969 decision by the Dutch government not to prosecute anymore;*
- *b) the dismissal adopted earlier;*
- *c) the prolonged failure to prosecute since the facts were already known in 1947/1948, though most certainly in 1969;*
- *d) inequality before the law, since similar offences in the period 1946 – 1950 were tried in respect of violation of the Sections 287 and 289 of the Dutch Penal Code, to which a lesser penalty would be applicable compared to the Sections applied now."*

2.15. In a letter dated 5 September 1995, the Minister of Justice notified the Dutch House of Representatives on the outcomes of the exploratory investigation as follows:

"The documentary in question sheds no new light on facts already known. The events in Rawagedeh are subsequently reported in the correspondence from the archive of procurator-general Felderhof, in the UN- report of 12 January 1948 and in the Note on Excesses of 1968. There are various interpretations as to the number of casualties of

9 December 1947. In any case it must be determined that the Dutch army carried out summary executions during the events in Rawagedeh, in the course of which there were a large number of casualties.
Nevertheless, it must be determined that prosecution of the crimes in question is no longer possible. In the debate about the Note on Excesses in the Dutch House of Representatives in 1969, the then prime minister De Jong stated that any crimes committed by Dutch soldiers in the period 1945 – 1950 not yet prescribed will no longer be prosecuted (Parliamentary documents 10 008, 74th sitting of 2 July 1969, page 3613/3614). Apart from this, in the framework of the parliamentary debate of the law of 8 April 1971 in the course of which the expiry of the time limit on war crimes and crimes against humanity is made extinctive it is stated that: "An investigation was conducted into the crimes committed by Dutch soldiers in Indonesia in the period 1945 – 1950. The government notified the Dutch House of Representatives of this in a memorandum. In the public debate of this memorandum, the considerations leading to the decision not to prosecute any crimes from that period of which the time limit had not yet expired were explained. Consequently, there would be no basis for an extinctive prescription of these crimes." (Parliamentary documents 10 251, 140 a, MOR to the Dutch Senate). From this it must be concluded that upon the termination of the prescription of war crimes, the legislator did not consider crimes committed by Dutch soldiers in Indonesia in 1945 – 1950. Therefore, I do not consider further investigation appropriate."

2.16. The Foundation was established in the Netherlands on 4 April 2007 and pursuant to its bye-laws, it has for its purpose, among other things, to represent the interests of the civilian (Indonesian) victims, or else their surviving relatives, who during the colonial period suffered under the violence of the Dutch regime and the violation of human rights that were committed by the Dutch military under the aegis of the Dutch government in the colonial period. Besides this, the Foundation has for its purpose to obtain acknowledgement from the Dutch government for the Indonesian victims and damages resulting from war and to realize legal rehabilitation for these victims.

2.17. In a letter dated 8 September 2008, the attorney for the plaintiffs holds the State liable for the damages incurred by plaintiffs as a result of the actions of the Dutch soldiers in Rawagedeh. In the process, the attorney for the plaintiffs has requested compliance with both the obligation arising from a wrongful act to compensation for damages and with a natural obligation to provide compensation and legal rehabilitation.

2.18. By letter of 21 November 2008 the State informed the attorney for the plaintiffs not to be prepared to compensate for the damages as assessed.

3. The dispute

3.1. Plaintiffs claim by judicial decree, in so far as provisionally enforceable:

I. to rule that the State has acted unlawfully towards the plaintiffs whose spouses were executed, or else who themselves sustained injuries and that it is therefore liable for damages they incurred or are yet to incur, to be assessed by the Court and to settle in accordance with the law, to be increased by the statutory interest from the day of the summons until the date on which payment is made in full;

II. to rule that that the State has acted unlawfully towards the Foundation and is liable for the damages incurred and yet to incur by the other parties whose male family members were executed by Dutch soldiers on 9 December 1947;

III. to order the State to compensate for extra-judicial collection costs, to be assessed by the Court and to settle in accordance with the law;

IV. to order the State to pay costs, in any case to compensate these.

3.2. Plaintiffs base their claims on the fact that the State acted unlawfully by (i) executing the spouses of the plaintiffs sub 1 to 7 and the father of plaintiff 8 and by shooting down Sakam and (ii) failing to launch a proper judicial investigation and failure to prosecute and bring to trial the Dutch soldiers responsible for these executions.

Executions

3.3. In connection with the claim by virtue of the executions plaintiffs state that the executions took place

in the scope of an official military operation for which the State is ultimately responsible. According to the plaintiffs the State has violated their fundamental personality rights by executing the male inhabitants of Rawagedeh. Apart from this, in their opinion the conduct of the Dutch soldiers was in violation of the statutory obligations vested in the State and the care that the State is required to observe, given the circumstances. According to the plaintiffs, at the time of the executions the State was under the obligation to protect the physical integrity and the lives of its subjects, including (at the time) the inhabitants of Rawagedeh. For that purpose, in the first place plaintiffs refer to Section 4 of the Dutch Constitution of 1938 and to Section 148 of the Dutch Military Criminal Justice Act is it applied in 1947, in which the conduct of the Dutch military is qualified as a criminal act. Besides this, according to plaintiffs the aforementioned obligation of the State to protect arose from compulsory standards of international law, which in so far as these were not codified, in any case would apply as customary law or as general fundamental statutory principles.

Failure to prosecute and bring to trial

3.4. According to the plaintiffs the failure to launch a proper judicial investigation into the executions and the failure to bring the Dutch soldiers responsible for these executions to trial is unlawful towards them, now that from the correspondence between Spoor and Felderhof it follows that successful prosecution of major Wijnen could unreservedly have been achieved and instituted solely for political reasons. To explicitly decide not to prosecute in 1948, 1969 and 1995 must be considered continuous unlawful conduct by the State, according to plaintiffs. In their opinion, the State's obligation to prosecute not only arises from national law, but also from the European Convention on Human Rights (ECHR) which became effective in 1954 and which contains the obligation of the State to protect the right to life. According to plaintiffs this includes the positive obligation of the State to prosecute and bring to trial violations of the protected right to life of Section 2 ECHR. The fact that the executions took place prior to the ECHR becoming effective does not impair the obligation of the State to as yet conduct an investigation in such cases, after the entry into force in 1954, according to plaintiffs.

3.5. Plaintiffs state to have incurred damages as a result of unlawful acting by the State, which damages consist of both financial losses and intangible losses. The deaths of the men of Rawagedeh led to a loss the source of income for their surviving relatives. In the second place plaintiffs argue that the events of 9 December 1947 have seriously and personally affected the people involved, which has led to permanent damage. More specifically, according to plaintiffs the State has violated their family lives, personal integrity, life-style and mental condition.

3.6. The State puts up a reasoned defence. In so far as relevant, the arguments of parties are dealt with in more detail hereinafter.

4. The judgement

Description of the plaintiffs

4.1. Upon statement of reply plaintiffs argued that plaintiff sub 7 died on 6 June 2010 and that her daughter Remi Binti Taslim is her legal successor ipso jure based on Book 4, Section 182 of the Dutch Civil Code in conjunction with Book 4, Section 10 of the Dutch Civil Code. In connection with this, the State rightfully adopted the position that a party to the proceedings who dies during proceedings in an ongoing action, cannot be replaced as a party by an heir through a single notification on a court document. In order to effect that a legal successor may replace an initial party in an action, the path of suspension and resumption as provided for in the Sections 225-227 of the Dutch Code of Civil Procedure must be followed. In case of failure to suspend the proceedings by the daughter of plaintiff sub 7, these proceedings will be resumed based on Section 225, sub 2 of the Dutch Code of Civil Procedure in the name of the initial party.

Judgement on the merits

4.2. Up for judgement is whether the State is liable towards plaintiffs for damages, resulting from unlawful acting on the part of the State, which according to plaintiffs consists of (i) the execution of a large portion of the male inhabitants of Rawagedeh on 9 December 1947 and the shooting down of Sakam and (ii) the failure to conduct a proper judicial investigation into the executions and the failure to prosecute and bring to trial the Dutch military responsible for these executions.

Claim by virtue of the executions and the shooting down of Sakam

4.3. The Court states first and foremost that the State acknowledges that the executions of the men of Rawagedeh on 9 December 1947 and the shooting down of Sakam (to be referred to hereinafter as "the executions"), towards plaintiffs sub 1 to 9 are unlawful. However, according to the State plaintiffs may not enforce any claims towards it arising from these executions since the legal claim for compensation for damages arising from the executions has lapsed.

Applicable law

4.4. Before it can be assessed as to whether the prescription defence is successful, the Court will ascertain which law applies to the legal claim arising from the unlawful act. Plaintiffs in the counsel's plea stated that according to them, Dutch East Indies law is applicable, while the State in its turn maintains that Dutch law applies. In its search for an answer to this question the Court seeks harmonization with the Unlawful Act (Conflict of Laws) Act. Although the executions took place prior to the Unlawful Act (Conflict of Laws) Act becoming effective on 1 June 2001, Dutch international private law on this point which had been in force for a considerable amount of time, has been codified within this Act, so in this case the laws laid down in this Act may be assumed. Section 3 of the Unlawful Act (Conflict of Laws) Act stipulates that obligations arising from unlawful acts are governed by the laws of the State on whose territory the act is committed. After the executions had taken place on the territory of the then Dutch East Indies and based on the starting point laid down in this article, in principle, the laws of the Dutch East Indies must be applied. However, the Dutch East Indies have ceased to exist as a political entity for a considerable time now and Dutch East Indies law has therefore long ago ceased to be an existing law. There are no precedents known to the Court, of such a situation where Dutch international private law refers to the laws of a political entity that no longer exists as such. The Court distinguishes two possible ways of approach in this situation: either the laws of the political entity which manifested itself on the former Dutch East Indies territory will apply, or else the laws of the political entity that the former Dutch East Indies was part of at that time. This means that either the laws of the Republic of Indonesia or the Dutch law will be applicable. Considering the fact that the executions were carried out by Dutch soldiers in the scope of the colonial rule of the Kingdom of the Netherlands at the time, on territory which at the time formed part of the Kingdom of the Netherlands, the Court is of the opinion that the executions are connected more closely with the Netherlands, than with Indonesia. This entails that it must be ruled that the obligation in question by virtue of these executions is governed by Dutch law.

4.5. Subsequently, based on the Dutch New Civil Code Transition Act, it must be determined whether the claim from plaintiffs by virtue of the executions must be judged according to current or old law. Seeing as that the damages assessed by plaintiffs as a result of the executions have occurred prior to 1 January 1992, pursuant to article 173 in conjunction with article 68(a) of the Dutch New Civil Code Transition Act the law will apply as it was in force prior to 1 January 1992.

4.6. From the previous it follows that the prescription defence of the State must be judged on the basis of the law is it applied before 1 January 1992. The State has primarily based its prescription defence on Section 1 of the Act from 31 October 1924, Bulletin of Acts and Decrees 428 (hereinafter: the Statute of Limitations) which was repealed as per 1 January 1992. This Statute of Limitations contains a specific regulation on prescription and limitation for monetary debts of the Central and other Governments. Based on this article, a time limit of five years applies for such monetary debts, which will start on 31 December of the year in which the monetary debt becomes payable.

Prescription

4.7. The Court states first and foremost that since the claim from plaintiffs by virtue of the executions serves to obtain compensation from the State, this is a case of a claim serving to settle a monetary debt under the Statute of Limitations. This means that the question as to whether the time limit of this claim has expired must be answered based on the Statute of Limitations, which in the case of such claims must be considered as special legislation with respect to the general rules on prescription under the old laws. Plaintiffs put forward a plea against invoking the Statute of Limitations, arguing that their claim towards compensation by virtue of the executions only became payable in May 2005, in the meaning of the Statute of Limitations and that for this reason, the time limit on their claim had not yet expired at the time when the summons was issued. To support this argument plaintiffs pointed out that the time limit of the Statute of Limitations does not commence during the period that the claimant is not able to enforce its claims. Plaintiffs argue that they have not been able to enforce their claims towards the State earlier during the period 1947 – 2005, due to their personal and social circumstances and the consensus-based local customary law that applies to them.

4.8. The Court does not follow plaintiffs in this argument. As the State rightfully argued, for the question as to whether this is a case of a payable debt within the meaning of the Statute of Limitations according to previous decisions of the Supreme Court, the decision will only rely on the moment in time when the authority arises to demand immediate compliance with the obligation (cf. Supreme Court 4 March 1966, Dutch Law Reports 1966, Supreme Court 11 September 1992, Dutch Law Reports 1992, 746, Supreme Court 22 September 1995 and Supreme Court 29 September 1995, Dutch Law Reports 1997, 418 and 419 with commentary from C.J.H. Brunner under Dutch Law Reports 1997, 420). With regard for the claims in question, for compensation of damages arising from unlawful act, the Supreme Court rules that the moment the claim becomes payable coincides with the moment of inception of the claim. For this moment of inception it is required that the damages are incurred at that moment (Supreme Court 24 May 199, Dutch Law Reports 1992, 246). It is not required for the claimant to be familiar with the existence of the obligation at that moment. The claim from plaintiffs was incepted immediately after the executions had taken place on 9 December 1947. This entails that within the meaning of the Statute of Limitations the right of claim by virtue of these executions became payable on that date. As to the rule that the term of five years commences on 31 December of the year in which the debt became payable, the Supreme Court has only accepted two exceptions. The first exception concerns the situation where there is a claim for compensation of damages caused by environmental pollution which only becomes apparent after some time has lapsed. The second exception concerns a case where the civil judge may only grant the damage claim after the administrative judge has adopted the unlawfulness of the relevant government resolution. These exceptional situations do not occur in the case in question. This means that the limitation period of the right of claim from plaintiffs commenced on 31 December 1947 and that the prescription in the absence of an act of interruption set out or having become manifest was concluded on 31 December 1952. As becomes apparent from Section 73(a), Sub 2 from the New Civil Code Transition Act, the Dutch New Civil Code has not brought about any changes in the legal consequences of this prescription.

4.9. In case the time limit on their rights of claim by virtue of the executions may have expired, plaintiffs also assume the position that invoking expiry of the time limit by the State in terms of reasonableness and fairness is unacceptable and that for this reason the limitation period based on Book 6, Section 2, sub 2 of the Dutch Civil Code must be excluded from application. Plaintiffs refer to the views phrased by the Supreme Court in its ruling of 28 April 2000, Dutch Law Reports 2000, 430, on the basis of which, in its opinion it must be assessed as to whether invoking expiry of the time limit is unacceptable in terms of reasonableness and fairness in this case. Plaintiffs state that the Supreme Court, also under the old laws, in cases of unlawful government acts based on good faith and later the restrictive operation of reasonableness and fairness has accepted exceptions to the absolute limitation period. At this time plaintiffs refer to the Supreme Court rulings mentioned hereinbefore of 9 October 1992, Dutch Law Reports 1994, 286 and 287 and 28 October 1994, Dutch Law Reports 1995, 139, concerning cases of hidden damage and a case where an action due to an unlawful resolution may not be instituted until after this resolution has been set aside by the competent administrative court in the matter. In the opinion of plaintiffs the exception on the absolute limitation period is not restricted to cases of hidden damage and should be assessed based on the facts and circumstances of the case to determine as to whether an exceptional situation is involved. According to plaintiffs, the test against the views phrased by the Supreme Court in its ruling of 28 April 2000 should turn out in their favour since the unlawfulness of the executions and therefore the existence of a claim is a given, since the State has declared itself aware of the seriousness of the acts committed and since the surviving relatives of the executed men until shortly have had no fair opportunity to turn to the Dutch State or the Dutch Court with their claim.

4.10. Alternatively plaintiffs assume the position that the State's reliance on prescription is in violation of the principles of good governance and fundamental human rights. For this purpose they state that with respect to the claims of (surviving relatives of) victims of World War II, the State waived their reliance on prescription. According to plaintiffs there is no objective and reasonable justification for this difference in treatment. For this reason, in the opinion of plaintiffs the State acts in violation of the principle of equality and the prohibition of arbitrariness, while according to them an arbitrary and discriminatory application of the law of prescription and limitation is also in violation of the First Protocol to, and Article 6 of the ECHR.

4.11. In defence the State assumed the position that under the old laws it has not been accepted that an absolute limitation period is excluded from application on the grounds of reasonableness and fairness. According to the State, the absolute limitation period must be enforced strictly for reasons of legal certainty and the protection of the interests of the debtor. The State is of the opinion that the Supreme Court has only allowed moving the time of inception of the limitation period to a later time in two cases. This concerns the rulings of the Supreme Court, which in the scope of being due and payable have already been addressed. The exceptions that were accepted there within do not occur in the case in question, according to the State. The Supreme Court ruling of 28 April 2000 cited by plaintiffs, where a

limitation period was excluded from application on the grounds of reasonableness and fairness solely refers to the rules on prescription under the current Dutch Civil Code, according to the State and in its opinion this only applies to cases of hidden damages, or else damages that arise only after the limitation period has expired. Apart from these cases where an action objectively could not be instituted earlier, under the current laws there is no room to exclude an absolute limitation period from application, according to the State. Also, in the event that in the case in question, testing against the views phrased by the Supreme Court in its ruling of 28 April 2000 is required, the outcome of this test should be in favour of the State, in its opinion. In addition, the State points out the circumstance that the unlawful acts occurred 62 years prior to the claim for liability, so in consideration of the passage of time it did not need to take a claim for liability into account. This is all the more cogent according to the State, given that the Netherlands and the Republic of Indonesia had already agreed on a comprehensive financial settlement in the 1966 Financial agreement, in which also the claims from plaintiffs must be deemed to have been included. Besides this, according to the State the requirement for a claim for liability within a reasonable term has not been complied with since plaintiffs have been aware of the damages and the person responsible for it since 9 December 1947. A possible lack of legal knowledge or of awareness of the legal existence of a right of claim may not lead to exclusion of a limitation period based on reasonableness and fairness.

4.12. The alternative reliance on the principle of equality and the prohibition of arbitrariness on the part of plaintiffs also fails according to the State now that reliance on prescription concerns an entitlement of the debtor, which means that either or not invoking prescription is a choice of the debtor. In this sense it is the opinion of the State that it does not matter that it did not invoke prescription of the right of claim at issue in the light of the treatment of claims of (surviving relatives of the) victims of World War II. In this respect the State notes not to have chosen to abandon its reliance on prescription regarding all claims. Furthermore the State argues that the restitution of cultural goods from World War II to the original entitled parties was preceded by a political debate which led to an expansion of the restitution policy as a goodwill gesture. The claims with respect to the events in Rawagedeh have also been subject of political debate, according to the State. However, the result of this debate was that no financial compensation will be awarded to plaintiffs and other surviving relatives of the events in Rawagedeh. In the opinion of the State there also has not been any violation of the ECHR and the First Protocol, since the ECHR and therefore the First Protocol, are excluded from application because plaintiffs are outside the jurisdiction of the State as referred to in Article 1 ECHR and moreover, their claim is also provisionally excluded from the scope of application of the ECHR as it was incepted on 9 December 1947 and the ECHR and the First Protocol for the Netherlands did not take effect until 1 August 1954.

4.13.

As such, in the first place it is to be assessed as to whether under the old laws a limitation period that has been completed may remain excluded from application based on the derogatory effect of reasonableness and fairness. The Court observes that the Supreme Court accepted this possibility under the current law for the first time in its ruling of 28 April 2000. Other than the State's argument, from the manner in which the Supreme Court phrased this exception on the objective and absolute character of the limitation period in question it cannot be deduced that it wished to restrict this exception to the case where the damages first actually occurred, or else where only then it could be perceived that the limitation period had expired. Under the old laws of the Supreme Court has accepted that in certain cases the inception of the prescription based on the derogatory effect of reasonableness and fairness is suspended. However, the Supreme Court has not ruled in cases where the limitation period under the old laws based on the derogatory effect of the reasonableness and fairness (formerly good faith) was completely excluded from application. In the opinion of the Court, the absence of such a ruling may not lead to the conclusion that the Supreme Court wanted to restrict the derogatory effect of the reasonableness and fairness regarding limitation periods under the old laws to a suspension of the moment of inception of the limitation period. The Court also does not share the conclusion of the State that from the ruling of 3 November 1995 (Dutch Law Reports 1998, 380) it follows that under the old laws a limitation period may not be excluded from application, since the judgement passed in that ruling was explicitly placed in light of the regulations of the current Dutch Civil Code and the Supreme Court afterwards in particular chose to accept for the current law that invoking a prescription according to standards of reasonableness and fairness may be unacceptable. This means that it must be assumed that also under the old laws in exceptional cases a limitation period may be excluded from application in case reliance thereupon is unacceptable according to standards of reasonableness and fairness. The reason why in the scope of the test to be instituted in connection therewith, no link may be sought with the viewpoints catalogue phrased by the Supreme Court in its ruling of 28 April 2000 remains unknown.

4.14. Subsequently, the question at hand is whether, considering the circumstances of this specific case, invoking the prescription by the State is unacceptable according to standards of reasonableness and fairness. The Court answers this question in the affirmative for part of the plaintiffs and for that purpose finds as follows. First and foremost, it must

be stated that in the case in question there is a very exceptional situation of which there are no precedents known within the Dutch jurisprudence. After all, this case concerns executions of unarmed subjects of the then Kingdom of the Netherlands by Dutch soldiers, carried out without any judicial process, in the scope of enforcing the colonial regime of the State in what is now a former colony. As it so acknowledges, the State may be attributed serious blame for these executions. Also, based on the applicable law at the time, the State was under the obligation to protect the physical integrity and the life of its subjects and in no way whatsoever did it have the right to kill or seriously injure people without any judicial process. The serious culpability of the actions of the State were determined shortly after the executions, as becomes evident among other things, from the report of the 'Committee of Good Offices on the Indonesian Question' of the UN Security Council from 1948 in which the executions were deemed as 'deliberate and ruthless' and as such were also acknowledged by the highest military command, as is evidenced by the correspondence between Spoor and Felderhof from which follows that a prosecution of major Wijnen, who was responsible for the executions, would unreservedly have resulted in a conviction. The particular seriousness of the facts at issue and the knowledge the State has had thereof from the very beginning, is an important factor for the conclusion drawn by the Court hereinbefore. So this is explicitly not about facts that at the time were considered acceptable and would only be deemed unacceptable according to current insights.

4.15. Since it was familiar with the facts and its responsibility for them, the State has also had to hold into account that it would be confronted to compensate the damages. By nevertheless assuming a wait-and-see attitude, which in the opinion of the Court is not in keeping with the seriousness of the facts and the knowledge of culpability of this, it maneuvered itself into the position that leaves the matter unsettled. Invoking prescription is not compatible with this. In doing so, the Court does not deliver an opinion in a more general sense that liable persons may always be expected to take the initiative to compensate for damages themselves, but it does weight the wait-and-see attitude in the judgement that invoking prescription according to standards of reasonableness and fairness is unacceptable.

4.16. Furthermore, the Court takes into consideration that although the facts are old, these are still facts that refer to a period in the history of the Netherlands that has not yet been finalized. Most telling in this respect is the comparison plaintiffs have made to the expanded restitution policy applied by the State concerning claims from (surviving relatives of) survivors of World War II. From this it becomes apparent that the State in itself does not want to finalize that part of history of which both the executions in Rawagedeh as well as the injustice of the victims mentioned last, are part of. Moreover, this concerns a period in history from which there are people alive still, who have been through this period and the facts in question.

4.17. With this last conclusion the Court also restricts its judgement. The State's reliance on prescription will solely be unacceptable according to standards of reasonableness and fairness towards the widows of the executed men and the men who were injured during the executions. The actions by the State affect their (other) surviving relatives of a next generation to a less direct extent. Towards them and thus towards plaintiff sub 8 invoking prescription may be successful.

4.18. The point of view of the State that abandoning the limitation period causes the legal certainty to be adversely affected and evidentiary problems arise, does not alter the abovementioned judgement. After all, in the first place the limitation period is meant to protect the debtor against (unfounded) claims against which it may not be able to defend itself properly as a result of the loss of articles of evidence due to the lapse of time. To exclude the limitation period of article 1 of the Statute of Limitations from application in the case in question, does not lead to consequences against which the limitation period aims to protect the debtor. The State, after all, acknowledged both the executions and their unlawfulness, so furnishing evidence to the facts and in doing so, a weaker case for the State, are not at issue. With respect to this, in light of the fact that this is a case of very serious imputable act on the part of the State, the interests involved with legal certainty will not be awarded such weight that the limitation period must be kept strictly in hand.

4.19. The abovementioned, viewed together and in mutual coherence leads to the final conclusion that the State's reliance on a limitation period of the right of claim of plaintiffs by virtue of the executions according to standards of reasonableness and fairness is unacceptable towards these plaintiffs who were involved in the executions either as widows of the executed men or who were involved in the executions themselves.

Conclusion regarding the claim by virtue of the executions

4.20. Since the State has not contested the unlawfulness of the executions towards plaintiffs and having regard to the foregoing, it is not entitled to reliance on prescription of the right of claim due to plaintiffs by virtue of the executions, the claimed declaratory decision set out in the legal grounds 3.1 under I with respect to plaintiffs sub 1 to 7 and Sakam

will be allowable in so far as it concerns the claim by virtue of the executions. Since plaintiffs sub 1 to 7 and Sakam have argued convincingly that they have incurred damages as a result of the executions, the claim to refer to follow-up proceedings for the determination of damages set out in the legal grounds 3.1 under I will also be allowable. The claim set out in the legal grounds 3.1 under I regarding plaintiff sub 8 will not be allowable because plaintiff sub 8 had not yet been born at the time of the executions, so pertaining to her this is not a matter of her spouse being executed in accordance with the situation as referred to in the claimed declaratory decision, nor from the situation that she even incurred in jury as a result of the executions. Moreover, the State's reliance on prescription towards her is valid. The claimed declaratory decision set out in the legal grounds 3.1 under II that the State acted unlawfully towards her with the executions is not allowable either. For that purpose, the Court finds that the State did not act unlawfully towards the Foundation with the executions. After all, the Foundation did not exist at the time and it has not been argued, nor has it become evident that the Foundation has incurred damages of its own as a result of the executions. The declaratory decision claimed by the Foundation that the State is liable for the damages incurred and damages yet to be incurred by the other parties whose male family members were executed by Dutch soldiers on 9 December 1947 will also be dismissed since the Foundation has failed to clarify on whose behalf it acts in particular, which causes its claim on this point insufficiently specified.

Claim by virtue of the failure to institute proper criminal proceedings into the executions and failure to prosecute the Dutch soldiers responsible for the executions and bring them to trial

4.21. The State's defence against the claim by virtue of the failure to institute proper criminal proceedings into the executions and failure to prosecute the Dutch soldiers responsible for the executions and bring them to trial is twofold. In the first place the State contests to have acted unlawfully. Besides this, the State is of the opinion that at this point the limitation period has also expired on this claim by plaintiffs.

Applicable law

4.22. The Court will first address the State's reliance on prescription as the most far-reaching defence. Before it may be assessed as to whether the prescription defence will be successful, the Court needs to determine which law is applicable to this right of claim from unlawful act. Plaintiffs made it known in the counsel's plea that according to them the Dutch East Indies law also applies to this claim while the State, in turn, argues the applicability of Dutch law. In response to this question the Court seeks harmonization with the Unlawful Act (conflict of Laws) Act. Article 3 of the Unlawful Act (conflict of Laws) Act stipulates that obligations from unlawful acts are governed by the laws of the State on whose territory the act takes place. Since the decision not to prosecute was made in the Netherlands, the applicable law is Dutch law. Subsequently, it is to be determined on the basis of the Dutch New Civil Code Transition Act whether the claim from plaintiffs from unlawful act must be judged according to current or old laws. Plaintiffs argue that in 1948, 1969 and in 1995, the State decided not to prosecute and bring to trial the Dutch soldiers responsible for the executions and that therefore this is a case of an ongoing unlawful act. The Court does not follow plaintiffs in this argument. From the documents submitted by parties it becomes apparent that in 1948 an investigation was conducted into the possibilities of prosecuting major Wijnen and that with regard to this investigation in accordance with the legal system at that time, on the advice of procurator-general Felderhof it was decided not to proceed to prosecuting and bringing to trial major Wijnen (nor, in doing so, also implicitly, the Dutch soldiers under his command). From this follows that the unlawful act by the State that was set out, consisting of failure to(further) investigate the executions and failure to prosecute and bring to trial the soldiers responsible for the executions was committed in 1948. The circumstance that it was decided in 1969 and 1995 not to proceed to prosecution as yet, does not affect the fact that the decision not to prosecute, and in doing so, the decision not to institute a further criminal investigation had already been made in 1948. This entails that this is not a matter of an ongoing violation of the law as stated by plaintiffs. The fact that the alleged unlawful act by the State was committed in 1948 implies that the damages resulting from this unlawful act as set out by plaintiffs occurred prior to 1 January 1992. This means that pursuant to article 173 in conjunction with article 68(a) of the Dutch New Civil Code Transition Act, the applicable law is Dutch law as it applied prior to 1 January 1992.

Prescription

4.23. Since the claim from plaintiffs by virtue of the failure to institute proper criminal proceedings into the executions and failure to prosecute the Dutch soldiers responsible for the executions and bring them to trial (eventually) serves to obtain compensation from the State, the prescription defence of the State must also be assessed on the basis of the Statute of Limitations, which after all, under the old laws included a specific prescription regulation for the prescription of monetary debts of the Central and Local governments. Based on article 1 of the Statute of Limitations there is a five year limitation period for such monetary debts, which commences on 31 December of the year when the

monetary debt has become payable. Plaintiffs are of the opinion that their claim did not become payable until 2008 because they had not been able to state their claims any earlier. The Court does not share this opinion with plaintiffs. As was found earlier in legal grounds 4.7, for the question as to whether there is a due and payable debt in the meaning of the Statute of Limitations according to established case law of the Supreme Court, the decisive moment is only the moment of the inception of the authority to demand immediate compliance with the obligation. With regard to the claims as those in question for compensation of damages from unlawful acts, according to this case law, the moment the claim becomes payable coincides with the moment of its inception. For this moment of inception it is required that the damages were incurred at that moment. It is not required for the creditor to already be familiar with the existence of the obligation at that moment. In the opinion of the Court the claim of plaintiffs arose in 1948 with the decision not to proceed to prosecution and a (further) criminal investigation. The right of claim from plaintiffs has thus become due and payable in 1948 in the meaning of the Statute of Limitations. The fact that this is not a matter of exceptions accepted by the Supreme Court at the time of inception of the limitation period is not up for discussion. The foregoing leads to the conclusion that the limitation period commenced on 31 December 1948 and that in the absence of an assertion or any evidence of an act of interruption, the limitation period on the relevant claim from plaintiffs expired on 31 December 1953. The Dutch New civil Code, pursuant to article 73(a) paragraph 2 of the Unlawful Act (conflict of Laws) Act, in the legal effects of this prescription has not brought any change. Plaintiffs argued that the claim of unlawful act for failure to prosecute has not become time-barred, since the criminal prosecution of the executions has not become time-barred. However, this argument is not supported by the law as it was applicable at the time (nor is it supported under the current laws). As the State rightfully remarked, civil law has its own system of limitation periods for claims as the one in question, which are based in civil law. This entails that also in the event that criminal prosecution for the executions would still be possible, the correctness of which may remain unanswered here, this does not imply that the prescription of the claim under civil law by virtue of unlawful act does not commence.

4.24. In conclusion, plaintiffs argued that with regard to this portion of the claim invoking prescription by the State is unacceptable according to standards of reasonableness and fairness. For this purpose they argue that the investigation in 1948, was conducted in total seclusion and that the State did not bother to notify the surviving relatives of the executed men, among whom plaintiffs, of the course of the investigation and the decision not to proceed to prosecution. Plaintiffs argue not to have received information from the State in 1969 and 1995 either and based on this come to the conclusion that it was impossible for them to argue the claim for unlawful act in question any earlier. Plaintiffs' opinion in this argument is not followed either. Leaving aside the fact whether under the old laws the State was under the obligation to inform plaintiffs of the course of the investigation conducted in 1948, 1969 and 1995 and the 1948 decision not to proceed to prosecution, in any case, arising from the Parliamentary debate on the Note on Excesses in 1969 it was evident for plaintiffs from public sources that there was to be no prosecution of the soldiers responsible for the executions and following from this, there would be no further criminal investigation. Presuming that the claim from plaintiffs and the Foundation did not become payable until 1969, plaintiffs did not institute a claim against the State within the five year term as set out in the Statute of Limitations either, nor did they otherwise interrupt the limitation period in time. In addition, the Court points out here that the seriousness and culpability of the argument of failure to investigate and failure to institute criminal proceedings is of a completely different order as the seriousness and culpability of the executions themselves.

4.25. The conclusion is that the time limit on the claim from plaintiffs by virtue of the failure to institute a proper criminal investigation and the failure to proceed to prosecuting the Dutch soldiers responsible for the executions has expired and that the reasonableness and fairness do not prejudice the State's reliance on prescription. The claim from plaintiffs must be rejected simply based on this ground. With this state of affairs it may remain unanswered s to whether the State acted unlawfully towards plaintiffs by not conducting further criminal investigation into the executions and by not instituting prosecution of the responsible Dutch soldiers.

Completion

4.26. From the foregoing it follows that the claimed declaratory decision set out in the legal grounds 3.1 under I is allowable in the following way, under the proviso that this will not be declared provisionally enforceable, since a declaratory decision does not lend itself for that purpose according to its nature. The reference to the follow-up proceedings for the determination of damages may also be allowed towards plaintiffs sub 1 to 7 and Sakam. Further claims will be dismissed. The question as to whether the State owes interest on the amount of the claim to be awarded eventually must be answered in the follow-up proceedings for the determination of damages. The claimed extra-judicial collection costs do not qualify for allowance. From the documents submitted and the statements made about this in the summons it may not be deduced that prior to the commencement of the procedure, more or other costs were incurred then those which in general are reasonable and necessary for the preparation of a case. The latter costs must be

considered to pertain to actions for which the costs as referred to in the Sections 237 to 240 of the Dutch Code of Civil Procedure already tend to include compensation.

4.27. As the party mainly found against, the State will be ordered to pay the legal costs of plaintiffs sub 1 to 7 and Sakam. This order for costs will be declared provisionally enforceable. The Court sees no cause to reduce the legal costs in connection with the dismissal of the claim of the Foundation since the viewpoint of all plaintiffs are identical. Plaintiff sub 8 and the Foundation as parties found against will be ordered to pay the legal costs of the State, which the Court estimates at nil because the State did not conduct separate defence against the claim of these plaintiffs.

5. The decision

The Court:

- rules that the State acted unlawfully towards plaintiffs sub 1 to 7 by executing their then spouses on 9 December 1947 and towards Sakam by shooting him down and that the State is liable towards them for the damages consequently incurred and yet to be incurred, to be assessed by the Court and to be settled in accordance with the law;

- orders the State to pay the legal costs of plaintiffs sub 1 to 7 and Sakam, up to this day estimated at € 334.25 in disbursements and € 1,808.— in attorney's salary and declares these orders for costs provisionally enforceable;

- orders plaintiff sub 8 and the Foundation to pay the legal costs of the State, up to this day estimated at nil;

- dismisses all other applications.

This court ruling was passed by D.A. Schreuder, LL.M., J.J. van der Helm, LL.M., and M.E. Honée, LL.M., and pronounced in open court on 14 September 2011.

[signature] **[signature]**

[official stamp of the District Court of The Hague]

Issued as true bailiff's copy

14 September 2011

The Court Clerk

[signature]

I, Guy Schuitemaker, residing at # 21 Trajanushof, De Meern, The Netherlands, sworn translator English-Dutch and Dutch-English hereby declare that the above is an accurate, true and faithful English translation of a copy of the original text as drawn up in the Dutch language.