EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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# Dismissal of claim that Netherlands peacekeepers should have been prosecuted for their conduct at Srebrenica

In its decision in the case of Mustafić-Mujić and Others v. the Netherlands (application no. 49037/15) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The applicants, relatives of men killed in the Srebrenica massacre of July 1995, imputed criminal responsibility to three Netherlands servicemen who were members of the UN peacekeeping force. They complained that the Netherlands authorities had wrongly refused to investigate and prosecute the servicemen for allegedly sending their relatives to their probable death by ordering them to leave the safety of the UN peacekeepers' compound after the Bosnian Serb forces had overrun Srebrenica and its environs.

The Court found that the Netherlands authorities had sufficiently investigated the incident and given proper consideration to the applicants' request for prosecutions. In relation to the investigation, the Court held that there had been extensive and repeated investigations by national and international authorities. There was no lingering uncertainty as regards the nature and degree of involvement of the three servicemen and it was therefore impossible to conclude that the investigations had been ineffective or inadequate. In relation to the decision not to prosecute – taken on the basis that it was unlikely that any prosecution would lead to a conviction – the Court rejected the applicants' complaints that that decision had been biased, inconsistent, excessive or unjustified by the facts.

## Principal facts

There are four applicants in this case, all of whom are relatives of victims of the Srebrenica massacre.

The first three applicants are: Mehida Mustafić-Mujić, born in 1956, who is a national of Bosnia and Herzegovina and lives in Srebrenica (a municipality in eastern Bosnia); and her two children, Alma and Damir Mustafić, born in 1981 and 1979 respectively, who are both Netherlands nationals and live in Utrecht and Veenendaal. The fourth applicant is Hasan Nuhanović, born in 1968, who is also a national of Bosnia and Herzegovina and lives in Sarajevo.

During the 1992-95 war in Bosnia and Herzegovina, Srebrenica and its environs were designated a "safe area" by the United Nations Security Council, intended to be free from attack or any hostile act. United Nations peacekeeping troops were stationed there. In 1995 the peacekeepers were a Netherlands army battalion known as Dutchbat. They were based in a compound in the village of Potočari.

In July 1995, Bosnian Serb forces overran the "safe area". Thousands of civilians converged on the Dutchbat compound, seeking safety.

Dutchbat was ordered to withdraw, taking locally recruited UN staff with them. A list of 29 staff members was drawn up; they were to await evacuation with Dutchbat. Civilians who were not on the list were ordered to leave the Dutchbat compound.

The case concerns the deaths of Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović on or shortly after 13 July 1995.

Rizo Mustafić, the husband and father of the first three applicants, was employed by Dutchbat as an electrician, and was included in the list of 29 who would be allowed to leave with the Netherlands forces. However, the Dutchbat non-commissioned officer in charge of locally recruited staff mistakenly ordered him to leave.

Muhamed Nuhanović was the younger brother of the applicant Hasan Nuhanović, who had been an interpreter for Dutchbat and was included on the list. He asked the Dutchbat deputy commander to also include his brother. The deputy commander refused, fearing that he would compromise the safety of legitimate UN staff members by including persons who did not meet the relevant criteria. Muhamed was therefore ordered to leave the compound.

Ibro Nuhanović was the father of Muhamed and Hasan, and had also been permitted to stay with the Dutchbat forces because he had acted as the refugees' representative in negotiations. However, when his son Muhamed was ordered to leave, Ibro chose to go with him.

In the following days, 7,000 to 8,000 Bosniac men were killed by the Bosnian Serb army and Serb paramilitaries. The victims included Rizo Mustafić, Muhamed Nuhanović and Ibro Nuhanović.

On 5 July 2010, the applicants lodged a criminal complaint with the public prosecutor. They requested that a criminal investigation be launched into the actions of the Dutchbat commander, the deputy commander and the aforementioned non-commissioned officer, for their alleged complicity in genocide or war crimes committed against their family members, on the basis that those three servicemen had exposed their relatives to their likely death in full awareness of their probable fate. On 7 March 2013 the public prosecutor informed the applicants that no prosecution would be brought. The applicants lodged a complaint about the public prosecutor's decision with the Military Chamber of the Court of Appeal of Arnhem-Leeuwarden. On 29 April 2015 the Court of Appeal dismissed the complaint, finding that prosecutions were unlikely to lead to a conviction.

The applicants also filed a civil suit against the Netherlands government. After the case was dismissed at first instance, on 26 June 2012 the Court of Appeal held the government liable in tort for the damage caused by the death of the applicants' relatives.

Other domestic fact-finding investigations into the Srebrenica massacre included an individual debriefing of all Dutchbat personnel who had been present at the fall of Srebrenica; a parliamentary inquiry; and an extensive report (of which an English-language version exists) by the NIOD Institute for War, Holocaust and Genocide Studies.

The incident has also been the subject of a number of prosecutions by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Several former members of the Bosnian Serb army have already been convicted and sentenced in final judgments. Radovan Karadžić, the President of Republika Srpska during the Bosnian War, has been convicted at first instance, and his case is currently under appeal. The trial of General Mladić, former head of the Bosnian Serb Army, is still ongoing.

## Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 23 October 2015.

Relying on Article 2 (right to life), the applicants complained that the Court of Appeal had failed to order the criminal prosecution of the three Netherlands servicemen, or at least a criminal investigation into their involvement in the deaths of their relatives.

The decision was given by a Chamber of seven, composed as follows:

Luis **López Guerra** (Spain), *President*,
Helena **Jäderblom** (Sweden),
Johannes **Silvis** (the Netherlands),

Branko **Lubarda** (Serbia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus)*, Judges*,

and also Fatoş **Aracı**, *Deputy Section Registrar.*

## Decision of the Court

### Article 2

The Court found that the application was inadmissible. It started by making the following general points.

Firstly, the present case differed from most previous cases which the Court has had to consider under the procedural aspect of Article 2 in that the information that had become available over the years was unusually expansive and detailed and included material gleaned from official sources both international and domestic.. The composite result of all these investigations was that specific and detailed official records now exist reflecting the circumstances in which the applicants' relatives had fallen into the hands of the Bosnian Serb Army and there is no lingering uncertainty as regards the nature and degree of involvement of the three Netherlands servicemen. It was therefore not possible for the Court to find that the investigations were ineffective or inadequate.

Secondly, the purpose of Article 2 was to secure the right to life. It was for this reason and this reason only that Parties to the Convention were required to put in place criminal sanctions against offences against the person and enforce them. No provision of the Convention conferred any right to "private revenge".

Thirdly, the respondent State's procedural obligation under Article 2 arising from the conflicts that engulfed the former Yugoslavia after 1991 could be discharged through its contribution to the work of the ICTY, given that the ICTY had primacy over national courts and could take over national investigations and proceedings at any stage in the interest of international justice.

The individual complaints in regard to the decision not to prosecute were addressed as follows.

The Court rejected the applicants' complaints that the proceedings in the Military Chamber of the Court of Appeal had been unfairly conducted. The Court held that the presence of a serving officer on the Court of Appeal had not undermined its independence, because such officers were not subject to any military authority or discipline in that role and enjoyed the same guarantees of independence as their civilian colleagues; furthermore, there was no evidence to support the applicants' suggestion that the panel had been biased in this case. In regard to the applicants' assertion that the Court of Appeal had applied the wrong legal standard – because it had treated the three soldiers merely as potential accessories to crimes, as distinct from the principal perpetrators, rather than holding them to account as State agents – the Court found that that had been entirely appropriate, given that there was no evidence (or indeed allegation) that the Dutch soldiers had had a direct hand in the killings. Certain alleged shortcomings in the decision-making of the Public Prosecution Service had been cured by the extensive and detailed independent assessment made by the Court of Appeal itself. The Court of Appeal had also been entitled to make the finding that a prosecution would not result in a conviction, given that it had been made in the context of assessing whether there had been sufficient evidence to justify a prosecution.

Finally, the Court found no reason to suggest that the Court of Appeal had misrepresented the facts or arguments. The finding that the Netherlands soldiers had been unaware of the extent of the imminent massacre was consistent with the findings of the ICTY. The Court of Appeal's conclusions

were not inconsistent with those that had been made in the civil courts, given that the two sets of proceedings had involved different parties and different legal tests.

*The decision is available only in English.*

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**Press contacts**
echrpress@echr.coe.int | tel: +33 3 90 21 42 08

**George Stafford (tel: + 33 3 90 21 41 71)**
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Denis Lambert (tel: + 33 3 90 21 41 09)
Inci Ertekin (tel: + 33 3 90 21 55 30)