

2014

Liability in Peacekeeping Missions: A Civil Cause of Action for the Mothers of Srebrenica Against the Dutch Government and the United Nations

Jasna Hasanbasic

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Jasna Hasanbasic, *Liability in Peacekeeping Missions: A Civil Cause of Action for the Mothers of Srebrenica Against the Dutch Government and the United Nations*, 29 Emory Int'l L. Rev. 415 (2014). Available at: <https://scholarlycommons.law.emory.edu/eilr/vol29/iss2/4>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

LIABILITY IN PEACEKEEPING MISSIONS: A CIVIL CAUSE OF ACTION FOR THE MOTHERS OF SREBRENICA AGAINST THE DUTCH GOVERNMENT AND THE UNITED NATIONS

INTRODUCTION

In 1995, while under the protection of the United Nations Protection Force (UNPROFOR), peacekeepers who were under the command and control of the Dutch military, the citizens of Srebrenica, Bosnia, became victims of gruesome atrocities and the worst genocide in Europe since World War II.¹ This Comment does not ask the killings question. The Serbs are held liable for that crime.² Instead, this Comment seeks to identify the crimes committed by the United Nations and the Netherlands by failing to prevent genocide in a town they pledged to protect; and to suggest a successful path to monetary recovery for the victims of Srebrenica.

As history tells us, the personal injury that the victims of genocide suffer is not one that can simply heal with time.³ While many non-governmental organizations that seek justice on behalf of the victims of the Srebrenica genocide exist, The Mothers of Srebrenica (The Mothers) is perhaps the most well known organization.⁴ The Mothers represent approximately 6000 women seeking justice—criminal and civil—for the genocide committed against their loved ones. While the criminal prosecutions of those who committed the genocide provided some justice for The Mothers of Srebrenica, they continue to suffer from depression, posttraumatic stress disorder, and loss of companionship. The Mothers, like others in similar situations, ought to have legitimate causes of action available to them within the Dutch court system under various legal doctrines.⁵ The most supportive precedent for The Mothers

¹ See Prosecutor v. Kristić, Case No. IT-98-33-A, Judgment, ¶ 28, 38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); *Bosnian Genocide*, HISTORY, <http://www.history.com/topics/bosnian-genocide> (last visited Feb. 21, 2014); *History of Bosnia-Herzegovina*, EUROPE-CITIES, <http://www.europe-cities.com/en/654/bosnia-herzegovina/history/period1/> (last visited Feb. 21, 2014).

² Antoine Ollivier, *Judicial and Similar Proceedings the Judgment of the International Court of Justice in the "Genocide" Case Between Bosnia and Herzegovina v. Serbia and Montenegro*, 46 I.L.M. 185 (2007).

³ *History of Bosnia-Herzegovina*, EUROPE-CITIES, <http://www.europe-cities.com/en/654/bosnia-herzegovina/history/period1/> (last visited Feb. 21, 2014).

⁴ See generally Benjamin E. Brockman-Hawe, *Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation* 10 WASH. U. GLOBAL STUD. L. REV. 727 (2011).

⁵ See *infra* Part II.

lawsuit is the Dutch Supreme Court's 2013 groundbreaking decision in *Netherlands v. Nuhanović*. This decision is the first time that any court has held the Netherlands liable for the deaths in Srebrenica.

This Comment will proceed in a series of steps that begins with Part I and a discussion of the situation that led to the atrocities: the disintegration of Yugoslavia into multiple states, the Balkan conflict, U.N. involvement in the region, and the genocide. Part II examines whether there is a sufficient international legal doctrine that could respond to The Mothers' injuries, and if not, whether domestic legal doctrines and courts, like those in the Netherlands, should be available for redress. Causes of action in this context might be based in fraud, gross negligence, breach of duty, deprivation of self-defense and the like.

This Comment argues that international law, lacking the basic tort elements of adequate rules, rights, and remedies, is not the proper legal avenue to address the Srebrenica atrocities. Instead, domestic law and courts, must fill this void. If they do, however, additional important implications must be faced, which will be discussed in the final portion of this Comment: Will the fact that the United Nations and the Netherlands might find itself being sued for grossly negligent peace-keeping efforts encourage more effective planning and execution of the peace-keepings' responsibilities? Or will that threat mean that the United Nations will draw back from this vital international function? The example of Srebrenica will be a case study for similar possible legal claims in the future, like, for example, those that may arise if there is international involvement in the present conflict in Syria.

I. BACKGROUND HISTORY ON YUGOSLAVIA AND BOSNIA

The genocide that occurred in Srebrenica, Bosnia and Herzegovina (Bosnia) will be the case study for this paper and many of the above analysis will be applied to it. Before the above analysis is applied to Srebrenica, it is important to understand the history of Bosnia and the break-up of Yugoslavia in order to comprehend the events that lead to Europe's worst genocide since World War II.⁶

⁶ See generally EUROPE-CITIES, *supra* note 3.

A. *The Origins of the Conflict*

For centuries, the small country of Bosnia, located on the Balkan Peninsula in Southern Europe,⁷ was Europe's well-known multiethnic political entity that was kept united under Josip Broz Tito's (Tito) iron-hand regime.⁸ This multiethnicity dates back to the Ottoman Empire, which ruled parts of the Balkan region between 1463 and 1878, resulting in many of the local, native Slavs' converting to Islam.⁹ This conversion added the third major ethnic group, the Bosniaks,¹⁰ to Bosnia's already existing Croat¹¹ and Serb¹² population.¹³ As is to be expected in such a small, yet diverse region, many conflicts quickly emerged as Western Europe encouraged the preservation of Christianity in the region threatened by the newly emerging Islam population.¹⁴

Even though many conflicts existed throughout history between the different ethnicities in Bosnia, Tito maintained peace among the different groups and republics.¹⁵ In fact, Tito's former Yugoslavia model for this multiethnic society is the only model that was able to provide peace and stability in the region.¹⁶ However, Tito's regime did not go without criticism, and many who opposed this socialist system were pursuing a transition into the federalism system.¹⁷ Nevertheless, even under Tito's unifying regime, in 1946 the Yugoslavia Constitution divided the country into six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, and two autonomous regions, Vojvodina and Kosovo.¹⁸

Tito's death in 1980 brought much political instability and economic difficulties to Yugoslavia, and by the late 1980s, most of the republics of

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Bosniac, or Bosniaks, is the term used to refer to Bosnian Muslims. ENCYC. OF THE NATIONS, <http://www.nationsencyclopedia.com/economics/Europe/Bosnia-and-Herzegovina.html> (last visited Feb. 21, 2014).

¹¹ Croat is the term used to refer to Bosnian Catholics whose roots stem for the neighboring country of Croatia. *Id.*

¹² Serb is the term used to refer to the Bosnian Orthodox population whose roots stem from the neighboring country of Serbia.

¹³ *Id.*

¹⁴ See CATIE CARMICHAEL, *ETHNIC CLEANSING IN THE BALKANS: NATIONALISM AND THE DESTRUCTION OF TRADITION* 22 (2002).

¹⁵ See EUROPE-CITIES, *supra* note 3.

¹⁶ *Tito's Yugoslavia*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/yugo-hist2.htm> (last visited Feb. 21, 2014).

¹⁷ See *id.*

¹⁸ CONSTITUTION OF THE FEDERATIVE PEOPLE'S REPUBLIC OF YUGOSLAVIA (1946).

Yugoslavia were seeking autonomy and democracy.¹⁹ This democratic pretense instead gave rise to nationalism in all the republics, with each republic wanting a country for only its ethnicity.²⁰ In 1989 the nationalist, Slobodan Milosević, was elected as President of Serbia, and was seeking to establish a pure Serbian country—“Greater Serbia”—free of all other ethnicities.²¹ As a result, in 1990 all of the remaining republics held their first free elections, which all resulted in nationalist parties’ victories throughout the region.²² With such a nationalistic tone in the region, many began to question the future of the republic without an ethnic majority such as Bosnia.²³

Bosnia, unlike the other republics, had no ethnic majority, and in 1991 the population of Bosnia was comprised of 43.5% Bosniaks, 32.1% Serb, 17.4% Croat, 5.5% Yugoslav and 2.4% Other.²⁴ Bosnia held a referendum in February 1992, as a response to the nationalistic threat that it felt from Serbia, and declared its independence the following month.²⁵ In order to achieve this result, the Bosniaks and Croats combined their efforts in order to outvote the Serbs who were against an independent Bosnia.²⁶ The Serbs boycotted the results of the referendum, and instead proclaimed their own republic, Republika Srpska.²⁷ As the international community recognized the independence of Bosnia, diplomatic tensions between Bosnia and Serbia severely increased, triggering Serbia to withdraw the Yugoslav People’s Army (JNA) from the territory.²⁸

Serbia, “the guiding force” of the JNA,²⁹ was in union with the Serbs in Bosnia, providing them with much military assistance for their common goal—the creation of a “Serb-dominated westerns extension of Serbia.”³⁰ However, there was one obstacle in the creation of this pure Serbian state: the Croat and

¹⁹ EUROPE-CITIES, *supra* note 3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See generally id.*

²⁴ Angela M. Banks, *Moderating Politics in Post-Conflict States: An Examination of Bosnia And Herzegovina*, 10 UCLA J. INT’L L. & FOREIGN AFF. 1, 6 (2005).

²⁵ *Id.* at 7–8.

²⁶ *Id.*

²⁷ *Id.*

²⁸ EUROPE-CITIES, *supra* note 3.

²⁹ Carlos J. Williams, *Yugoslavia to Withdraw Troops from Slovenia*, L.A. TIMES (July 19, 1991), http://articles.latimes.com/1991-07-19/news/mn-2529_1_federal-troops.

³⁰ Banks, *supra* note 24, at 8.

Bosniac population living in this territory.³¹ As a result, the Serbs utilized ethnic cleansing in an attempt to create their one, pure, and united Serbia.³² According to the United Nations Commission of Experts, the ethnical cleansing that the Serbs administered included: “murder, torture, arbitrary arrest and detention, extrajudicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.”³³ While these atrocities occurred across the entire region, the worst violations occurred in Srebrenica.³⁴

B. The Genocide in Srebrenica

As the Serbs attempted to annex a block of territory in eastern Bosnia, they encountered the predominately small, Bosniac town of Srebrenica.³⁵ Since the primary goal was the creation of a pure-Serbia, the inhabitants of Srebrenica needed to be eliminated.³⁶ The President of Republic Srpska, Radovan Karadžić, instructed his military forces to, “create an unbearable situation of total insecurity with no hope of further survival, or life, for the inhabitants of Srebrenica.”³⁷ On July 6, 1995, operation code-named “Krivaja 95” commenced, with the Serb forces moving in “from the south and burning Bosniak homes along the way.”³⁸ As a result of “chaos and terror, thousands of [Srebrenica’s inhabitants]”³⁹ sought shelter and safety by fleeing to the nearby town of Potočari, which stationed about 200 Dutch peacekeepers.⁴⁰ On July 11, as Bosnian Serb military leader Ratko Mladić walked the streets of Srebrenica, he stated on a recorded film for a Serb journalist, “We give this town to the

³¹ *Id.*

³² *See id.*

³³ Final Report of the United Nations Commission of Experts on Former Yugoslavia, U.N. ESCOR, 49th Sess., at 131, U.N. Doc. S/1994/674 (1994).

³⁴ Ian Traynor, *Srebrenica genocide: Worst massacre in Europe since the Nazis*, THE GUARDIAN (June 10, 2010, 12:31 PM), <http://www.theguardian.com/law/2010/jun/10/hague-bosnian-serb-srebrenica-genocide1>. Because of the international community’s failure in Srebrenica, the press and media has discussed and continues to cover the genocide in Srebrenica in the greatest detail. *See id.*

³⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica*, ¶ 19, U.N. Doc. A/54/549 (Nov. 15, 1999).

³⁶ *See id.*

³⁷ R. Jeffrey Smith, *Srebrenica Massacre*, ENCYC. BRITANNICA (July 17, 2014), <http://www.britannica.com/EBchecked/topic/1697253/Srebrenica-massacre>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Serb nation . . . The time has come to take revenge on the Muslims.”⁴¹ On this same night, more than 10,000 Bosniaks attempted to escape from Srebrenica by seeking an escape route through the dense forest.⁴² Unfortunately, their escape attempt was not successful, and the Serb troops either shelled them to death or brought them back to the occupied territory.⁴³

On July 13, 1995, Europe’s worst genocide since World War II was committed.⁴⁴ In the words of the presiding Judge of the Appeals chamber of the International Criminal Tribunal for the former Yugoslavia,

They [the Bosnian Serb forces] stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification and deliberately and methodically killed them solely on the basis of their identity. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide.⁴⁵

Solely because of their ethnicity, the Serb forces executed over 8000 men and young boys, scattering their remains all over the region in secret mass graves.⁴⁶

C. *United Nations’ Involvements in Bosnia and Its Mission*

The international community, through the United Nations, quickly acknowledged the gravity of the situation that resulted from the break-up of former Yugoslavia. The International Committee of the Red Cross (ICRC) soon classified the conflict in Bosnia as an “international armed conflict, due to the invasion by the Federal Republic of Yugoslavia, and an internal armed conflict.”⁴⁷ At the beginning of the conflict between the republics, the Security Council of the United Nations, adopted Resolution 713 which required that “all States shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Vernon Bogdanor, *Srebrenica: The Silence Over Britain’s Guilt Must Be Ended*, THE GUARDIAN (July 12, 2012, 11:45 AM), <http://www.theguardian.com/commentisfree/2012/jul/12/srebrenica-massacre-bosnia-and-herzegovina>.

⁴⁵ Traynor, *supra* note 34.

⁴⁶ Stichting Mothers of Srebrenica and Others v. Netherland Application No. 65542/12, Eur. Ct. H.R. 1, 6 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

⁴⁷ U.N. Secretary-General, *supra* note 35, ¶ 16.

decides otherwise.”⁴⁸ Unfortunately, this effort by U.N. would “overwhelmingly benefit the Serbs”⁴⁹ who were closely associated with JNA and the arms industry, receiving much support in the form of military material, intelligence, and funds from the Republic of Yugoslavia (today’s Serbia).⁵⁰ The Croats received the “broad range of support” from the Republic of Croatia.⁵¹

The primary purpose of the United Nations Protection Force (UNPROFOR) was to serve as a peacekeeping operation, although many U.N. officials voiced their concern that such a mission would not be possible without the cooperation between the hostile parties.⁵² Originally UNPROFOR’s mandate extended only to Croatia, and its mission was to “ensure that the three ‘United Nations Protected Areas’ (UNPAs) in Croatia were demilitarized and that all persons residing in them were protected from fear of armed attack.”⁵³ However, as the conflict in Bosnia intensified, “UNPROFOR’s mandate and strength” were extended to the protection of the Sarajevo airport and the delivery of humanitarian assistance in Bosnia.⁵⁴ Similarly, news quickly spread to the international community about the desperate cry for help from Srebrenica and its surrounding towns. In Srebrenica and its neighboring towns ethnic cleansing was already occurring, and the Serbs were interfering with humanitarian aid, which created unbearable conditions for the native populations.⁵⁵ In response, the Commander of the UNPROFOR forces in Bosnia traveled to the region on March 11, 1993, to observe the situation; and upon his arrival he witnessed first-hand the siege conditions in Srebrenica.⁵⁶ Prior to his departure from this “living hell,” the Commander promised the native population at a public gathering in Srebrenica that, “[the people of Srebrenica] were under United Nations’ protection and that he [the Commander] would not abandon them.”⁵⁷

⁴⁸ *Id.* ¶ 12. Resolution 713 was adopted in 1991. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* ¶ 15.

⁵¹ *Id.* ¶ 17.

⁵² *Id.* ¶ 13.

⁵³ United Nations Protection Force, *Former Yugoslavia*, UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION (Aug. 31, 1996), http://www.un.org/en/peacekeeping/missions/past/unprof_p.htm.

⁵⁴ *Id.*

⁵⁵ U.N. Secretary-General, *supra* note 35, ¶ 21.

⁵⁶ *Id.* ¶ 38.

⁵⁷ *Id.*

While “no issue in the history of the Security Council has engendered more resolutions and statements over a comparable period,” a consensus on the extension of UNPROFOR’s mandate was unachievable.⁵⁸ As a compromise, the Security Council established “security zones,” “safe havens,” and “protected areas” for the Bosniac population suffering at the hands of the military equipped Serbs.⁵⁹ Immediately, additional concerns were raised, primarily that such a mission would require “combat-capable” troops, something that the peacekeepers on the ground were not.⁶⁰

Once these “safe-havens” were established, UNPROFOR, without the United Nations’ permission, took on the full responsibility of protecting these areas.⁶¹ The UNPROFOR commanders convinced the Bosniac forces to sign an agreement to “give up their arms to UNPROFOR in return for the promise of a ceasefire [and] the insertion of an UNPROFOR company into Srebrenica.”⁶² As requested, the Bosniac troops handed over their weapons to UNPROFOR, and approximately 170 UNPROFOR troops, principally from Canada, established their presence for the first time in Srebrenica.⁶³ Once the Security Council was confronted with the situation on the ground, it supported the efforts of UNPROFOR to demilitarize Srebrenica, stating, “the alternative could have been a massacre of 250,000 people. It definitely was an extraordinary emergency situation that had prompted UNPROFOR to act . . . There is no doubt that had this agreement not been reached, which justifies the efforts of the UNPROFOR Commander.”⁶⁴ Echoing this sentiment, the Security Council in its May 8, 1993, agreement officially stated that Srebrenica was to be considered a “demilitarized zone.”⁶⁵

On June 4, 1993, in an effort to officially extend UNPROFOR’s mandate into the “save haven”, the Security Council adopted Resolution 836 (1993) under Chapter VII of the Charter and stated the following:

5.) . . . *decides* to extend . . . the mandate of the United Nations Protection Force in order to enable it, in the safe areas . . . to deter attacks against the safe areas, to monitor the ceasefire, to promote the withdrawal of the military or paramilitary units other than those of

⁵⁸ *Id.* ¶ 42.

⁵⁹ *Id.* ¶ 45.

⁶⁰ *Id.* ¶ 48.

⁶¹ *Id.*

⁶² *Id.* ¶ 59.

⁶³ *Id.* ¶ 61.

⁶⁴ *Id.* ¶ 63.

⁶⁵ *Id.* ¶ 65.

the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992;⁶⁶

9.) *Authorizes* the Force, in addition to the mandate defined in resolution 770 (1992) of 13 August 1992 and 776 (1992) in carrying out the mandate defined in paragraph 5 above, acting in self-defense, to take the necessary measures, *including the use of force*, in reply to bombardments against the safe areas by any of the parties *or to the armed incursion into them* or in the event of any deliberate obstruction in or around those areas to the freedom of movement of the Force or protected humanitarian convoys;⁶⁷

10.) *Decides* that . . . Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and the Force, all necessary measures through the use of air power, in and around the safe areas in Bosnia and Herzegovina, to support the Force in the performance of its mandate set out in paragraphs 5 and 9 above.⁶⁸

Relying on the protection of UNPROFOR, Srebrenica was induced into demilitarizing its civilians and putting its faith into the hands of UNPROFOR's promise to protect them from the evil that was knocking on their doorstep.⁶⁹

There was no consensus among United Nations' member states on how much protection UNPROFOR should offer, and how that authorized force should be used.⁷⁰ Even those member states with the most conservative view on UNPROFOR's authorization of force quickly acknowledged that more troops were necessary to protect the area against the Serb forces that continued to shell, bombard, and march towards Srebrenica, directly threatening Security Council Resolution 836.⁷¹ While experts on the ground recommended that an additional 135,000 troops be added to UNPROFOR in order for it to successfully uphold its mandate, six months later, fewer than 2000 additional soldiers were added.⁷² Of 2000 UNPROFOR soldiers, only 370 were stationed in Srebrenica and expected to keep the peace in a town that the U.N. itself

⁶⁶ *Id.* ¶ 78.

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added).

⁶⁹ *See generally id.*

⁷⁰ *Id.* at 23–25.

⁷¹ *See id.* ¶ 94.

⁷² Lewis MacKenzie, *The Real Story Behind Srebrenica*, DAVID-MORRISON.ORG.UK, <http://www.david-morrison.org.uk/bosnia/srebrenica.htm> (last visited Sept. 27, 2014).

acknowledged was at great risk to a massacre.⁷³ In retrospect, it is no surprise that the Serbs continued with their “Greater Serbia” plan and marched on Srebrenica on July 11, 1995.⁷⁴ In his last attempt to save the “safe haven” the Dutch commander transmitted a report to his superiors at the U.N. and UNPROFOR leaders, in which he pleaded:⁷⁵

I am responsible for these people [yet] I am not able to defend these people; defend my own battalion; find suitable representatives among the civilians because the official authorities are for certain reasons not available; find representatives among the military authorities because they are trying to fight for a corridor to the Tuzla area, and will not show up anyway because of purely personal reasons; manage to force ARBiH troops to hand-over their weapons In my opinion there is one way out—negotiations today at the highest level; UNSG, highest national authorities and both Bosnian Serb and Bosnian Government.⁷⁶

The commander’s cry for help was ignored due to structural problems within the U.N. and UNPROFOR, and Srebrenica was seized that same day by the Serbian forces.⁷⁷ Only two days later, under the “watchful eye” of UNPROFOR did the Serbs execute 20,000 Bosniaks.⁷⁸

D. *Who Is Responsible?*

While most of the world, except Republika Srpska and Serbia, does not deny that genocide occurred in Srebrenica, many hold a different position on who, other than the Serbs, is responsible and what remedies, if any, are available.⁷⁹ The majority of those who committed, or ordered their soldiers to commit, genocide in Srebrenica have been, or are being, prosecuted on the international platform at the International Tribunal for the Former Yugoslavia

⁷³ U.N. Secretary-General, *supra* note 35, ¶ 63.

⁷⁴ See Leman Canturk, *Anatomy of a Peacekeeping Mission: Srebrenica Revisited*, WORLDPRESS.ORG (Oct. 25, 2007), <http://www.worldpress.org/Europe/2975.cfm>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Marija Ristic, *NGOs Criticize Serbian President for Genocide Denial*, BALKAN TRANSITIONAL JUSTICE (Oct. 12, 2012), <http://www.balkaninsight.com/en/article/ngos-criticize-serbian-president-for-genocide-denying>; *Bosnian Serbian Leader Denies Srebrenica Was Genocide*, BALKAN TRANSITIONAL JUSTICE (July 12, 2010), <http://www.balkaninsight.com/en/article/bosnian-serb-leader-denies-srebrenica-was-genocide/>.

(ICTY)⁸⁰ or in domestic courts.⁸¹ While the ICTY's sentencing of these human rights criminals has not gone without criticism,⁸² that is not the focus of this Comment. The question, however, remains, who else was responsible? Many of the victims' relatives, as well as legal scholars believe that the Serb forces would not have been able to commit genocide had UNPRFOR not disarmed the people of Srebrenica.⁸³ Consequently, they argue that the U.N. invoked a duty to protect this vulnerable population once it disarmed them and failure to do so, deprived the people of Srebrenica of their universal right to self-defense.⁸⁴ Thus, logically it follows that The Mothers of Srebrenica ought to be able to seek a remedy for the suffering they endured as a result of the deadly save havens.

II. INTERNATIONAL LAW PROVIDES LEGAL REMEDIES FOR THE VICTIMS OF GENOCIDE

The primary cause of action for The Mothers of Srebrenica is through international *tort* law.⁸⁵ To understand the analysis presented in this paper, it is important to understand the basic principles of any successful legal system which would give a plaintiff a cause of action and, if appropriate, a remedy for any harm. Therefore, in order for The Mothers of Srebrenica to bring a successful action against the Dutch government or the U.N., the legal system must be comprised of the basic core elements—rules, rights, and remedies.⁸⁶

A. *The International Legal System and the Basis for Liability*

One of the most well-known and basic concepts of legal jurisprudence is that a legal system consists of rules.⁸⁷ A number of scholars think of justice as

⁸⁰ *Key Figures of the Cases*, INT'L CRIM. TRIBUNAL FOR FORMER YUGO., <http://www.icty.org/sid/24> (last visited Sept. 27, 2014).

⁸¹ Denis Dzidic, *Bosnia 'Failing' to Prosecute War Crimes Efficiently*, BALKAN TRANSITIONAL JUSTICE (Aug. 13, 2013), <http://www.balkaninsight.com/en/article/bosnia-war-crimes-prosecutions-dubbed-not-efficient>.

⁸² Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L. J. 1685, 1687 (2008).

⁸³ See *Stichting Mothers of Srebrenica and Others v. Netherland App. No. 65542/12*, Eur. Ct. H.R. 1, 13 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

⁸⁴ *Id.*

⁸⁵ See generally G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755 (2006).

⁸⁶ See *Legal Rights*, in STANFORD ENCYC. OF PHILOSOPHY, <http://plato.stanford.edu/entries/legal-rights/>.

⁸⁷ H. L. A. HART, *THE CONCEPT OF LAW* 8 (1961).

either “justice *according to* law,” or justice “*of* the laws.”⁸⁸ Many forms of rules exist within any one system. Some are based on equity, others on legislation, but the most common rules, which tend to be universally accepted, stem from the concept of natural law.⁸⁹ The idea of natural law traces back to Aristotle, who argued that certain principles, such as the right to life, are derived from nature and are binding upon all human society.⁹⁰ Positivists⁹¹, on the other hand, who deny the existence of natural law, argue that international law which Bentham⁹² spoke of, is not law because it lacks an enforcement mechanism.⁹³ The key indicating words of rules within a legal system are preceded by the words “must”, “should”, “ought to” (or their inverse) indicating that the legal system is established by some kind of rules.⁹⁴ Nevertheless, regardless of their initial source, rules are one of the three core requirements of any legal system.⁹⁵

The second core requirement of any legal system is the existence of rights.⁹⁶ Well-known scholars such as Ronald Dworkin argue that if a system does not have rights, it is in fact not a legal system.⁹⁷ Thus, if a legal system restricts an individual’s freedom or behavior through the concept of “rules,” it ought to guarantee to the individual other freedoms through the concept known as “rights.” The basic principle of the famous saying “what the left hand giveth, the right hand taketh away” is clearly evident here. A legal system would not be sustainable if it only imposed rules on its people, which restricted their freedom, without in exchange, offering some rights.⁹⁸ Even in countries that are often criticized for not providing its people with enough rights, such as

⁸⁸ See *id.* at 7.

⁸⁹ See *The Natural Law Tradition in Ethics*, STANFORD ENCYC. OF PHILOSOPHY, <http://plato.stanford.edu/entries/natural-law-ethics/>, for more on natural law.

⁹⁰ *Natural Law Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/natural%20law> (last visited Oct. 5, 2014).

⁹¹ Positivists define law as that what “derives from written decisions made by governmental bodies that are endowed with the legal power to regulate particular areas of society and human conduct. *Legal Positivism Definition*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Legal+Positivism> (last visited Oct. 5, 2014).

⁹² Jeremy Bentham is the earliest and chief expounder of utilitarianism. Brian Duignan, *Jeremy Bentham*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/61103/Jeremy-Bentham> (last updated Aug. 25, 2014).

⁹³ See *Legal Positivism*, STANFORD ENCYC. OF PHILOSOPHY, <http://plato.stanford.edu/entries/legal-positivism/>.

⁹⁴ HART, *supra* note 87, at 10.

⁹⁵ See *id.* at 6.

⁹⁶ See *id.* at 7.

⁹⁷ See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁹⁸ *Id.*

Iran and China, the people still enjoy the basic right of not being murdered or robbed by other citizens.⁹⁹ Thus, the citizens have these rights because their governments established rules that protect those rights.¹⁰⁰

The last factor I mention is remedy. Blackstone considered remedy critical to a legal system.¹⁰¹ Remedy takes both corrective and punitive forms of justice in civil law, as well as punishment in criminal law.¹⁰² What good are rules, if there are no enforcement mechanisms? What good are rights, if there are no remedies for those whose rights have been violated? Most scholars, who criticize international law, criticize it for lack of enforcement and remedy.¹⁰³ While international law has provided justice through its international courts by prosecuting those who committed genocide in Srebrenica, international law ought to also enable The Mothers of Srebrenica, and other victims of gross human rights violations, to seek their own justice in the courts.

While positivists such as H.L.A. Hart argue that international law is in fact law, many other scholars do not agree with Hart's conclusion, arguing that because of the lack of enforcement, international law is not binding.¹⁰⁴ There are numerous reasons why the existence of international law is questioned, ranging from lack of authority and legislature, to enforcement.¹⁰⁵ However, authority and enforcement in international law do in fact exist, and the most common form of international law enforcement is through the International Court of Justice (ICJ) and the International Criminal Court (ICC).¹⁰⁶

B. International Organizations' Liabilities

Originally, only States had standing under international law and were subjected to the rules of international law.¹⁰⁷ Joseph Story was the first to

⁹⁹ QANUNI ASSASSI JUMHURII ISLAMI IRAN [THE CONSTITUTION OF THE REPUBLIC OF IRAN] 1368 [1989], art. 22; XIANFA art. 53 (1982) (China).

¹⁰⁰ *See id.*

¹⁰¹ *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1321–22 (2003) (discussing Blackstone's numbering remedy among the "five subordinate rights through which people vindicated their absolute rights," personal security, personal liberty, and private property).

¹⁰² *See* Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 85–87, 95 (2003).

¹⁰³ Jack Goldsmith & Daryl Levinson, *Law For States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1793 (2009).

¹⁰⁴ *See* Hart, *supra* note 87; *see also* Goldsmith, *supra* note 101, at 1793.

¹⁰⁵ *See generally* Goldsmith, *supra* note 101.

¹⁰⁶ Research Guides, U.N., <http://research.un.org/en/docs/law/courts> (last updated Oct. 11, 2014).

¹⁰⁷ *See generally* Robert Beckham & Dagmar Butte, *Introduction to International Law*, INT'L L. STUDENTS ASS'N, <http://www.ilsa.org/jessup/intlawintro.pdf>.

distinguish between public international law and private international law.¹⁰⁸ While public international law regulates the matters affecting States, private international law regulates international matters between individuals, such as business transactions between companies.¹⁰⁹ Today, the original view has been expanded and allows individuals to be prosecuted under international law, and in fact many prosecutions are conducted in international tribunals such as the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.¹¹⁰ Therefore, if individuals are subject to the rules of international law by the United Nations, they should also have the right to bring suits against the United Nations, especially if they are victims of gruesome violations such as genocide.¹¹¹

Another fairly recent expansion of international law has included subjecting organizations to its rules, rights, and remedies. The first case, which recognized that organizations are subject to international law, is known as “The Reparation Case.”¹¹² This case involved two United Nations General Assembly appointed personnel, one a Swedish mediator and the other a French observer, who were sent to Jerusalem after World War II in order to assist the Israeli and Palestinian governments in reaching a peace agreement.¹¹³ Shortly thereafter, persons wearing Israeli military uniform assassinated both UN personnel in the Israeli zone.¹¹⁴ The relatives of the victims sued Israel in the ICJ, since Israel was responsible for the actions of their soldiers.¹¹⁵ The United Nations General Assembly saw this as a good opportunity to ask the ICJ for an advisory opinion on whether an international organization could bring suit against a government and obtain damages:

In the event of an agent of the United Nations in the performance of his duties suffers an injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation

¹⁰⁸ See A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 48 (2003).

¹⁰⁹ See *id.* at 43.

¹¹⁰ See Research Guides, *supra* note 104.

¹¹¹ See generally *id.*

¹¹² Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11, 1949).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

due in respect of the damage caused (a) to the United Nations; and
(b) to the victim or to the persons entitled through him?¹¹⁶

In a groundbreaking decision, the ICJ advised that the General Assembly that the United Nations does have the capacity to bring an international claim against another government, and even against non-member states.¹¹⁷ The ICJ based its decision on the U.N. Charter, by which the United Nations has its own identity and personality, and is distinct from other member states.¹¹⁸ Therefore, the United Nations was able to claim compensation from the Israeli government for the deaths of its personnel and was successfully awarded \$100,000 for the loss of its Swedish mediator and French translator.¹¹⁹

In a legal context, it is always important to realize that the most groundbreaking decisions can be a double-edged sword. When the ICJ established the rule in the *Reparation Case* that international organizations have the capacity to bring lawsuits, it implied that these organizations also have certain obligations under international law.¹²⁰ As a result, the ICJ once more in its advisory opinion in the *Immunity from Legal Process Case* found that “the United Nations may be required to bear responsibility for the damage arising from acts performed by the Organization or by its agents acting in their official capacity.”¹²¹ While the court acknowledged the validity of the United Nations’ immunity, which is granted to the organization under Article 105 of its Charter, the court did not consider this immunity to be absolute and clearly informed the world that the United Nations can also be sued for damages that arise from it or its agents’ acts.¹²² This has been an important ruling, especially in cases where United Nations’ troops are assigned to conflict areas. The United Nations could be held liable for the actions of its troops, as long as the United Nations “retains ultimate authority and control so that operational command only was delegated.”¹²³

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ *See generally id.*

¹²¹ Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29), 89.

¹²² *Id.*

¹²³ *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Eur. Ct. H.R. 1, 39 (2007), [http:// hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830).

C. Attribution to the States

On several occasions, the ICJ has held that while acts of peacekeeping missions can be attributed to the United Nations, they can also be attributed to the States who contribute these troops.¹²⁴ According to Article I of the European Convention on Human Rights, a country is responsible for the conduct of the persons within its jurisdiction.¹²⁵ The United Kingdom confirmed this responsibility with the House of Lords decision in *Al-Jedda v. Secretary of State for Defense* in 2008.¹²⁶ The claim before the House of Lords was one of false imprisonment, where an Iraqi national claimed that his detention violated the Human Rights Act of 1998 and the English common law.¹²⁷ The House of Lords was charged with three issues on appeal:¹²⁸ whether the U.K. government or the United Nations was liable for the appellant's allegedly wrongful detention;¹²⁹ what obligations,¹³⁰ if any, does the U.K. owe under the European Convention on Human Rights;¹³¹ and whether English common law or Iraqi law applied to the appellant's detention.¹³²

On the first question, the House of Lords held that "the allegedly wrongful conduct was attributable to the United Kingdom and not the United Nations," distinguishing this case from *Behrami v. France* because the U.K. forces were not under the effective control of the United Nations.¹³³ On the second question, the House of Lords found that the United Kingdom's obligations under the European Convention are limited to only those which it owes under the U.N. Charter.¹³⁴ And on the final question, the Lords of Appeal held that Iraqi tort law would govern this case.¹³⁵ In the interest of justice, the Dutch Supreme Court ought to follow this English precedent and attribute the

¹²⁴ See *R v. Defence Secretary*, [2008] 2 WLR 31 (H.L.) 35–37 (appeal taken from Eng.).

¹²⁵ See *id.* at 46.

¹²⁶ *Id.* at 68.

¹²⁷ *Id.* at 34.

¹²⁸ *Id.* at 34–35.

¹²⁹ *Id.* The question of whether the United Nations was liable was raised because the acts could be attributed "to the organization as a result of a Security Council Resolution that authorized multinational force in Iraq." Jacob Katz Cogan, *R (on the application of Al-Jedda) v. Secretary of State for Defence*, INT'L LAW REPORTER (Dec. 16, 2007, 12:13 AM), <http://ilreports.blogspot.com/2007/12/r-on-application-of-al-jedda-v.html>.

¹³⁰ *R v. Defence Secretary*, [2008] 2 WLR 31 (H.L.) 34 (appeal taken from Eng.).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Cogan, *supra* note 127.

¹³⁴ *Id.*

¹³⁵ *Id.*

Dutchbat's¹³⁶ negligent conduct in Srebrenica to the Netherlands, if not to the United Nations. Once the Court attributes UNPROFOR's failure to the Netherlands, The Mothers of Srebrenica would receive justice in the form of monetary damages for UNPROFOR's falsely induced promises of protection.

D. Causes of Action Available Under International Law for the People of Srebrenica

The previous section of this Comment discussed the recent trend in international law that holds the United Nations and its member states responsible for a violation that they may commit on a mission. This Section applies this concept to the Srebrenica genocide and argues that the United Nations and the Netherlands need to be held responsible for the genocide committed in Bosnia, regardless of their immunity. Applying the rules, rights, and remedy analysis as previously discussed in Part II, the first question is to ask what rule did the United Nations and the Netherlands violate in Srebrenica? Those who have asked this question answer it with any, or all, of the following three: fraud, gross negligence, and breach of duty. Each of these legal avenues will be discussed and evaluated in this Section, in an attempt to establish the best cause of action for The Mothers against the Netherlands and the United Nations.

1. Fraud

Although fraud is a rule that has a long and varied history in most legal societies, there are common standards that govern the definition of fraud under international law.¹³⁷ Broadly defined, fraud is “a false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.”¹³⁸ Thus, fraud can be broken up into five elements: “1) a false statement of material fact; 2) knowledge on the part of the defendant that the statement is untrue; 3) intent on the part of the defendant to

¹³⁶ Dutchbat is the United Nations' short form for “Dutch Battalion.” *Stichting Mothers of Srebrenica and Others v. Netherland* Application No. 65542/12, Eur. Ct. H.R. 1, 6 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

¹³⁷ *Fraud Definition*, THEFREEDICTIONARY, <http://legal-dictionary.thefreedictionary.com/fraud> (last visited Sept. 27, 2014).

¹³⁸ *Id.* This is the common law definition of fraud.

deceive the alleged victim; 4) justifiable reliance by the alleged victim on the statement; and 5) injury to the alleged victim as a result of this reliance.”¹³⁹

The possibly fraudulent activity of the United Nations and UNPROFOR is the creation of the safe haven in Srebrenica and promising the residence of Srebrenica its protection.¹⁴⁰ The United Nations created the safe havens, while the commander of UNPROFOR promised the people of Srebrenica that they were “under United Nations protection,” and that “he would not abandon them.”¹⁴¹ UNPROFOR and the United Nations quickly realized that the Serb forces were not obeying the safe havens, but were continuing with their attacks at the same rate as before.¹⁴² In fact, direct statements from the United Nations indicated that a bloody massacre was possible, and yet the United Nations disarmed the people of Srebrenica and stationed a peacekeeping mission on the ground, one that was not equipped to keep or establish peace.¹⁴³ The United Nations and UNPROFOR intended for the people of Srebrenica to rely on their promise protection; this was evident from the statements that were made to the people before disarming them.¹⁴⁴ It was certainly reasonable for the vulnerable people of Srebrenica to rely on the statement and promises that were made to them by the United Nations and UNPROFOR. The last element of fraud is the most evident in this case: as a result of the people of Srebrenica’s reliance on UNPROFOR’s statement and U.N. disarmament, they were handed over to the enemy and were victims of genocide.¹⁴⁵ While The Mothers of Srebrenica would have a great challenge proving the intent to defraud element of fraud, in the interest of justice that challenge ought to be outweighed by the strong establishment of the other four elements.

2. *Gross Negligence*

A second cause of the action for The Mothers of Srebrenica is gross negligence, or *dolo proxima*.¹⁴⁶ Once again, different legal systems will have different standards and elements for gross negligence, but the common definition of gross negligence is “carelessness in reckless disregard for the

¹³⁹ *Id.*

¹⁴⁰ *See generally* U.N. Secretary-General, *supra* note 35.

¹⁴¹ *Id.* at 14.

¹⁴² *Id.* at 25.

¹⁴³ *See id.* at 19.

¹⁴⁴ *See id.* at 13–14.

¹⁴⁵ *See id.*

¹⁴⁶ *Gross Negligence*, THEFREEDICTIONARY, <http://legal-dictionary.thefreedictionary.com/Gross+negligence>.

safety or lives of others, which is so great it appears to be a conscious violation of other people's right to safety."¹⁴⁷ Gross negligence must not be confused with fraud, because according to common law authorities, unlike fraud, gross negligence can coexist with good faith and honesty of intention.¹⁴⁸ Thus, proving the elements of gross negligence will be easier for a plaintiff than those of fraud and perhaps the more successful route that they should take.

The United Nations and UNPROFOR committed gross negligence when they established the safe havens and disarmed the people of Srebrenica. Once the U.N. established the safe havens it admittedly realized that the Serb forces were not honoring this establishment and proceeded to march towards Srebrenica, burning towns, raping women, and killing children along the way. The U.N. was careless again when it deployed fewer than 2000 additional troops instead of the requested 135,000. Furthermore, the U.N. had no plan or strategy for UNPROFOR in case the Serbs attacked, which was not a question of "if" but rather "when." The U.N. carelessly disregarded the safety and lives of the people of Srebrenica by disarming them and then failing to implement reasonable measures that would protect these people. Thus, The Mothers of Srebrenica have a valid claim that the U.N. committed gross negligence when it established the safe havens and disarmed the people of Srebrenica.

3. *Breach of Duty*

The third cause of the action that The Mothers of Srebrenica have against the United Nations and the Dutch government, is under the breach of duty theory. Before a plaintiff can sue for breach of duty, he or she first must establish that the defendant in fact owed the plaintiff a duty.¹⁴⁹ First this Part will establish that the United Nations and Dutch UNPROFOR troops established a duty to protect the people of Srebrenica by disarming them and promising them their protection. Next, this Part will establish a cause of action for The Mothers of Srebrenica against the United Nations and UNPROFOR for the breach of their duty to protect, which resulted in genocide.

In 1999, U.N. Secretary-General instructed forces under U.N. command and control to respect international humanitarian law.¹⁵⁰ This official statement

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Observance by United Nations forces of international humanitarian law*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/resources/documents/misc/57jq7l.htm> (last visited Oct. 15, 2014).

served as the basis for the discussion of whether international organizations have a duty to protect, and specifically in the context of this Comment, the duty to protect the safe havens that they create.¹⁵¹ Those who argue that no such duty exists base their conclusion on the notion that “duties to protect would have to originate out of art. 1 of the *Geneva Convention IV* and *Additional Protocol*, which requires that contracting parties ‘undertake to respect and to ensure respect for this Protocol in all circumstances.’”¹⁵²

This argument fails because those who are in support of it do not consider other sources that can invoke the duty to protect.¹⁵³ For example, as a result of the atrocities that were committed in Bosnia and Rwanda, the United Nations adopted the Responsibility to Protect (R2P).¹⁵⁴ The Responsibility to Protect doctrine states:

The international community has a responsibility to use appropriate diplomatic, humanitarian *and other means* to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.¹⁵⁵

Also, in 2001, the International Commission on Intervention and State Sovereignty stated, “all states, but especially democracies, have a responsibility to protect civilians when the civilians are threatened with a mass killing.”¹⁵⁶ With this statement in 2001 and the adoption of R2P in 2005, the United Nations clearly established that it has a duty in the international community to protect those who need its protection the most. While these doctrines are enacted after the Srebrenica genocide, the principles they carry should be applied retroactively.

Even under the basic principles of tort law, the plaintiffs can successfully argue that the United Nations owed them a duty to protect. Under basic tort

¹⁵¹ Sarah Perkins, *The Failure to Protect: Expanding the Scope of Command Responsibility to the United Nations at Srebrenica*, 62 U.T. FAC. L. REV. 193, 195 (2004).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Mark Notaras & Vesselin Popovski, *The Responsibility to Protect*, UNITED NATIONS UNIVERSITY (Apr. 5, 2011), <http://unu.edu/publications/articles/responsibility-to-protect-and-the-protection-of-civilians.html> (emphasis added).

¹⁵⁵ *The Responsibility to Protect*, UNITED NATIONS (Apr. 16, 2014), <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

¹⁵⁶ Michael Ignatieff, *The Duty to Protect, Still Urgent*, N.Y. TIMES (Sept. 13, 2013) http://www.nytimes.com/2013/09/14/opinion/the-duty-to-protect-still-urgent.html?_r=0.

law, a defendant can create a duty for himself, even in situation where a duty did not exist, if he makes a promise, the plaintiff relies on that promise, and as a result the plaintiff suffers a personal injury.¹⁵⁷ In the case of Srebrenica, the United Nations promised the people of Srebrenica safety through the concept of this safe haven.¹⁵⁸ The people of Srebrenica trusted the United Nations and welcomed this proposal with open arms.¹⁵⁹ In fact, the people of Srebrenica relied on the United Nations' promise to the extent that they were willing to surrender any and all of their weapons and entrusted their lives to the United Nations.¹⁶⁰ In order to properly remedy this breach of duty, the Dutch Supreme Court should acknowledge the United Nations and the Dutchbat's breach of duty and provide monetary compensation for The Mothers of Srebrenica's continued suffering.¹⁶¹

The safe haven of Srebrenica was supposed to be protected by the Dutch UNPROFOR battalion.¹⁶² These were Dutch soldiers who were serving the United Nations on behalf of their country, the Netherlands.¹⁶³ The basic theory of agent and principle would apply in this instance, and history has long established that military personnel are agents of the country on whose behalf they are serving the mission.¹⁶⁴ Thus, these soldiers served in UNPROFOR because their country, the Netherlands, asked them to serve on this mission. Only naturally then does the question arise: whether the Netherlands had a duty to protect the people of Srebrenica through its Soldiers, and whether this duty was breached when its soldiers failed on their mission?¹⁶⁵

4. *Right to Self-Defense*

The last, but most certainly not the weakest, cause of action that The Mothers have against the Netherlands and the United Nations is that they were deprived of their inherent right to self-defense.¹⁶⁶ According to the United Nations Article 51 there is an inherent right—either individually or

¹⁵⁷ See generally Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 *FORDHAM L. REV.* 1501 (2006).

¹⁵⁸ See generally U.N. Secretary-General, *supra* note 35.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* ¶ 59–60, 62.

¹⁶¹ See generally *id.*

¹⁶² *Id.* ¶ 104.

¹⁶³ See generally *id.*

¹⁶⁴ See generally Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 *ANN. REV. POL. SCI.* 203 (2005).

¹⁶⁵ *Id.*

¹⁶⁶ See United Nations Charter, art. 51.

collectively—to self-defense if an armed attack occurs.¹⁶⁷ UNPROFOR deprived the people of Srebrenica of this right when it disarmed them in exchange for UNPROFOR’s protection.¹⁶⁸ Even though the United Nations acknowledged that Srebrenica was a “massacre waiting to happen” it deprived the people of Srebrenica the right to protect themselves by disarming them and inducing them to rely on a protection force that was incapable of any protection.¹⁶⁹ The least that UNPROFOR could have done to not violate the right to self-defense is returned to the people of Srebrenica their weapons once it realized that it would not be able to protect them.¹⁷⁰

The people of Srebrenica have filed numerous suits against the United Nations, as well as against the Netherlands.¹⁷¹ Many of these lawsuits have been class actions by the plaintiffs known as “Stichting Mothers of Srebrenica.”¹⁷² Set up as a foundation under Netherlands law, this group is composed primarily of women whose sons, husbands, fathers, brothers, and other male relatives were murdered in the genocide.¹⁷³ Unfortunately, none of their lawsuits have been successful.¹⁷⁴ The suits against the Netherlands were protected on the basis that the United Nations had effective control over the Dutchbat at the time of the genocide,¹⁷⁵ thus the Netherlands was held not to be responsible. In the meantime the suits against the United Nations also failed because of the United Nations’ immunity defense, which under the umbrella theory, which has been extended to protect U.N.’s peacekeeping missions, such as UNPROFOR.¹⁷⁶ However, this precedent is about to change as a result of the Dutch Supreme Court’s recent 2013 ruling in *The Netherlands v. Nuhanović*.¹⁷⁷

¹⁶⁷ *Id.*

¹⁶⁸ U.N. Secretary-General, *supra* note 35, ¶ 490; Hof’s-Gravenhage 30 maart 2010, LJN 2010 (Stichting Mothers of Srebrenica/De Staat der Nederlanden en De Verenigde Naties) (Neth.).

¹⁶⁹ U.N. Secretary-General, *supra* note 35, ¶ 59.

¹⁷⁰ *See generally id.*

¹⁷¹ *See generally* Manuel J. Ventura, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention*, EJIL: TALK! (Sept. 6, 2013), <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>.

¹⁷² Stichting Mothers of Srebrenica and Others v. Netherland Application No. 65542/12, Eur. Ct. H.R. 1, 3 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

¹⁷³ *See id.*

¹⁷⁴ *See* Ventura, *supra* note 174.

¹⁷⁵ *See* Stichting Mothers of Srebrenica and Others v. Netherland Application No. 65542/12, Eur. Ct. H.R. 1, 6 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

¹⁷⁶ *See id.* at paras. 141, 149, 169.

¹⁷⁷ HR 6 januari 2013, RvdW 2013, 1037 m.nt. (De Staat der Nederlanden/Nuhanović) (Neth.) para. 33–36.

E. The Nuhanović Case As Precedent For The Mothers of Srebrenica

In *Nuhanović*, the Dutch Supreme Court upheld an earlier decision by the court of appeals in 2011, which ruled that the Dutch state was liable for three deaths committed during the genocide in Srebrenica.¹⁷⁸ Hasan Nuhanović was a United Nations interpreter for the Dutch peacekeepers and has been suing the Dutch state for the last eleven years for the murder of his mother, father, and brother in Srebrenica.¹⁷⁹ While Mr. Nuhanović himself was considered “local personnel” of the United Nations, his mother, Nasiha Nuhanovic, brother, Muhamed Nuhanovic, and father, Ibro Nuhanovic, as well as an electrician who worked at the compound, Rizo Mustafic, sought refuge on the Dutch station base in Srebrenica after the enclave fell into the hands of the Serbs.¹⁸⁰ The Dutch, who had already witnessed the Serbs beating and killing male refugees outside of their compound, threw these three men out, along with another 200 refuge seeking men, and handed them over to the Serbs.¹⁸¹ To no one’s surprise, the Serbian forces executed all of these refuge-seeking civilians.¹⁸² The Dutch Supreme Court held that the Dutch government was responsible for the deaths of those refugees the Dutch forced to leave the compound.¹⁸³

To fully understand the implications that the *Nuhanović* case will have on The Mothers, it is important to understand the consequences the genocide of Srebrenica has had on United Nations and the Netherlands.

Three years after the genocide, on November 30, 1998, the General Assembly of the United Nations adopted resolution A/RES/53/35 that requested the Secretary-General to provide a comprehensive report, assessing the events that occurred in Srebrenica from the date that the safe havens were

¹⁷⁸ *Dutch state liable for three Srebrenica deaths—court*, BRIT. BROAD. CORP. (Sept. 6, 2013, 11:37 ET), <http://www.bbc.co.uk/news/world-europe-23986063> [hereinafter BRIT. BROAD. CORP.].

¹⁷⁹ *Id.*

¹⁸⁰ HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.); for a discussion of the electrician see BRIT. BROAD. CORP., *supra* note 176.

¹⁸¹ See BRIT. BROAD. CORP., *supra* note 181; Dan Bilefsky & Marlise Simons, *Netherlands Held Liable for 300 Deaths in Srebrenica Massacre*, N.Y. TIMES (July 16, 2014), http://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html?_r=0.

¹⁸² See *id.*; see also Kieran Corcoran, *Dutch peacekeepers were responsible for 300 Bosnian Muslims at Srebrenica who sought refuge at UN base in 1995, Dutch Court Rules*, DAILY MAIL (July 16, 2014, 13:49 ET), <http://www.dailymail.co.uk/news/article-2694427/Dutch-peacekeepers-responsible-death-300-Bosnian-Muslims-Srebrenica-sought-refuge-UN-base-1995-Dutch-court-rules.html>.

¹⁸³ Michael Ignatieff, *The Duty to Protect, Still Urgent*, N.Y. TIMES (Sept. 13, 2013), http://www.nytimes.com/2013/09/14/opinion/the-duty-to-protect-still-urgent.html?_r=0; *Dutch State liable over 300 Srebrenica Deaths*, BRIT. BROAD. CORP. (July 16, 2014, 11:49 ET), <http://www.bbc.com/news/world-europe-28313285>.

created—April 16, 1993—until the endorsement of the cease fire, the Dayton Peace Agreement, by the Security Council on December 15, 1995.¹⁸⁴ Three years later, on November 15, 1999, the 113 page long, final report was distributed to the General Assembly.¹⁸⁵ While the report summarized various “peace-making efforts” and “decision-making procedures in the United Nations Security Council, UNPF, and UNPROFOR,” the most pertinent aspect of the report is Section XI: “The fall of Srebrenica: an assessment.”¹⁸⁶ The following excerpt from the report established that UN had a duty to protect the people of Srebrenica, and violated the people of Srebrenica’s right, under the Charter of the United Nations, to self-defense, by stating:

The community of nations decided to respond to the war in Bosnia and Herzegovina with an arms embargo, with humanitarian aid and with the deployment of a peacekeeping force. It must be clearly stated that these measures were poor substitutes for more decisive and forceful action to prevent the unfolding horror. The arms embargo did little more than freeze in place the military balance within the former Yugoslavia. It left the Serbs in a position of overwhelming military dominance and effectively deprived the Republic of Bosnia and Herzegovina of its right, under the Charter of the United Nations, to self-defense. It was not necessarily a mistake to impose an arms embargo, which after all had been done when Bosnia and Herzegovina was not yet a State Member of the United Nations. Once that was done, however, there must surely have been some attendant duty to protect Bosnia and Herzegovina, after it became a Member State, from the tragedy that then befell it. Even as the Serbs attacks on and strangulation of the ‘safe areas’ continued in 1993 and 1994, all widely covered by the media and, presumably, by diplomatic and intelligence reports to their respective Governments, the approach of the members of the Security Council remained largely constant. The international community still could not find the political will to confront the menace defying it.¹⁸⁷

Thus, the Stichting Mothers of Srebrenica have two causes of action against the United Nations: failure to protect and violation of self-defense.¹⁸⁸ Before addressing the United Nations’ immunity, and how it has so far rendered these

¹⁸⁴ Stichting Mothers of Srebrenica and Others v. Netherland Application No. 65542/12, Eur. Ct. H.R. 1, 6–7 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.*

lawsuits unsuccessful, it is useful to also establish the causes of action that The Mothers have against the Netherlands.

One of the reasons that the *Nuhanović* case is ground breaking for The Mothers, and possibly future victims of genocide, is that the Dutch Supreme Court affirmed Mr. Nuhanovic's breach of duty to protect claim against the Dutch government.¹⁸⁹ The two main issues in the Nuhanovic case that the Court answered were whether Dutchbat's conduct could be attributed to the State,¹⁹⁰ and whether Dutchbat's conduct was wrongful.¹⁹¹ As in every case, it is important to understand the underlying facts of the Dutchbat's involvement in the genocide before the above questions can properly be assessed and answered.

After General Mladić captured Srebrenica on July 11, 1995, "a stream of refugees" fled the town and sought shelter in the Dutchbat compound, which initially allowed more than 5000 of the refugees to enter the compound, including 239 men of military age (i.e. men between the ages of 16 and 60).¹⁹² On that same evening, Dutch Defense Minister Voorhoeve agreed to evacuate the refugees in a telephone conference with General Nicolai, Chief of Staff of UNPROFOR HQ, and shortly thereafter, Lieutenant Colonel Karremans received a fax message from General Gobillard, Deputy Commander of UNPROFOR HQ, "instructing him to enter into negotiations with the Bosnian-Serb army and to protect the refugees."¹⁹³ A few hours later, Lieutenant Karremans followed orders and met with Mladić. He requested withdrawal of the Dutch battalion and to arrange for the safe withdrawal of the refugees.¹⁹⁴

The next day, on July 12, 1995, Voorhoeve instructed Karremans to "save whatever can be saved" from the Serbs and evacuate from Srebrenica.¹⁹⁵ For the last time, Karremans met with Mladić to set up an evacuation plan, which was negotiated for only the Dutchbat and twenty-nine "local personnel"¹⁹⁶ and by early afternoon the remaining of the refugees outside the Dutchbat compound were taken away by the Serbs.¹⁹⁷ By the next day, the Dutchbat

¹⁸⁹ HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 34.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 7.

¹⁹⁷ *Id.* at 7–8.

troops received reports of the Serbs committing crimes against the refugees they had taken from the compound the day before—in particular crimes against the male refugees.¹⁹⁸ The male refugees were taken some 300-400 meters outside the UNPROFOR compound, where they were then beaten, stripped of their identity papers and then executed.¹⁹⁹ The Serbs murdered the great majority of all the men of military age who were left in Srebrenica.²⁰⁰

Since Nuhanovic was an interpreter for UNPROFOR, he was considered one of the twenty-nine local personnel and was placed on the evacuation list.²⁰¹ After the fall of Srebrenica, his father, mother, and minor brother sought refuge in the compound, but were not placed on the evacuation list since they were not “employees of the U.N.”²⁰² Nuhanović, aware of the gravity of the situation outside of the compound, made several unsuccessful attempts to add his family to the evacuation list in an attempt to try and save their lives.²⁰³ After learning that they were not allowed to stay at the UNPROFOR compound, Nuhanović’s father, mother, and brother made their way towards the exist of the compound, when Major Franken had a change of heart and offered to allow Ibro, the father, to stay at the compound since he had been a member of the civilian committee that had held the consultations with Mladić.²⁰⁴ Since Nuhanović’s mother and brother were not offered that same opportunity, Ibro chose to leave the compound together with his wife and his son, which resulted in all three of them being murdered by the Serbs.²⁰⁵ After most of the genocide was committed, the Dutchbat left their compound on July 21, 1995.²⁰⁶

Nuhanović’s claim for damages from the Dutch government is based on two causes of action: the Dutchbat wrongly refused to add his brother to the list of local personnel; and the wrongful conduct by the Dutchbat of expelling his father, mother, and brother from the compound.²⁰⁷ The first issue that the Supreme Court of the Netherlands addressed was whether the Netherlands could be held responsible for the actions of the Dutchbat, or whether these acts

¹⁹⁸ *Id.* at 8.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 9.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 8–9.

²⁰⁵ *Id.* at 9.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 10.

were solely attributable to the United Nations.²⁰⁸ The Court held that the standard for determining whether the Dutchbat's conduct should be attributed to the United Nations or to the State, depends on the effective control theory which asks: "which of them had effective control over the Dutchbat at the time of the conduct referred to in these proceedings."²⁰⁹ The Court also established that "effective control" includes not only giving orders, but also having the capacity to prevent wrongdoings.²¹⁰ While the court pointed to the generally accepted "effective control" theory which states "that where a State has placed troops at the disposal of the United Nations to carry out a peace mission, the answer to the question as to which of them specific conduct of such troops must be attributed depends on which of them had effective control over the conduct in question,"²¹¹ the Court also noted that more than one party can have effective control simultaneously.²¹² Since Nuhanović did not argue that the United Nations had effective control over the Dutchbat, the Supreme Court decided to leave that issue open, but the Court established that the Netherlands did in fact have "effective control" over the Dutchbat, thus making the State liable for any of the Dutchbat's illegal actions.²¹³

In *Nuhanović* the Court attributed to the Netherlands the unlawful conduct of the Dutchbat because the Dutchbat should not have asked Muhamed to leave the compound since it knew the risks to which Muhamed would be exposed.²¹⁴ The Court based its holding on the fact that the State acted wrongfully towards the victims under domestic law of Bosnia and Herzegovina, as well as under treaty law by violating Ibro, Muhamed, and Nasiha's right to life and prohibition of inhuman treatment.²¹⁵ Nuhanović was able to recover damages for his family's loss, as well as for the damages that he suffered and continues to suffer on account of his family's loss.²¹⁶

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.* at 11.

²¹⁰ *Id.*

²¹¹ *Id.* at 11–12.

²¹² *Id.* at 12.

²¹³ *Id.* at 11–12.

²¹⁴ *Id.* at 12. The "open door" means the analysis of whether the United Nations had effective control over the Dutchbat.

²¹⁵ *Id.* at 13.

²¹⁶ *Id.*

F. New Implications for Other Victims of Genocide in Light of the Nuhanović Case

The face of The Mothers is Munira Subasic, a woman who lost twenty-two family members in the Srebrenica genocide, and is now seeking to promote awareness, justice, and an opportunity for all the of those who have lost someone they loved to heal.²¹⁷ Ms. Subasic has testified at the ICTY against many Serbs who were accused of committing genocide in Srebrenica.²¹⁸ Unfortunately, most legal actions brought by The Mothers against the United Nations and the Netherlands—at least up until this point—have been unsuccessful, mainly because the Netherlands continue to claim that it did not have “effective control” over the Dutchbat, while the United Nations has been deemed to have immunity from the claims.²¹⁹ As a result of the *Nuhanović* decision, however, The Mothers could potentially use this precedent to receive damages for those they lost as a result of wrongful and negligent conduct on behalf of the United Nations and the Netherlands.²²⁰

The Mothers’ legal battle with the United Nations and the Netherlands started in 2005; however, due to recent developments it is important to analyze the cases against the two parties separately. While the *Nuhanović* decision might aid The Mothers in their lawsuit against the Netherlands, it might be too late to make a difference in their suits against the United Nations because its immunity protected it in the prior lawsuits, and the Dutch Supreme Court did not—and could not—invalidate the United Nations’ immunity defense.²²¹ In their initial lawsuit, The Mothers joined the Netherlands and the United Nations as codefendants, basing their claims on international and Dutch civil law.²²² Their Dutch civil law claims were based on the following: the United Nations and the Netherlands failed to abide by the agreement which had been executed with the inhabitants of the Srebrenica enclave (including the

²¹⁷ See Svjetski mediji o izbacivanju Munire Subašić sa sjednice u UN-u [World media coverage on the expulsion of Muria Subasic from the U.N.], KLIX (Apr. 4, 2013), <http://www.klix.ba/vijesti/bih/svjetski-mediji-o-izbacivanju-munire-subasic-sa-sjednice-u-un-u/130411110>.

²¹⁸ *Id.*

²¹⁹ See *Srebrenica Massacre Survivors Take Legal Action Against Dutch Government*, THE GUARDIAN (Apr. 7, 2014 9:20 AM), <http://www.theguardian.com/world/2014/apr/07/srebrenica-massacre-bosnia-and-herzegovina>.

²²⁰ See Tom Dannenbaum, *Dutch Supreme Court Affirms That Dutchbat Acted Unlawfully in Srebrenica*, EJIL: TALK! (Sept. 8, 2013), <http://www.ejiltalk.org/dutch-supreme-court-affirms-that-dutchbat-acted-unlawfully-in-srebrenica/> [hereinafter *Dutch Supreme Court Affirms*].

²²¹ See *Stichting Mothers of Srebrenica and Others v. The Netherlands*, App. No. 65542/12, EUR. CT. H.R. 1, 15–16 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

²²² *Id.* at 14.

applicants) by which the above-mentioned parties committed to provide protection inside the Srebrenica safe area in exchange for disarmament; and the Netherlands, with the connivance of the United Nations committed a tort against the applicants since they failed to send well-equipped troops to Bosnia that would have been capable of ensuring a stable and peaceful environment for the entire zone.²²³

As anticipated by the Plaintiffs, the United Nations relied on its privileges and immunities granted to it under the U.N. Charter in order for the organization to be able to effectively and independently carry out its functions.²²⁴ According to Article 105, paragraph 1 of the U.N. Charter: “The Organization shall enjoy in the territory of each of its Members [Member States] such privileges and immunities as are necessary for the fulfillment of its purpose.”²²⁵ Additionally, the United Nations pointed to Article II, Section 2 of the Immunities Convention that grants the United Nations immunity as follows, “The United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”²²⁶ In *The Mothers* case, the United Nations failed to waive its immunities, and in fact did not even appear to defend this lawsuit, allowing the State of the Netherlands to represent it on this matter.²²⁷

The Mothers challenged the Dutch National Court’s grant of the U.N. immunities in their newly lawsuit filed in 2013 with the European Court of Human Rights (ECtHR).²²⁸ On June 27, 2013, the Court held that the Netherlands did not violate the applicants’ right to “access to a court,” as guaranteed by Article 6 of the Convention, by granting the United Nations immunity from domestic jurisdiction.²²⁹ The Court, however, neglected to answer the lingering question of what it would take for an international organization to be legally accountable for its conduct.²³⁰ When the Court was weighing the right of *The Mothers* to access the courts against the privilege and immunities of international organizations, the Court stated, “International

²²³ *Mothers of Srebrenica v. The Netherlands*, LJN: BR0133 The Hague Court of Appeal (July 5, 2011).

²²⁴ *Id.*

²²⁵ U.N. Charter art. 105, para. 1.

²²⁶ *Id.*; Convention on the Privileges and Immunities of the United Nations art. 2, sec. 2 (Feb. 13, 1946).

²²⁷ *Mothers of Srebrenica v. The Netherlands*, LJN: BR0133 The Hague Court of Appeal (July 5, 2011), 2–5.

²²⁸ *Stichting Mothers of Srebrenica and Others v. The Netherlands*, App. No. 65542/12, EUR. CT. H.R. 1, 14 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

²²⁹ *Id.* at 24.

²³⁰ *See generally id.*

law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*.”²³¹ Ironically, in this decision the European Court of Human Rights considered immunity to be of greater value and importance than gruesome violations of human rights, such as genocide.

While it appears that The Mothers have reached the end of their road in their lawsuits against the United Nations, a strong policy argument exists that the United Nations should waive its privileges and immunities and allow the courts to determine liability as a result of the *Nuhanović* decision.²³² Instead, they are seeking these damages for their suffering and loss of companionship, and in an effort to promote awareness, responsibility, and prevent such future failures from occurring elsewhere.²³³ The United Nations, an organization that was created in the aftermath of the Holocaust and whose primary mission is to promote and ensure human rights, ought to give more consideration to the access of courts for gross human rights violations. As stated August Reinisch and Ulf Andreas Aeber, “human rights rationale of providing access to court is equally cogent in the context of the immunity of international organizations.”²³⁴ This is a very valid point, especially because the United Nations itself accepted responsibility:

The international community as a whole must accept its share of responsibility for allowing this tragic course of events by its prolonged refusal to use force in the early stages of the war. This responsibility is shared by the Security Council, the Contact Group, and the other Governments which contributed to the delay in the use of force, as well as by the United Nations Secretariat and the mission in the field.²³⁵

²³¹ *Id.* at 41.

²³² See Tom Dannenbaum, *Dutch Supreme Court Affirms That Dutchbat Acted Unlawfully in Srebrenica*, EJIL: TALK! (Sept. 8, 2013), <http://www.ejiltalk.org/dutch-supreme-court-affirms-that-dutchbat-acted-unlawfully-in-srebrenica/>; see also Manuel J. Ventura, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention*, EJIL: TALK! (Sept. 6, 2013), <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>.

²³³ *Id.*

²³⁴ August Reinisch & Ulf Andreas Weber, *The Jurisdictional Immunity of International Organizations, The Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, 1 INT'L. ORG. L. REV. 59, 67 (2004).

²³⁵ *Stichting Mothers of Srebrenica and Others v. The Netherlands*, App. No. 65542/12, EUR. CT. H.R. 1, 7 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255> (quoting U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly resolution 53/35: The fall of*

It is very counterintuitive that the United Nations takes responsibility for Srebrenica in investigative reports, yet denies The Mothers a day in court based on its immunity.²³⁶ The General Assembly should address this inconsistency in the immediate future, and pass a resolution that would waive the United Nations' immunity in the proceedings initiated by The Mothers, allowing the trier of fact to determine liability, and if appropriate, damages.

Unless and until the United Nations Generally Assembly passes a resolution waiving the United Nations' immunity in the Srebrenica proceedings, The Mothers will not be successful in obtaining any damages for the loss of their loved ones from the United Nations.²³⁷

However, the Dutch Courts have opened the door for other victims to bring suit against culpable States.²³⁸ As the *Nuhanović* decision makes clear, the Netherlands does not enjoy the same protection under the Charter of the United Nations, and the privileges and immunities that the Charter does grant are for the United Nations exclusively, not member States.²³⁹ Nevertheless, States involved in the peacekeeping operations still assert the United Nations' privileges and immunities, arguing that they are shielded from liability.²⁴⁰ However, there is indication that the United Nations' immunity does not shield States liability, for example, the Internationally Wrongful Act of an International Organization, Chapter II, Article 7 "Attribution of conduct to an international organization and State," reads as follows:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law

Srebrenica, ¶ 501, U.N. Doc. A/54/549 (Nov. 15, 1999)); HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 17–20.

²³⁶ *Stichting Mothers of Srebrenica and Others v. The Netherlands*, App. No. 65542/12, EUR. CT. H.R. 1, 31 (2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>; *The Nuhanović Case*, *supra* note 200.

²³⁷ *See generally* Manuel J. Ventura, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention*, EJIL: TALK! (Sept. 6, 2013), <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>.

²³⁸ *See generally* HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.); *see also* Owen Bowcott, *Netherlands to pay compensation over Srebrenica massacre*, THE GUARDIAN (Sept. 6, 2013), <http://www.theguardian.com/world/2013/sep/06/netherlands-compensation-srebrenica-massacre>.

²³⁹ *See generally* HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.); *see also* U.N. Charter art. 100 para. 2.

²⁴⁰ Scott P. Sheeran, *Contemporary Issues in UN Peacekeeping and International Law*, IDCR (2011).

*an act of the latter organization if the organization exercises effective control over that conduct.*²⁴¹

The Supreme Court of the Netherlands dismissed this as a restriction on the Netherlands' responsibility for Srebrenica.²⁴² However, most recently in the *Nuhanović* decision, the Court clearly stated that conduct of peacekeeping missions could be attributed to the international organization *and* the State.²⁴³

While the United Nations exercised effective control over the Dutchbat due to the command control it had over the troops, the disciplinary powers and criminal jurisdiction (the "organic commands") remained vested in the Netherlands.²⁴⁴ Accordingly, the principle of command responsibility is also appropriate in this context, since it was the Netherlands commanders on the ground in Srebrenica.²⁴⁵ Command responsibility is a form of responsibility that arises from an omission to act.²⁴⁶ In such instances, the commander/superior may be held criminally responsible under this doctrine where, during his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.²⁴⁷ While this doctrine requires that the commander's subordinates commit the crimes before he can be held responsible, the purpose of this doctrine supports that a literal meaning of "subordinates" should not be required.²⁴⁸ "Command responsibility evolved out of an ethic that abhorred the notion that an individual, with the power to stop the commission of a crime and the professional duty to enforce and ensure respect for order, could simply stand by and allow such crimes to take place."²⁴⁹ This doctrine has been created to serve greater justice, and the intent of the document should be taken into consideration when attempting to hold commanders responsible even for crimes not committed by their subordinates.²⁵⁰ The requirement that the subordinates commit the crime is not

²⁴¹ Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 63rd Sess., Apr. 26–June 3 and July 4–Aug. 12 2011, ¶¶ 87–88, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10 (2011) (emphasis added).

²⁴² HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 35.

²⁴³ *Id.* at 19.

²⁴⁴ *Id.*; Sheeran, *supra* note 243.

²⁴⁵ Guenel Mettraux, *The Doctrine of Superior/Command Responsibility*, PEACE AND JUSTICE INITIATIVE (Sept. 23, 2014), <http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Perkins, *supra* note 169, at 196.

²⁵⁰ *See id.*

the purpose of this doctrine, rather, justice is.²⁵¹ Those who are commanders and subordinates should not allow genocide to be committed on those who they swore to protect. While holding the commanders criminally responsible is perhaps stretching the document beyond its intent, it would be appropriate to hold the commanders responsible for their omission to act and protect the people of Srebrenica.²⁵²

G. *What's Next for The Mothers?*

As a result of the recent holding in *Nuhanović*, The Mothers might be more successful in litigation against the Netherlands. Since the Supreme Court of the Netherlands attributed the Dutchbat's wrongful conduct against Nuhanović's family, it ought to attribute the Dutchbat's wrongful conduct against the rest of the Srebrenica population to the Netherlands.²⁵³ The goal of The Mothers' litigation is to raise awareness and prevent future genocide. However, they should argue that they were denied the right to self-defense due to UNPROFOR's breach of duty to protect them and the United Nations' negligent establishment of the safe haven.²⁵⁴ While the Court in *Nuhanović* distinguished the other victims from those of the Nuhanović family, The Mothers should have argued that everyone in Srebrenica was in the same situation as the Nuhanović family, and that UNPROFOR owed them the same duties.²⁵⁵ Under international law, the victims outside the compound have an equal right to life and protection, as did Nuhanović's family.²⁵⁶ The ICJ has also indicated that there is a global responsibility to prevent genocide, varying with a state's "capacity to influence" the genocidal action.²⁵⁷ This capacity to influence is determined by looking at several factors, one of which being "geographical distance" of the state who has a duty to protect and the wrongdoings which are to be committed.²⁵⁸ It is undoubted that the Dutchbat had the influence to

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 31.

²⁵⁴ Mothers v. Netherlands, *supra* note 85; See also Manuel J. Ventura, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention*, EJIL: TALK! (Sept. 6, 2013), <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>.

²⁵⁵ See HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) 31.

²⁵⁶ See *id.*

²⁵⁷ See Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montengro), 2007 I.C.J. 43, 221 (Feb. 26).

²⁵⁸ *Id.*

prevent genocide, as evidenced by the several meetings that the Dutch commanders had with Mladić as Srebrenica fell.²⁵⁹

H. Implications for Future Peacekeeping Missions

One of the most dangerous conflicts ongoing in the world today is the crisis in Syria. Resembling many events that occurred in the early 1990's in Bosnia, the conflict in Syria is developing on the world platform due to technological advances.²⁶⁰ More blood is shed and more innocent lives are lost, all while the rest of the world is deliberating on the proper course of action. As with any military intervention, the Security Council has met and deliberated the possibility of a United Nations intervention in Syria.²⁶¹ The Russians, a close ally of the Syrian government, opposed the intervention, blocking the draft resolution in front of the Security Council.²⁶² Shortly thereafter, the Obama administration proposed American intervention based on humanitarian efforts to end the bloodshed and restore peace in Syria.²⁶³ The American people resisted his proposition mainly because of their negative experience with recent U.S. involvement in the Middle East, such as in Afghanistan and Iraq. However, there is another concern that was not properly addressed by Congress: once it got involved in the conflict, the United States would take on the responsibility of protecting the people of Syria. If, after taking on this responsibility, the United States failed in its mission, it could be held accountable under the Dutch Supreme Court rationale.

The possibility of accountability should not discourage States to get involved in peacekeeping missions. However, when States or the United Nations make the decision to get involved in an armed conflict and protect human rights, they should make that decision calculatedly. For example, a peacekeeping mission is not viable in places that do not have peace; instead a cease-fire is required first. However, once a decision is made to get involved

²⁵⁹ Compare *Stichting Mothers of Srebrenica and Others v. Netherland* App. No. 65542/12, Eur. Ct. H.R. 1, 13 (2013), with Manuel J. Ventura, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention*, EJIL: Talk! (Sept. 6, 2013), <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>.

²⁶⁰ Conor Higgins, *The Dangers in Limited Involvement in Syria*, THE WASHINGTON TIMES (Sept. 20, 2013), <http://communities.washingtontimes.com/neighborhood/its-all-smoke-and-whiskey/2013/sep/20/dangers-limited-involvement-syria/>.

²⁶¹ Rick Gladstone, *Security Council Returns to Role in Syria Conflict*, N.Y. TIMES, (Sept. 17, 2013), http://www.nytimes.com/2013/09/18/world/middleeast/security-council-syria.html?_r=0.

²⁶² Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), http://www.nytimes.com/2013/09/01/world/middleeast/syria.html?pagewanted=all&_r=0.

²⁶³ *The Dangers in Limited Involvement in Syria*, *supra* note 284.

and save lives, if the people have to give up something in exchange for international protection, they should have a remedy if that protection fails. Based on the *Nuhanović* decision, however, foreign involvement in other countries for peace restoration might nevertheless be affected.²⁶⁴ If The Mothers case against the Netherlands proves to be successful, no state should hinder humanitarian efforts in the fear of getting sued for permitting genocide, because after all, the involvement should prevent genocide and human rights violations.²⁶⁵

While accountability for States and organizations that fail their mission should exist, the scope should not be too broad. The instance where plaintiffs should have the strongest cause of action against a State or the United Nations that aided them in unsuccessful peacekeeping missions is if the plaintiffs had to give up something in exchange for the protection of the international community. For example, the people of Srebrenica laid down their arms in exchange for the protection from UNPROFOR. However, if the plaintiffs were not required to give up anything for the protection of the international community during a peacekeeping mission, their claim, while still possibly valid, ought to be scrutinized more. Perhaps the strongest argument those plaintiffs would have is that they were induced into believing that the international community would protect them, but that is not the same as trading their own weapons in reliance on the protection from the international community.

The *Nuhanović* case, and potentially the case of The Mothers against the Netherlands, might hold States and International Organizations accountable for their failed peacekeeping missions. This accountability might in fact be a successful shift in international law, ensuring more successful peacekeeping missions and achieving the goal of preserving human rights. In context, it always important to remember that the purpose of these missions is to preserve human *rights*—and that a right does not exist if there is no remedy for it once that right is violated.

JASNA HASANBASIC*

²⁶⁴ HR 6 september 2013, RvdW 2008, 12/03324 m.nt. LZ/TT (Netherlands/Nuhanovic) (Neth.) X.

²⁶⁵ *Id.*

* Notes & Comments Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2015); B.A., Georgia State University (2010). The author wishes to thank Timothy P. Terrell; Osman, Sadika & Nihad Hasanbasic; the EILR executive board and all the candidates for their assistance and encouragement in the writing of this Comment.