

**HUMAN RIGHTS
REMEDIES FOR
VIOLATIONS OF THE
LAW OF ARMED
CONFLICT:
REFLECTIONS ON THE RIGHT TO
REPARATION IN LIGHT OF
RECENT DOMESTIC COURT
DECISIONS IN THE NETHERLANDS
AND DENMARK**

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www.internationalcrimesdatabase.org

ICD Brief 26
September 2019

ABSTRACT

In recent decisions courts in the Netherlands and Denmark awarded compensation to individual victims for damage caused by the respective state's armed forces in military operations abroad. The events to which the claims for compensation related took place in situations of armed conflict. Some of these events had been previously qualified as genocide, war crimes, and crimes against humanity. Others may be qualified as violations of international humanitarian law. Currently, the state practice on the right to reparation for victims of international humanitarian law violations is not consistent and the existence of such a right itself is a subject of academic debate. The recent court decisions in the Netherlands and Denmark make a significant contribution to this debate and to the developing state practice. They *de facto* recognise a right of individual victims of international humanitarian law violations to claim compensation directly from the responsible state and clarify the application of international law in defining the standard of wrongfulness under domestic law, showing that domestic courts may serve as a mechanism to enforce international law in situations of armed conflict. These decisions also clarify the criteria for attribution of seconded military forces' conduct to the sending state and suggest that domestic courts are able to handle large and complex compensation claims related to military forces' activities abroad.

I. INTRODUCTION

After the fall of Srebrenica on 11 July 1995, thousands of Bosnian Muslim men, women, and children fled to Potočari, where the headquarters of the Dutch military contingent (Dutchbat), part of the United Nations Protection Force in Bosnia and Herzegovina (UNPROFOR), were located. Over 5,000 Bosnian Muslims were admitted into the Dutchbat's compound. A far larger number stayed outside. Another 10,000 to 15,000 men fled to the woods. On 12 and 13 July the Bosnian Serb Army transported out of the area the Bosnian Muslims who had stayed in and outside the compound. Men were removed from the group and asked to board separate buses. Between 14 to 17 July 1995 Bosnian Serb forces killed at least 7,000 Bosnian Muslim men from the 'safe' area, most of them in mass executions.¹

¹ District Court of The Hague, *X and Stichting Mothers of Srebrenica v. State of the Netherlands*, Case No. C/09/295247/ HA ZA 07-2973, Judgment, 16 July 2014 (*Mothers of Srebrenica* District Court), paras 2.32-2.43. An English translation is available here: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>>.

On 25 November 2004 an operation took place in and around the city of Az Zubayr, in the Basra province of Iraq, in which Iraqi, Danish, and British soldiers participated (operation Green Desert).² In the course of the operation the Iraqi National Guard conducted house searches and arrests, while the Danish forces provided support by forming an “outer ring” behind the Iraqi soldiers. During the operation at least 27 Iraqi citizens were captured and detained in a military base and subsequently in a prison in Basra, where they were subjected to inhumane treatment and torture.³ After up to 50 days in detention, the detainees were released.⁴

Recently, courts in the Netherlands and Denmark awarded compensation to individual victims for damage caused by the respective state’s armed forces in the operations described above. The events to which the claims for compensation relate took place in situations of armed conflict. Some of these events had been previously qualified as genocide, war crimes, and crimes against humanity. Others may be qualified as violations of international humanitarian law. This paper analyses the decisions of the Dutch and Danish courts in the context of the developing state practice on the right to reparation for victims of international humanitarian law violations and the academic debate on the existence of such a right. Part II examines the international norms relating to the right to reparation for victims of violations of the law of armed conflict. Part III presents the main findings of the decisions under review. The Dutch decisions, which all address the liability of the Dutch state for Dutchbat’s acts in relation to the massacre in Srebrenica in 1995, are examined together. The discussion focuses on three questions: attribution of the alleged conduct to the state, determination of wrongfulness, and establishment of a causal link, required for liability. The Danish decision, which concerns the liability of the Ministry of Defence for acts of Danish military forces in relation to operation Green Desert in Iraq, is presented following the same structure. Part IV analyses the significance of these findings in the context of the developing state practice and academic debate on the right to reparation of victims of international humanitarian law violations. Part V presents some concluding remarks.

² High Court of Eastern Denmark, Case No. B-3448-14, *X. v. Ministry of Defence*, Judgment, 15 June 2018 (*Green Desert* High Court), p. 721. A copy of the decision can be requested here: <<http://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/Domilraksagen.aspx>>.

³ *Green Desert* High Court, pp. 722-724.

⁴ *Green Desert* High Court, p. 804.

II. A RIGHT TO REPARATION FOR VICTIMS OF INTERNATIONAL HUMANITARIAN LAW VIOLATIONS UNDER INTERNATIONAL LAW?

In addition to national law, the conduct of military forces in an armed conflict may infringe upon norms of international humanitarian law and norms of international human rights law. While there is a significant overlap between these two bodies of international law, there are also important differences.

Human rights treaties guarantee to victims of human rights violations the right to an effective remedy.⁵ They create international enforcement mechanisms at the centre of which is the right to individual complaint. Under human rights law, the right to an effective remedy creates an obligation for the states parties to the respective treaty to investigate human rights violations, to prosecute the perpetrators under certain conditions, and to make reparation to individuals whose rights have been violated.⁶ As held by the Human Rights Committee, the body set up to ensure compliance with the ICCPR, “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged”.⁷

The Human Rights Committee has determined that reparation under the ICCPR can involve compensation, restitution, rehabilitation and measures of satisfaction, including public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁸

At a regional level, the European Convention on Human Rights authorises the European Court of Human Rights (ECtHR) to afford just satisfaction in cases where it has found a violation of

⁵ International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR), Art. 2(3); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (ICERD), Art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (CAT), Art. 13; International Convention for the Protection of All Persons from Enforced Disappearance 20 December 2006 (ICPPED), Art. 8(2); European Convention on Human Rights, 4 November 1950 (ECHR), Art. 13; American Convention on Human Rights, 22 November 1969, Art. 25.

⁶ See Human Rights Committee, General Comment 31, 26 May 2004, CCPR/C/21/Rev.1/Add. 13 (Human Rights Committee, General Comment 31), paras 15, 18; see also Bassiouni, M. Cherif, ‘International Recognition of Victims Rights’, 6 Human Rights Law Review (2006) 203 (reprinted in Bassiouni, Cherif (ed.), *International Criminal Law, Third Edition, Volume III, International Enforcement*, Martinus Nijhoff Publishers, 2008, pp. 680.

⁷ Human Rights Committee, General Comment 31, para. 16.

⁸ Human Rights Committee, General Comment 31, para. 16. Other United Nations human rights treaties include similar provisions. See CAT, Art. 14, ICPPED, Art. 24(4) (compensation); ICPPED, Art. 24(5)(c) (just satisfaction); ICPPED, Art. 24(5)(b) (restitution); CAT, Art. 14, ICPPED, Art. 24(5)(c) (rehabilitation); CAT, Art. 14; ICPPED, Art. 24(5)(c) (guarantee of non-repetition).

the convention.⁹ While the ECtHR retains wide discretionary powers to assess whether compensation or any other measure of satisfaction is necessary,¹⁰ it has awarded pecuniary and non-pecuniary damages as well as compensation for legal costs.¹¹ The Inter-American Court of Human Rights, established by the American Convention on Human Rights to interpret and apply the convention, has adopted a wide interpretation of the concept of reparation and has ordered specific reparation measures in favour of victims, including measures such as remembrance monuments, public apologies and provision of access to education and medical services.¹² The African Charter on Human and People's Rights contains no specific provision on a right to a remedy. Under the Protocol to the Charter, however, in cases of a violation, the African Court on Human and People's Rights shall make "appropriate orders to remedy the violation, including the payment of fair compensation or reparation".¹³

International humanitarian law instruments, on the other hand, create obligations for the parties to an armed conflict¹⁴ but do not provide for specific rights for victims or establish international judicial or other bodies to monitor the enforcement of their provisions. Article 3 of the 1907 Hague Convention IV Concerning the Laws and Customs of War on Land and Article 91 of Additional Protocol I¹⁵ provide that a state party to a conflict is liable to pay compensation for international humanitarian law violations committed by its armed forces.

Other international humanitarian law treaties confirm a state's obligation to make reparation for international humanitarian law violations committed by its armed forces.¹⁶ As noted by the International Committee of the Red Cross (ICRC), a state's responsibility to make full

⁹ ECHR, Article. 41.

¹⁰ See Haldemann, Frank, 'Principle 31. Rights and Duties Arising Out of the Obligation to Make Reparation', in: Haldemann, Frank and Unger, Thomas, *The United Nations Principles to Combat Impunity: a Commentary*, Oxford University Press, 2018, pp. 336-348 (Haldemann), marginal note 29.

¹¹ Evans, Christine, 'The Right to Reparation in International Law for Victims of Armed Conflict', Cambridge University Press, 2012 (Evans), pp. 65-66.

¹² Evans, pp. 36, 75.

¹³ Protocol to the African Charter On Human And Peoples' Rights on the Establishment of an African Court on Human And Peoples' Rights, 9 June 1998, Art. 27(1).

¹⁴ See Droege, Cordula, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *40 Isr. L. Rev.* 310 (2007), pp. 348-355.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I).

¹⁶ The four Geneva Conventions of 1949 exclude the possibility for a state to absolve itself from liability for grave breaches of the conventions, First Geneva Convention 1949, Art. 51; Second Geneva Convention 1949, Art. 52; Third Geneva Conventions 1949, Art. 131; Fourth Geneva Convention 1949), Art. 148. Article 38 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, concluded in The Hague on 26 March 1999, applicable also to non-international armed conflicts, confirms the responsibility of a state to provide reparation, irrespectively of the provisions relating to individual criminal responsibility. This obligation is confirmed further by the International Law Commission (ICL)'s Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (DARS), see in particular Articles 1-3, and 31.

reparation for the loss or injury caused by its international humanitarian law violation is now a norm of customary law applicable to both international and non-international armed conflicts.¹⁷ Forms of reparations under international humanitarian law include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁸

While a state's obligation to make reparation for its international humanitarian law violation is firmly established in international law, the existence of a corresponding right of individual victims of international humanitarian law violations is subject of debate.¹⁹ Under the traditional view, applications for reparation or compensation can be made only via the state.²⁰ Reparations have been provided to individuals via mechanisms set up by inter-state agreements or via unilateral state acts.²¹ An obvious downside of this approach is that victims would have to rely on their home states exercising diplomatic protection,²² as there are no clear legal mechanisms through which victims would be able to participate in inter-state negotiations or to influence unilateral state acts. As noted by Fleck, the general obligation of states to make reparation to victims is often limited in peace negotiations.²³

Individual victims may also seek reparation directly from the responsible state. Kalshoven notes in this respect that Article 3 of the 1907 Hague Convention IV does not specify who the claimant may be and there is nothing in the text that excludes the possibility for individual claims.²⁴ He comments that in fact the records of the Second Hague Peace Conference in 1907, at which the text of Article 3 was adopted, provide convincing evidence that this text was intended not so much as a rule relating to international liability of one state *vis-à-vis* another,

¹⁷ Henckaerts, Jean-Marie and Doswald-Beck, Louise 'Customary International Humanitarian Law, Volume I: Rules', International Committee of the Red Cross, 2005 (Henckaerts and Doswald-Beck), p. 537.

¹⁸ Fleck, Dieter, 'Individual and State Responsibility for Violations of the *Ius in Bello*: An Imperfect Balance', in: Heintschel von Heinegg, Wolff and Epping, Volker (eds.), *International Humanitarian Law Facing New Challenges*, Springer, 2007 (Fleck), pp. 199. See also Gillard, Emanuela-Chiara, 'Reparations for violations of international humanitarian law', *International Review of the Red Cross Vol. 85, No. 851 (2003)*, pp. 529-553 (Gillard), pp. 531-532.

¹⁹ Tomuschat, Christian, 'The International Law of State Immunity and Its Development by National Institutions', *Vanderbilt Journal of Transnational Law*, vol. 44, issue 4 (2011) (Tomuschat), p. 1140; Tomuschat, Christian, 'Reparation for Victims of Grave Human Rights Violations', *10 Tulane Journal of International and Comparative Law*, (2002), p. 176; Haldemann, marginal note 38, see also marginal notes 10-12. See also Fleck, pp. 190-193; Gillard, p. 536.

²⁰ Fleck, p. 190.

²¹ Henckaerts and Doswald-Beck, pp. 541-545.

²² See Zimmermann, Andreas, 'Comment: Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law—Synergy and Conflict', in: Heintschel von Heinegg, Wolff and Epping, Volker (eds.), *International Humanitarian Law Facing New Challenges*, Springer, 2007, pp. 215-223 (Zimmermann), p. 215.

²³ Fleck, p. 191.

²⁴ Kalshoven, Frits, 'Some Comments on the International Responsibility of States', in: Heintschel von Heinegg, Wolff and Epping, Volker (eds.), *International Humanitarian Law Facing New Challenges*, Springer, 2007, pp. 207-214 (Kalshoven 2007), p. 212.

but as a rule on a state's liability to individual persons for losses resulting from the conduct of that state's armed forces.²⁵ When these records are considered together with the *travaux préparatoires* of Article 91 of Additional Protocol I, a conclusion could be drawn that the two articles together were intended to cover compensation to both the state and individual victims.²⁶ In a recent study the ICRC has noted that there is an increasing trend of enabling individual victims to seek reparation directly from the responsible state.²⁷

Individual claims against a state brought before courts other than those of the state responsible for the alleged violation are nevertheless likely to fail due to the application of the rule on state immunity. Under this rule, developed as a rule of customary international law primarily through judicial practice of municipal courts, a state is immune from the jurisdiction of another state with respect to acts and omissions in the exercise of its sovereign power (*acta jure imperii*).²⁸ In the beginning of the 21st century courts in Italy and Greece ruled that jurisdictional immunity is not absolute and cannot be invoked by a state with respect to acts constituting crimes under international law.²⁹ The International Court of Justice (ICJ) rejected this position in its judgment in the case of *Germany v. Italy*. It ruled that state immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces in an armed conflict, even if these acts take place on the territory of the forum state,³⁰ and even if the alleged wrongful acts consist of serious violations of international human rights law, the international law of armed conflict, or infringe upon *jus cogens* norms.³¹ The ICJ has not ruled yet, however, on whether international law conferred upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation. Having granted Germany's claim in *Germany v. Italy*, it found it unnecessary to address this issue.³²

²⁵ Kalshoven, Frits, 'State responsibility for warlike acts of the armed forces: from Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond', *40 International and Comparative Law Quarterly*, 827, 858 (1991) (Kalshoven 1991), p. 830. See also Kalshoven 2007, p. 207.

²⁶ Kalshoven 1991, pp. 846-847; Kalshoven 2007, p. 212.

²⁷ Henckaerts and Doswald-Beck, p. 541.

²⁸ ILC, Draft Articles on Jurisdictional Immunities of States and Their Property, Article 6; Yearbook of the International Law Commission, 1980, Vol. II (2), p. 143, para. 7, p. 147, para. 26. See International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012 (ICJ *Germany v. Italy*), para. 60; see also Fleck, p. 183.

²⁹ ICJ *Germany v. Italy*, paras 27-31 citing *Ferrini v. Federal Republic of Germany*, decision No. 5044/2004 (Rivista di diritto internazionale, Vol. 87, 2004, p. 539; International Law Reports (ILR), Vol. 128), p. 658; *Prefecture of Voiotia v. Federal Republic of Germany*, case No. 11/2000 (ILR, Vol. 129, p. 513).

³⁰ ICJ *Germany v. Italy*, paras 77-78.

³¹ ICJ *Germany v. Italy*, paras 91, 97.

³² ICJ *Germany v. Italy*, para. 108.

Individual claims against the state responsible for the alleged violation brought before that state's domestic courts, however, would not encounter the obstacle of state immunity. This immunity cannot be invoked before national courts of the country of origin.³³ It is inherent in Article 3 of the 1907 Hague Convention IV and Article 91 of Additional Protocol I that violations of international humanitarian law, when committed by individuals whose behaviour may be attributed to a state within the meaning of the International Law Commission (ICL)'s Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (DARS), entail the responsibility of that state.³⁴ Therefore, claims for reparation for international humanitarian law violations by organs of a state, brought against that state, in its domestic courts would normally have a better chance of success. Commenting on such potential lawsuits Kalshoven made the following remarks in 2007:

Issues of violation of the law of armed conflict might belong in the category of tort cases, and an individual victim might find an argument supporting his or her claim under this heading in Article 3 of the 1907 Hague Convention. Obviously, our claimant will encounter a number of obstacles, and the chances of success are slim. The point to be made is, however, that the obstacles are a matter of domestic law and, indeed, politics: there is nothing in Article 3, nor in the position of individuals, that would prevent a domestic court from deciding in favour of the individual claimant.³⁵

A decade later, courts in the Netherlands and Denmark suggest that Kalshoven might have been right.

III. THE DUTCH *SREBRENICA* CASES AND THE DANISH *GREEN DESERT* CASE

A. *Srebrenica* cases

Background

In 2006 surviving relatives of Nuhanović and Mustafić, two Bosnian Muslim men who were forced to leave the Dutchbat compound on 13 July 1995 and were killed subsequently by Bosnian Serb forces, filed civil lawsuits for damages against the Dutch state before the District Court of The Hague (*Nuhanović* and *Mustafić*, respectively). The District Court dismissed the

³³ Fleck, p. 183.

³⁴ Zimmermann, p. 215.

³⁵ Kalshoven 2007, p. 213.

claims, finding that Dutchbat's acts must be attributed exclusively to the UN.³⁶ The Court of Appeal reversed this finding. In its judgment of 5 July 2011 it ruled that the Dutch state can be held responsible for Dutchbat's acts over which it had effective control.³⁷ The court found further that by ensuring that the male relatives of the plaintiffs left the compound against their will Dutchbat acted wrongfully, in violation of the law of Bosnia and Herzegovina and international human rights treaties.³⁸ The Supreme Court affirmed the Court of Appeal's judgment in its entirety.³⁹

The association 'Mothers of Srebrenica' and ten surviving relatives of men killed in Srebrenica filed a similar lawsuit a year after the commencement of the proceedings in *Nuhanović* and *Mustafić*, seeking a declaratory judgment that the state had failed to fulfil its obligations under international law and compensation for the losses suffered (*Mothers of Srebrenica*). On 16 July 2014 the District Court of The Hague granted the claim in part. It found the state liable for the evacuation of male refugees from the Dutchbat compound on 13 July 1995 and awarded compensation.⁴⁰ On 27 June 2017 the Court of Appeal set aside this judgment and assessed

³⁶ District Court of The Hague, *M.M. et al. v. State of the Netherlands*, Case No. 265618/HA ZA 06-1672, Judgment, 10 September 2008 (*Mustafić* District Court), para. 4.17. On the same day, the District Court of The Hague issued a separate but largely similar decision in *Nuhanović*. An English translation of the decision of the District Court is available here: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2008:BF0182>>. To the extent that the claim concerned acts of other government officials, the District Court found that this claim was not sufficiently substantiated, *Mustafić* District Court, para. 4.6.

³⁷ Court of Appeal of The Hague, *Nuhanović v. the State of the Netherlands*, Case No. 200.020.174/01, Judgment, 5 July 2011 (*Nuhanović* Court of Appeal), para. 5.20. An English translation is available here: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR5388>>. On appeal *Nuhanović* additionally sought a declaratory judgment that the state had violated the ECHR and the ICCPR by not instituting criminal proceedings in relation to the violations of these conventions and a ruling that the state had violated *Nuhanović's* right to fair trial, *Nuhanović* Court of Appeal, para. 3.10.

³⁸ *Nuhanović* Court of Appeal, paras. 6.7-6.8. Having granted the main complaint, the Court of Appeal decided that it was not necessary to examine the claims relating to other acts, *Nuhanović* Court of Appeal, para. 6.22. The court dismissed *Nuhanović's* claim regarding the state's failure to institute criminal proceedings in relation to the ECHR and ICCPR violations on the basis of an on-going criminal investigation, *Nuhanović* Court of Appeal, paras 7.2-7.4.

³⁹ Dutch Supreme Court, *State of the Netherlands v. Mustafić, State of the Netherlands v. Nuhanović*, judgments, 6 September 2013 (*Nuhanović* Supreme Court), para. 4. An English translation is available here: <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003324.pdf>>. See International Crimes Database for a summary of the Supreme Court's judgment <<http://www.internationalcrimesdatabase.org/Case/1005>>.

⁴⁰ *Mothers of Srebrenica* District Court, paras 4.56-4.58, 4.116, 4.322, 4.326, 4.329, 4.332, 5.1. Initially the plaintiffs filed a lawsuit against both the UN and the state of the Netherlands. In an interim judgment of 10 July 2008 the District Court of The Hague found that the UN enjoyed immunity and that it was not competent to rule on the claim against it. The Court of Appeal and the Supreme Court affirmed. See International Crimes Database for a summary of the decisions of the District Court of The Hague <<http://www.internationalcrimesdatabase.org/Case/758>>, the Court of Appeal <<http://www.internationalcrimesdatabase.org/Case/747>> and the Supreme Court of the Netherlands <<http://www.internationalcrimesdatabase.org/Case/769>>. On 11 June 2013 the European Court of Human Rights declared that the complaint against the Supreme Court decision was without merit, *Mothers of Srebrenica* District Court, para. 4.3.

the alleged Dutchbat's conduct against a revised legal standard for attribution.⁴¹ The Court of Appeal limited the acts attributable to the state, but it found two of these acts wrongful: (i) the separation of male refugees outside the compound on 13 July after the arrival of the Bosnian Serb forces and (ii) the failure to give the male refugees in the compound the choice of staying.⁴² The court issued a declaratory judgment with respect to the first wrongful act and awarded partial compensation with respect to the second.⁴³ On 19 July 2019 the Dutch Supreme Court set aside the Court of Appeal's declaration with respect to the first wrongful act.⁴⁴ It affirmed the Court of Appeal's ruling with respect to the second but limited the state's liability to 10% of the damage suffered by surviving relatives.⁴⁵

The proceedings in *Nuhanović*, *Mustafić*, and the *Mothers of Srebrenica* cases will be referred to collectively as the *Srebrenica* cases.

Findings and discussion

(i) Attribution of conduct of seconded national armed forces

All courts in the *Srebrenica* cases found that the question whether the conduct of armed forces participating in a UN peacekeeping mission may be attributed to the sending state must be decided on the basis of public international law.⁴⁶

In *Nuhanović* and *Mustafić*, the District Court found that the acts of Dutchbat must be attributed exclusively to the UN. Referring to customary international law and the ILC's Draft Articles on the Responsibility of International Organizations (DARIO), it reasoned that the operational command and control over troops assigned to UN peacekeeping missions was transferred to the UN.⁴⁷ The Court of Appeal agreed with the District Court that Dutchbat was placed under

⁴¹ Court of Appeal of The Hague, *X and Stichting Mothers of Srebrenica v. State of the Netherlands*, Case No. 200.158.313/01 and 200.160.317/01 (English version), Judgment, 27 June 2017 (*Mothers of Srebrenica* Court of Appeal), para. 73.3.

⁴² *Mothers of Srebrenica* Court of Appeal, paras 61.3, 61.5, 63.7.

⁴³ *Mothers of Srebrenica* Court of Appeal, paras 61.8, 68, 69.1, 73.2.

⁴⁴ Supreme Court of the Netherlands, *The State of the Netherlands v. Stichting Mothers of Srebrenica et al*, Case No. 17/04567 (Eng), ECLI:NL:HR:2019:1284, Judgment, 19 July 2019 (*Mothers of Srebrenica* Supreme Court), paras. 4.5.4, 4.5.5, 5.1, 6.

⁴⁵ *Mothers of Srebrenica* Supreme Court, paras. 4.6.9, 4.7.7-4.7.9, 5.1, 6.

⁴⁶ *Mustafić* District Court, paras 4.8-4.10; *Nuhanović* Court of Appeal, paras 5.3-5.8; *Nuhanović* Supreme Court, paras 3.6.2-3.11.3; *Mothers of Srebrenica* District Court, paras 4.33-4.34; *Mothers of Srebrenica* Court of Appeal, para. 11.2; *Mothers of Srebrenica* Supreme Court, paras. 3.2, 3.3.1.

⁴⁷ *Mustafić* District Court, paras 4.10-4.11, 4.13. The District Court found that a ground for attribution to the state in UN peacekeeping missions may arise if the state had violated the UN command structure, which was not the case, *Mustafić* District Court, paras 4.16.1-4.16.6.

the command of the UN.⁴⁸ Referring to Article 6 of DARIO, however, it took the view that the decisive criterion for attribution was the exercise of effective control, a question to be decided on a case-by-case basis depending on the specific circumstances of the case.⁴⁹ The Court of Appeal took into account the fact that the state had control over personnel and disciplinary matters and was in a position to initiate criminal proceedings, that the events forming the basis of the proceedings took place in a very specific context when Dutchbat's (and UNPROFOR's) mission to protect Srebrenica had failed, that the decision to evacuate Dutchbat and the refugees was taken in consultations between the UN and the Dutch government, and that in the transitional period after 11 July 1995 the state was able to exercise control over Dutchbat in practice.⁵⁰ On this basis it concluded that the state possessed effective control over the alleged conduct and that this conduct can be attributed to the state.⁵¹ The Supreme Court affirmed this decision, finding that DARIO allowed for the possibility of conduct to be attributed to an international organisation and a state, which would result in dual attribution to the international organisation and the respective state.⁵²

The District Court in the *Mothers of Srebrenica* also adopted the effective control criterion for attribution,⁵³ but it interpreted it differently. It found that the state exercised effective control over Dutchbat's *ultra vires* (beyond its legal power or authority) actions, over and against UN instructions.⁵⁴ The Court of Appeal reversed this finding. It confirmed effective control as the criterion for attribution, which it defined as factual control over specific acts, assessed in the specific circumstances of the case.⁵⁵ On the basis of Article 8 of DARIO, the Court of Appeal ruled that Dutchbat's acts must be considered acts of the UN if they took place "in an official capacity and within the overall function" of the UN, even if they ran counter to instructions.⁵⁶

⁴⁸ *Nuhanović* Court of Appeal, para. 5.7.

⁴⁹ *Nuhanović* Court of Appeal, paras 5.8-5.9.

⁵⁰ *Nuhanović* Court of Appeal, paras 5.10-5.18.

⁵¹ *Nuhanović* Court of Appeal, para. 5.20.

⁵² *Nuhanović* Supreme Court, paras 3.9.3-3.9.4. For an assessment of the Supreme Courts' findings on attribution, see Christine Bakker, 'Dual Attribution of Acts Committed by a UN Peacekeeping Force: an Emerging Norm of Customary International Law: the Dutch Supreme Court's Judgments in *Nuhanović* and *Mustafić*', 23 *Italian Y.B. Int'l L.* 287 (2013) (Bakker).

⁵³ *Mothers of Srebrenica* District Court, paras 4.33-4.34.

⁵⁴ *Mothers of Srebrenica* District Court, paras 4.56-4.57. The court found that such actions are attributable to the state because the state "has a say over the mechanisms underlying said ultra vires actions, selection, training and the preparation for the mission of the troops placed at the disposal of the UN" as well as powers to take measures to counter *ultra vires* actions on the part of the troops, *Mothers of Srebrenica* District Court, para. 4.57. The District Court found that to this effect, specific instructions or orders from the state were not required, the decisive factor was that the state retained its powers after the transfer of command and control, *Mothers of Srebrenica* District Court, para. 4.58.

⁵⁵ *Mothers of Srebrenica* Court of Appeal, para. 12.1.

⁵⁶ *Mothers of Srebrenica* Court of Appeal, para. 15.2. Article 8 of DARIO provides as follows: "The conduct of an organ or agent of an international organization shall be considered an act of that organization under

The Court of Appeal accepted that only conduct beyond the official capacity or the overall functions of the UN cannot be attributed to the UN.⁵⁷ The Court of Appeal found that the Dutch state had no controlling powers with regard to operational decisions after the transfer of command and control.⁵⁸ Only after the UN and the Dutch government took a decision together in the evening of 11 July to evacuate the population from the *mini* 'safe' area (the area in and around the Dutchbat compound), did the state have effective control over acts performed by Dutchbat in relation to the humanitarian aid and the evacuation of the Bosnian Muslims from in the *mini* 'safe' area.⁵⁹ The Supreme Court affirmed the Court of Appeal's definition of effective control as factual control over specific conduct,⁶⁰ rejecting arguments that effective control may ensue from a general instruction from the state, or be inferred from circumstances showing that the state was in a position to prevent the acts in question, or from the fact that the conduct was *ultra vires*.⁶¹

(ii) Wrongfulness of the alleged conduct

a. Applicable national law

In *Nuhanović* and *Mustafić* it was not disputed that based on Dutch private international law, the alleged wrongful act must be tested against the law of Bosnia and Herzegovina.⁶² In *Mothers of Srebrenica*, the courts found that the unlawfulness must be determined on the basis of Dutch law.⁶³

international law if the organ or agent acts in an official capacity and within the overall functions of the organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."

⁵⁷ *Mothers of Srebrenica* Court of Appeal, para. 15.3.

⁵⁸ *Mothers of Srebrenica* Court of Appeal, para. 15.3. See also paras 16.1, 21-22, 27.2, 28, 29.1-31, 32.1.

⁵⁹ *Mothers of Srebrenica* Court of Appeal, para. 32.2. See also paras 24.1, 24.3.

⁶⁰ *Mothers of Srebrenica* Supreme Court, para. 3.5.4.

⁶¹ *Mothers of Srebrenica* Supreme Court, paras. 3.5.2, 3.5.3, 3.6.1. The Supreme Court found that unlike the previous proceedings before it regarding these events, the question of dual attribution did not arise in the present case. *Mothers of Srebrenica* Supreme Court, para. 3.3.5.

⁶² *Nuhanović* Court of Appeal, para. 6.3. See also *Nuhanović* Supreme Court, para. 3.15.5.

⁶³ The District Court reasoned that the alleged unlawful conduct consisted of exercise of public authority, *i.e. acta jure imperii* (*Mothers of Srebrenica* District Court, para. 4.167), that the jurisprudential rule which applied in 1995 was subsequently codified but the new law contained no special provision for *acta jure imperii*, and that according to the (recently enacted) section 10:159 of the Dutch Civil Code *acta jure imperii* should be assessed according to the law of the State that exercised this authority, *Mothers of Srebrenica* District Court, paras 4.168-4.169. This finding was not appealed, *Mothers of Srebrenica* Court of Appeal, para. 33. The District Court in *Mothers of Srebrenica* clarified that there was no conflict between the approaches taken as in *Nuhanović* and *Mustafić* the applicable law was not in dispute and did not have to be officially determined. In any event, any differences between the two legal systems apparently concerned only the determination of damage, See *Mothers of Srebrenica* District Court, para. 4.171. See also *Mothers of Srebrenica* Supreme Court, para. 4.1.

b. Violations of state's obligations under international law

The plaintiffs in the *Srebrenica* cases argued that the state acted wrongfully in violation of the ECHR, ICCPR, the Genocide Convention, the 1949 Geneva Conventions and their additional protocols, the Standing Operating Procedures (SOP), and the UNPROFOR's mandate.⁶⁴

1. International human rights treaties

In *Nuhanović* and *Mustafić* the Court of Appeal found that the principles contained in Articles 2 and 3 of the ECHR and 6 and 7 of the ICCPR need to be construed as rules of customary international law that have universal validity and that are binding on the state.⁶⁵ Additionally, it found that the ICCPR applied as part of Bosnian law, as the ICCPR was in force in BiH in 1995 and pursuant to the BiH constitution it had direct effect.⁶⁶ The law of BiH and the legal principles laid down in articles 6 and 7 of the ICCPR did not allow the surrender of civilians to the armed forces if there was a real and predictable risk that they would be killed or subjected to inhumane treatment.⁶⁷ Taking into account the knowledge that Dutchbat had in the afternoon of 13 July, the Court of Appeal found that Dutchbat could not have reasonably drawn any other conclusion but that the able-bodied men leaving the compound in order to be "evacuated" by Bosnian Serb forces ran a real risk of being killed or subjected to inhumane treatment.⁶⁸ The Supreme Court dismissed the arguments against these findings raised in cassation.⁶⁹

In *Mothers of Srebrenica*, the District Court found that Articles 2 and 3 of the ECHR and 6 and 7 of the ICCPR, which had direct effect in accordance with the Dutch constitution, created a positive obligation for the state to protect the right to life and the physical integrity of the person subject to its legal system.⁷⁰ The court then proceeded with an analysis of whether the state exercised jurisdiction in the sense of Articles 1 of the ECHR and 2 of the ICCPR over the alleged conduct. Referring to the *Al-Skeini* judgment of the ECtHR, it found that through

⁶⁴ *Mustafić* District Court, para. 3.3.4; *Mothers of Srebrenica* District Court, para. 4.147.

⁶⁵ *Nuhanović* Court of Appeal, para. 6.3.

⁶⁶ *Nuhanović* Court of Appeal, para. 6.4.

⁶⁷ *Nuhanović* Court of Appeal, para. 6.8.

⁶⁸ *Nuhanović* Court of Appeal, para. 6.7.

⁶⁹ *Nuhanović* Supreme Court, paras 3.15.1-3.15.5. In an important *obiter dictum*, the Supreme Court observed that the state was competent to exercise jurisdiction as referred to in Article 1 of the ECHR and Article 2(1) of the ICCPR because Dutchbat's presence in Srebrenica resulted from the participation of the Netherlands in UNPROFOR, which in turn derived its right to take action in Srebrenica from the agreement on the status of UNPROFOR, concluded between the UN and BiH. The Supreme Court also rejected the state's submissions that it was *de facto* impossible for it to exercise jurisdiction in the compound, *Nuhanović* Supreme Court, para. 3.17.3.

⁷⁰ *Mothers of Srebrenica* District Court, paras 4.151-4.152, see also para. 4.148.

Dutchbat the state exercised effective control over the compound after the fall of Srebrenica.⁷¹ Additionally, it considered the underlying universal principles enshrined in Articles 2 and 3 ECHR and 6 and 7 ICCPR as clarifying the standard of care under the Dutch Civil Code.⁷²

The Court of Appeal took a slightly different approach. In assessing the applicability of the ECHR and ICCPR, it considered its earlier findings that acts performed by Dutchbat in the *mini* safe area (including outside the compound) with regard to the evacuation of refugees can be attributed to the state from the moment the decision to evacuate had been taken.⁷³ The Court of Appeal confirmed the District Court's conclusion that the state exercised jurisdiction within the meaning of Articles 1 of the ECHR and 2 of the ICCPR in the compound during the transitional period.⁷⁴ However, it also noted that even if the ECHR and ICCPR were not applicable due to the absence of jurisdiction, this would not have altered the assessment of the claims, as the standards derived from the ECHR and the ICCPR were also implicit in the law of the Netherlands in the sense that a breach of those standards must be considered a violation of the generally accepted standards of due care.⁷⁵ This finding was not challenged in cassation.⁷⁶

2. The Genocide Convention and international humanitarian law instruments

The courts in the *Srebrenica* cases adopted a cautious approach regarding the application of the Genocide Convention and the international humanitarian law instruments relied on by the plaintiffs.

In *Nuhanović* and *Mustafić* the courts did not enter into a discussion on this issue. The District Court noted only that in determining whether the state attempted to prevent the death of the victim, the Genocide Convention "had nothing to add" to the ECHR and the ICCPR, as under

⁷¹ The court reasoned that the compound was a fenced off area in which Dutchbat had the say and over which after the fall of Srebrenica the UN had almost no actual say anymore and that the Bosnian Serb forces respect this area and did not go in. The Court accordingly concluded that through Dutchbat the State was only able to supervise observance of the human rights anchored in the ECHR and the ICCPR *vis-à-vis* those persons who after the fall of Srebrenica were in the compound, *Mothers of Srebrenica* District Court, paras 4.160-4.161, see also para. 4.154; European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, Judgment of 7 July 2011 (*Al-Skeini* judgment), paras 138-139.

⁷² *Mothers of Srebrenica* District Court, paras 4.174, 4.176.

⁷³ *Mothers of Srebrenica* Court of Appeal, paras 37.4, 38.2.

⁷⁴ As the Supreme Court in its *obiter dictum* in the *Nuhanović* case, the Court of Appeal in the *Mothers of Srebrenica* referred to the fact that Dutchbat's presence in the compound arose from the Netherlands' participation in the UNPROFOR, which derived its authority in Srebrenica from an agreement between the UN and BiH. Therefore, in the transitional period the state had jurisdiction in the compound within the meaning of Articles 1 of the ECHR and 2 of the ICCPR and the state effectively exercised this jurisdiction in the compound. *Mothers of Srebrenica* Court of Appeal, paras 38.3-38.6.

⁷⁵ *Mothers of Srebrenica* Court of Appeal, para. 38.7.

⁷⁶ *Mothers of Srebrenica* Supreme Court, para. 4.2.2.

these human rights treaties the state had a positive obligation to protect the right to life.⁷⁷ The Court of Appeal refrained from pronouncing on the applicability of the Genocide Convention, finding that having granted the complaint on other bases advanced by the plaintiffs, it was not necessary to discuss the Genocide Convention and the other standards relied on, as the plaintiffs had not based a separate claim on them.⁷⁸

In *Mothers of Srebrenica* the courts took a firmer stance. The District Court denied the plaintiffs' claim for a declaratory judgment that the state had violated its obligation to prevent genocide under the Genocide Convention,⁷⁹ reasoning that this obligation, as evidenced by the text of the convention and its drafting history, existed only between states parties to the convention.⁸⁰ The court did not enter into a discussion of whether the state's obligation under the Genocide Convention was *jus cogens*, as even if it was, it would not have been directly applicable under the Dutch constitution.⁸¹ Nevertheless, as will be discussed below, the District Court applied the Genocide Convention, the SOP and the international humanitarian law rules on which the SOP was based in determining the standard of care under Dutch law.

The Court of Appeal in *Mothers of Srebrenica* also refused to issue a declaratory judgment for a violation of Article 1 of the Genocide Convention,⁸² holding that the obligation to prevent genocide was not specific enough to be enforced in court. According to the court, tangible, specific obligations to prevent were not included in the Genocide Convention⁸³ and a 'best

⁷⁷ *Mustafić* District Court, para. 4. 2.

⁷⁸ *Nuhanović* Court of Appeal, para. 6.22.

⁷⁹ *Mothers of Srebrenica* District Court, para. 4.164.

⁸⁰ *Mothers of Srebrenica* District Court, para. 4.164. The plaintiffs had argued that this position was considered "unsatisfactory" in the literature and legal practice and that individuals too should be able to submit claims against states. The District Court dismissed this argument, finding that the preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (Basic Principles), on which the plaintiffs had relied, made it clear that the document contained no new international or domestic legal obligations, *Mothers of Srebrenica* District Court, paras 4.162-4.163.

⁸¹ *Mothers of Srebrenica* District Court, para. 4.164. At the outset of its discussion on the applicable international standards, the District Court in the *Mothers of Srebrenica* case recalled that in accordance with Article 93 of the Constitution of the Netherlands, international treaties have direct effect in the Netherlands after publication, provided that they are eligible for immediate applicability in cases submitted to a court of law, *i.e.* the relevant provisions must be sufficiently precise as to the right they confer or the obligation they impose so that they can operate domestically without question as to the objective law. The District Court clarified that Article 93 does not apply to international treaties that do not qualify as "binding on all" and customary international law whether *jus cogens* or not, but rights protected by such sources of law, remain "in effect" in the Netherlands through domestic law, for example, governing unlawful acts. *Mothers of Srebrenica* District Court, para. 4.148.

⁸² *Mothers of Srebrenica* Court of Appeal, para. 34.1-34.6.

⁸³ The Court of Appeal noted in particular that Article 1 of the convention did not define precisely the obligation to prevent genocide and that Article 5 specifically clarified that further rules were required to give effect to the convention, *Mothers of Srebrenica* Court of Appeal, para. 34.4.

efforts' obligation described in the ICJ's judgment in *Bosnia and Herzegovina v. Serbia* did not impose on the state any specific obligations enforceable by a national court in a dispute between a citizen and the state.⁸⁴ The Supreme Court affirmed.⁸⁵ With respect to the 1949 Geneva Conventions and Additional Protocol I the Court of Appeal similarly found that they had effect only between states and were not suitable for application by a national court in the relationship between citizen and government, due to their insufficiently specific wording.⁸⁶ The application of international humanitarian law instruments was not discussed in the Supreme Court's judgment.

c. The standard of care under domestic law

In *Nuhanović* and *Mustafić* the courts assessed the wrongfulness of the alleged conduct on the basis of the law of Bosnia and Herzegovina (the Act on Obligations and ICCPR which applied directly) and the fundamental principles contained in the ECHR and ICCPR.

In *Mothers of Srebrenica*, the District Court accepted that international treaties that do not have direct effect pursuant to Article 93 of the Dutch Constitution, and customary international law, including norms constituting *jus cogens*, may remain "in effect" in the Netherlands through domestic law, for example, tort law.⁸⁷ Despite refusing to directly apply the Genocide Convention and international humanitarian law instruments, the court considered them, in addition to the ECHR and the ICCPR, in defining the standard of care under the Dutch Civil Code. The court found that the interpretation of the standard of care through the underlying universal legal principles in Articles 2 and 3 of the ECHR and 6 and 7 of the ICCPR implied that the military force whose task was to protect the refugees in the safe area was there to protect the right to life and physical integrity of the persons inasmuch as that may reasonably be asked of it.⁸⁸ UNPROFOR's mandate clarified that the idea of protection should have always been uppermost for Dutchbat.⁸⁹ The requirement to report war crimes in the SOP, which was based on international humanitarian law, was intended in the short term to provide deterrence for the belligerent parties and in the long term to support prosecutions of those committing war crimes.⁹⁰ Importantly, the court clarified that the state, as a party to the

⁸⁴ *Mothers of Srebrenica* Court of Appeal, para. 34.4, citing ICJ, Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 26 February 2007 (ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*). According to the court, the situation was not remedied by the Basic Principles, which did not contain any new obligations.

⁸⁵ *Mothers of Srebrenica* Supreme Court, para. 3.7.3.

⁸⁶ *Mothers of Srebrenica* Court of Appeal, para. 34.5.

⁸⁷ *Mothers of Srebrenica* District Court, paras 4.148, 4.165.

⁸⁸ *Mothers of Srebrenica* District Court, paras 4.176.

⁸⁹ *Mothers of Srebrenica* District Court, paras 4.175.

⁹⁰ *Mothers of Srebrenica* District Court, paras 4.177.

Genocide Convention, should have been guided by the convention and the ICJ's jurisprudence. The court referred specifically to the ICJ's findings that responsibility for failure to prevent genocide is incurred if the state fails to take all measures within its power which might have contributed to preventing the genocide, that the state's capacity to influence the acts of genocide depends, *inter alia*, on the geographical distance and the state's legal capacity in respect of the situation, and that a state's obligation to prevent arises from the moment it learns or should have learned of a serious risk that genocide will be committed.⁹¹

The District Court indeed applied these standards in its assessment of the alleged unlawfulness of Dutchbat's actions. It found that Dutchbat's cooperation in the removal of refugees from the compound on 13 July could be qualified as a violation of Articles 2 of the ECHR and 6 of the ICCPR and was contrary to the standard of care under Book 6, Section 162 of the Dutch Civil Code, emphasising that this standard of care was exemplified by the principles of law forming the basis of the human rights treaties and the state's obligations under international law to prevent genocide.⁹² The District Court found also that Dutchbat's failure to report war crimes constituted a violation of generally accepted standards of customary international law, but the state was not liable for this unlawful failure as the causal link required for liability was lacking.⁹³

The Court of Appeal in *Mothers of Srebrenica* interpreted the standard of care under Dutch law as including standards derived from the ECHR and the ICCPR.⁹⁴ Applying these standards, it found two of Dutchbat's acts to be wrongful: (i) the facilitation of the "evacuation" of Bosnian Muslim men outside the compound after the arrival of the Bosnian Serb forces on 13 July and (ii) its failure to give the Bosnian Muslim men in the compound the choice of staying.⁹⁵ The Supreme Court agreed with the second conclusion⁹⁶ but it reversed the first one, reasoning that the "evacuation" would have continued even without Dutchbat's participation and taking into account "the war situation, the options available to Dutchbat and the interests of the women, children, and elderly".⁹⁷

⁹¹ *Mothers of Srebrenica* District Court, paras 4.178-4.179 citing ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*.

⁹² *Mothers of Srebrenica* District Court, para. 4.329.

⁹³ *Mothers of Srebrenica* District Court, paras 4.264, 4.278.

⁹⁴ *Mothers of Srebrenica* Court of Appeal, para. 38.7.

⁹⁵ *Mothers of Srebrenica* Court of Appeal, paras. 61.5, 61.8, 63.7. See also *Mothers of Srebrenica* Court of Appeal, para. 65.

⁹⁶ *Mothers of Srebrenica* Supreme Court, para. 4.6.9.

⁹⁷ *Mothers of Srebrenica* Supreme Court, para. 4.5.4.

(iii) Causality

The Court of Appeal in *Mothers of Srebrenica* also considered that even without Dutchbat's participation in the evacuation of Bosnian Muslim men outside the compound on 13 July, their faith would not have been different. However, it took this fact into account in its assessment of whether a causal link between Dutchbat's acts and the damage claimed was present. As no such link was established the Court of Appeal denied the claim for monetary compensation.⁹⁸ Emphasising that facilitating serious violations of fundamental human rights in and of itself and irrespectively of other circumstances, was wrongful, the Court of Appeal issued a declaratory judgment that a wrongful act had been committed.⁹⁹ The approach the Supreme Court took was markedly different.¹⁰⁰ First, it considered the factors that the Court of Appeal assessed in causality, in its determination of the wrongfulness of the act itself. Second, by taking such factors and other circumstances into account the Supreme Court seems to have disagreed with the position of the Court of Appeal that facilitating gross human rights violations in and of itself is a wrongful act.

With respect to the departure of Bosnian Muslim men from the Dutchbat compound, the courts in the *Srebrenica* cases were not consistent. The Court of Appeal in *Nuhanović* and *Mustafić* found that a causal link between this act and the Bosnian Muslim men's death had been established, taking into account that everyone who remained at the compound on 13 July reached their destination alive, that all persons in the compound were allowed to leave with Dutchbat, and that the Dutchbat convoy was not submitted to any inspections.¹⁰¹ The District Court in *Mothers of Srebrenica* similarly found that the required causal link was proven, as it was determined with a sufficient degree of certainty that the able-bodied men staying at the compound would have survived if Dutchbat had not cooperated with their removal.¹⁰²

The Court of Appeal in *Mothers of Srebrenica* took a different approach. It determined that the Bosnian Muslim men in the compound had only a 30% chance of survival if they had stayed and awarded compensation to the surviving relatives in proportion to this chance.¹⁰³ The Supreme Court disagreed with this determination and made its own estimation, finding that

⁹⁸ *Mothers of Srebrenica* Court of Appeal, paras. 64.2, 64.3.

⁹⁹ *Mothers of Srebrenica* Court of Appeal, para. 65.

¹⁰⁰ See preceding paragraph.

¹⁰¹ *Nuhanović* Court of Appeal, para. 6.14. This finding was not disturbed by the Supreme Court.

¹⁰² *Mothers of Srebrenica* District Court, para. 4.330.

¹⁰³ *Mothers of Srebrenica* Court of Appeal, paras 68, 69.1.

the Bosnian Muslim men had only a 10% chance of surviving had they been allowed to stay in the compound.¹⁰⁴

Despite these disagreements, it is important to emphasise that the Dutch courts in the *Srebrenica* cases were unanimous that Dutchbat's failure to give the Bosnian Muslim males in the compound the choice of staying was a wrongful act warranting compensation to surviving relatives.

B. *Green Desert* case

Background

Twenty-three victims alleging inhumane treatment and torture as a result of operation Green Desert in Iraq, described above, brought a civil lawsuit against the Danish Ministry of Defence before the High Court of Eastern Denmark. The plaintiffs sought compensation for harm suffered during and after operation Green Desert and an order to the Ministry to conduct an effective, official and independent inquiry (*Green Desert* case).¹⁰⁵ On 15 June 2018 the High Court issued a judgment finding that no soldiers under the Danish battalion's operational control exposed the plaintiffs to inhumane treatment in connection to operation Green Desert. It also found that it had not been established that Danish soldiers had witnessed any inhumane acts against the plaintiffs during the operation.¹⁰⁶ The High Court found, however, that on the basis of the information available to it at the time of the decision to participate in the operation, the Ministry of Defence should have known that there was a real risk that detainees taken into Iraqi custody would be subjected to inhumane treatment.¹⁰⁷ The High Court found that there was a causal link between the Danish forces' commitment and participation in the operation and the exposure of the detainees to inhumane treatment.¹⁰⁸ It awarded partial compensation in the amount of DKK 30,000 (approximately EUR 4,000) to 18 of the plaintiffs. The Ministry of Defence announced that it would appeal the High Court's decision before the Danish Supreme Court.¹⁰⁹

¹⁰⁴ *Mothers of Srebrenica* Supreme Court, paras 4.7.6-4.7.9.

¹⁰⁵ *Green Desert* High Court, pp. 9-10.

¹⁰⁶ *Green Desert* High Court, p. 810.

¹⁰⁷ *Green Desert* High Court, pp. 810-812.

¹⁰⁸ *Green Desert* High Court, p. 812.

¹⁰⁹ See 'Court orders Denmark to compensate 18 Iraqis over torture', Al Jazeera, 15 June 2018: <<https://www.aljazeera.com/news/2018/06/court-orders-denmark-compensate-18-iraqis-torture-180615185349646.html>>.

Findings

(i) Attribution

The presence of Danish forces in Iraq at the time of operation Green Desert was based on UN Security Council Resolutions and was approved by the Danish Parliament.¹¹⁰ The High Court found, however, that the Danish Ministry of Defence was responsible for the decision to participate in and for the subsequent participation of Danish forces in operation Green Desert. The fact that the Danish battalion's presence and activities in Iraq rested on UN Security Council resolutions, according to the court, could not have led to another assessment.¹¹¹ Thus, the criterion for attribution applied by the High Court appears to be the power to take decisions with respect to the challenged conduct — an approach that seems to be in line with the effective control criterion of the DARIO and with the approach of the Dutch courts in the *Srebrenica* cases.

(ii) Wrongfulness of the alleged conduct

a. Applicable national law

The High Court found that the Danish authorities had jurisdiction over the case and that Danish law applied. This decision was based on the Coalition Provisional Authority (CPA) Order No. 17, which was endorsed by the Danish Parliament in its decision approving the deployment of Danish forces in Iraq.¹¹² Pursuant to CPA Order No. 17, which had the status of law in Iraq,¹¹³ multinational forces had immunity from the Iraqi legal process and were subject to the exclusive jurisdiction of their sending states. Third-party claims arising from acts or omissions of the multinational forces “that do not arise in connection with military combat operations” were to be submitted and handled by the state sending the forces alleged to have caused the damage, in accordance with its national law.¹¹⁴ The High Court accepted that this order balanced, on the one hand, the need for extensive, but not absolute, immunity for the multinational forces and, on the other, the need to allow local citizens to claim compensation for damage caused by multinational forces which did not arise from lawful military operations.¹¹⁵

¹¹⁰ *Green Desert* High Court, p. 716, 718.

¹¹¹ *Green Desert* High Court, p. 812.

¹¹² *Green Desert* High Court, pp. 763-765.

¹¹³ *Green Desert* High Court, pp. 10-11, 761, referring to CPA Regulation No. 1.

¹¹⁴ *Green Desert* High Court, pp. 17-18, 762-763, referring to CPA Order No. 17, section 6(1).

¹¹⁵ *Green Desert* High Court, p. 763.

b. Violations of international human rights law

The plaintiffs based their compensation claim on Article 3 of the ECHR, which was incorporated into domestic Danish law through Law No. 285 of 1992 and subsequent legislation, and on the UN Convention against Torture (CAT).¹¹⁶ The Ministry of Defence disagreed, arguing that the rules of the ECHR and CAT did not apply because of lack of territorial jurisdiction.¹¹⁷

Having found that Danish law applied and taking into account that the substantive protection in Article 3 of the ECHR was incorporated into Danish law, the High Court found it unnecessary to consider whether the territorial conditions of the ECHR's jurisdictional clause in Article 1 had to be fulfilled.¹¹⁸

c. Liability under domestic law

The High Court assessed the compensation claim on the basis of the general rules on liability for acts of public authorities, defined in Danish Supreme Court jurisprudence and the Danish Liability and Compensation Act, taking into account Article 3 of the ECHR as well as Articles 13 and 41 of the convention.¹¹⁹ It referred to Supreme Court jurisprudence stating that in light of Denmark's international obligations, the standard of conduct must be interpreted in accordance with the principle that persons in the custody of the authorities must be treated humanely and not subjected to torture, inhumane or degrading treatment. This implied that responsibility for surrender may arise if Danish authorities knew or should have known that the surrender would entail a real risk that those surrendered would be exposed to inhumane treatment.¹²⁰ The High Court also noted that a violation of Article 3 of the ECHR would require compensation if the plaintiff was entitled to compensation in accordance with Article 41 of the ECHR.¹²¹

(iii) Causal link

The High Court found that there was a causal link between the Danish battalion's commitment and subsequent participation in operation Green Desert and the treatment the plaintiffs were exposed to in Iraqi custody. Such a causal link existed with respect to inhumane treatment but

¹¹⁶ *Green Desert* High Court, pp. 9-10.

¹¹⁷ *Green Desert* High Court, p. 691.

¹¹⁸ *Green Desert* High Court, pp. 764-766.

¹¹⁹ *Green Desert* High Court, pp. 758-765.

¹²⁰ *Green Desert* High Court, pp. 760, 765, referring to Danish Supreme Court jurisprudence.

¹²¹ *Green Desert* High Court, p. 761.

not with respect to torture, as it was not shown that there was a general risk that detainees would be subjected to torture, ill-treatment or other systematic violence.¹²²

IV. ASSESSMENT

While the application of international human rights law to situations of armed conflict has been the subject of a great body of literature and jurisprudence of national and international human rights courts, the Dutch *Srebrenica* cases and the Danish *Green Desert* case are some of the few cases dealing exclusively with civil liability claims against states based on conduct of the respective state's armed forces abroad. The decisions in these cases contribute to the developing state practice on the right to reparation for victims of international humanitarian law violations and to the academic debate in this field.

As noted earlier, the state practice on this issue is not consistent. Some domestic courts have been reluctant to accept an individual right to reparation for victims of international humanitarian law violations. The German Federal Constitutional Court ruled in 2006 in the *Distomo* case that neither international nor German domestic law (as of 1944) provided a basis for the plaintiffs' claims for reparation for violations of the law of armed conflict.¹²³ The German Federal Constitutional Court held that Article 3 of Hague Convention IV did not provide for an individual right to compensation and that this provision was applicable only among states,¹²⁴ a position shared by the High Regional Court of Cologne in the *Bridge of Varvarin* case¹²⁵ and by courts in Japan.¹²⁶ Other domestic courts have awarded compensation for damage resulting from the respective state's military forces' conduct abroad violating ECHR provisions,

¹²² *Green Desert* High Court, pp. 812-813.

¹²³ Rau, Markus, 'State Liability for Violations of International Humanitarian Law – The *Distomo* Case Before the German Federal Constitutional Court', German Law Journal, Vol. 07, No. 07 (2005), pp. 701-720 (Rau), pp. 707, 709-710, citing Federal Constitutional Court, 2 BvR 1476/03, decision of 15 February 2006 (*Distomo* case).

¹²⁴ Rau, p. 708, citing Federal Constitutional Court, 57 *Neue Juristische Wochenschrift* 3257, 3258 (2004), decision of 28 June 2004 (concerning claims of Italian military detainees) and Federal Constitutional Court, 58 *Neue Zeitschrift Für Verwaltungsrecht* 560, 564 (2005), decision of 26 October 2004 (concerning claims in the Soviet Occupation Zone).

¹²⁵ Rau, p. 708, citing Higher Regional Court, Cologne 58 *Neue Juristische Wochenschrift* 2860, 2861 (2005).

¹²⁶ Rau, p. 708, citing Tokyo High Court, *X et al. v. The State of Japan*, judgment of 7 August 1996 (English translation reproduced in 40 Japanese Annual of International Law 116 (1997)); Tokyo High Court, *X et al. v. The State*, judgment of 6 December 2000 (English translation reproduced in 44 Japanese Annual of International Law 173 (2000)); Tokyo High Court, *X et al. v. The Government of Japan*, judgment of 8 February 2001 (English translation reproduced in 45 Japanese Annual of International Law 142 (2002)); and Tokyo District Court, *X et al. v. State of Japan*, judgment of 17 June 1999 (English translation reproduced in 43 Japanese Annual of International Law 192 (2000)).

noting that no specific norm of international humanitarian law regulated the conduct in question.¹²⁷

The events on which the Dutch *Srebrenica* cases are based, namely the killing of at least 7,000 Bosnian Muslim men by Bosnian Serb forces in July 1995, have been defined as war crimes and crimes against humanity by the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹²⁸ and as genocide by both the ICTY and the ICJ.¹²⁹ Acts of inhumane treatment or torture of civilians or persons *hors de combat* in Iraqi custody, such as those discussed in the Danish *Green Desert* case, may constitute a violation of Article 3 common to all four Geneva Conventions of 1949, which applies to non-international armed conflicts, in particular, of the requirement that civilians and persons *hors de combat* must be treated humanely and of the prohibition of “violence to life and person, [...] cruel treatment and torture”. Operation Green Desert took place after the end of the war in Iraq in the spring of 2003 and after the end of the occupation on 28 June 2004.¹³⁰ The security situation at the time of the operation, however, was complex, due to the presence of roadside bombs and the intensifying use of heavy guns and other weapons,¹³¹ which indicates that at the time of the operation an armed conflict was ongoing. The High Court confirmed in its judgment that international humanitarian law continued to apply.¹³²

While the *Srebrenica* courts and the *Green Desert* court did not base their decisions directly on international humanitarian law (in the *Green Desert* case international humanitarian law was not even relied on by the plaintiffs) and instead relied on a mixture of domestic civil liability law and international human rights law, the underlying acts to which the claims relate may constitute violations of both international human rights and humanitarian law. By granting the claims, the *Srebrenica* courts and the *Green Desert* court implicitly acknowledged that victims of international humanitarian law violations may seek reparation directly from the state responsible for the violation, at least when the underlying act infringes upon both bodies of law. Instructive in this respect are the considerations of the *Green Desert* court in relation to

¹²⁷ United Kingdom, *Serdar Mohammed v. Ministry of Defence and Others*, High Court of Justice, [2014] EWHC 1369 (QB) Case No: HQ12X03367, judgment of 2 May 2014, paras 293-294. See also United Kingdom, *Mohammed and Others v. Secretary of State for Defence, Rahmatullah v. MoD*, Court of Appeal, Case Nos: A2/2014/1862; A2/2014/4084; A2/2014/4086, judgment of 30 July 2015.

¹²⁸ ICTY *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Trial Judgment, 12 December 2012, paras 1183 (extermination as a crime against humanity), 1187 (murder as a war crime and as a crime against humanity), 1193 (persecutions as a crime against humanity).

¹²⁹ ICTY *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Appeal Judgment, 8 April 2015, para. 648; ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 297.

¹³⁰ *Green Desert* High Court, p. 26.

¹³¹ *Green Desert* High Court, p. 718.

¹³² *Green Desert* High Court, p. 26.

the application of CPA Order No. 17 to individual compensation claims. The High Court accepted that this order balanced the need for immunity for the multinational forces and the need to allow local citizens to claim compensation for damage caused by them.¹³³ The High Court also found that the purpose of the regulation and the need to give practical effect to the provision regarding third-party claims also required that the injured party could rely on this regulation against the troop-sending state without being dependent on international action by the Iraqi government to enforce this provision.¹³⁴ The text of CPA Order No. 17 and its interpretation by the Danish High Court in the *Green Desert* case thus appear to be consistent with the way, according to Kalshoven, Article 3 of the 1907 Hague Convention IV was intended to operate.¹³⁵

It will be difficult in these circumstances to maintain that an individual will be entitled to a right to reparation with respect to human rights violations but not with regard to violations of international humanitarian law, even if the underlying acts are the same.¹³⁶ Domestic courts will ultimately decide such claims on the basis of domestic law. As the decisions reviewed above show, domestic law may incorporate, explicitly or implicitly, norms of international human rights law and international humanitarian law¹³⁷ and domestic courts may choose to rely in their interpretation on both bodies of law. Even if it found that the Genocide Convention and international humanitarian law instruments did not have direct effect under Dutch law, the District Court in *Mothers of Srebrenica* relied on these instruments in clarifying the standard of care under domestic law. It is further important that in the decisions discussed above the Dutch and Danish courts applied domestic civil liability law with respect to acts of the armed forces in armed conflict abroad. In these circumstances, distinguishing between reparation claims based on international humanitarian law and reparation claims based on international human rights law may no longer be so relevant.

¹³³ *Green Desert* High Court, p. 763.

¹³⁴ *Green Desert* High Court, p. 764.

¹³⁵ Kalshoven 2007, pp. 212-213:

One practical way for belligerent states to fill the gap left in 1907 is to open a counter where day-to-day matters of compensation are directly settled. It appears to be the case that the U.S. armed forces regularly apply this method in their operations on other states' territories. This appears to be exactly what the initiators of Article 3 of 1907 had in mind in the first place.

¹³⁶ See Zimmermann, p. 221.

¹³⁷ Some international humanitarian law treaties create specific obligations for the states parties to enact implementing legislation. The four 1949 Geneva Conventions create an obligation for the states parties to enact legislation penalising grave breaches and to take measures to suppress other violations of the conventions (First Geneva Convention 1949, Art. 49-50; Second Geneva Convention 1949, Art. 50(2); Third Geneva Convention 1949, Art. 129(2); Fourth Geneva Convention 1949, Art. 146(2)). The Genocide Convention creates an obligation to enact legislation penalising genocide (Art. V).

A significant contribution of the *Srebrenica* cases is the elaboration of the standard for attribution of conduct of military forces seconded by a state to an international organisation. As noted by Bakker, by accepting the possibility of dual attribution to both the UN and the sending state, the Supreme Court in *Nuhanović* and *Mustafić* “has taken a clear stance in a field, which is at the heart of an on-going debate before national and international courts, among States and international organizations, and in international legal literature” and “has created a significant precedent, which may contribute to the further development of customary international law in this field”.¹³⁸ The question of attribution is likely to play a critical role in future claims for reparation, considering that in practice states often contribute military forces to international organisations for peacekeeping or military operations abroad and international organisations enjoy jurisdictional immunity. The decisions in the Dutch *Srebrenica* cases are likely to influence domestic courts in other states adjudicating on the same or similar issue. It is further relevant that the approach of the High Court of Eastern Denmark in *Green Desert* is consistent with the approach of the *Srebrenica* cases. While the former did not involve secondment of national armed forces to an international organisation, it nevertheless concerned conduct of armed forces deployed abroad on the basis of UN Security Council resolutions and acting as part of a multinational force.

It has been pointed out that if an individual right to reparation for violations of the law of armed conflict existed, its actual realisation in the context of mass violations “will prove a daunting, if not impossible, task” in light of the “overwhelming number of claims and other ‘factual’ obstacles”, among other issues.¹³⁹ Relevant in this respect is that in *Mothers of Srebrenica* the courts had to assess a large number of acts and omissions affecting various groups of victims. The association ‘Mothers of Srebrenica’ represented the interests of approximately 6,000 surviving relatives of the fall of Srebrenica. The High Court in the Danish *Green Desert* case discussed claims filed by 23 plaintiffs involving different factual circumstances. In its judgment of over 800 pages it considered a number of complex legal and evidentiary questions. The ability of these courts to handle such issues may suggest that in reality individual claims for reparation may not have the feared impact on the judicial system. Additionally, one may wonder why the inability of a judicial system to handle a large number of complex claims would be a factor weighing against the existence of an individual right. Mechanisms may be adopted to address any such concerns, for example, joint proceedings

¹³⁸ Bakker, pp. 290, 288.

¹³⁹ Haldemann, marginal note 40. See also Tomuschat, p. 1140.

in cases based on the same or similar circumstances or single claims submitted by legal entities representing the interests of multiple victims.

Finally, it is important to note the approach taken by the courts of appeal in the *Srebrenica* cases and by the High Court in the *Green Desert* case with respect to the extraterritorial application of human rights treaties. In *Nuhanović* and *Mustafić* the Court of Appeal construed the principles in Articles 2 and 3 of the ECHR and 6 and 7 of the ICCPR as rules of customary international law with universal validity, binding on the state.¹⁴⁰ In *Mothers of Srebrenica* the Court of Appeal noted that even if the ECHR and ICCPR were not applicable due to the absence of jurisdiction, this would not have affected its assessment, as the standards of these human rights treaties were implicit in the law of the Netherlands.¹⁴¹ In the *Green Desert* case the High Court found it unnecessary to address this issue, as Danish law applied and Article 3 of the ECHR was incorporated into Danish law. As pointed out by Ryngaert in relation to the Court of Appeal's judgment in *Mothers of Srebrenica*, this may suggest that "jurisdiction is in the end not decisive for the determination of the wrongfulness of an act committed extraterritorially".¹⁴² These decisions clarify that the standard in civil liability claims against a state is broader than in complaints alleging specific human rights violations against the state, as the question in the former case is not whether the state "owed human rights obligations to the individuals" outside its territory but whether the conduct of the armed forces "constituted an unlawful act" according to domestic law,¹⁴³ an assessment in which fundamental humanitarian law rules, explicitly or implicitly, are likely to play a role.

V. CONCLUSION

The recent court decisions in the Netherlands and Denmark discussed in this article make a significant contribution to the developing state practice on the right to reparation for international humanitarian law violations. First, while the courts did not rely directly on international humanitarian law as a basis for their decision, they *de facto* recognized a right of individual victims of international humanitarian law violations to claim compensation directly from the responsible state. Second, by applying domestic civil liability law to acts of the armed forces abroad and by interpreting this law in light of applicable international legal standards,

¹⁴⁰ *Nuhanović* Court of Appeal, para. 6.3.

¹⁴¹ *Mothers of Srebrenica* Court of Appeal, para. 38.7.

¹⁴² Ryngaert, Cedric, 'Peacekeepers Facilitating Human Rights Violations: the Liability of the Dutch State in the Mothers of Srebrenica cases', *Netherlands International Law Review* (2017) 64:453-535 (Ryngaert), p. 457.

¹⁴³ See Ryngaert, p. 457 (emphasis omitted).

the Dutch and Danish courts showed that domestic courts may serve as an effective mechanism to enforce international law in situations of armed conflict. Further, the decisions discussed above clarified the criteria for attribution of seconded military forces' conduct to the sending state and are likely to influence future state practice on this issue. These decisions also showed that domestic courts are able to handle large and complex compensation claims related to activities in an armed conflict taking place abroad and affecting numerous victims.

Marcel Brus has described law as “a dynamic instrument of society” so that “what appears an impossibility at one moment can become a reality if societal attitudes change”.¹⁴⁴ The decisions in the Dutch *Srebrenica* cases and in the Danish *Green Desert* case may be seen as an expression of the changing values in society. The Dutch *Srebrenica* cases are not an isolated development in the Netherlands.¹⁴⁵ The future will show whether domestic courts in other countries will continue this trend and what impact domestic courts may have on the enforcement of international law in armed conflicts.

¹⁴⁴ Brus, Marcel, ‘*Jus Humanitatis* and the Right to Reparation for International Crimes in Foreign Domestic Courts’, 14 *Int’l Crim. L. Rev.* 358 (2014) (Brus), 364.

¹⁴⁵ In 2011 the District Court of The Hague accepted the claim of victims of a killing, which took place in present day Indonesia in 1947 and held the state liable to pay compensation and to offer formal apologies for the crime, Brus, p. 361, citing District Court of The Hague, *Wisah Binti Silan et al v. The Netherlands*, no. LJN: BS8793, judgment of 14 September 2011. In another case, a court in the Netherlands awarded compensation to a victim of rape by five Dutch soldiers in 1949 in the village in Peniwen in East Java, District Court of The Hague, *X. v. The State of the Netherlands*, Case No. C/09/483032/ HA ZA 15-20, judgment of 27 January 2016.