

THE LEGACY OF SREBRENICA: POTENTIAL CONSEQUENCES OF REDUCING LIABILITY FOR TROOP CONTRIBUTING COUNTRIES IN MODERN UN PEACEKEEPING OPERATIONS

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Abstract: In 2014 the District Court of The Hague returned its decision in a case concerning peacekeeper (Dutchbat) wrongdoing during the 1995 massacre at Srebrenica, Bosnia-Herzegovina. The district court dismissed the UN as party to the suit, basing this decision on the organization's statutory immunity from prosecution. As a basis for holding the Netherlands liable for Dutchbat's actions, the district court utilized the effective control standard. This standard triggered liability for conduct undertaken either under direct order from Dutch officials, or in violation of the mission mandate. The district court strictly interpreted effective control, concluding the Netherlands was liable for conduct only insofar as it pertained to Dutchbat personnel who actively separated male Muslim refugees, who were later executed by the Bosnian Serbian Army. The decision reflected a commitment to limiting Member States' liability so as to sustain enthusiastic troop contribution to peacekeeping. This policy could have negative repercussions as peacekeepers adopt increasingly complex responsibilities, especially in areas afflicted by terrorism. These missions frequently involve asymmetrical warfare, and some have become the most dangerous on record. Zealously encouraging Member States to deploy troops to areas under constant threat of unpredictable terrorist acts strongly calls into question the prudence of this policy.

INTRODUCTION

After the Republic of Bosnia-Herzegovina declared its independence from the Republic of Yugoslavia in March 1992, armed conflict between Bosnian Muslims and Serbian militia forces erupted across the eastern region of the country.¹ In response, the United Nations (UN) extended the mandate of

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¹ See Rb. 's-Gravenhage [Hague District Court] 16 juli 2014, No. 09/295247 / HA ZA 07-2973, ¶ 2.3 (Mothers of Srebrenica/Netherlands) (*Mothers of Srebrenica IV*) (Neth.), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748> [<https://perma.cc/RN9M-6MYS>]; *Srebrenica in Summary*, HAGUE JUST. PORTAL (Aug. 7, 2008), <http://www.haguejusticeportal.net/index.php?id=9564> [<https://perma.cc/VDN9-V6VV>].

the UN Protection Force (UNPROFOR) to facilitate delivery of humanitarian aid and protect designated “safe areas” within Bosnia-Herzegovina.² Srebrenica, an enclave of Bosnian Muslim refugees,³ was one such safe area near Bosnia’s border with Serbia.⁴ In July 1995, UNPROFOR forces, comprised of approximately 600 Dutch peacekeepers (Dutchbat) were overcome by members of the Bosnian Serbian Army (BSA) and retreated, along with 20,000–25,000 refugees, from Srebrenica to their encampment in the neighboring town of Potočari.⁵ Following the exodus from Srebrenica and subsequent evacuation from Potočari, the BSA captured and killed between 7000 and 8000 Bosnian Muslim men.⁶

The Srebrenica massacre and ensuing legal actions have had forceful repercussions in the international legal community, particularly concerning the roles and responsibilities of current UN peacekeeping operations across the globe.⁷ In a civil suit in the District Court of the Hague in June 2007, the Association of the Mothers of Srebrenica and ten individual claimants brought an action against the State of the Netherlands (State) and the UN.⁸ They claimed the State and UN were jointly liable for failing to fulfill their duty to protect the refugees who were removed from the safe area and executed by BSA.⁹ The district court dismissed the UN as party to the suit, asserting it had no jurisdiction over the case due to the UN’s immunity in matters of litigation.¹⁰ The

² *Mothers of Srebrenica IV*, ¶¶ 2.12, 2.4–2.5.

³ *Id.* ¶ 2.5.

⁴ *Srebrenica in Summary*, *supra* note 1.

⁵ *Mothers of Srebrenica IV*, ¶¶ 2.34–.35; *Srebrenica in Summary*, *supra* note 1.

⁶ *Mothers of Srebrenica IV*, ¶ 2.43; Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT’L L. 341, 378 (2016); *Srebrenica in Summary*, *supra* note 1.

⁷ 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) (weighing the costs and benefits of protecting the United Nations (UN) from prosecution in instances of peacekeeper malfeasance and suggesting that the case in The Hague Court of Appeal established a high standard of immunity that is unlikely to be overcome by the international law tenet of right of access to a court, even in the absence of alternative legal fora); Louise Bosetti et al., *Peacekeeping in Cities: Is the UN Prepared?*, UNITED NATIONS U.: CTR. FOR POL’Y RES. (Apr. 12, 2016), <http://cpr.unu.edu/peacekeeping-in-cities-is-the-un-prepared.html> [<https://perma.cc/UZ6X-MGCV>] (questioning the UN’s capacity to adequately quell rebel and terrorist groups engaged in unpredictable urban warfare, while not destabilizing “conflict economies” unwittingly through the mere sustained presence of UN peacekeepers).

⁸ See *Mothers of Srebrenica IV*, ¶¶ 2.45.1–.46; Brockman-Hawe, *supra* note 7, at 730. The Association represented approximately 6000 women who blamed the State of the Netherlands (State) and the UN for the loss of their loved ones at Srebrenica. See Jasna Hasanbasic, Comment, *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, 415 (2014).

⁹ See *Mothers of Srebrenica IV*, ¶ 3.1; Brockman-Hawe, *supra* note 7, at 728.

¹⁰ See *Mothers of Srebrenica IV*, ¶¶ 1.1, 4.3.

Court of Appeal of The Hague upheld this decision in 2010.¹¹ In 2014 the district court returned its final judgment, finding the State liable for only a small portion of the claims against it.¹² This decision cemented the concept of the UN's "absolute immunity," and shifted a heavy portion of the liability for peacekeeper wrongdoing onto Member States contributing troops.¹³

Part I of this Comment provides background facts of the Srebrenica massacre and the civil suit in the district court between the Association of the Mothers of Srebrenica and the State. Part II discusses the arguments and the ensuing decision by the district court. Part III examines the implications of the decision on current UN peacekeeping operations in areas afflicted by terrorism, using the UN peacekeeping operation in Mali as an example.

I. BACKGROUND

A. Establishment of UNPROFOR and Its Implementation in Srebrenica

On February 21, 1992 the UN Security Council (Security Council) adopted Resolution 743, which established UNPROFOR as part of a peace agreement between warring parties in Croatia.¹⁴ On June 8, 1992, the Security Council expanded UNPROFOR's mandate to include Bosnia-Herzegovina after fighting erupted between the army of Bosnia-Herzegovina (ABiH) and BSA.¹⁵ Concurrent territorial conflicts between BSA and Bosnian Muslims in eastern Bosnia-Herzegovina led to the formation of numerous Muslim enclaves.¹⁶ Srebrenica, located approximately ten kilometers southeast of the Yugoslavian border, was one such enclave with a population of approximately 60,000 by early 1993.¹⁷

In a public announcement in Srebrenica on March 14, 1993, then-Commander of UNPROFOR, General P.P.L.A. Morillon, assured a crowd of Bosnian Muslims that "they were under the protection of the UN and that he

¹¹ *Id.*; see Hof's-Gravenhage [Appeal Court in The Hague] 30 mart 2010, No. 200.022.151/01 (Mothers of Srebrenica/Netherlands) (*Mothers of Srebrenica II*) (Neth.), http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf [<https://perma.cc/5JLP-CLHW>].

¹² *See id.* ¶¶ 4.341, .4. The district court dismissed the claims of claimants one through ten, determining none of their lost family members fell under the Dutch peacekeepers' (Dutchbat) protection during the *transitional period*. *See id.* The district court attributed liability to the State for the Association's claims, insofar as they related to men deported from Potočari on July 13, 1995 and executed by the Bosnian Serbian Army (BSA). *Id.* ¶¶ 4.339, 4.342.

¹³ *See Mothers of Srebrenica II*, ¶ 1.3; Brockman-Hawe, *supra* note 7, at 730, 744; Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 33 (2016); Hasanbasic, *supra* note 8, at 445–46.

¹⁴ *Mothers of Srebrenica IV*, ¶ 2.2; S.C. Res. 743, ¶ 2 (Feb. 21, 1992).

¹⁵ *Mothers of Srebrenica IV*, ¶¶ 2.3–4.

¹⁶ *Id.* ¶ 2.5.

¹⁷ *Srebrenica in Summary*, *supra* note 1; *see Mothers of Srebrenica IV*, ¶ 2.5.

would not abandon them.”¹⁸ Shortly thereafter, on April 16, 1993, the Security Council adopted Resolution 819, which held in part that Srebrenica should be free from hostile acts, that the BSA should cease their attack and withdraw from the region, and that the UN Secretary-General should take measures to increase UNPROFOR presence in the region.¹⁹ Between April 18 and May 6, 1993, the UNPROFOR Commander oversaw a set of demilitarization agreements between the leaders of BSA and ABiH.²⁰ These agreements stipulated that ABiH fighters within the safe area had to resign their arms to UNPROFOR peacekeepers.²¹ In return, BSA General R. Mladić agreed to withdraw the heavy artillery that threatened the demilitarized zone.²²

On June 4, 1993 the Security Council adopted Resolution 836.²³ This Resolution further extended the UNPROFOR mandate to allow Dutchbat to deter attacks, monitor the cease-fire, deliver humanitarian relief within the designated safe areas, and respond with force to any bombardment against the safe areas or deliberate obstruction of humanitarian convoys destined for these zones.²⁴ Member States were also authorized to take all necessary measures through the use of air power to support UNPROFOR peacekeepers in the fulfillment of their mandate in and around the safe areas.²⁵

On March 3, 1994, Dutchbat mobilized and established its headquarters in the abandoned town of Potočari, about five kilometers from the town of Srebrenica.²⁶ In addition to moving into the safe area, Dutchbat manned several observation posts in the region.²⁷ Only a few months later, around June 1994, BSA began to interfere with humanitarian convoys destined for the safe area, limiting the supply of humanitarian aid and food that arrived to the refugees and Dutchbat forces.²⁸

On May 29, 1995, UNPROFOR Commander English Lieutenant General Sir R.A. Smith communicated a Post Airstrike Guidance missive to Dutchbat.²⁹ Smith informed them that, in order to prevent unnecessary loss of life, execution of the UNPROFOR mandate was to be secondary to the security of UN personnel.³⁰ Smith elaborated on the communication, instructing Dutchbat to hold positions it could practically reinforce or recover by counter attack, but

¹⁸ *Mothers of Srebrenica IV*, ¶ 2.6.

¹⁹ *Id.* ¶ 2.7; S.C. Res. 819, ¶¶ 1–2, 4 (Apr. 16, 1993).

²⁰ *See Mothers of Srebrenica IV*, ¶¶ 2.8, .10.

²¹ *See id.*

²² *Id.* ¶ 2.10.

²³ S.C. Res. 836 (June 4, 1993).

²⁴ *Id.* ¶ 5.

²⁵ *Id.* ¶ 10.

²⁶ *See Mothers of Srebrenica IV*, ¶¶ 2.15–.16.

²⁷ *See id.* ¶ 2.16.

²⁸ *See id.* ¶ 2.19.

²⁹ *Id.* ¶¶ 2.18, .20.

³⁰ *Id.* ¶ 2.20.

to abandon isolated positions within BSA territory when holding them would likely lead to substantial Dutchbat casualties.³¹

B. The Fall of Srebrenica and Evacuation from Potočari

The BSA attack began on June 3, 1995 with the siege of observation post OP-E, and culminated with the taking of the town of Srebrenica on July 11, 1995.³² Throughout this period, BSA repeatedly shelled the town of Srebrenica and attacked observation posts in the surrounding safe area.³³ Dutchbat communicated several requests for close air support to the UNPROFOR headquarters in Croatia in order to deter BSA, but all requests were denied with the exception of one air strike on July 11, 1995.³⁴ The absence of close air support caused Dutchbat to abandon multiple observation posts, blocking positions, and, eventually, the entire town of Srebrenica.³⁵

On the afternoon of July 11, 1995, before Srebrenica fell, tens of thousands of Bosnian Muslim refugees fled in the direction of the Dutchbat encampment at Potočari, which had been designated a “mini safe area.”³⁶ Between 20,000–25,000 refugees sought safety in Potočari while between 10,000–15,000 Bosnian Muslim men fled instead into the woods nearby.³⁷ BSA captured an estimated 6000 of these men.³⁸ That same evening, Dutchbat Battalion Commander, Dutch Lieutenant Colonel T.J.P. Karremans negotiated with BSA General Mladić to secure the evacuation of refugees from the mini safe area.³⁹ On the afternoon of July 12, 1995, BSA sanctioned numerous vehicles to begin evacuation.⁴⁰

Before evacuation began, BSA pronounced that it would be screening the refugees for able-bodied men who were under suspicion of committing war crimes.⁴¹ BSA pulled numerous men from the groups awaiting evacuation, and sent them off in separate vehicles for purported interrogation.⁴² In reality, BSA killed these men, along with those captured in the woods near Srebrenica, in a

³¹ *See id.*

³² *See id.* ¶¶ 2.21, .34.

³³ *See id.* ¶¶ 2.21–.25, .34.

³⁴ *See id.* ¶¶ 2.21–.27, .31–.32.

³⁵ *See id.* ¶¶ 2.21, .25–.26, .28, .33–.34.

³⁶ *See id.* ¶ 2.35.

³⁷ *Id.* ¶¶ 2.35–.36.

³⁸ *Id.* ¶ 2.36.

³⁹ *See id.* ¶¶ 2.39, 4.212.

⁴⁰ *Id.* ¶ 2.40. Refugees went first to Tišća, then walked a few kilometers through no man’s land between BSA-controlled territory and Bosnian Muslim-controlled territory until they reached Kladanj. *See id.* ¶ 4.216. In Kladanj a Pakistani UN Battalion coordinated their transport to a provisional reception area in Tuzla. *See id.*

⁴¹ *See id.* ¶ 2.40.

⁴² *See id.*; *Srebrenica in Summary*, *supra* note 1.

series of mass executions between July 14 and July 17, 1995.⁴³ During the capture of Srebrenica, more than 7000 Bosnian Muslim men from the safe area were taken from their families, executed, and thrown into mass graves by BSA forces.⁴⁴ After the evacuation was completed, Dutchbat left Potočari and returned home.⁴⁵

C. Subsequent Legal Action in the District Court of The Hague

On June 4, 2007, the Association of the Mothers of Srebrenica along with ten individual claimants brought a civil suit in the district court against the State and UN.⁴⁶ Claimants sought compensation for the loss of their male family members, as well as declaratory judgments regarding the State's and UN's complicity in the massacre.⁴⁷ The district court dismissed claims against the UN in an interim judgment on July 10, 2008, reasoning that because the UN enjoyed absolute immunity from prosecution, the district court had no jurisdiction to hear the case against it.⁴⁸ The court of appeal upheld this decision.⁴⁹ On July 16, 2014, the district court found the State liable for a portion of claimants' loss, and ordered that the State pay costs of litigation in the amount of €6060.85.⁵⁰ All other claims were dismissed.⁵¹

II. DISCUSSION

A. Scope of the Dispute

The district court's dismissal of the UN as a party to the suit clearly established the UN's absolute immunity from prosecution.⁵² This decision was made and later upheld as a matter of international public policy, recognizing that the key to the UN's efficacy is its invulnerability to lawsuits.⁵³ As such,

⁴³ See *Mothers of Srebrenica IV*, ¶ 2.43; *Srebrenica in Summary*, *supra* note 1.

⁴⁴ *Mothers of Srebrenica IV*, ¶¶ 2.43, .45.2, .45.5, .45.10.

⁴⁵ See *id.* ¶ 2.41.

⁴⁶ *Id.* ¶ 3.1.

⁴⁷ *Id.*

⁴⁸ See *id.* ¶¶ 1.1, 4.3.

⁴⁹ *Id.* ¶ 1.1.

⁵⁰ *Id.* ¶¶ 5.1–.2.

⁵¹ *Id.* ¶ 5.4.

⁵² See Hof 's-Gravenhage [Appeal Court in The Hague] 30 mart 2010, No. 200.022.151/01, ¶ 1.3 (Mothers of Srebrenica/Netherlands) (*Mothers of Srebrenica II*) (Neth.); Rb. 's-Gravenhage [Hague District Court] 16 juli 2014, No. 09/295247 / HA ZA 07-2973, ¶ 4.3 (Mothers of Srebrenica/Netherlands) (*Mothers of Srebrenica IV*) (Neth.); Brockman-Hawe, *supra* note 7, at 736; Hovell, *supra* note 13, at 33; *Srebrenica in Summary*, *supra* note 1.

⁵³ See *Mothers of Srebrenica II*, ¶ 4.2; *Mothers of Srebrenica IV*, ¶ 4.3. The UN enjoys immunity from all forms of legal process, regardless of jurisdiction, unless the UN explicitly waives its immunity in a specific case. G.A. Res. 22 (I), Convention on the Privileges and Immunities of the United Nations, art. II, §2 (Feb. 13, 1946).

the scope of *Mothers of Srebrenica* shifted entirely onto the State.⁵⁴ Central to the outcome of the case was the district court's determination of the extent of the State's effective control over Dutchbat in and around Srebrenica, and whether it permitted unlawful acts under applicable international and national laws.⁵⁵

B. Attributable Failure

Claimants' central claim was that the State failed to fulfill its obligation to protect the populace in the mini safe area after the fall of Srebrenica.⁵⁶ They argued that the State violated national and international humanitarian law, the UN Charter and UNPROFOR mandate, and various international treaties, including the European Convention on Human Rights (ECHR), International Covenant on Civil and Political Rights (ICCPR), Geneva Conventions, and Convention on Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁵⁷ In response, the district court clarified that claimants derived no third-party right to demand protection from the State simply because the State had put its troops at the UN's disposal to implement Resolution 836.⁵⁸ Any failure that occurred while Dutchbat implemented the mandate or an order from UN officials was attributable to the UN; however, since the UN was dismissed from the case in 2008, these failures were not addressed.⁵⁹ The only failures the district court examined were those resulting from the State exercising control over Dutchbat.⁶⁰

⁵⁴ See *Mothers of Srebrenica IV*, ¶ 4.4.

⁵⁵ See HR [Neth. Supreme Court] 6 september 2013, No. 12/03329, ¶¶ 3.5.2, .8.1–.2 (Netherlands/Mustafić), [https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20\(1\).pdf](https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20(1).pdf) [<https://perma.cc/M5J8-6CCQ>]; HR [Neth. Supreme Court] 6 september 2013, No. 12/03324, ¶¶ 3.5.2, 3.8.1–.8.2 (Netherlands/Nuhanović), <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003324.pdf> [<https://perma.cc/TA38-FB5U>]; *Mothers of Srebrenica IV*, ¶¶ 4.29, 4.32–.33. Two prior cases decided by the Supreme Court of the Netherlands established that the effective control criterion had to be met in order to attribute Dutchbat actions to the State. *Mothers of Srebrenica IV*, ¶ 4.33.

⁵⁶ See *Mothers of Srebrenica IV*, ¶ 3.2.

⁵⁷ *Id.*; see U.N. Charter arts. 1, 51; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; S.C. Res. 836, *supra* note 23; S.C. Res. 743, *supra* note 14.

⁵⁸ See *Mothers of Srebrenica IV*, ¶ 4.27.

⁵⁹ See *id.* ¶ 4.28.

⁶⁰ See *id.* ¶ 4.29.

C. Attributable Actions and Jurisdiction of the State in the Safe Area

The district court reiterated that the criterion of effective control had to be met in order to attribute Dutchbat conduct to the State.⁶¹ In determining effective control, the district court first had to define the extent to which the State transferred command and control of Dutchbat to the UN.⁶² It concluded that after the State agreed to put Dutchbat forces at the UN's disposal, the UN assumed operational command and control over Dutchbat, which then functioned as a contingent of UNPROFOR.⁶³ Consequently, the district court confirmed that the Security Council held primary responsibility for commanding Dutchbat peacekeepers in Srebrenica, leaving the State with no formal competence regarding Dutchbat's implementation of the mandate.⁶⁴

The district court noted that the State retained the following rights: control over selection and training of troops, authority to withdraw Dutchbat from the mission, and authority to discipline military personnel or subject them to criminal law for their malfeasance.⁶⁵ In so doing, the district court made a key distinction between those actions Dutchbat took under UN orders, and those it took either under direction from the State or as an independent ultra vires action against UN instruction.⁶⁶ Any action under UN instruction was not attributable to the State.⁶⁷ Conversely, any ultra vires action, whether or not explicitly ordered by the State, was deemed attributable to the State because it retained effective control over preparation, withdrawal, and discipline of Dutchbat.⁶⁸

⁶¹ *Id.* ¶¶ 4.33–.34. “Effective control” was defined as the State having an actual say or exercising factual control over Dutchbat's specific actions. *Id.*

⁶² *See id.* ¶ 4.36.

⁶³ *See id.* ¶ 4.37. The district court used a 1994 report from the UN Secretary-General to form a working definition of UN “control and command.” *See id.* ¶ 4.42. The report asserted that the UN exercised not full, but “operational command” with the authority to issue operational directives within the limits of (1) a specific mandate of the UN Security Council (Security Council); (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range. *See* U.N. Secretary-General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: Command and Control of United Nations Peace-keeping Operations*, ¶ 6, U.N. Doc. A/49/681 (Nov. 21, 1994).

⁶⁴ *Mothers of Srebrenica IV*, ¶¶ 4.38, .40. The district court dismissed as irrelevant the fact that certain Dutch nationals occupied positions in the UN chain of command, finding their presence alone did not lead to an inference that the State retained effective control. *See id.* ¶¶ 4.50, .52. Similarly, the fact that contact between The Hague and Dutch UN Protection Force (UNPROFOR) officers intensified before the fall of Srebrenica did not indicate the State exercised effective control. *See id.* ¶ 4.54.

⁶⁵ *Id.* ¶ 4.41.

⁶⁶ *See id.* ¶¶ 4.57–.58, .68. Ultra vires actions were defined as any actions taken beyond the authority given by the UN, or contrary to UN instructions. *Id.*

⁶⁷ *See id.* ¶¶ 4.57, .68.

⁶⁸ *See id.* ¶¶ 4.41, .57–.58.

With one exception, the district court concluded the State exercised no effective control over Dutchbat prior to the fall of Srebrenica.⁶⁹ Therefore, the State was not liable for Dutchbat's failure to protect the populace within the safe area until after BSA took Srebrenica.⁷⁰

After BSA captured Srebrenica at about eleven o'clock on the night of July 11, 1995, Dutchbat entered into what the district court labeled a "transitional period."⁷¹ This phase is of particular importance because it marked the failure and resultant termination of the UNPROFOR mandate.⁷² It also signaled the beginning of a period in which the State became involved in the refugee evacuation and began to exercise effective control over Dutchbat's actions within the mini safe area.⁷³ The district court specified that actions attributable to the State were limited solely to Dutchbat's treatment of refugees within the mini safe area demarcated after the fall of Srebrenica.⁷⁴ As a result, the district court granted only a few of claimants' claims regarding Dutchbat actions under the effective control of the State.⁷⁵ For actions falling outside of the State's effective control, there were typically other factors—such as decision-making powers resting within the UN chain of command—that defeated claimants' arguments.⁷⁶

Turning next to the problem of jurisdiction over the safe area, the district court accepted a portion of claimants' argument, holding that the State had ef-

⁶⁹ *See id.* ¶ 4.79. The exception concerned Dutchbat's abandonment of its "blocking positions." *See id.* The district court dismissed accusations that Dutchbat abandoned the blocking positions too readily, citing evidence that Dutchbat had insufficient equipment and manpower to repel BSA forces, making their abandonment not unreasonable in context. *See id.* ¶ 4.189.

⁷⁰ *See id.* ¶ 4.79.

⁷¹ *See id.* ¶ 4.84.

⁷² *See id.* ¶ 4.82.

⁷³ *See id.* ¶¶ 4.82–.85, .87.

⁷⁴ *See id.* ¶ 4.90. The district court considered that because UNPROFOR Deputy Commander Gobilliard ordered Dutchbat to protect the refugees "in [their] care" immediately after Dutchbat's withdrawal to Potočari, the order could only reasonably relate to the refugees within the mini safe area. *See id.* Any action against that order within the mini safe area was ultra vires and thus attributable to the State. *See id.* Consequently, Dutchbat's conduct before the transitional period or toward refugees outside the mini safe area did not fall under the State's effective control. *See id.* ¶¶ 4.87, .104.

⁷⁵ *Id.* ¶ 4.91. Actions falling under the State's effective control included: abandoning the blocking positions to deter BSA's advance, not reporting all war crimes observed within the mini safe area, not providing adequate medical care to the refugees within the mini safe area, handing over weapons and equipment to BSA during the refugee evacuation, maintaining the decision not to allow all refugees into the compound at Potočari, separating men from other refugees during the evacuation, and cooperating in the evacuation of refugees from the compound. *Id.*

⁷⁶ *See id.* ¶¶ 4.104–.113, .130–.139, .142. Dutchbat actions not under the State's effective control included: interference with and cessation of close air support to Dutchbat; failure of French helicopters to appear and be deployed, thus thwarting plans to recapture Srebrenica; initial refusal to allow all refugees into the compound at Potočari before the beginning of the transitional period; and Dutchbat advising male refugees to flee into the woods near Srebrenica and neglecting to sound a general alarm when male refugees fled into the woods around Srebrenica. *See id.*

fective control over the entire mini safe area after the fall of Srebrenica.⁷⁷ Citing the *Al-Skeini v. United Kingdom* judgment as precedent, the district court reasoned that because (1) Dutchbat was the only military presence in the safe area and thus exercised effective control over the area, and (2) the UN exercised almost no actual say over Dutchbat actions within the fenced off compound at Potočari after the fall of Srebrenica, the State then assumed effective control over Dutchbat and responsibility for the observance of human rights within the mini safe area.⁷⁸

D. Applicable National and International Laws

Though Dutchbat's conduct arose in the context of a UN mission, the district court concluded that the law of the Netherlands applied to claimants' valid claims, given that the unlawful acts in question were attributable to the State.⁷⁹ This conclusion was bolstered by the State's own allowance that it made no difference whether unlawfulness of the acts was determined by Bosnian law or the law of the Netherlands.⁸⁰

The district court then turned to the State's Constitution to determine the applicability of international laws.⁸¹ Under Section 93 of the Constitution, provisions of treaties and decisions of international law organizations may be legally binding on all party states (not simply signatories) as a matter of customary international law once they are published, provided that they sufficiently specify the right conferred and the obligation it imposes on parties to the provision.⁸²

Accordingly, the district court affirmed that the right to life in ECHR Article 2 and ICCPR Article 6, as well as the prohibition of torture and inhuman treatment contained in ECHR Article 3 and ICCPR Article 7 were binding on all, reinforced by the State's obligation as a convention party in both instanc-

⁷⁷ *Id.* ¶ 4.160.

⁷⁸ See *Mothers of Srebrenica IV*, ¶¶ 4.154, .160 (citing *Al-Skeini v. United Kingdom* [GC], 2011-IV Eur. Ct. H.R. 107, 167–69). This case established that a contracting state may be liable for conduct—whether lawful or unlawful—in a foreign state when, through its troops, it performs functions normally performed by the government of that foreign state. *See id.*

⁷⁹ See *Mothers of Srebrenica IV*, ¶ 4.171.

⁸⁰ *See id.* ¶ 4.172. The State volunteered that any differences between the laws of Bosnia and the Netherlands would only be relevant when settling the amount of immaterial damage. *See id.*

⁸¹ GW. [Constitution] art. 93; see *Mothers of Srebrenica IV*, ¶ 4.148.

⁸² GW. [Constitution] art. 93. The Constitution sets forth that a treaty provision or decision made by an international law organization may qualify as “binding on all” after it is published. *See id.* The district court asserted that such a provision or decision may be “binding on all” so long as it can be immediately applied in cases submitted to a court of law. *Mothers of Srebrenica IV*, ¶ 4.148. The treaty provision must precisely define the right(s) it confers or obligation(s) it imposes so that any national legal system can easily and objectively apply it. *See id.*

es.⁸³ The district court deemed the Genocide Convention applicable because, though it was not “binding on all” in the sense described in the Constitution, the State was still beholden to it as a convention state.⁸⁴ The district court dismissed claimants’ contention that violation of the UNPROFOR mandate was a valid basis for their claims of unlawfulness.⁸⁵ It elaborated that the mandate possessed only a powers-creating character, and did not give rise to enforceable legal obligations.⁸⁶

E. Unlawfulness of Attributable Actions

In analyzing actions attributable to the State, the district court identified two requisite elements for attributing liability for unlawful conduct.⁸⁷ First, whether the officials’ actions were unreasonable given the information they possessed at the time of action.⁸⁸ Second, a causal link needed to be present, whereby the court could establish with a sufficient degree of certainty that the men from the safe area would not have been killed without the unlawful actions of the State.⁸⁹ After applying the standard of care and causal link heuristic, the district court concluded the State was liable for only one unlawful action—Dutchbat actively assisting BSA in separating male refugees from the other refugees during evacuation from the compound.⁹⁰ All other actions of which the State was accused were either deemed unlawful but lacking the causal link, or not unlawful.⁹¹

The district court dramatically curtailed the extent of the State’s liability, acknowledging that the extreme circumstances of war factored heavily into its assessment of the reasonableness of Dutchbat’s conduct.⁹² Liability was reduced until it applied solely to family members—all of whom were represented by the Association of the Mothers of Srebrenica—of the men who were deported from the compound in the afternoon of July 13, 1995, and subsequently

⁸³ ICCPR, *supra* note 57, arts. 6–7; ECHR, *supra* note 57, arts. 2–3; *Mothers of Srebrenica IV*, ¶ 4.152.

⁸⁴ *See* GW. [Constitution] art. 93; *Mothers of Srebrenica IV*, ¶¶ 4.163–.164, .179.

⁸⁵ *Mothers of Srebrenica IV*, ¶ 4.149.

⁸⁶ *Id.*

⁸⁷ *See id.* ¶¶ 4.180, .182.

⁸⁸ *See id.* ¶ 4.180.

⁸⁹ *See id.* ¶ 4.182.

⁹⁰ *See id.* ¶¶ 4.116, .312, .316.

⁹¹ *See id.* ¶¶ 4.273, 4.276–.277. The actions deemed unlawful were not reporting all observed war crimes. *Id.* Nonetheless, the district court reasoned this would not have led to timely military intervention that would have saved the men executed by BSA. *See id.* The actions deemed not unlawful included: abandoning the blocking positions, not providing adequate medical care to the refugees, advising male refugees to flee into the woods, handing over weapons and other equipment to BSA, upholding the decision to not allow all refugees into the compound, and assisting in the evacuation by forming a lock and guiding the refugees to the buses. *Id.* ¶¶ 4.335–.337.

⁹² *See id.* ¶ 4.181.

executed by BSA.⁹³ The State was ordered to pay only the costs of legal proceedings; all other claims were dismissed.⁹⁴

The district court's systematic limitation of liability, beginning with a broad discussion of UN immunity and narrowing into a nuanced analysis of specific actions taken by Dutchbat and the State, set a controversial precedent.⁹⁵ This decision posited fundamental questions to the international legal community concerning the propriety of intervention by the UN and its Member States.⁹⁶ As the landscape of contemporary conflict shifts away from war confined to a specific geographical range within a certain period of time, and towards decentralized and unpredictable acts of violence and terrorism, *Mothers of Srebrenica* calls into question the essential efficacy of UN peacekeeping operations and existing methods of ensuring their accountability.⁹⁷

III. ANALYSIS

A. Policy Underpinnings of the District Court's Decision

Since the massacres in Srebrenica and Rwanda, both of which targeted persons under the protection of UN peacekeeping operations, a considerable body of research has examined the privileges and immunities of the UN.⁹⁸ The

⁹³ See *id.* ¶ 4.342.

⁹⁴ *Id.* ¶¶ 4.344, 5.1–4. Damages for claimants' loss were not awarded because the district court rejected their claim that the State's agreement to supply troops for the UNPROFOR mission constituted an agreement to a third-party clause that extended an obligation to protect claimants and their families. See *id.* ¶¶ 4.27–28.

⁹⁵ See Brockman-Hawe, *supra* note 7, at 730, 736–38; Hasanbasic, *supra* note 8, at 445.

⁹⁶ See Boon, *supra* note 6, at 378–79; Guido den Dekker, *Immunity of the United Nations Before the Dutch Courts*, HAGUE JUST. PORTAL 4–5, 7 (July 28, 2008), http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Den_Dekker_Srebrenica_HJP.pdf [<https://perma.cc/2NKQ-99SZ>]; Hovell, *supra* note 13, at 34; Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 127 (2002); Anastasia Telesetsky, *Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility Before the International Court of Justice*, 21 MINN. J. INT'L L. 75, 84 (2012).

⁹⁷ See Bosetti, *supra* note 7; Brockman-Hawe, *supra* note 7; Hasanbasic, *supra* note 8 (arguing that increased State liability is necessary to provide just legal remedies to victims of peacekeeper malfeasance, and suggesting the Nuhanović case before the Supreme Court of the Netherlands provides a favorable example).

⁹⁸ See, e.g., Boon, *supra* note 6 (analyzing the disjointed standards of immunity between the UN and its Member States, and calling for increased UN Member State (Member State) involvement in reconsidering if UN immunity legitimately serves the interests of those purportedly benefitting from UN peacekeeping operations); den Dekker, *supra* note 96, at 2–4 (using the District Court of The Hague's 2008 dismissal of the UN as party to the case to analyze "whether immunity can be restricted if it is incompatible with peremptory or other fundamental standards of international law"); Hovell, *supra* note 13, at 1 (arguing that "[e]conomizing on due process standards" by applying a blanket of absolute immunity to the UN for its peacekeepers' wrongdoings "is proving to be a false economy"); Rawski, *supra* note 96 (asserting that unfettered immunity for individuals functioning in their capacity as UN officials is an unacceptable extension of UN immunity); Telesetsky, *supra* note 96, at 75

general consensus is that, given its foundation in the Convention on Privileges and Immunities and Article 105 of the UN Charter, as well as its nearly uniform support in customary international law, the UN is all but legally impenetrable.⁹⁹ Thus, the district court's decision to dismiss the UN as party to the case was not shocking.¹⁰⁰ Perhaps more startling was the district court's apparent willingness to hand down a judgment that, for all intents and purposes, left the mothers without adequate remedy for the loss of their family.¹⁰¹

One potential explanation for this result is that the district court was tasked with an impossible public policy conundrum.¹⁰² On one hand, the district court faced a group of mothers who had suffered devastating losses due to clear failure of the UNPROFOR operation.¹⁰³ Equitable considerations would stress the need for the adoption of a broad view of effective control, so as to provide the mothers with some form of just remedy.¹⁰⁴ Adopting such a view would have resulted in heavy attribution of responsibility to the State, which, arguably, it could have withstood without suffering a crippling financial or political loss.¹⁰⁵ On the other hand, the district court had to consider the long-term implications of its decision on the overall functioning of UN peacekeeping.¹⁰⁶ Had the district court adopted an expansive view of effective control, increased ascription of liability, though not catastrophic to the instant party,

("States should . . . enlarge the ICJ's practice of issuing advisory opinions that 'bind' parties to guarantee that the doctrine of international organization responsibility is coherently applied to the UN.").

⁹⁹ See U.N. Charter art. 105, ¶ 1; G.A. Res. 22 (I), *supra* note 53, art. II, §2; den Dekker, *supra* note 96, at 4; Hovell, *supra* note 13, at 33.

¹⁰⁰ See U.N. Charter art. 105, ¶ 1; G.A. Res. 22 (I), *supra* note 53, art. II, §2; den Dekker, *supra* note 96, at 4; Hovell, *supra* note 13, at 33.

¹⁰¹ See Rb. 's-Gravenhage [Hague District Court] 16 juli 2014, No. 09/295247 / HA ZA 07-2973, ¶¶ 5.1–4 (Mothers of Srebrenica/Netherlands) (*Mothers of Srebrenica IV*) (Neth.); Boon, *supra* note 7, at 343.

¹⁰² See Boon, *supra* note 6, at 346–47, 377; Patrick J. Lewis, *Who Pays for the United Nations' Torts?: Immunity, Attribution, and "Appropriate Modes of Settlement,"* 39 N.C. J. INT'L L. & COM. REG. 259, 300 (2014).

¹⁰³ See *Mothers of Srebrenica IV*, ¶¶ 3.1, 3.2.1, 4.8.2.

¹⁰⁴ See Boon, *supra* note 6, at 343, 356. The UN has recognized an individual's right to a remedy for injury; however, the UN limits its financial and temporal liability by excluding injuries resulting from actions deemed necessary to a peacekeeping operation's function. See *id.*

¹⁰⁵ See *Mothers of Srebrenica IV*, ¶¶ 5.1–4; see, e.g., Brian Martin, *Managing Outrage Over Genocide: Case Study Rwanda*, 21 GLOBAL CHANGE, PEACE & SECURITY 275 (2009) (illustrating how Member States Bangladesh, Belgium, and Ghana were not attacked for their peacekeepers' failure in preventing the Rwandan genocide, leaving the UN to bear the brunt of international criticisms); Declan Walsh Nicola Byrne, *UN Peacekeepers Criticized*, SCOTSMAN (Dec. 22, 2002), <https://www.globalpolicy.org/component/content/article/199/40816.html> [<https://perma.cc/N9EE-WYEZ>] (providing examples in which UN peacekeepers were punished for crimes like murder, sexual exploitation, and rape, taking the focus off their corresponding Member States).

¹⁰⁶ See Boon, *supra* note 6, at 346; Lewis, *supra* note 102.

could have drastically curbed other UN Member States' willingness to contribute troops.¹⁰⁷

The question remains, however, whether the district court's decision will produce the desired effect of sustaining enthusiastic peacekeeping troop contributions going forward.¹⁰⁸ With the landscape of violent conflict changing at a rapid pace, especially in areas targeted by terrorist organizations,¹⁰⁹ peace operations have begun to take an increasingly arduous toll on UN Member States' resources.¹¹⁰

B. Implications of the District Court's Narrow View of Effective Control

Since the UN's inception in 1945,¹¹¹ Member States have been relied upon exclusively to supply both troops and financing for peacekeeping operations worldwide.¹¹² In order to fulfill the UN Charter goals of defending global values and preventing the recurrence of atrocities like the Holocaust,¹¹³ principle peacekeeping activities include: conflict prevention and peacemaking, peacekeeping, and peace-building.¹¹⁴ On a fundamental level, three prerequisites are widely accepted as essential to an effective peacekeeping operation: consent of the parties to the peacekeepers' presence, use of force only in self-

¹⁰⁷ See Boon, *supra* note 6, at 346; Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113, 170, 184 (2010); Lewis, *supra* note 103, at 300.

¹⁰⁸ See Boon, *supra* note 6, at 346; Dannenbaum, *supra* note 107; Lewis, *supra* note 102.

¹⁰⁹ See DAVID KEEN, *ENDLESS WAR?* 51 (2006); George R. Lucas, Jr., "New Rules for New Wars" *International Law and Just War Doctrine for Irregular War*, 43 CASE W. RES. J. INT'L L. 677, 678 (2011).

¹¹⁰ See Melanie Marquis, *Mali's Peacekeeping Needs Are 'Obvious': Bibeau*, GLOBE & MAIL (Sept. 1, 2016, 5:05 PM), <http://www.theglobeandmail.com/news/politics/malis-peacekeeping-needs-are-obvious-bibeau/article31677431/> [<https://perma.cc/WR8Q-K65U>]; *Financing Peacekeeping*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/operations/financing.shtml> [<https://perma.cc/TXL4-KM45>].

¹¹¹ *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> [<https://perma.cc/2GG7-JZ2Q>].

¹¹² See Otto Spijkers, *What's Running the World: Global Values, International Law, and the United Nations*, 4 INTERDISC. J. HUM. RTS. L. 77, 98 (2010); *Financing Peacekeeping*, *supra* note 110.

¹¹³ See U.N. Charter arts. 1, 51; Press Release, Secretary-General, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, U.N. Press Release SG/SM/7263 (Dec. 16, 1999) [hereinafter Press Release, Secretary-General].

¹¹⁴ See U.N. Secretary-General, Report of the Panel on United Nations Peace Operations, Identical letters dated Aug. 21, 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council, ¶ 10, U.N. Doc. A/55/305S/2000/809 (Aug. 21, 2000) [hereinafter U.N. Secretary-General, Report of the Panel on UN Peace Operations].

defense, and complete neutrality in the eyes of the parties in conflict.¹¹⁵ The third prerequisite—complete neutrality of UN peacekeepers—was tagged as one of the fundamental contributing factors to Dutchbat’s failure in Srebrenica and is what led UN officials to engage in a major overhaul of the UN’s conceptualization of peacekeepers roles and responsibilities in conflict zones.¹¹⁶ Now, UN peacekeeping operations appear to be compensating for their past failings by accepting more varied responsibilities and sanctioning the use of force where necessary to protect civilians.¹¹⁷ The emergence of more aggressive peacekeeping operations marks a trend toward offensive UN mandates, as opposed to traditionally neutral and defensive ones.¹¹⁸ Some scholars have postulated that it seems extremely likely that these aggressive peace-making tactics will result in more numerous claims against troop contributing countries for causing death and injury during conflict.¹¹⁹

C. Potential Peacekeeping Hurdles Due to Narrow Effective Control

One illustrative example of the potentially detrimental effects of the district court’s decision is the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).¹²⁰ Deployed on July 1, 2013, MINUSMA’s functions have run the gamut of peacekeeping operations: to protect civilians and promote human rights, facilitate negotiation between political parties in conflict, reestablish the State authority, protect UN personnel, support cultural preservation, and rebuild the security sector throughout Mali.¹²¹ MINUSMA forces, spread across the entire country, continuously run up

¹¹⁵ See Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475, 480 (2003).

¹¹⁶ See Barbara Crossette, *U.N. Details Its Failure to Stop ‘95 Bosnia Massacre*, N.Y. TIMES (Nov. 16, 1999), http://www.nytimes.com/1999/11/16/world/un-details-its-failure-to-stop-95-bosnia-massacre.html?_r=0 [https://perma.cc/682V-6KCD]; U.N. Secretary-General, Report of the Panel on UN Peace Operations, *supra* note 114, ¶¶ 1–3, 25, 104; Press Release, Secretary-General, *supra* note 113.

¹¹⁷ See S.C. Res. 2164, ¶¶ 6–9 (June 25, 2014); Editorial, *The Guardian View on UN Peacekeeping: Admirable Aims but a Troubled Record*, GUARDIAN (Aug. 21, 2016), <https://www.theguardian.com/commentisfree/2016/aug/21/the-guardian-view-on-un-peacekeeping-admirable-aims-but-a-troubled-record> [https://perma.cc/8CND-9QJQ].

¹¹⁸ See SCOTT SHEERAN & STEPHANIE CASE, INT’L PEACE INST., THE INTERVENTION BRIGADE: LEGAL ISSUES FOR THE U.N. IN THE DEMOCRATIC REPUBLIC OF THE CONGO 17 (2014); Boon, *supra* note 7, at 385.

¹¹⁹ See Boon, *supra* note 6, at 374, 385.

¹²⁰ See S.C. Res. 2164, *supra* note 117; Thomas Walkom, *Canada’s Return to UN Peacekeeping Promises Little Peace*, TORONTO STAR (Aug. 10, 2016), <https://www.thestar.com/opinion/commentary/2016/08/10/canadas-return-to-un-peacekeeping-promises-little-peace-walkom.html> [https://perma.cc/6WAA-9AR7]; *World’s Most Dangerous Peacekeeping Mission*, BBC NEWS (Nov. 20, 2015), <http://www.bbc.com/news/world-africa-34812600> [https://perma.cc/S96C-JWA9].

¹²¹ See S.C. Res. 2164, *supra* note 117, ¶¶ 13–14.

against a number of armed Islamist groups, many of which have connections to international terrorist organizations like Al-Qaeda.¹²² Many of these groups have been fighting for years to gain control over Mali and advance the spread of Islam through the use of terrorist tactics.¹²³ In the two years and eight months from MINUSMA's inception on April 25, 2013 to December 31, 2015, there were 223 recorded terrorist incidents in Mali,¹²⁴ some of which directly targeted MINUSMA forces.¹²⁵

The unprecedented damage sustained by UN peacekeepers in Mali, reaching 105 fatalities and 200 injuries in just three years, has earned MINUSMA the title of "World's Most Dangerous Peacekeeping Mission."¹²⁶ At the recommendation of Secretary-General Ban Ki-Moon, the number of MINUSMA peacekeepers has already increased to over 12,000 troops, surpassing its original forecast of 11,200 military personnel.¹²⁷ This is a new genre of peacekeeping, one that poses new and potentially unresolvable challenges to UN peacekeeping operations.¹²⁸ Unlike previous conflicts, such as the BSA attack on Srebrenica,¹²⁹ violence of the kind MINUSMA faces is geographically dispersed, instigated by habitually decentralized terrorist organizations, targeting

¹²² See Conor Gaffey, *Peacekeeping in Mali: The U.N.'s Most Dangerous Mission*, NEWSWEEK (June 12, 2016, 3:00 AM), <http://www.newsweek.com/mali-un-mission-northern-mali-conflict-aqim-africa-peacekeeping-468907> [<https://perma.cc/J5AN-K24G>]; *World's Most Dangerous Peacekeeping Mission*, *supra* note 120; *History*, UNITED NATIONS PEACEKEEPING: MINUSMA, <http://minusma.unmissions.org/en/history> [<https://perma.cc/VL57-SK88>]. Active militant groups in Mali include Mouvement national pour la libération de l'Azawad (MNLA), along with Islamic groups including Ansar Dine, Al-Qaida in the Islamic Maghreb, and the Mouvement pour l'unicité et le jihad en Afrique de l'Ouest, in addition to deserters from the Malian armed forces. See Gaffey, *supra*; *History*, *supra*.

¹²³ See Gaffey, *supra* note 122; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, FRANCE 24 (June 12, 2016), <http://www.france24.com/en/20160612-un-extend-mali-minusma-mission-deadly-islamist-attacks-peacekeepers> [<https://perma.cc/4XJY-SVMS>]; *History*, *supra* note 122.

¹²⁴ Terrorist Incidents in Mali Between Apr. 25, 2013 and Dec. 31, 2015, GLOBAL TERRORISM DATABASE, http://apps.start.umd.edu/gtd/search/Results.aspx?page=1&casualties_type=b&casualties_max=&start_year=2013&start_month=4&start_day=25&end_year=2015&end_month=12&end_day=31&dtp2=all&country=123&count=100&expanded=yes&charttype=line&chart=overtime&ob=GTIDID&od=desc#results-table [<https://perma.cc/M63B-7EWY>].

¹²⁵ See Gaffey, *supra* note 122; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, *supra* note 123.

¹²⁶ See Gaffey, *supra* note 122; Marquis, *supra* note 110; *World's Most Dangerous Peacekeeping Mission*, *supra* note 120.

¹²⁷ Gaffey, *supra* note 122; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, *supra* note 123.

¹²⁸ See Baroness Anelay, Opinion, *Africa: Making Peacekeeping Work*, ETHIOPIAN HERALD (Sept. 3, 2016), <http://allafrica.com/stories/201609061038.html> [<https://perma.cc/R3SH-PTT4>]; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, *supra* note 123; *World's Most Dangerous Peacekeeping Mission*, *supra* note 120.

¹²⁹ See *Mothers of Srebrenica IV*, ¶ 2.22.

both civilians and military personnel, and frequently motivated by religious as well as political aims instead of solely territorial gain.¹³⁰

However great its desire to avert disasters like the Srebrenica massacre, without proper human resources, financing, and focused mandate, the UN may nonetheless be overextending itself and causing more harm than good in Mali.¹³¹ Many sources, scholars and politicians alike, contend that the global war on terror—in which many of the terrorist groups in Mali are arguably key players—lacks any foreseeable end.¹³² Instead of extinguishing terrorism in places like Mali, UN peacekeepers may in fact be aggravating terrorist groups further, ineffectively resisting and unintentionally causing massive civilian and UN personnel casualties.¹³³

By so drastically limiting the State's effective control in *Mothers of Srebrenica*, the district court has set a precedent that has already accomplished its short-term goal of sustaining enthusiastic troop contribution.¹³⁴ Following this line of logic, the district court's decision may also have contributed to the maintenance of UN and its Member States' involvement in indeterminate violence, like the strife in Mali.¹³⁵ The indefinite nature of conflict with transnational terrorist organizations like Al-Qaeda, Al-Qaida in the Islamic Maghreb, Ansar Dine, and *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* will inevitably put a hefty strain on peacekeeping resources.¹³⁶ Consequently, the enthusiasm the district court sought to foster through its limitation of the

¹³⁰ See KEEN, *supra* note 109, at 18, 54; Nick J. Sciullo, *On the Language of (Counter)Terrorism and the Legal Geography of Terror*, 48 WILLAMETTE L. REV. 317, 318, 325–26 (2012); Anelay, *supra* note 128; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, *supra* note 123; Walkom, *supra* note 120; *History*, *supra* note 122.

¹³¹ See Anelay, *supra* note 128; *World's Most Dangerous Peacekeeping Mission*, *supra* note 120.

¹³² See *al-Marri v. Pucciarelli*, 534 F.3d 213, 252 (4th Cir. 2008) (Motz, J., concurring); KEEN, *supra* note 109, at 3, 20, 23; Elizabeth L. Bahr, *Is the Gavel Mightier Than the Sword? Fighting Terrorism in American Courts: The Problematic Implications of Using the Foreign Sovereign Immunities Act to Compensate Military Victims of America's War on Terror*, 15 GEO. MASON L. REV. 1115, 1156 (2008); S. Iqbal Riza, *The UN and the Future of Multilateralism: An Interview with Chef de Cabinet to the UN Secretary-General*, 27 FLETCHER F. WORLD AFF. 39, 42–43 (2003).

¹³³ See KEEN, *supra* note 109, at 12, 44.

¹³⁴ See Anelay, *supra* note 128; Gaffey, *supra* note 122; Press Release, White House Office of the Press Sec'y, Declaration of Leaders' Summit on Peacekeeping (Sept. 28, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/28/declaration-leaders-summit-peacekeeping> [<https://perma.cc/SR87-W5MX>].

¹³⁵ See Marquis, *supra* note 110; *UN Looks to Extend Mali Mission Despite Deadly Attacks on Peacekeepers*, *supra* note 123; Walkom, *supra* note 120; Press Release, White House Office of the Press Sec'y, *supra* note 134.

¹³⁶ See KEEN, *supra* note 109, at 12, 44; Marquis, *supra* note 110 (identifying uncontrollable nature of terrorist threats in Mali as a factor in Canada's decision of where to send its peacekeepers); *World's Most Dangerous Peacekeeping Mission*, *supra* note 120 (detailing how the influence of Islamist terrorist organizations has made the United Nations Multidimensional Integrated Stabilization Mission in Mali the "most dangerous [UN peacekeeping mission] on record"). See generally *Financing Peacekeeping*, *supra* note 110 (providing data on recent Member State contributions to UN peacekeeping).

State's—and, by extension, all troop contributing countries'—liability, may decline sharply as Member States' debt and death tolls rise in years to come.¹³⁷

If the district court had instead adopted a broader view of the State's effective control, it could have set a precedent more closely aligned with the UN's ostensive aim of improving its peace operations' efficacy.¹³⁸ Though expanding liability for peacekeepers' failings may have diminished Member States' willingness to contribute troops in the short-term, it could also have forced the UN to examine more judiciously the deficiencies of its current peacekeeping model.¹³⁹ For example, in light of the increasingly deadly and unpredictable terrorist attacks in Mali despite increased MINUSMA military presence, critical reflection on the UN's limited capacity to make peace could spur the organization to alter its approach.¹⁴⁰ This could lead to the UN calling on alternative military reinforcement, such as the North Atlantic Treaty Organization (NATO), which could be better equipped to address terrorist threats.¹⁴¹ Though simply conjectural at this point, because the UN already has been publicly upbraided for its reluctance to call on NATO in instances like Srebrenica, it seems possible that ceding peace-making responsibilities to alternative military organizations would be a more prudent and efficacious course of action.¹⁴²

CONCLUSION

Though likely motivated by a commendable goal of averting the demise of UN peacekeeping, the district court's adoption of a narrow view of effective control in *Mothers of Srebrenica* possibly has swung the policy pendulum too far towards nonexistent liability. The immediate goal of encouraging Member States to continue providing troops has been accomplished by reducing liability for triggering death and injury during UN missions. Nonetheless, in light of the recent overhaul and expansion of the UN's peacekeeping approach, this goal appears overzealous. Peacekeeping now entails more complex and dangerous missions, inevitably accompanied by rising death tolls and increased

¹³⁷ See Boon, *supra* note 6, at 367, 377; den Dekker, *supra* note 96, at 7; Marquis, *supra* note 111; *World's Most Dangerous Peacekeeping Mission*, *supra* note 120; *Financing Peacekeeping*, *supra* note 110.

¹³⁸ See U.N. Secretary-General, Report of the Panel on UN Peace Operations, *supra* note 114, ¶¶ 1, 9, 25; Press Release, Secretary-General, *supra* note 113; *UN Global Counterterrorism Strategy*, UNITED NATIONS: CTITF, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> [<https://perma.cc/E4RT-QZKT>].

¹³⁹ See U.N. Secretary-General, Report of the Panel on UN Peace Operations, *supra* note 114, ¶¶ 6, 9; Boon, *supra* note 6, at 346, 347; Lucas, *supra* note 109, at 692–93; Press Release, Secretary-General, *supra* note 113.

¹⁴⁰ See U.N. Secretary-General, Report of the Panel on UN Peace Operations, *supra* note 114, ¶ 2; Crossette, *supra* note 116.

¹⁴¹ See Boon, *supra* note 6, at 346; Crossette, *supra* note 116.

¹⁴² See U.N. Secretary-General, Report of the Panel on UN Peace Operations, *supra* note 114, ¶¶ 1–3, 25, 104; Crossette, *supra* note 116.

demands on human and financial resources. Given the protracted and dynamic nature of the struggle against terrorism, it is doubtful operations like MINUSMA will reach any logical conclusion in the near future. Without critical reflection on the long-term effects of low-liability for peacekeepers, these troop contributions, though doubtlessly motivated by many ethical and political concerns, could be considered uninformed if not fundamentally misguided.

