The Supreme Court of the Netherlands—acts and omissions of Dutch peacekeepers—attribution —compensation for damages

THE STATE OF THE NETHERLANDS v. RESPONDENTS & STICHTING MOTHERS OF SREBRENICA. No. 17/04567. *At* https://uitspraken.rechtspraak.nl/inziendocument?id = ECLI:NL:HR:2019:1284.
Supreme Court of the Netherlands, July 17, 2019.

The July 2019 decision of the Supreme Court of the Netherlands constitutes the final act of a long litigation arising from the July 1995 genocide in Srebrenica. After Bosnian Serb militias attacked the safe area of Srebrenica, members of the Dutch battalion (Dutchbat), which was responsible for safeguarding the enclave under a UN mandate, permitted between 8,000 and 10,000 men and boys to be taken away by Bosnian Serb forces. Those men and boys were eventually killed by forces commanded by General Ratko Mladić and Radovan Karadžić, president of the autonomous Republika Srpska. This Supreme Court decision and related rulings involve issues of international responsibility for the conduct of peacekeepers—in particular, attribution of conduct to the United Nations and its member states and immunity of international organizations.

Prior to this decision, the District Court, the Court of Appeal, the Supreme Court of the Netherlands, and the European Court of Human Rights (ECtHR) had all found that while the United Nations had immunity before domestic courts, proceedings could continue against The Netherlands.[1] On the issue of state responsibility, the District Court found that the state was liable for the damage suffered by the persons represented by Stichting Mothers of Srebrenica. On appeal, the state was found to have acted wrongfully by facilitating the evacuation of men and boys into the buses provided by the Bosnian Serb Forces and by not letting the remaining refugees stay. The Court of Appeals assigned 30 percent liability to the Netherlands. The Supreme Court also found the state partially responsible for the damages arising from the conduct of Dutch peacekeepers, opening a door to reparations for victims of peacekeeper malfeasance.[2] Nonetheless, it reduced the percentage of liability from 30 percent to 10 percent. This reduction was based on Dutch tort law and the Supreme Court's factual assessment of the events between June 11–13, 1995. The Court reasoned that there was only a 10 percent chance that Dutchbat could have saved the victims, given the control of the area exercised by the Bosnian Serb forces. The Supreme Court's decision is notable for its emphasis on the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) at the expense of the Articles on the Responsibility of International Organizations (ARIO), which led to a narrow approach to shared responsibility and the attribution of wrongful conduct.

[1] Mothers of Srebrenica Association et al. v. The Netherlands and the United Nations, ECLI:NL:RBSGR:2008:BD6795, Decision (The Hague Dist. Ct. July 10, 2008) (Neth.); Mothers of Srebrenica Association et al. v. The Netherlands and the United Nations, ECLI:NL:GHSGR:2010:BL8979, Decision (The Hague Ct. App. Mar. 20, 2010) (Neth.); Mothers of Srebrenica Association et al. v. The Netherlands and the United Nations, ECLI:NL:HR:2012:BW1999, Decision (Sup. Ct. Neth. Apr. 13, 2012) (Neth.); Stichting Mothers of Srebrenica and Others v. The Netherlands, Appl. No. 65542/12, Decision (Eur. Ct. Hum. Rts. June 11, 2013); Mothers of Srebrenica Association et al. v. The Netherlands, ECLI: NL:GHDHA: 2017:3376, Judgment (The Hague Ct. App. June 27, 2017) (Neth.).

[2] Mothers of Srebrenica Association et al. v. The Netherlands, ECLI:NL:HR:2019:1223, Judgment, para. 4.7.9 (English translation: ECLI:NL:HR:2019:1284) (Sup. Ct. Neth. July 19, 2019) (Neth.) [hereinafter *Mothers of Srebrenica*].

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The factual background to the litigation concerns the ethnic and religious conflicts in the Balkans. On March 3, 1992, the Republic of Bosnia and Herzegovina declared itself independent from the Socialist Federal Republic of Yugoslavia. On March 27, 1992, the Bosnian Serbs (the Serbs living in Bosnia) also declared themselves independent of the new state of Bosnia and Herzegovina, and fighting erupted between the army of Bosnia and Herzegovina, dominated by Bosnian Muslims, and the Army of Republika Srpska (VRS). On June 8, 1992, the Security Council extended the United Nations Peace Forces (UNPROFOR) mandate, initially established in Croatia, to include Bosnia and Herzegovina.

In 1992, the United Nations established Srebrenica as a safe area and demanded that it be kept free from armed and hostile attacks.[3] Two years later, the Netherlands sent a military unit to participate in UNPROFOR identified as Dutchbat, which was placed under the command of the United Nations and functioned as an UNPROFOR contingent. Dutchbat was deployed to the Srebrenica enclave and set up its headquarters in an abandoned factory at Potočari. This compound was situated in the safe area approximately five kilometers from Srebrenica.

On July 6, 1995, the VRS, under General Mladić, launched an attack on the safe area. The Dutchbat retreated and allowed the VRS to disarm them (para. 28). On July 11, Srebrenica fell into Bosnian Serb hands. Approximately 20,000 to 25,000 refugees sought refuge in the mini safe area of the Potočari compound (para. 41). Approximately 10,000 to 15,000 men fled into the woods, and approximately 6,000 of those men fell into Serb hands (para. 42). On the evening of July 11, 1995, UNPROFOR began to discuss with Mladić the evacuation of the refugees. UNPROFOR and Mladić arranged that Dutchbat would supervise the evacuation, and Mladić would personally take care of their transport, with men and boys leaving first (para. 46). Dutchbat supervised the movement of refugees to the buses by creating a corridor of vehicles and a human cordon of soldiers and tape (para. 49). At the time, the Bosnian Serb forces were not aware that approximately three hundred men remained in the compound after the evacuation. A list of 251 names was compiled of these remaining male refugees, and it was faxed to international and national authorities, and also reported to the Serbs (para. 56). By the evening of July 13, 1995, all men inside the mini-compound were also forced to leave the base (para. 58). Shortly thereafter, reports of massacres emerged. Many of the refugees were forced to dig their own graves, and were then shot in the back.

The central legal issue in the case was whether the Dutch state, via the acts of Dutchbat, was responsible in whole or in part for the deaths of the Bosnian victims. The plaintiffs were the Stichting Mothers of Srebrenica (Stichting Mothers) who represented the relatives of 6,000 victims. They initiated suit against the Netherlands and the United Nations in 2007. The plaintiffs argued that the defendants should be held responsible for the deaths because they did too little to protect the population of the safe area around Srebrenica and during the evacuation of the refugees, and cooperated in the separation of males from other refugees. The Dutch state argued that the deaths were caused by the acts of the VRS.

At the District Court level, the state was held liable for the damage as a result of Dutchbat's cooperation in loading and deporting the male refugees, who were later executed on the afternoon of July 13, 1995.[4] On appeal, the state was found to have acted wrongfully on two

[3] SC Res. 819 (Apr. 16, 1993).

[4] Mothers of Srebrenica Association et al. v. The Netherlands, ECLI:NL:RBDHA:2014:8748, Judgment, paras. 4.337–4.338, 4.342–4.343 (The Hague Dist. Ct. July 16, 2014) (Neth.).

grounds: (1) by facilitating the separation of the male refugees by the Bosnian Serbs and allowing them to go to the buses; and (2) by not giving the male refugees inside the compound on July 13, 1995 the choice of staying there. As a result, the court found the state had denied those men and boys a 30 percent chance of being spared inhumane treatment and executions by the Bosnian Serbs. The state was ordered to compensate the victims for the damage.[5]

United Nations peacekeeping operations are complex because they involve troops that are placed at the disposal of the United Nations.[6] This series of decisions, in addition to two earlier Dutch cases, *Nuhanović* and *Mustafić,* involving individuals who sought refuge on the compound and were later killed, all addressed whether peacekeeper conduct should be attributed to the United Nations, to the member states that contributed troops, or to both.[7]

One approach to attribution of wrongful peacekeeper conduct arises from ARIO. Article 6 of ARIO provides that the conduct of an organ of an international organization is attributable to that organization.[8] In addition, Article 7 provides that "the conduct of an organ of a State . . . that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."[9] There was disagreement between the parties and the courts as to how to apply these articles. The Netherlands argued that Article 6 applied because Dutchbat was an organ of the United Nations.[10] However, the International Law Commission's commentary indicated that attribution of conduct of peacekeeping operations should be based on Article 7 and follow from factual considerations.[11]

ARSIWA offers an alternative approach to attribution. Under Article 4, "the conduct of any State organ shall be considered an act of that State under international law."[12] Under Article 8, "the conduct of a . . . group of persons shall be considered an act of a state under international law if . . . the group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[13] If Dutchbat was an organ of the Netherlands, then its acts would be attributable to that state. However, if,

[5] *Mothers of Srebrenica Association et al. v. The Netherlands*, ECLI: NL:GHDHA: 2017:3376, *supra* note 1, para. 4.344.

[6] *See* Cedric Ryngaert & Otto Spijkers, *The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgement in Mothers of Srebrenica*, 66 NETH. INT'L L. REV. 537 (2019).

[7] "Hasan Nuhanović worked as an interpreter for Dutchbat. When the enclave fell, Nuhanović was permitted to leave with Dutchbat, but they refused to protect his relatives. Nuhanović's father and brother were handed over to the Bosnian Serb Army and were killed. Rizo Mustafć was working as an electrician for Dutchbat, and was thus on the list of local staff members who were permitted to evacuate with Dutchbat. However, because of some administrative misunderstanding, members of Dutchbat at the crucial time were not aware that his name was on the list, and told him to leave the compound. This led to his death at the hands of the Bosnian Serbs." *Id.* at 539, nn. 4–5. These cases were procedurally decided together.

[8] Draft Articles on the Responsibility of International Organizations, Art. 6, UN Doc. A/66/10 (2011), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf [hereinafter ARIO].

[9] *Id.* Art. 7

[10] Importantly, the UN also took this position in its comments on ARIO. Comments and Observations on Responsibility of International Organizations Received from International Organizations, Comments from United Nations Secretariat at 28, UN Doc. A/CN.4/545 (June 25, 2004).

[11] Report of the International Law Commission of Its Sixty-Third Session (April 26–June 3, July 4–August 12, 2011), at 90, UN Doc. A/66/10.

[12] Articles on State Responsibility for Internationally Wrongful Acts, Art. 4, UN Doc. A/56/49(Vol. I)/Corr.4 (2001) [hereinafter ARSIWA].

[13] *Id.* Art. 8.

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after it is placed at the disposal of the United Nations, it was no longer an organ of the Netherlands, then Article 8 of ARSIWA would apply.[14]

In the *Nuhanović* case, the Supreme Court, applying Article 7 of ARIO and Article 8 of ARSIWA, held that it was possible that both the Netherlands and the United Nations had effective control over the same wrongful conduct and that attributing the conduct to the Netherlands did not in any way determine whether the United Nations also had effective control.[15] Importantly, however, the Court did not consider Dutchbat to be either a UN or a state organ.[16] Instead, attribution of conduct depended on who exercised effective control as a factual matter. Moreover, the Supreme Court upheld the Court of Appeal's reasoning that effective control was linked with the entity that had the power to prevent wrongful conduct.[17]

In the current decision, however, the Supreme Court set aside the Court of Appeal's finding on the power-to-prevent standard.[18] The Supreme Court concluded that the power-to-prevent standard was based on an incorrect interpretation of the law, namely that under Article 8 of ARSIWA, effective control exists in the event of "[a]ctual participation of and directions given by that state."[19] The decision then analyzed Article 8, assessing the factual control of the specific conduct actually exercised by Dutchbat. The Supreme Court discussed the commentary to Article 8 and the interpretations of the effective control test in *Military and Paramilitary Activities in and Against Nicaragua*, *Bosnia and Herzegovina v. Serbia and Montenegro*, and *Prosecutor v. Tadić* (paras. 3.4.2–3.4.3). It upheld the Court of Appeal's decision that the state had no effective control of the acts of which Dutchbat was accused (para. 3.5.5).

Another issue of note in the decision was whether the peacekeepers' acts were *ultra vires,* that is, outside the scope of their authority. Stichting Mothers had argued that acts of Dutchbat that did not comply with orders of their United Nations Command should be attributed to the Netherlands. This argument was accepted by the District Court but rejected on appeal, on the basis that any *ultra vires* acts of peacekeepers should be attributed to the United Nations (para. 3.6.1).[20] Article 8 of ARIO provides that *ultra vires* acts of the organs of an international organization, as covered by Article 6 of ARIO, are attributable to that organization.[21] However, as noted above, peacekeepers are dealt with under a different provision of ARIO, Article 7, which does not consider peacekeepers to be organs of an international organization.[22]

[14] Ryngaert & Spijkers, *supra* note 6, at 542.

[15] Netherlands v. Mustafić-Mujić, 12/03329, Decision, paras. 3.11.2–3.12.3 (Sup. Ct. Neth. Sept. 6, 2013) (Neth.) (English translation).

[16] Ryngaert & Spijkers, *supra* note 6, at 542.

[17] *Netherlands v. Mustafić-Mujić*, *supra* note 15, paras. 3.11.2–3.12.3.

[18] *Mothers of Srebrenica*, *supra* note 2, para. 3.5.3.

[19] *Netherlands v. Mustafić-Mujić*, *supra* note 15, paras. 3.11.2–3.12.3. *See also* International Law Commission, Responsibility of States for Internationally Wrongful Acts, Art. 8, Commentary (3), (4) (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[20] "Article 8 DARIO—which, according to the Commentary to this article (at 9), also applies to UN Peacekeeping troops like Dutchbat—provides that *ultra vires* conduct is in principle attributed to the international organization [citations omitted]."

[21] ARIO, *supra* note 8, Art 8.

[22] *Id.* Art. 7

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In addition to integrating international legal standards into the analysis, it is significant that the Supreme Court used Dutch law to evaluate whether the Dutchbat command "knew or ought to have known" of the fate awaiting the separated male refugees (paras. 4.1–4.2.1). The Supreme Court answered in the affirmative, concluding that Dutchbat's command knew that there was a real risk that the Bosnian Serbs would violate the rights to life and physical integrity of the male refugees protected by Articles 2 and 3 of the European Convention on Human Rights (*id.*). Nonetheless, on the issue of damages, the Supreme Court agreed with the Court of Appeal that the battalion could not reasonably have avoided the risk of violating the rights of the males in the compound, because ceasing to cooperate with the VRS would have led to chaos and potential deaths (para. 4.5.4).

The Supreme Court disagreed, however, with the Court of Appeals that the Dutch state denied the victims a 30 percent chance of not being subjected to inhumane treatment and executions by the Bosnian Serbs, although it found that the Dutch peacekeepers had acted wrongfully when they did not allow individuals already in the compound the opportunity to stay. Applying Dutch law rather than international law, and considering whether Ratko Mladić and his paramilitaries would have tried to forcibly remove the men from the peacekeepers compound, the Supreme Court reduced the responsibility of the Dutch state from 30 percent to 10 percent (paras. 4.5.4, 6). As the Court explained:

> the prospects of the male refugees were very bleak, even if they were to remain in the compound. . . . They probably would have done everything within their power to remove the men from the compound or to have them removed . . . . [O]n the other hand, it cannot be completely ruled out that if Dutchbat had been able to withstand the threat of violence, the Bosnian Serbs would not have been willing to risk attacking the compound on order to deport the male refugees. In that event, after all, they would have to commence an open attack on UN troops, which could lead to international outrage and escalation of the conflict. (Para 4.7.9)

Another issue that arose in the case involved the duty to prevent genocide. The Supreme Court evaluated whether the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) has direct effect, but found that it is not specific enough to contain direct obligations on the duty to prevent.[23] The Court stated that the text and legislative history of the Genocide Convention "offer no ground[s] for the assumption that the Contracting States intended to assign direct effect to the obligation of effort defined in Article I of the Genocide Convention" (para. 3.7.3). Moreover, the Court went on to note that although Article I of the Genocide Convention provides

[23] The duty to prevent has been recognized as an obligation *erga omnes*. Orna Ben-Naftali, *The Obligations to Prevent and to Punish Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 36 (Paola Gaeta ed., 2009). The ICJ in the *Bosnian Genocide Case* said that the duty to prevent is "one of conduct not of result in the sense that a state cannot be under an obligation to succeed." *Id.* at 40 (quoting the *Bosnian Genocide Case*). A state is to employ "all means reasonably available" and is responsible if the state "manifestly failed to take all measures to prevent that were within its power." *Id.* (quoting the *Bosnian Genocide Case*). In other words, the Court adopted a due diligence standard. *Id.* Anja Seibert-Fohr, *State Responsibility for Genocide Under the Genocide Convention*, *in* Gaeta, *supra*, at 357 (emphasis added). The Court had previously construed broadly the obligations under the Genocide Convention in its 1951 Advisory Opinion on Reservations to the Genocide Convention. *Id.*

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that the contracting parties undertake to prevent genocide, it does not determine the manner in which they will do so (*id.*).

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There are three main areas of jurisprudential import apparent in this decision: the Court's emphasis on ARSIWA rather than ARIO; the effect of this decision on shared responsibility and the power-to-prevent standard for attribution of conduct; and the Court's determination that the Genocide Convention imposes no specific direct obligations that can be applied in a dispute between a citizen and the state.

As an initial matter, it is noteworthy that the Supreme Court relied on ARSIWA rather than ARIO, demonstrating the greater authority that ARSIWA continues to enjoy.[24] The original conception of the two sets of articles was that they would be complementary; ARIO was modeled after ARSIWA and expected to follow in its footsteps.[25] Indeed, the International Law Commission began working on the topic in 2002, soon after the completion of ARSIWA, with the intention of extending and adapting those articles to international organizations.[26] That a national court did not give priority to ARIO on an issue involving United Nations peacekeepers suggests that the Articles have not taken root.

It was in applying ARSIWA that the Supreme Court reasoned that the power-to-prevent standard promulgated by the District Court was not applicable.[27] This standard was based on prior decisions that the Dutch government "would have had the power to prevent the alleged conduct," and that effective control includes the power to prevent.[28] As noted above, Dutch courts had previously accepted the power-to-prevent notion of attribution of conduct, expanding the concept in cases of omission.[29] The expansion of responsibility for both states and international organizations for wrongdoing was an important and exciting jurisprudential trend. The power-to-prevent standard of attribution opened up significant opportunities for plaintiffs to bring claims against peacekeeper in cases of wrongdoing.[30] However, in this decision, the Supreme Court clearly rejected this approach to attribution. The Court reasoned that under ARSIWA, no such standard is applicable; rather, effective control is based on factual control.

[24] The International Law Commission (ILC) itself acknowledged that the ASRIWA hold more authority than ARIO. ARIO, *supra* note 8, paras. 5–6. Nonetheless, ARIO was a project that faced criticism since its inception. Several areas were considered problematic: that ARIO does not sufficiently recognize the differences between states and international organizations (an apples and oranges problem); that ARIO does not sufficiently differentiate between the different kinds of international organizations (i.e., that ARIO does not distinguish between international financial institutions, international courts, and United Nations specialized agencies); that ARIO was created before the primary rules applicable to international organizations were more developed; and that ARIO is based on limited state practice. *See, e.g.*, Mirka Möldner, *Responsibility of International Organizations – Introducing the ILC's DARIO*, 16 MAX PLANCK Y.B. UN L. 281 (2012); José E. Alvarez, *Revisiting the ILC's Draft Rules on International Organization Responsibility*, 105 ASIL PROC. 344 (2011).

[25] Möldner, *supra* note 24, at 284.

[26] *Id.* at 285.

[27] *Mothers of Srebrenica*, *supra* note 2, para. 3.3.5 ("The provisions in DARIO concerning the attribution of conduct to an international organization are not directly relevant in these proceedings.")

[28] Nuhanović v. The Netherlands, ECLI:NL:GHSGR:2011:BR5388, Decision, para. 5.18 (The Hague Ct. App. July 5, 2011) (Neth.).

[29] ARIO, *supra* note 8, Art. 4 (noting that the term conduct covers both acts and omissions).

[30] *See generally* 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 (2010).

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In retreating from a power-to-prevent standard, the Supreme Court made it harder to establish shared responsibility. The Court of Appeal's approach of identifying the entity that is best able to prevent wrongful conduct was a step forward in access to justice and, eventually, remedies for victims. The Supreme Court's decision was a retreat in that sense.

Moreover, one of the justifications for continuing to uphold United Nations immunities has been that Stichting Mothers could sue the Netherlands, giving them access to an effective remedy.[31] Under the Supreme Court's *Mothers of Srebrenica* approach, the acts of UN peacekeepers will ordinarily be attributed exclusively to the United Nations. As Cedric Ryngaert and Otto Spijkers note, the UN normally exercises command and control over peacekeepers and therefore wrongdoing is attributed to the United Nations.[32] Rather than exploring the possibility of shared responsibility between the United Nations and the Netherlands, however, the Supreme Court focused on the probabilities of survival of the victims. Unfortunately, this further cements an accountability gap between victims of peacekeeper wrongdoing and reparations.[33]

As noted above, the Court distinguished between the duty to punish and the duty to prevent genocide and found that the obligation to prevent genocide is formulated in general terms and does not entail precise obligations that can be applied directly in a dispute between an individual and the state (para. 3.7.3). The Court reached this conclusion by reviewing the text and the legislative history of the Genocide Convention, pursuant to Articles 31, 32, and 33 of the Vienna Convention of the Law of Treaties (para. 3.7.2). The rejection of this separate ground of state responsibility for the duty to prevent genocide rolls back the International Court of Justice (ICJ) decision in the *Bosnian Genocide Case*, which also dealt with the Srebrenica massacre. There, the ICJ distinguished between the duty to prevent and the duty to punish genocide, noting that the duty to prevent genocide is in effect a duty of effort, not of result: "the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome."[34] Interestingly, the Dutch advocate general interpreted the relevant provisions of the Genocide Convention differently from the Court, calling for clarification of the scope of the duty to prevent:

> According to the International Court of Justice, the obligation to prevent genocide is not absorbed by the obligation to punish genocide. Unlike the obligation to punish genocide, which is fleshed out in the other articles of the Genocide Convention, the obligation to prevent genocide is not fleshed out, other than in Article VIII. This is why it is much

[31] Guido den Dekker & Jessica Schechinger, *The Immunity of the United Nations Before the Dutch Courts Revisited*, THE HAGUE JUSTICE PORTAL, at 8 (2010) *available at* http://www.haguejusticeportal.net/index.php?id=11748.

[32] Ryngaert & Spijkers, *supra* note 6.

[33] *See generally* CARLA FERSTMAN, INTERNATIONAL ORGANIZATIONS AND THE FIGHT FOR ACCOUNTABILITY (2017); *see also* Tom Dannenbaum, *A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands*, EJIL:*TALK!* (July 23, 2019), *at* https://www.ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands.

[34] Case Concerning Application on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Merits, 2007 ICJ Rep. 43, para. 461, *available at* https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf.

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> more the case than with the obligation to punish genocide, which—in view of the above—has no direct effect, to clarify the scope of the obligation to prevent genocide that ensues from Article I of the Genocide Convention and the specific measures that this obligation demands.[35]

The Supreme Court's finding that the duty to prevent genocide imposes no specific direct obligations was not a foregone conclusion. It is significant that some national jurisdictions have given the Genocide Convention direct effect or implemented the treaty directly in domestic law.[36]

There are very few cases in national courts in which peacekeeper wrongdoing has been assessed. From this perspective, *Stichting Mothers of Srebrenica* is as an important decision by a domestic high court on the question of international responsibility. However, it is disappointing that the decision takes a conservative approach to the issues of effective control and shared responsibility, both concepts that allow for a more accurate allocation of international responsibility in complex peacekeeping operations. Moreover, the finding that the duty to prevent genocide has no direct effect will reverberate: the Genocide Convention is one of the great achievements of the twentieth century, and this decision reduces state responsibility for acting in a timely manner to save potential victims.

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Italian Court of Cassation—sovereign immunity—acta jure imperii—jus cogens—*violation of fundamental human rights and humanitarian law—enforcement of foreign judgment granting compensation—third party attachment*

DEUTSCHE BAHN AG v. REGIONE STEREÁ ELLADA. Judgment No. 21995 (IT:CASS:2019:21995CIV). *At* http://www.italgiure.giustizia.it/sncass.
Corte di Cassazione (III Division), September 3, 2019.

With Judgment No. 21995/2019 (the Judgment), the Italian Court of Cassation (Court of Cassation) once again tackled the limits of sovereign immunity with regard to crimes against humanity (para. 7).[1] The Judgment is part of litigation originating in Greece with the Leivadia Tribunal's 1997 *Distomo* decision,[2] confirmed in 2000 by the Areopago (Hellenic

[35] Mothers of Srebrenica Association et al. v. The Netherlands, ECLI:NL:PHR:2019:95, Opinion of the Advocate General, para. 4.69 (English translation: ECLI:NL:PHR:2019:785) (Sup. Ct. Neth. Feb. 1, 2019) (Neth.).

[36] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 347–52 (2000).

[1] Deutsche Bahn AG v. Regione Stereá Ellada, Judgment No. 21995 (IT:CASS:2019:21995CIV), para. 7 (Court of Cassation (III Division) Sept. 3, 2019) (It.) [hereinafter Judgment]. The decisions rendered by the Court of Cassation as of 2015 may be retrieved at http://www.italgiure.giustizia.it/sncass.

[2] Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case), Case No.137/1997, Judgment (Court of First Instance of Leivadia Oct. 30, 1997) (Greece). Ilias Bantekas, *Case Note:* Prefecture of Voiotia v. Federal Republic of Germany, 92 AJIL 765 (1998).