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Fair Trial in *Mothers of Srebrenica et al.*: Guessing as a Form of Reasoning

RESEARCH ARTICLE

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ABSTRACT

On 19 July 2019, the Dutch Supreme Court (*Hoge Raad*) rendered the final judgment in the proceedings led by Stichting Mothers of Srebrenica ('Mothers'), a foundation established under the Dutch law, in the interests of more than 6,000 surviving relatives of the Srebrenica genocide. Mothers and ten individual plaintiffs alleged multiple failures by the Dutch State regarding the fall of the Srebrenica safe area designated by the United Nations ('UN') and the fate of more than 30,000 people who had fled to either a nearby compound of the Dutch battalion or other locations, including about 7,000 Bosniac males. However, the Supreme Court established the State's responsibility only regarding a group of approximately 350 males who had been allowed inside the Dutchbat compound but were then handed over to the Bosnian Serbs. This contribution examines from the perspective of the right to fair trial how the courts determined the State's liability for damages in relation to these males. It questions whether the parties to the proceedings had an opportunity to present their arguments on facts and evidence as to a percentage of the State's liability for damages. It also views the Supreme Court's determination of the liability at 10% as problematic.

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1. INTRODUCTION

In the midst of the war in Bosnia and Herzegovina, in March 1994, Dutch troops (also known as 'Dutchbat') arrived in the Srebrenica enclave to provide security for the Srebrenica safe area, as part of the UN peacekeeping force. Dutchbat headquarters were set up near the city of Srebrenica in an abandoned factory at Potočari situated in the safe area ('the compound').[1]

On 6 July 1995, Bosnian Serbs launched an attack on the safe area and a few days later, on July 11th, they overran the city of Srebrenica.[2] That day, thousands of Bosniacs fled in the direction of the nearby woods or to the Dutchbat compound in Potočari, where Dutchbat had set up a mini safe area consisting of the compound and its nearby area. Dutchbat admitted approximately 5,000 people, including approximately 350 males, inside the compound. The other people remained in the mini safe area outside the compound.[3]

On 12 and 13 July 1995, on the orders of the Bosnian Serbs, buses arrived at the mini safe area to remove people from there. As people were making their way to the buses, the Bosnian Serbs separated males from females.[4] The Bosniacs who had been admitted inside the Dutchbat compound were the last ones to be removed from the mini safe area, including the approximately 350 males.[5] Dutchbat let these 350 males walk into the hands of Bosnian Serbs, without first trying to keep them inside the compound, or offering them a possibility to remain there.[6] These Bosniac males as well as others captured by Bosnian Serbs subsequently perished in mass executions, which started on 13 July 1995.[7]

On 4 June 2007, the Mothers and ten surviving relatives of the males killed in the Srebrenica massacre instituted proceedings against the Dutch State and the UN before the District Court of The Hague (*Rechtbank Den Haag*) in relation to the fall of Srebrenica and the events that followed. The Dutch courts however declined jurisdiction with regard to the UN. The European Court of Human Rights ('the ECtHR') found that this grant of immunity to the UN served a legitimate purpose and was proportionate in terms of the right of access to a court secured by Article 6 § 1 of the European Convention on Human Rights ('the Convention').[8]

After the aforementioned decision by the ECtHR, the proceedings before the Dutch courts continued against the State. In these proceedings, the plaintiffs sought a declaratory judgment that the State had acted unlawfully. In this regard, they argued multiple failures on part of the State in relation to the fall of Srebrenica.[9]

However, the Dutch courts were prepared to discuss the State's liability only regarding the plaintiffs' claim concerning the removal of the approximately 350 males from inside the Dutchbat compound. They found that Dutchbat had acted unlawfully by failing to offer these males a possibility of staying inside the compound on 13 July 1995.[10] Yet, the Dutch courts disagreed on the issue of the State's liability for damages. In particular, the District Court of The Hague held that the State was liable for damages as it was sufficiently certain that the males would have survived.[11] However, the Court of Appeal of The Hague (*Gerechtshof Den Haag*) deemed that the Bosnian Serbs would have found the males in any event. The males would have had only a 30% chance of survival had they been able to stay inside the compound. The Court of Appeal thus opined that the State could be held liable for damages only in proportion to that lost chance of survival.[12] Eventually, the Supreme Court decreased the lost chance of survival and hence the State's liability for damages up to 10%.[13]

The right to fair trial in *Mothers of Srebrenica et al.* has been discussed considerably in relation to the right of access to a court triggered by matter of immunity of the UN, which, as noted above, came up early in the proceedings.[14] Somewhat less attention has been paid to other fair trial issues in the subsequent proceedings that continued only against the Dutch State. This contribution discusses a specific aspect of how the Dutch courts determined the State's liability for damages in respect of the approximately 350 males based on a lost chance of survival. The final determination of the lost chance of survival at 10% is relevant not only to how it characterises the gravity of the State's failure to protect the approximately 350 males, but also affects the surviving relatives' claims for compensation which are yet to be settled.[15]

This paper commences with an overview on the application of the right to fair trial to the proceedings in *Mothers of Srebrenica et al*. Next, it tackles three issues regarding the determination of the lost chance of survival of the approximately 350 males by the Dutch courts. Firstly, it questions whether the Mothers had an opportunity to present its arguments based on a percentage of the chance of survival of these males in line with the right to adversarial proceedings. In this regard, it must be considered relevant that the loss of a chance doctrine was applied for the first time in this case in the Court of Appeal's judgment and the Mothers subsequently complained to the Supreme Court that this had been a surprise ruling. Secondly, the contribution further scrutinises the complaint raised by the Mothers before the Supreme Court concerning its lack of an opportunity to present arguments on a percentage of the chance of survival of the approximately 350 males. In this respect, the paper observes that the Supreme Court provided no analysis of the said Mothers' complaint and explores whether this is compatible with the obligation on the Supreme Court to give sufficient reasons for its judgment. Thirdly, the discussion proceeds to the reasoning by which the Supreme Court determined the lost chance of survival at 10%. It opines that the highly selective and speculative assessment of what would

have happened to the approximately 350 males had they remained inside the Dutchbat compound does not sit well with the plaintiffs' right to a reasoned judgment. The discussion on each of these matters commences with an overview of the relevant fair trial standards under Article 6 § 1 of the Convention. The conclusion highlights the key deficiencies of the fairness of the trial in *Mothers of Srebrenica et al*.

2. APPLICABILITY OF THE RIGHT TO A FAIR TRIAL

One of the general requirements in order to bring Article 6 § 1 of the Convention into play is that proceedings at issue must concern, among others, 'the determination of (...) civil rights (...)'.[16] In the domestic proceedings, no doubts arose that the case of *Mothers of Srebrenica et al*. concerned the determination of a civil right recognised under Dutch law. In fact, already when deciding on the tension between the UN's immunity and the right of access to a court, the domestic courts, including the Supreme Court, accepted, without any question, the applicability of Article 6 § 1 of the Convention. Their finding that granting immunity to the UN was compatible with the right of access to a court as guaranteed by Article 6 § 1 confirmed that, as a matter of principle, this Convention provision was applicable to the case.[17]

However, it is noteworthy that, when the issue of the UN's immunity was subsequently brought to Strasbourg, the ECtHR denied the standing of the Mothers to complain about violations of Articles 6 and 13 of the Convention. The ECtHR held that neither the Mothers' civil rights nor its own Convention rights were at issue. In other words, only the rights of the surviving relatives were at stake. The Mothers could not claim to be a 'victim' of a violation of those provisions within the meaning of Article 34 of the Convention.[18] As a result, the ECtHR examined the issue of the UN's immunity only in relation to the ten surviving relatives, who had complained to the ECtHR along with the Mothers.

The ECtHR decision certainly reveals a dissonance between the domestic and the Convention systems as to who can invoke the fair trial guarantees. However, for the purposes of the present discussion, it suffices to recall that, as a matter of the Dutch law, the Mothers could also benefit from the guarantees of Article 6 of the Convention. It should be noted that the ECtHR has recognised that the concept of 'victim' in Article 34 of the Convention must be interpreted autonomously and independently of domestic concepts concerning the capacity of taking proceedings.[19]

For the reasons to which this contribution now turns, the manner in which the domestic courts dealt with the issue of the State's liability for damages can be considered problematic in terms of the right to fair trial.

3. OPPORTUNITY TO PRESENT ARGUMENTS ON A PERCENTAGE OF THE CHANCE OF SURVIVAL

As noted above, the Dutch courts determined that the State's liability for damages in respect of the approximately 350 males removed from the Dutchbat compound on 13 July 1995 was limited to 10% since the State had deprived these males of a 10% chance of survival by failing to offer them a possibility of remaining inside the compound.[20] From the judgments of the domestic courts, it emerges that such an approach to determining the State's liability for damages – based on a percentage of the lost chance of survival – appeared, in these proceedings, for the first time in the judgment of the Court of Appeal of The Hague, which determined it at 30%.[21] Furthermore, in their cassation appeal to the Supreme Court, the plaintiffs complained that the Court of Appeal's ruling on a percentage of the chance of survival was an impermissible surprise ruling and that no proper debate on such an issue had taken place between the parties.[22]

In that light, the question arises whether the plaintiffs' right to adversarial hearing has been respected, and, in particular, whether they had an opportunity to comment on the issue of a percentage of the lost chance of survival.[23] In what proceeds, this article first outlines the key Convention standards on the right to an adversarial hearing and then explores whether these standards were observed in *Mothers of Srebrenica et al*.

3.1 THE RIGHT TO ADVERSARIAL HEARING

At the outset, it should be recalled that the concept of a fair trial under Article 6 § 1 of the Convention comprises the fundamental right to adversarial proceedings.[24] As held by the ECtHR, the right to adversarial proceedings means, among others, the opportunity for the parties to a civil trial to have knowledge of and comment on all observations filed, with a view to influence the court's decision.[25] In so far as it emerges that in the present case an issue of a percentage of the lost chance of survival was raised by the Court of Appeal of its own motion rather than by one of the parties,[26] the ECtHR has held that judges themselves must also respect the principle of adversarial proceedings, in particular when they decide on a claim on the basis of a matter raised by the court of its own motion.[27] It is legitimate for the parties to a dispute to expect to be consulted as to whether a specific argument calls for their comments.[28]

It further emerges from the ECtHR case-law that, where a court based its judgment on an issue raised of its motion, a key question is whether a party was 'caught off guard' by such a turn in the proceedings, or, in other words, whether a party could not have anticipated it. In this connection, it should also be noted that the adversarial principle requires that courts do not base

their judgments on elements of fact or law which were not discussed during the proceedings and which even a diligent party could not have anticipated.[29]

It thus follows that the first question to be explored is whether the Court of Appeal's ruling on a percentage of the chance of survival was indeed an unexpected turn in the proceedings for the plaintiffs. To reach a conclusion on this matter, the paper will first survey whether the loss of a chance doctrine has been applied *prima facie* in cases of gross human rights violations as was the present case. Next, it will examine how and when in the proceedings in *Mothers of Srebrenica et al.* the Dutch courts engaged with the chance of survival. If these considerations reveal that the percentage ruling was a surprise ruling, the Court of Appeal's decision is problematic. It is important to recall in this regard that, according to the ECtHR case-law, a defect at a lower-instance court may be remedied on appeal, as long as a higher-instance court has full jurisdiction either to take the decision itself or to remit the case for a new decision.[30] It is thus further examined whether the issue of the lack of an opportunity for the plaintiffs to argue a survival chance percentage before the Court of Appeal was addressed by the Supreme Court.

3.2 WHETHER THE PLAINTIFFS WERE CAUGHT BY SURPRISE

3.2.1 Preliminary remarks: the loss of chance in the Dutch jurisprudence

Before turning to the specific circumstances in *Mothers of Srebrenica et al.*, it should be noted that the application of the loss of a chance doctrine leading to a percentage of the claim being awarded, is not unknown in the jurisprudence of the Dutch courts. It has been applied in situations where an actual harm had occurred, but the causal relationship between the unlawful conduct and the harm was uncertain.[31] At the same time, it emerges that, prior to the Court of Appeal's judgment in *Mothers of Srebrenica et al.*, this doctrine had been applied to cases of professional liability and medical negligence.[32]

Furthermore, the loss of a chance doctrine had not been considered in two earlier cases specifically dealing with the State's liability for damages in relation to the removal of the males from the Dutchbat compound in Potočari, namely in *Nuhanović*[33] and *Mustafić et al.*[34] In that light, it does not appear that, at the time of the proceedings in *Mothers of Srebrenica et al.*, the loss of a chance doctrine had been an established practice in cases of the State's responsibility for alleged human rights violations such as in *Mothers of Srebrenica et al.*

Moreover, the assessment in *Nuhanović* and *Mustafić et al.* indicated that, in order to determine the State's liability for damages, a detailed assessment of individual circumstances of a person was required. On the other hand, *Mothers of Srebrenica et al.* was a mass litigation. Depending on its outcome, the number of surviving relatives entitled to claim damages could have, at least theoretically, reached thousands and in relation to different circumstances in and around Srebrenica in July 1995. As was noted above, the multiple allegations brought by the Mothers concerned thousands of people.

Indeed, the plaintiffs in *Mothers of Srebrenica et al.* sought a declaratory judgment, asking the domestic courts to recognise as unlawful the State's conduct in relation to the events at issue and that the State had an obligation to pay damages. As the next step and after having secured a favourable judgment, the surviving relatives represented by the Mothers intended to pursue claims for compensation to be assessed in subsequent proceedings against the State.[35] Furthermore, under the applicable law, the Mothers was not authorised to bring an action for damages, as was also acknowledged already by the first-instance court.[36] In that light, its claims, as also formulated by the District Court of The Hague, did not indicate that a specific extent of the State's liability for damages could be assessed in these proceedings.

3.2.2 Proceedings before the District Court

Turning to the proceedings before the District Court of The Hague, it is noteworthy that, as regards the standards of assessment to be applied to the case, the District Court identified the requirement of a causal link in terms of a sufficient degree of certainty between the respective unlawful conduct and the damage.[37] It did not specify that in case of uncertainty as to causality, the loss of a chance doctrine might come into play in resolving the issue of the State's liability for damages.

In that vein, in relation to the removal of the males from the Dutchbat compound on 13 July 1995, the District Court found that the State was liable for damages incurred by the surviving relatives of these males, represented by the Mothers. In this regard, the District Court accepted that the required causal relationship had been proven. It determined with a sufficient degree of certainty that the males would have survived had Dutchbat refrained from cooperating with the Bosnian Serbs in their removal.[38] It added that possible further relevant questions fell outside the scope of these proceedings.[39]

3.2.3 Proceedings before the Court of Appeal

When it comes to the proceedings before the Court of Appeal of The Hague, it is curious that the Advocate General indicated in his opinion to the Supreme Court that in the appeal hearing held on 6 October 2016, the Court of Appeal had put a question to the parties as to what would have happened to the males had they remained inside the compound on 13 July 1995, and that the parties had debated this question as regards the good or bad chances of the survival of these males.[40] The

Advocate General opined that, given this course of the debate, the parties should have taken into account that the Court of Appeal would determine the males' chance of survival in the manner in which it did.[41]

However, it remains unclear how the question by the Court of Appeal as to what would have happened to the males had they remained inside the compound indicated that the parties were invited to comment specifically on a percentage of the lost chance of survival of the males. The question did not specify this.

In addition, the Advocate General opined that a letter the Mothers had sent to the Court of Appeal on 20 July 2017 seeking to correct the transcript of the appeal hearing indicated that the Mothers had been aware of the loss of a chance assessment. In particular, the letter stated that in the appeal hearing the Mothers had referred to 50% survival with regard to the males who had fled in the direction of the woods and not with regard to the males who had fled to the Dutchbat compound.[42] In relation to this letter, it is noteworthy that it was sent more than nine months after the appeal hearing took place. It is questionable that the Mothers would have left this error in the transcript unaddressed for such a long period of time had it actually known that the Court of Appeal would be determining a percentage of the lost chance of survival.

Moreover, it was clearly acknowledged by the Supreme Court that, in the proceedings before the Court of Appeal, the parties had only commented on whether the causality had or had not existed between the failure to offer the approximately 350 males the choice of remaining inside the Dutchbat compound and their subsequent killing by the Bosnian Serbs.[43]

3.2.4 Interim considerations

In view of the earlier practice of the domestic courts on the loss of chance doctrine, the mass nature and breadth of *Mothers of Srebrenica et al.*, and the standards of assessment specified by the District Court of The Hague, it is difficult to detect how the Mothers could have anticipated that the appeal proceedings would boil down to determining the State liability based on a percentage of the lost chance of survival and specifically in relation to the approximately 350 males. Given the inherently complex nature of such calculation, the Court of Appeal should have paid special diligence to making sure that it invited the parties to comment on determination of this percentage in respect of the 350 males. However, it did not. The contribution thus turns to the question as to whether this issue was remedied in the subsequent proceedings before the Supreme Court.

3.3 APPROACH BY THE SUPREME COURT: FAILURE TO ADDRESS THE SURPRISE RULING

The Supreme Court, as a court of cassation, could have examined whether the procedural law had been applied correctly by the Court of Appeal and how to remedy the lack of an opportunity for the plaintiffs to present their arguments on facts and evidence as regards the percentage of the lost chance of survival.[44]

In this regard, it should be noted that, despite being a court of cassation, the Supreme Court embarked on a detailed reassessment of the facts of the case.[45] In particular, it found that the circumstances of the case were 'insufficient to support the Court of Appeal's opinion that there was a realistic chance of 30% that the male refugees in the compound could have stayed alive if they had been offered the choice of staying [there]'.[46] It further held that '[i]n view of all of the circumstances, the Supreme Court estimates that chance at 10%'.[47]

Even though the Supreme Court decided to reassess the survival chance percentage, it did not invite the parties to present their arguments on facts and evidence in this regard. At the same time, it noted that '[n]either of the parties complained that the Court of Appeal [had] wrongly failed to take certain facts or circumstances into account…'.[48] This observation by the Supreme Court could be read in a way that, in case the Mothers disagreed with the Court of Appeal's assessment of 30%, the Mothers should have disputed this finding also in terms of facts and evidence in its cassation appeal.

Such an approach would seem problematic for at least two reasons. Firstly, the plaintiffs in *Mothers of Srebrenica et al.* alleged a wide range of failures on the part of the State. Applying the approach of the Supreme Court, the plaintiffs would need to submit detailed arguments on facts and evidence as regards each of the alleged violations just in case the Supreme Court decides to reassess any of them. Secondly, the reassessment of the facts is not generally what cassation proceedings are about. The Supreme Court, being a court of cassation, does not generally deal with facts or evidence. Further, it follows from Article 419 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) that the Supreme Court is bound by the facts as established in the impugned judgment.

As regards the reassessment of the percentage of the chance of survival in the present case, the Supreme Court provided the following justification:

> Although this also requires an assessment of the facts, the Supreme Court finds cause – in particular taking into account the long period of time that has passed since the events in Srebrenica in 1995 and the length of the proceedings (starting in June 2007) to date – to conclude the matter on the point of the causality, with due observance of Articles 420-421 DCCP.[49]

In so far as the Supreme Court referred to Article 421 of the Dutch Code of Civil Procedure, it remained unclear why it deemed that the requirements of this provision

were met. In particular, Article 421 allowed the Supreme Court to decide on a factual matter of a 'minor nature' (*van ondergeschikte aard*). As already noted above, a percentage of the lost chance of survival of the approximately 350 males was an important issue in the case. It concerned the extent of the State's liability for damages. In the earlier proceedings, the parties had not debated a percentage of the lost chance of survival. Insofar as the Supreme Court justified its reassessment of the facts by reference to the length of the trial, those are important considerations. However, and as held by the ECtHR, the desire to expedite the case does not justify disregarding such a fundamental principle as the right to adversarial proceedings.[50]

3.4 CONCLUDING REMARKS

In view of the foregoing, it appears that the domestic courts determined the percentage of the lost chance of survival of the approximately 350 males first at 30% and then at 10%, without having heard the parties' submissions as to the facts and evidence on this type of percentage. It also appears that a considerable discretion is exercised by the domestic courts in application of the loss of a chance doctrine. However, and as a matter of procedure, the ECtHR case-law indicates that special diligence is required of a court when an unexpected turn in the proceedings relates to a matter within its discretion. It should be recalled that the adversarial principle requires that courts do not base their decisions on elements of fact or law which were not discussed during the proceedings and which even a diligent party could not have anticipated.[51] In that light, an issue of the right to adversarial hearing arises as regards the 10% ruling on the lost chance of survival of the approximately 350 males whom Dutchbat handed over to Bosnian Serbs on 13 July 1995. Further, for the reasons that follow, this assessment by the domestic courts is also problematic when scrutinised from the angle of the right to a reasoned decision.

4. REASONING BY THE DUTCH COURTS AS REGARDS THE LOST CHANCE OF SURVIVAL

This section looks at two aspects from the perspective of the right to a reasoned decision under Article 6 § 1 of the Convention. Firstly, it discusses the lack of analysis in the Supreme Court's judgment on the Mothers' plea that the Court of Appeal's ruling on a percentage of the lost chance of survival was an impermissible surprise ruling and that no proper debate had taken place between the parties on such an issue.[52] Secondly, it looks at the reasoning by which the Dutch courts determined the percentage of the lost chance of survival of the approximately 350 males. Before delving into these issues, the contribution will first recall the relevant Convention standards on the right to a reasoned decision in the context of which the two issues are then explored.

4.1 THE RIGHT TO A REASONED DECISION

It is a well-established case-law of the ECtHR that the fair trial guarantees enshrined in Article 6 § 1 of the Convention include the obligation for courts to adequately state the reasons on which their decisions are based. This demonstrates to the parties that they have been heard, affords them the possibility to appeal against the decision, and the possibility of having the decision reviewed by an appellate body.[53] At the same time, the duty to provide reasons cannot be understood as requiring a detailed answer to every argument. The extent to which the duty to give reasons applies varies according to the nature of the decision and is determined in light of the specific circumstances of the case.[54] Hence, the Supreme Court's approach to the Mothers' plea, and the determination by the Dutch courts of the percentage will be considered separately with due regard to their specific nature.

4.2 THE MOTHERS' PLEA OF IMPERMISSIBLE SURPRISE RULING

At the outset, it should be recalled that in its appeal on points of law, the Mothers complained that the Court of Appeal's decision to determine a percentage of the lost chance of survival was an impermissible surprise ruling and that no proper debate on such an issue had taken place between the parties.[55] However, it may be observed that the judgment of the Supreme Court did not analyse this issue. While, indeed, the ECtHR has held that the duty to give reasons does not require courts to provide a detailed answer to every argument raised by the parties, it does require a specific and express reply where a party's submission is decisive for the outcome of the proceedings. Further, the ECtHR has held that the courts must examine pleas concerning the Convention rights with particular rigour and care.[56]

As regards the question of whether the Mothers' plea was decisive for the outcome of the case, it should be recalled that it concerned the assessment of the percentage of the lost chance of survival of the approximately 350 males. This assessment was crucial for determining the extent of the State's liability. It was therefore essential that the Supreme Court provide a specific and express reply as to why it considered that the Mothers had had an adequate opportunity to comment on a percentage of the lost chance of survival in these proceedings, especially when it comes to facts and evidence.

The assessment of the percentage was a complex one. In this connection, and by way of example, the Mothers could have invoked arguments militating in favour of the position of the surviving relatives in whose interests it acted. For instance, and at least theoretically, the Mothers could have argued that, in view of the

considerable number of the males, their situation should not be generalised and that individual circumstances of each male should be examined in these proceedings in order to determine their respective chance of survival. To demonstrate this point, already in the cases of *Nuhanović* and *Mustafić et al.* the domestic courts noted that the Bosnian Serbs had murdered 'able-bodied' males.[57] In that light, the physical condition as well as age of each male might have been relevant factors for their chance of survival. Perhaps an argument could have been made that it was appropriate to identify certain categories of males, for example, based on age, within the group of the 350 males and determine their respective chances of survival.

Be that as it may, what is of relevance in the context of the right to a reasoned decision is that the Supreme Court did not state specific reasons as to why it considered that the determination of a percentage was not a surprise ruling. Furthermore, this plea concerned a Convention right, namely, the right to adversarial hearing under Article 6 § 1. Therefore, it should have been examined with particular rigour and care.

4.3 DETERMINATION OF THE PERCENTAGE OF THE LOST CHANCE OF SURVIVAL

The determination by the Supreme Court and the Court of Appeal of the lost chance of survival has already received criticism as being inherently subjective and even arbitrary.[58] Indeed, the Supreme Court and the Court of Appeal tried to determine what might have happened to the approximately 350 males had they been allowed to remain inside the compound on 13 July 1995 by reference to various events, actual and possible, and to varying degrees possible.

From the Court of Appeal's reasoning, it emerges that it based its finding as to the percentage of the lost chance of survival on the following considerations. Firstly, Bosnian Serbs would have discovered the males inside the compound prior to the evacuation of Dutchbat from Potočari. Secondly, it was uncertain that, upon their discovery, Bosnian Serbs would have left these males undisturbed, as it was likely that Bosnian Serbs could have outnumbered Dutchbat and the males, and it was uncertain that the international community could have intervened in due time. On the other hand, there were reasons to believe that sparing the blue helmets had been the Bosnian Serbs' attack strategy and they had thus far left the UN troops inside the compound undisturbed.[59]

In that light, the Court of Appeal held that it could not establish that the males' chance of survival 'was so small as to be negligible'. It concluded as follows:

> All things considered, the Court of Appeal determines the chance that the men would have escaped inhumane treatment and execution by the Bosnian Serbs if they had been able to stay in the UN compound at 30%. By not offering the men the choice of staying in the compound – with explanation of the risks they would run on leaving the compound – on 13 July 1995, the State (Dutchbat) deprived them of this chance.[60]

It is noteworthy that the Supreme Court considered the aforementioned Court of Appeal's reasoning as problematic. It opined that certain other considerations made by the Court of Appeal offered virtually no indication that Bosnian Serbs would have left the males undisturbed. Hence, it found that the Court of Appeal's finding as regards the causality had been 'insufficiently reasoned and therefore [could not] be upheld'.[61] In this vein, the Supreme Court acknowledged that the Court of Appeal's reasoning had been defective, and then attempted to 'remedy' this defect.

Based on the circumstances taken into account by the Court of Appeal, the Supreme Court reassessed the prospects of the males as 'very bleak'. It opined that little weight could be attached to the fact that the Bosnian Serbs had thus far left the Dutchbat compound undisturbed as they could have reacted differently after realising that the Bosniac males were kept there. On the other hand, it was possible that the Bosnian Serbs would not have been willing to commence an open attack on the UN troops or that the international community would have reacted forcing the Bosnian Serbs to leave the males alone. Hence, the Supreme Court opined that the chance that the Bosniac males would have escaped the Bosnian Serbs, had the males been allowed to remain inside the compound, was 10%.[62]

In relation to this assessment, one may note that, indeed, adjudication entails a degree of discretion on the part of the courts, and the Supreme Court provided certain reasons for its ruling on the lost chance of survival. Also, in terms of Article 6 § 1 of the Convention, it was for the domestic courts to assess and weigh items of evidence before them.[63] Hence, it cannot be said that the Supreme Court failed to provide some reasons for its 10% ruling, or the Court of Appeal for its 30% ruling for that matter. But even such reasoned outcome entailed a significant degree of arbitrariness as regards a specific percentage.

In particular, the Supreme Court lowered the lost chance of survival from 30% to 10% as it attributed 'little' weight to the fact that the Bosnian Serbs had left the compound undisturbed since up until then they had had no reason to use arms against the UN troops in the compound.[64] In this vein, the Supreme Court appeared to suggest that it was very likely that the Bosnian Serbs would have actually attacked the Dutchbat compound in order to remove the Bosniac males from there. While this is a highly speculative assessment, the Supreme Court did not provide a comprehensive assessment of the facts

or evidence indicating that the Bosnian Serbs would have attempted to attack Dutchbat.

Moreover, the Supreme Court left it as a possibility that Dutchbat would have been able to withstand the threat of violence by the Bosnian Serbs and that the Bosnian Serbs would not have attacked the compound leading to international outrage and escalation of the conflict.[65] This is a significant finding as it also means that Dutchbat would have been able to delay the removal of Bosniac males even if for some period of time, during which further actions to save the males' lives could be taken, including action by the international community. In addition, and as was discussed earlier, each male's chance of survival could have been even higher depending on his age, physical condition or other individual circumstances.

In that light, a question arises whether such a method for determining the State's liability for damages – based on a percentage of the lost chance of survival – could at all be appropriate in the specific context of Srebrenica given the complexity and multitude of the factors involved. In order to achieve the precision this type of assessment suggested, the domestic courts should have carried out a comprehensive study of the situation and all different options available to Dutchbat at the time. Perhaps an expert report on these issues would have been useful. Be that as it may, the path the domestic courts chose remains open to debate as to whether it ensured the plaintiffs' right to a reasoned decision in a real and effective manner. Even the Dutch courts' characterisation of the chance of survival as 'very bleak' and 'negligible' does not lead to the lost chance of survival of 10% or 30% respectively, which remain, while reasoned, still a guess. There is no convincing reasoning in these judgments to answer an argument on why the lost chance of survival was not, for example, 20% or 40%.[66] This indicates that many important arguments have remained unanswered.

4.4 CONCLUDING REMARKS

The Dutch courts embarked on a challenging assessment of the events in the very complex security situation of Srebrenica. One may thus understand the difficulties involved in assessing the issues of the State's liability for damages. It was however for the domestic courts to ensure that the method they apply in this specific case ensures the plaintiffs' right to a reasoned decision in a real and practical manner. However, the Court of Appeal and the Supreme Court chose a path which, on the one hand, created an expectation of precision and accuracy, but, on the other hand, left an overall impression of speculation. The process by which the Supreme Court arrived at its 10% ruling is further complicated by the lack of analysis in its judgment as to whether the Mothers' had an opportunity to argue the issue of percentage as regards the facts and evidence in the earlier proceedings.

5. CONCLUSION

The Supreme Court's judgment of 19 July 2019 marked the end of a more than a decade long effort led by the Mothers to elucidate the responsibility of the Netherlands in relation to the events in and around Srebrenica in July 1995 before the domestic courts. Even though these events had affected the lives of thousands of people to varying degrees, the domestic courts established the State's responsibility in relation to a group of approximately 350 males who initially had been allowed inside the Dutchbat compound and had then been handed over to the Bosnian Serbs.

Further proceedings boiled down to the extent of the State's liability for damages in this respect. In an unexpected manner, the Court of Appeal decided to determine the State's liability for damages based on the chance of survival doctrine and determine a percentage of the chance of survival of these males had they been allowed to remain inside the compound. This approach entailed hypothesising what could have happened to the approximately 350 males had they been allowed to stay in the compound. It was difficult for the domestic courts to ensure that such assessment in the complex security situation of Srebrenica was not open to discussion. Yet, they should have ensured a detailed and comprehensive analysis of the facts and evidence as to what could have happened had Dutchbat allowed the males to remain inside the compound. In view of the reasoning provided by the Supreme Court, the question will linger as to why, according to the Supreme Court, the State had deprived the males of precisely a 10% chance of survival, especially as the case was about the State's failure to protect them in the context of Articles 2 and 3 of the Convention.[67] In terms of the right to a reasoned decision, important questions remained unanswered which could as well have favoured a higher chance of survival than that established by the Supreme Court. This, in combination with the lack of clarity from the side of the Supreme Court as to whether the Mothers had an opportunity to present its arguments on facts and evidence as regards the percentage, suggest that the domestic courts neglected the fair trial guarantees in relation to this determination.

At the same time, it remains to be seen how the Supreme Court's finding of 10% will be applied in practice in settling the surviving relatives' claims for compensation to be paid by the State. The last pages of this remarkable chapter on addressing the failures in relation to Srebrenica through judicial means are yet to be written.

NOTES

1 See Supreme Court 19 July 2019, ECLI:NL:HR:2019:1223 (English translation ECLI:NL:HR:2019:1284), paras 2.1.1(16)–(18).

2 ibid paras 2.1.1(28), (39).

3 ibid paras 2.1.1(40)–(42).

4 ibid paras 2.1.1(48)–(50), (57)–(58); ICTY, *Krstić*, IT-98-33-T, trial judgment, 2 August 2001, paras 48–55, 58.

5 Supreme Court 2019 (n 1), para 2.1.1(58).

6 See Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:1761 (English translation ECLI:NL:GHDHA:2017:3376), para 63.7.

7 Supreme Court 2019 (n 1), para 2.1.1(59); *Krstić* (n 4), paras 66–67.

8 District Court of The Hague 10 July 2008, ECLI:NL:RBSGR:2008:BD6795 (English translation ECLI:NL:RBSGR:2008:BD6796); *Stichting Mothers of Srebrenica and Others v the Netherlands* ECHR 2013–III, paras 54, 71, 77, 94, 169. See also, in this Special Issue, Luca Pasquet, 'Litigating the Immunities of International Organizations in Europe: The 'Alternative-Remedy' Approach and its 'Humanizing' Function' (2021) 36(1) Utrecht J Int Eur Law; Jacob Katz Cogan, '*Stichting Mothers of Srebrenica v. Netherlands*' (2013) 107 AJIL 884 (note).

9 District Court of The Hague 16 July 2014, ECLI:NL:RBDHA:2014:8562 (English translation ECLI:NL:RBDHA:2014:8748), paras 3.1–3.2.

10 Supreme Court 2019 (n 1), paras 4.6.9, 6.

11 District Court 2014 (n 9), para 4.330.

12 Court of Appeal 2017 (n 6), paras 66.3, 68, 69.1.

13 Supreme Court 2019 (n 1), paras 4.7.9, 6.

14 See Maria Irene Papa, 'The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity versus Right of Access to a Court' (2016) 14 JICJ 893; Kirsten Schmalenbach, 'Preserving the Gordian Knot: UN Legal Accountability in the Aftermath of Srebrenica' (2015) 62 NILR 313; Benjamin E. Brockman-Hawe, 'Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation' (2011) 10 Wash U Global Stud L Rev 727; Otto Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court' (2009) 13 Journal of International Peacekeeping 197; Guido den Dekker and Jessica Schechinger, 'The Immunity of the United Nations before the Dutch courts Revisited' (June, 2010) The Hague Justice Portal <*www.haguejusticeportal.net/index.php?id=11748*> accessed 30 January 2021.

15 As regards the ongoing settlement proceedings, see <*https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z25373&did=2020D53256*> accessed 20 June 2021.

16 In this regard, see *Naït-Liman v Switzerland* [GC] ECHR 2018, para 106; *Perez v France* [GC] ECHR 2004-I, para 57.

17 Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, paras 4.3.1ff; Court of Appeal of The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, paras 5.1–5.2, 5.6ff. See also District Court (n 8), paras 4.5, 5.22.

18 *Stichting Mothers of Srebrenica and Others* (n 8), paras 114–117.

19 ibid para 114.

20 See, in this Special Issue, Rianka Rijnhout, 'Mothers of Srebrenica: Causation and Partial Liability under Dutch Tort Law' (2021) 36(2) Utrecht J Int Eur Law.

21 Court of Appeal (n 6), paras 68, 73.2.

22 See Legal opinion Advocate General P. Vlas to Supreme Court 1 February 2019, ECLI:NL:PHR:2019:95, para 4.96.

23 See *Čepek v the Czech Republic* App no 9815/10 (ECtHR, 5 September 2013), paras 44–45.

24 See, among other authorities, ibid, para 44; *Werner v Austria* ECHR 1997-VII, para 63; *Ruiz-Mateos v Spain* (1993) Series A no 262, para 63.

25 *Kress v France* [GC] ECHR 2001-VI, para 74; *Köksoy v Turkey* App no 31885/10 (ECtHR, 13 October 2020), para 34; *Čepek* (n 23), para 44; *Ruiz-Mateos* (n 24), para 63.

26 Mr Marco R. Gerritsen, Lead Counsel for the *Mothers of Srebrenica* indicated that the determination of the percentage of the lost chance of survival was mentioned for the first time in the Court of Appeal's judgment and that it had not been raised by any of the parties. Interview with Mr Marco R. Gerritsen, 23 June 2021.

27 *Duraliyski v Bulgaria* App no 45519/06 (ECtHR, 4 March 2014), para 31; *Čepek* (n 23), para 45; *Prikyan and Angelova v Bulgaria* App no 44624/98 (ECtHR, 16 February 2006), para 42; *Skondrianos v Greece* App nos 63000/00 and 2 others (ECtHR, 18 December 2003), paras 29–30.

28 *Duraliyski* (n 27), para 32.

29 See *Rivera Vazquez and Calleja Delsordo v Switzerland* App no 65048/13 (ECtHR, 22 January 2019), paras 41, 48; *Alexe v Romania* App no 66522/09 (ECtHR, 3 May 2016), para 37; *Čepek* (n 23), paras 47 in fine, 48; *Colloredo Mannsfeld v the Czech Republic*, Apps nos 15275/11 and 76058/12 (ECtHR, 15 December 2016), paras 28–29.

30 See *Köksoy* (n 25), para 36.

31 Ivo Giesen, Elbert de Jong and Marlou Overheul, 'How Dutch Tort Law Responds to Risks' in Matthew Dyson (ed), *Regulating Risk Through Private Law* (Intersentia 2018), 190–191.

32 ibid 191. On professional liability, see Supreme Court 21 December 2012, ECLI:NL:HR:2012:BX7491. On medical negligence, see Court of Appeal of Amsterdam 4 January 1996, ECLI:NL:GHAMS:1996:AB8629; Supreme Court 23 December 2016, ECLI:NL:HR:2016:2987.

33 Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9225; Court of Appeal of The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR0133 (English translation ECLI:NL:GHSGR:2011:BR5388), 26 June 2012 ECLI:NL:GHSGR:2012:BW9015.

34 Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228; Court of Appeal of The Hague 5 July 2011, ECLI:NL:GHSGR:2011:BR0132 (English translation ECLI:NL:GHSGR:2011:BR5386), 26 June 2012, ECLI:NL:GHSGR:2012:BW9014. See also Miša Zgonec-Rožej, '*Netherlands v. Nuhanović Netherlands v. Mustafić-Mujić*' (2014) 108 AJIL 509 (note).

35 District Court (n 9), paras 3.1, 4.6–4.7.

36 ibid para 4.6 in fine. See also Supreme Court 2019 (n 1), para 4.8.2.

37 District Court (n 9), para 4.182.

38 District Court (n 9), paras 4.330, 4.332, 4.338, 4.342, 5.1.

39 ibid para 4.342 in fine.

40 See Court of Appeal (n 6), para 1.4.

41 Legal opinion Advocate General P. Vlas (n 22), para 4.97.

42 ibid para 4.97 in fine.

43 Supreme Court 2019 (n 1), para 4.7.8.

44 Regarding Article 419 § 2 of the Code of Civil Procedure, see *Yousef v the Netherlands* App no 33711/96 ECHR 2002-VIII, para 30.

45 See Cedric Ryngaert and Otto Spijkers, 'The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in Mothers of Srebrenica (2019)' (2019) 66 Neth Int Law Rev 537, 551; 'Staat redt onverwacht meer van z'n blazoen in Srebrenica-zaak' (22 July 2019) NRC Handelsblad <*www.nrc.nl/nieuws/2019/07/22/staat-redt-onverwacht-meer-van-zn-blazoen-in-srebrenica-zaak-a3967801*> accessed 6 February 2021.

46 Supreme Court 2019 (n 1), para 4.7.6.

47 ibid para 4.7.9.

48 ibid para 4.7.8.

49 ibid para 4.7.8.

50 See *Nideröst-Huber v Switzerland* ECHR 1997-I, para 30; *Sarıdaş v Turkey* App no 6341/10 (ECtHR, 7 July 2015), para 43 in fine.

51 See *Duraliyski* (n 27), para 32. See also *Čepek* (n 23), para 48; *Colloredo Mannsfeld* (n 28), paras 28–29.

52 See Legal opinion Advocate General P. Vlas (n 22), para 4.96.

53 See, for example, *Deryan v Turkey* App no 41721/04 (ECtHR, 21 July 2015), para 30; *Suominen v Finland* App no 37801/97 (ECtHR, 1 July 2003), paras 34, 37.

54 *Perez* (n 16), para 81; *García Ruiz v Spain* [GC] ECHR 1999-I, para 26; *Lăcătuş and Others v Romania* App no 12694/04 (ECtHR, 13 November 2012), para 97; *Suominen* (n 53), para 34.

55 See Legal opinion Advocate General P. Vlas (n 22), para 4.96.

56 See *Hiro Balani v Spain* (1994) Series A no 303-B, paras 27–28; *Wagner and J.M.W.L. v Luxembourg* App no 76240/01 (ECtHR, 28 June 2007), para 96; *Magnin v France* App no 26219/08 (ECtHR,

10 May 2012), para 29; *Fabris v France* [GC] ECHR 2013, para 72 in fine.

57 Supreme Court (n 3), paras 3.2(xii), (xvi); Supreme Court (n 34), paras 3.2(xii), (xvi).

58 See Ryngaert and Spijkers (n 45), 550–551. See also Cedric Ryngaert, 'Peacekeepers facilitating human rights violations: the liability of the Dutch State in the Mothers of Srebrenica cases' (2017) 64 Neth Int Law Rev 453; Gijs van Oenen, 'Een rekening doet 'Srebrenica' geen recht' (26 July 2019) NRC Handelsblad <*www.nrc.nl/nieuws/2019/07/26/een-rekening-doet-srebrenica-geen-recht-a3968344*> accessed 30 January 2021; Gijs van Dijck, 'When historic injustice meets tort law: the case of the Srebrenica genocide' (20 July 2017) Maastricht University Blog <*www.maastrichtuniversity.nl/blog/2017/07/when-historic-injustice-meets-tort-law-case-srebrenica-genocide*> accessed 30 January 2021. See also 'Staat redt onverwacht meer van z'n blazoen in Srebrenica-zaak' (22 July 2019) NRC Handelsblad <*www.nrc.nl/nieuws/2019/07/22/staat-redt-onverwacht-meer-van-zn-blazoen-in-srebrenica-zaak-a3967801*> accessed 6 February 2021.

59 Court of Appeal (n 6), paras 66.3-68.

60 ibid para 68.

61 Supreme Court 2019 (n 1), paras 4.7.6, 4.7.7.

62 ibid para 4.7.9.

63 See, among others, *Bochan v. Ukraine (no. 2)* [GC] ECHR 2015, para 61; *Zubac v Croatia* [GC] App no 40160/12 (ECtHR, 5 April 2018), para 79; *López Ribalda and Others v Spain* [GC] Apps nos 1874/13, 8567/13 (ECtHR, 17 October 2019), para 149.

64 Supreme Court 2019 (n 1), para 4.7.9.

65 ibid para 4.7.9.

66 Already the Court of Appeal's calculation of 30 % was described by Cedric Ryngaert as an 'informed guesswork'; see Ryngaert (n 58), 461. The Supreme Court's calculation of 10% has also been referred to as a 'well-educated guess'; see de Hoed J, 'Kansschade: een bewogen leerstuk' (2020) 3 Tijdschrift Voor Vergoeding Personenschade 103, 110.

67 See, in this special issue, Kushtrim Istrefi, 'The Right to Life in the *Mothers of Srebrenica* Case: Reversing the Positive Obligation to Protect from the Duty of Means to that of a Result' (2021) 36(1) Utrecht J Int Eur Law.

COMPETING INTERESTS

Zane Ratniece provided legal advice in *Stichting Mothers of Srebrenica v the Netherlands* and *Subašić and Others v the Netherlands* (2020) concerning the domestic proceedings in the *Mothers of Srebrenica* case.

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