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Assembling Pieces of Accountability for the Srebrenica Genocide

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Introduction

After the fall of the Srebrenica enclave in Bosnia and Herzegovina (BiH or Bosnia) in July 1995, thousands of civilians were subjected to sexual violence, nearly 30,000 women, children and elderly people were forcibly expelled, and over 7,000 Bosnian Muslim men and boys were executed. These killings have been qualified as genocide by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ). Survivors and victims' families have engaged in efforts to hold those responsible to account. Indeed, the Srebrenica genocide has been the subject of multiple legal proceedings against various actors before different courts, at both the national and international level. Amongst others, the ICTY has sentenced various individual perpetrators in criminal proceedings, the ICJ has ruled on the international responsibility of the Serbian state, and Dutch courts have been asked to rule on the responsibility of the Dutch state and the United Nations (UN) under domestic tort law. Yet almost 30 years after the genocide, accountability gaps remain. For instance, many criminal proceedings are still ongoing in Bosnia and Serbia, while no court has ruled on the UN's responsibility for its failure to protect the people who had sought refuge in a UN-protected safe area.

Both the Srebrenica genocide and its legal responses have received much attention in scholarship.[1] For instance, much has been written on the work of the ICTY,[2] the ICJ judgment in the

[1] See for instance Marko Attila Hoare, "A Case Study in Underachievement: The International Courts and Genocide in Bosnia-Herzegovina," *Genocide Studies and Prevention* 6, no. 1 (2011), 81–97, accessed October 19, 2024, https://digitalcommons.usf.edu/gsp/vol6/iss1/12/; Cedric Ryngaert and Nico Schrijver, "Lessons Learned from the Srebrenica Massacre: From UN Peacekeeping Reform to Legal Responsibility," *Netherlands International Law Review* 62, no. 2 (2015), 219–227, accessed October 19, 2024, https://link.springer.com/article/10.1007/s40802-015-0034-x; Luisa Vierucci, ed., "Foreword," *Journal of International Criminal Justice* 14, no. 4 (2016), 815–817, accessed October 19, 2024, https://doi.org/10.1093/jicj/mqw041.

[2] Among many other examples, see William A. Schabas, "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia," *Fordham International Law Journal* 25, no. 1 (2001), 23–53, accessed October 19, 2024, https://ir.lawnet.fordham.edu/ilj/vol25/iss1/2; Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 27, no. 3 (2005), 908–942, accessed October 19, 2024, https://doi.org/10.1353/hrq.2005.0045; Barbora Hola and Olivera Simić, eds., "ICTY Celebrities: War Criminals Coming Home," special issue, *International Criminal Justice Review* 28, no. 4 (2018), 285–290, accessed October 19, 2024, https://doi.org/10.1177/1057567718770707; Besmir Fidahić, "Case Study: The International Criminal Tribunal for the Former Yugoslavia's Court Transcripts in Bosnian/Croatian/Serbian—Part 1: Needs, Feasibility, and Output Assessment," *Genocide Studies and Prevention* 15, no. 2 (2021), 37–48, accessed October 19, 2024, https://doi.org/10.5038/1911-9933.15.2.1846.

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case of *Bosnia and Herzegovina v. Serbia and Montenegro*,[3] and the litigation of the Mothers of Srebrenica foundation before Dutch courts[4] and the European Court of Human Rights (ECtHR).[5] Yet few scholars discuss accountability for the Srebrenica genocide across multiple legal regimes, and to the best of our knowledge no study exists of the aggregate effect of the multiplicity of legal proceedings.[6]

Accordingly, the aim of this article is to answer the following question: to what extent have multiple adjudicatory mechanisms across legal regimes managed to deliver accountability for the Srebrenica genocide, and what are the remaining accountability gaps? We will answer this question by analyzing international and domestic case-law[7] and examining which actors have been held accountable (and to what extent) under various legal regimes for acts and omissions pertaining to the Srebrenica genocide.[8] We focus exclusively on *legal* accountability mechanisms that establish whether or not an actor can be held responsible for a breach of a legal obligation. While we recognize that other forms of accountability have an essential role to play

[3] Among many other examples, see Marko Milanović, "State Responsibility for Genocide: A Follow-Up," *European Journal of International Law* 18, no. 4 (2007), 669–694, accessed October 19, 2024, https://doi.org/10.1093/ejil/chm043; William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes," *Genocide Studies and Prevention* 2, no. 2 (2007), 101–122, accessed October 19, 2024, https://digitalcommons.usf.edu/gsp/vol2/iss2/2; David Scheffer, "The World Court's Fractured Ruling on Genocide," *Genocide Studies and Prevention* 2, no. 2 (2007), 123–136, accessed October 19, 2024, https://doi.org/10.3138/gsp.2.2.123; Dermot Groome, "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?" *Fordham International Law Journal* 31, no. 4 (2008), 911–989, accessed October 19, 2024, https://ir.lawnet.fordham.edu/ilj/vol31/iss4/7.

[4] See, for instance, Nataša Nedeski and Berenice Boutin, "The Continuing Saga of State Responsibility for the Conduct of Peacekeeping Forces: Recent Practice of Dutch and Belgian Courts," in *Netherlands Yearbook of International Law 2019—Yearbooks in International Law: History, Function and Future*, ed. Otto Spijkers et al. (The Hague: T.M.C. Asser Press, 2021), 310–322, accessed Decelber 22, 2024, https://doi.org/10.1007/978-94-6265-403-7_25; Cedric Ryngaert and Kushtrim Istrefi, eds., "Introduction: Special Issue 'The Legacy of the *Mothers of Srebrenica* Case'," *Utrecht Journal of International and European Law* 36, no. 2 (2021), 114–117, accessed October 19, 2024, https://doi.org/10.5334/ujiel.552.

[5] See, for instance, Kimberly Faith, "*Stichting Mothers of Srebrenica v. Netherlands*: Does U.N. Immunity Trump the Right of Access to a Court?" *Tulane Journal of International and Comparative Law* 22, no. 2 (2014), 359–376; Valentina Spiga, "Effective Limitations and Illusory Rights: A Comment on the *Mothers of Srebrenica* Decision of the European Court of Human Rights," *Italian Yearbook of International Law Online* 23, no. 1 (2014), 269–286, accessed October 19, 2024, https://doi.org/10.1163/22116133-90230047.

[6] For some early attempts to discuss accountability across multiple legal regimes, see Otto Spijkers, "Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica," *Human Rights & International Legal Discourse* 1, no. 2 (2007), 231–266, accessed October 19, 2024, https://ssrn.com/abstract=1566782; Andreas von Arnauld and Sinthiou Buszewski, "Modes of Legal Accountability: The Srebrenica Example," *Die Friedens-Warte* 88, no. 3/4 (2013), 15–44, accessed October 19, 2024, https://www.jstor.org/stable/23774049.

[7] In the absence of a database containing all the legal proceedings regarding the Srebrenica genocide, we cannot claim with complete certainty that we provide a fully exhaustive overview of the case-law, in particular when it comes to domestic law proceedings. An important caveat in this regard concerns language, as we have only limited access to non-English language sources, especially those in Bosnian and Serbian. Nevertheless, considering how much attention (legal responses to) the Srebrenica genocide has received, we assume for present purposes that most, if not all, legal procedures have been reported in English language media and/or scholarship.

[8] Litigation initiated by Dutchbat veterans and by ICTY defendants that does not pertain to the genocide as such falls outside the scope of our analysis. See for example District Court of The Hague November 1, 2005, ECLI:NL:RBSGR:2005:AU6006; Central Board of Appeal March 25, 2013, ECLI:NL:CRVB:2013:BZ1164; Central Board of Appeal April 9, 2015, ECLI:NL:CRVB:2015:1129; District Court of The Hague March 21, 2016, ECLI:NL:RBDHA:2016:2995; District Court of The Hague February 26, 2002, ECLI:NL:RBSGR:2002:AD9602; *Milošević v. The Netherlands*, ECtHR, no. 77631/01, March 19, 2002; *Blagojević v. The Netherlands*, ECtHR, no. 49032/07, June 9, 2009.

in addressing the needs and wants of victims as well as broader societal demands, they fall outside the scope of our present inquiry.[9]

Throughout our exploration and analysis of domestic and international case-law on the Srebrenica genocide, we aim to identify legal accountability gaps alongside two dimensions, one of which focuses on (access to) legal procedures (procedural accountability) and the other on the substantive outcome of these procedures from the perspective of victims' right to remedies and reparation (substantive accountability). First, we consider an accountability gap to arise when actors that have contributed to the Srebrenica genocide, whether through their action or inaction, have not been brought before a court that is able to rule on their legal responsibility and determine whether or not they have acted in breach of the law. From this procedural perspective, no accountability gap arises as long as relevant actors have been brought before a court with fair procedures, regardless of the substantive outcome of such legal proceedings.[10] Second, we also reflect on the substantive dimension of accountability: the extent to which legal proceedings that hold responsible actors to account leave gaps from the perspective of victims' right to reparation for serious human rights violations.[11] The right to reparation of individuals is increasingly recognized under international law,[12] and can be fulfilled through a combination of restitution, compensation, rehabilitation, satisfaction (which can come in different modalities and may include, for instance, legal recognition of wrongdoing, an apology or punishment of perpetrators) and guarantees of non-repetition.[13] From this perspective, a substantive accountability gap can also result from a procedurally correct legal decision that fails to hold to account an actor that has contributed to the genocide, or from a decision to award compensation only for a portion of the harm.

Below, we start by briefly recalling the events leading up to and following the Srebrenica genocide in order to contextualize the role that key actors have played, many of whom would later become the subject of legal proceedings. The following sections then discuss in turn the cases that have been adjudicated under domestic and international criminal law, tort law, and international state responsibility law. The final section provides an overarching analysis of the extent to which legal accountability for the Srebrenica genocide has been achieved and the accountability gaps that remain.

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[9] See, for instance, Olivera Simić and Kathleen Daly, "'One Pair of Shoes, One Life': Steps Towards Accountability for Genocide in Srebrenica," *International Journal of Transitional Justice* 5, no. 3 (2011), 1127–1145, accessed October 19, 2024, https://doi.org/10.1093/ijtj/ijr020; Larissa van den Herik, "Accountability Through Fact-Finding: Appraising Inquiry in the Context of Srebrenica," *Netherlands International Law Review* 62 (2015), 295–311, accessed October 19, 2024, https://doi.org/10.1007/s40802-015-0035-9.

[10] This approach resembles (though is not identical to) the principles arising from the theory of procedural justice, which focuses on "the fairness of the proceedings as distinct from the justness of the decision." See Filippo Fontanelli and Paolo Busco, "The Function of Procedural Justice in International Adjudication," *The Law and Practice of International Courts and Tribunals* 15, no. 1 (2016), 3, accessed October 19, 2024, https://doi.org/10.1163/15718034-12341310.

[11] A key idea underlying reparation is putting (a) victim(s) back in the position they were before the violation occurred. It must be noted that this traditional rationale underlying the right to reparation of victims of serious human rights violations is itself criticized for being inadequate in view of its exclusive focus on the past. See, for example, the discussion of theories on transformative reparation in Brianne McGonigle Leyh and Julie Fraser, "Transformative Reparations: Changing the Game or More of the Same?" *Cambridge International Law Journal* 8, no. 1 (2019), 39–59, accessed October 19, 2024, https://doi.org/10.4337/cilj.2019.01.02.

[12] See for instance Luke Moffett, *Reparations and War: Finding Balance in Repairing the Past* (Oxford: Oxford University Press, 2023); Anne Peters, "Conclusion: Reparation for Victims of Armed Conflict—At the Interface of International and National Law," in *Reparation for Victims of Armed Conflict*, ed. Cristián Correa et al. (Cambridge: Cambridge University Press, 2020), 265–284.

[13] United Nations, *General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, December 16, 2005 (UN Doc. A/RES/60/147).

The Srebrenica Genocide: Introducing Key Actors

After Bosnia declared its independence from the Socialist Federal Republic of Yugoslavia in April 1992, an armed conflict broke out between its Bosnian Muslim, Bosnian Croat, and Bosnian Serb population.[14] The Bosnian Serbs, who received military and financial support from the Federal Republic of Yugoslavia, declared the territories under their control to be a Serb republic in BiH, known as Republika Srpska.[15] They held overwhelming military superiority and carried out a systematic campaign of persecution of non-Serbs.[16]

As the international community grew increasingly concerned about the conflict in Bosnia, the UN responded with an arms embargo, humanitarian aid, and the deployment of a peacekeeping force: the United Nations Protection Force (UNPROFOR).[17] These responses proved to be wholly inadequate. The arms embargo froze the military balance that was in place at the start of the war, leaving Bosnian Serbs in a position of overwhelming military dominance, while UNPROFOR's mandate as a peacekeeping mission was destined to fail in a context where there was no peace to keep.[18]

The municipality of Srebrenica, with a majority Bosnian Muslim population, was viewed by the Bosnian Serbs as an obstacle to the formation of the Republika Srpska as a continuous territorial entity. The army of Republika Srpska (*Vojska Republike Srpske*, VRS) started attacking Srebrenica from Spring 1992 onwards. This led the UN Security Council to designate it as a UN-protected safe area in April 1993.[19] In March 1994, the Dutch contingent of UNPROFOR (Dutchbat)—a lightly-armed air-mobile infantry battalion[20]—was installed in the Srebrenica enclave, with its headquarters stationed in Potočari (frequently referred to as "the compound").

From February 1995 onwards, the VRS progressively limited the already restricted flow of humanitarian aid into Srebrenica, constrained the provision of supplies to Dutchbat,[21] and refused to allow the return of Dutch soldiers who had gone on leave.[22] In March 1995, Republika Srpska President Karadžić ordered the VRS to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica."[23] By June 1995, the enclave contained Bosnian Muslim combatants—most of them disarmed—and tens of thousands of civilians. The humanitarian situation was dire.[24]

In early July 1995, under the command of General Ratko Mladić, the VRS attacked the Srebrenica safe area.[25] Between July 6 and July 11, the VRS overran and took control of the area. Dutchbat commander Thom Karremans asked his UN superiors for close air support on

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[14] "The Conflicts," *International Criminal Tribunal for the Former Yugoslavia* (ICTY), n.d., accessed September 15, 2023, https://www.icty.org/en/about/what-former-yugoslavia/conflicts.

[15] A federation comprising Serbia and Montenegro, not to be confused with the Socialist Federal Republic of Yugoslavia.

[16] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, February 26, 2007, paras. 233–241; ICTY, *The Conflicts*.

[17] United Nations, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, The Fall of Srebrenica*, November 15, 1999 (UN Doc. A/54/549), para. 490; United Nations, *Security Council Resolution 743 (1992)*, February 21, 1992 (UN Doc. S/RES/743(1992)).

[18] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, paras. 488–492.

[19] *Stichting Mothers of Srebrenica et al. v. The Netherlands*, ECtHR, no. 65542/12, June 11, 2013, paras. 11–15; United Nations, *Security Council Resolution 819 (1993)*, April 16, 1993 (UN Doc. S/RES/819(1993)).

[20] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 36.

[21] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, para. 233.

[22] *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 282.

[23] *Prosecutor v. Karadžić*, IRMCT Appeals Chamber, 20 March 2019 (Judgement Summary), para 28.

[24] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 16; United Nations, *The Fall of Srebrenica*, paras. 234–237.

[25] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, paras. 226 and 230.

multiple occasions, but no decisive use of air power was made.[26] The VRS attack initially had limited objectives, but when the Bosnian Serb forces assessed that UNPROFOR was unable or unwilling to stop their advance, they decided to overrun the whole enclave.[27]

After the fall of Srebrenica on July 11, Dutchbat created a mini safe area for the protection of civilians that included the Potočari compound. At least 20,000 to 25,000 civilians sought refuge in this mini safe area, of which some 5,000 were admitted into the Potočari compound.[28] An estimated 10,000 to 15,000 Bosnian Muslim men fled into the woods surrounding the city, many of whom fell in the hands of the VRS.[29] That same day, the Netherlands and the UN jointly decided to evacuate both Dutchbat and the refugees from the mini safe area. Following meetings between Commander Karremans and General Mladić, it was agreed to deport the refugees to Bosnian Muslim-held territory.[30]

Shortly after Bosnian Serb buses arrived on July 12, 1995, to evacuate refugees, the VRS started separating male refugees from other refugees, with the cooperation of Dutchbat. In the days that followed, women, children and elderly people were deported to Tuzla, while men and boys of military age were taken to various holding sites, detained in brutal conditions and then executed. In the days that followed, over 7,000 Bosnian Muslim men and boys were killed.[31] A Serbian paramilitary unit known as the Scorpions was stationed near Srebrenica in July 1995 and at least some of its members participated in the killings.[32]

Between August and November 1995, after mass graves started being discovered through satellite imagery, Bosnian Serb forces engaged in a large-scale cover up operation.[33] They exhumed the remains of victims from primary graves and transported them to be reinterred at secondary and sometimes even tertiary gravesites further away. This greatly complicated the work of investigators and the identification of victims.[34] Almost three decades after the fall of the enclave, denial of the Srebrenica genocide and glorification of war crimes and criminals remain ubiquitous in Republika Srpska and Serbia, notably by political actors.[35]

Criminal Law Responses to the Srebrenica Genocide: Punishing Individual Perpetrators

Criminal law responses to the Srebrenica genocide have occurred at both the national and international level. With its focus on punishing individual perpetrators, criminal law remains the most visible and evocative legal response to mass atrocities. This is not to say that it is always the most apt or desirable legal response from the perspective of accountability, nor that it should be seen as the only available legal response. International criminal law, in particular, is

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[26] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 17; United Nations, UN Doc. A/54/549; Court of Appeal of The Hague 27 June 2017, ECLI:NL:GHDHA:2017:3376 (*Stichting Mothers of Srebrenica et al v. The Netherlands)*, paras. 27–37.

[27] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, para. 264.

[28] *Prosecutor v. Blagojević*, ICTY Trial Chamber Judgment, January 17, 2005, IT-02-60-T, paras. 146–147.

[29] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (Court of Appeal of The Hague), paras. 2.29–2.43; *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 19.

[30] District Court of The Hague July 16, 2014, ECLI:NL:RBDHA:2014:8562 (*Stichting Mothers of Srebrenica et al. v. The Netherlands*), paras. 4.80–4.83; United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, paras. 318–324.

[31] *Prosecutor v. Krstić*, Trial Chamber Judgment, August 1, 2001, IT-98-33-T, para. 1.

[32] *Bosnia and Herzegovina v. Serbia and Montenegro* (ICJ), para. 289.

[33] "Mass Graves," *Memorial Centre Srebrenica*, accessed September 15, 2023, https://srebrenicamemorial.org/en/page/mass-graves/27.

[34] Ibid.

[35] Genevieve Parent, "Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)," *Genocide Studies and Prevention* 10, no. 2 (2016), 38–58, accessed October 19, 2024, http://dx.doi.org/10.5038/1911-9933.10.2.1369; Adem Mehmedović et al., "Srebrenica Genocide Denial Report 2022," (Srebrenica: Memorial Centre Srebrenica, 2022), accessed September 15, 2023, https://srebrenicamemorial.org/assets/photos/editor/_mcs_izvjestaj_ENG_2022_FINAL_DI.pdf.

primarily concerned with sentencing in the form of incarceration,[36] which is "not always the best way to promote accountability."[37] What is more, punishing individuals for their participation in international crimes involves an individualization of what is essentially collective wrongdoing, and criminal proceedings are mostly unable to acknowledge the group-based nature of such crimes.[38] Indeed, international crimes are, in most instances, performed with the assistance of state structures, and accountability in such a context generally implicates the responsibility of both individuals and states.[39] In this respect, tort law and international state responsibility law can be seen as complementary legal responses that—to some extent—enable the targeting of collective entities such as the state.[40]

Nonetheless, criminal law remains an important part of the legal response to mass atrocities such as the Srebrenica genocide. Punishing individual perpetrators constitutes an acknowledgement of their wrongdoing and can as such function as satisfaction for victims. By collecting testimonial evidence of victims and survivors and creating a historical record of the atrocity, criminal proceedings can also contribute to satisfaction for victims and may later help support efforts to resist revisionism and genocide denialism.[41] Moreover, in some jurisdictions criminal courts have the ability to order reparations for victims,[42] including compensation, though this does not seem to be a common practice in the context of mass atrocities.[43] Accordingly, this section discusses the role of the ICTY and domestic courts in holding individual perpetrators accountable for the Srebrenica genocide,[44] before offering some concluding observations on the role of criminal proceedings in the overall pursuit of accountability for the Srebrenica genocide alongside the procedural and substantive dimensions previously identified.

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[36] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 495; Florian Jeßberger and Julia Geneuss, "Introduction: The Need for a Robust and Consistent Theory of International Punishment," in *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, ed. Florian Jeßberger and Julia Geneuss (Cambridge: Cambridge University Press, 2020), 4. See, for instance, article 24 Updated Statute of the ICTY (September 2009).

[37] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 10. See also Natasa Mavronicola and Mattio Pinto, "The Hegemony of Penal Accountability: Some Critical Reflections During (Ongoing) Atrocities," *EJIL: Talk!* (blog), December 15, 2023, accessed July 31, 2024, https://www.ejiltalk.org/the-hegemony-of-penal-accountability-some-critical-reflections-during-ongoing-atrocities/. See also Max Pensky's contribution to this special issue.

[38] Drumbl, *Atrocity, Punishment, and International Law*, 194.

[39] Thomas Weatherall, *Duality of Responsibility in International Law: The Individual, the State, and International Crimes* (Leiden: Brill Nijhoff, 2022), xiv; United Nations, *State Responsibility*, First report on State responsibility, by Mr. James Crawford, Special Rapporteur, April 24, May 1, 5, 11 and 26, July 22 and 24, August 12, 1998 (UN Doc A/CN.4/490), 22.

[40] These will be discussed further below.

[41] Though the assumption that there is a "direct link between establishing and disclosing facts about crimes and their public acknowledgement" can be rightfully challenged, see Jovana Mihajlović Trbovc, "The (Lack of) Impact of the ICTY on the Public Memory of the War in Bosnia and Herzegovina," in *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach*, ed. Carsten Stahn et al. (Oxford: Oxford University Press, 2020). See also Marko Milanović, "The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem," *American Journal of International Law* 110, no. 2 (2016), 233–259, accessed November 29, 2024, https://doi.org/10.5305/amerjintelaw.110.2.0233.

[42] See for instance Article 75 Rome Statute of the International Criminal Court. The ICTY cannot order compensation, but may order the return of property and proceeds of crime, see Article 24(3) Updated Statute of the ICTY (September 2009). See also Gentian Zyberi, "Responsibility of States and Individuals for Mass Atrocity Crimes," in *The Practice of Shared Responsibility in International Law*, ed. André Nollkaemper and Ilias Plakokefalos (Cambridge: Cambridge University Press, 2017), 236–262.

[43] Liesbeth Zegveld, "Victims as a Third Party: Empowerment of Victims?" *International Criminal Law Review* 19, no. 2 (2019), 321–345, accessed November 29, 2024, https://doi.org/10.1163/15718123-01806002.

[44] In light of the limited scope of this article and the considerable number of criminal cases at the domestic level, we do not engage in an exhaustive discussion of all criminal proceedings. Rather, we discuss cases at a more general level, referring to specific cases where relevant, in order to give a sense to what extent individual perpetrators have been held to account through judicial mechanisms.

Criminal Law Responses at the International Level: the ICTY

The ICTY was established by the UN Security Council in 1993 to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[45] As part of its completion strategy, the ICTY focused on the most senior leaders suspected of being responsible for international crimes, while transferring cases against intermediate and lower-level accused to competent national jurisdictions.[46] After its official closure in December 2017, the ICTY's remaining cases were transferred to the International Residual Mechanism for Criminal Tribunals (IRMCT).[47] In total, these judicial bodies have dealt with 13 cases related to the Srebrenica genocide, the last of which was concluded in May 2023.[48] Of the 20 defendants involved in these cases, five were sentenced to life imprisonment[49] and another 12 were convicted to prison sentences ranging from five to 35 years imprisonment.[50] Two defendants died before a final judgment was issued[51] and one was acquitted.[52]

The ICTY "has contributed greatly to the clarification of facts and the establishment of the responsibility of individuals."[53] One of its major contributions is establishing in *Prosecutor v. Krstić* that the Srebrenica atrocities qualified as genocide.[54] The trial and conviction of high-ranking political and military leaders, especially Mladić and Karadžić, is a considerable achievement in terms of obtaining accountability for the Srebrenica genocide. Overall, the ICTY appears to have held many of the most high-ranking individuals involved in the genocide to account.

However, we also identify the following accountability gaps with regard to the ICTY. First, as regards the substantive dimension of accountability, two defendants died before a (final) judgment was issued. Notably, following the death of former Serbian President Slobodan Milošević, the Trial Chamber terminated the proceedings against him.[55] As a result, the ICTY never had the chance to establish the facts about his role and rule on his responsibility for the crimes committed during the Yugoslav wars, including the Srebrenica genocide. Second, three of the defendants indicted in relation to the Srebrenica genocide entered a plea agreement, leading the Office of the Prosecutor to drop some charges.[56] Yet plea agreements can be problematic in terms of establishing the truth and holding perpetrators fully accountable for

[45] Article 1 Updated Statute of the ICTY (September 2009); see also United Nations, *Security Council Resolution 827 (1993)*, May 25, 1993 (UN Doc. S/RES/827 (1993)).

[46] "Completion Strategy," *ICTY*, accessed November 3, 2023, https://www.icty.org/en/sid/10016.

[47] United Nations, *Security Council Resolution 1966 (2010)*, December 22, 2010 (UN Doc. S/RES/1966 (2010)).

[48] *Prosecutor v. Stanišić and Simatović*, Appeals Chamber judgment, May 31, 2023, MICT-15-96-A.

[49] Radovan Karadžić (IT-95-5/18), Ratko Mladić (IT-09-92), Vujadin Popović (IT-05-88), Ljubiša Beara (IT-05-88) and Zdravko Tolimir (IT-05-88/2).

[50] Some suspects were tried only in relation to the Srebrenica genocide: Radislav Krstić (IT-98-33), Vidoje Blagojević (IT-02-60), Dragan Jokić (IT-02-60), Dražen Erdemović (IT-96-22), Momir Nikolić (IT-02-60/1) and Dragan Obrenović (IT-02-60/2). Others were also convicted in relation to other international crimes: Drago Nikolić (IT-05-88), Radivoje Miletić (IT-05-88), Vinko Pandurević (IT-05-88), Ljubomir Borovčanin (IT-05-88), Vidoje Blagojević (IT-02-60), Dragan Jokić (IT-02-60), Jovica Stanišić and Franko Simatović (MICT-15-96-A). The sentences of those convicted only in relation to the Srebrencia genocide range from five to 35 years' imprisonment (compare Radislav Krstić (IT-98-33) and Dražen Erdemović (IT-96-22)).

[51] In the case of Slobodan Milošević (IT-02-54) the Trial Chamber terminated the proceedings; in the case of Milan Gvero (IT-05-88) the Appeals Chamber terminated the proceedings.

[52] Momčilo Perišić (IT-04-81).

[53] Carsten Stahn, "Introduction: Legacy as Dialogue—Reflecting on the ICTY Experience," in Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach, ed. Carsten Stahn et al. (Oxford: Oxford University Press, 2020), 1.

[54] *Prosecutor v. Krstić*, Trial Chamber Judgment, August 1, 2001, IT-98-33-T, para. 598.

[55] *Prosecutor v. Milošević*, Trial Chamber Order, March 14, 2006 (IT-02-54-T).

[56] Dražen Erdemović (IT-96-22), Momir Nikolić (IT-02-60/1) and Dragan Obrenović (IT-02-60/2).

their crimes.[57] Third, while the ICTY's rulings may have contributed to accountability by imposing prison sentences on high-level perpetrators, recognizing wrongdoing and creating an historical record of the atrocities, the ICTY was unable to contribute to victims' right to remedies through other modalities, such as compensation orders for individual victims. Finally, lower-level perpetrators have not been tried by the ICTY, potentially leaving an accountability gap from the perspective of procedural accountability. This raises the question whether these individuals have been prosecuted in domestic courts. The next section thus turns to criminal law responses to the Srebrenica genocide in domestic jurisdictions.

Criminal Law Responses in Domestic Courts

During the early years of the ICTY, efforts to ensure justice focused primarily on "the international rather than the national justice system."[58] While from the outset, the ICTY was intended to be a temporary institution, at the time of its establishment "the ongoing armed conflict and the deep-seated animosity between the various ethnic and religious groups [in former Yugoslav states] made it unlikely that national courts would be willing or able to conduct fair trials."[59] Amongst others, it was considered that "the authorities would have hesitated to bring their own people (Muslims, Croats, Serbs) to book, whereas, had they initiated proceedings against their adversaries, probably such proceedings would have been highly biased."[60] Overall, courts in the former Yugoslavia were deemed to not "fully […] conform to internationally recognized standards of human rights and due process."[61]

As noted above, the transfer of cases against mid- and lower-level perpetrators to domestic courts was part of the ICTY's completion strategy, and the Tribunal's Prosecutor expressed a strong preference to transfer cases that involved crimes that had occurred in BiH to Bosnian courts.[62] But this ambition could not be implemented without addressing shortcomings in the Bosnian judiciary. This was done through the creation, in 2005, of the War Crimes Chamber as part of the State Court of BiH. The War Crimes Chamber has carried the largest workload of war crimes cases in the region, including cases pertaining to the Srebrenica genocide.[63] Criminal prosecution can also take place at the entity level before one of ten cantonal courts of the Federation of BiH, one of five district courts of the Republika Srpska, or the Basic Court of the Brčko District.[64]

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[57] See for example Janine Natalya Clark, "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation," *European Journal of International Law* 20, no. 2 (2009), 415–436, accessed October 19, 2024, https://doi.org/10.1093/ejil/chp034; Ralph Henham and Mark Drumbl, "Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia," *Criminal Law Forum* 16, no. 1 (2005), 49–87, accessed October 19, 2024, https://doi.org/10.1007/s10609-005-6739-5.

[58] Fidelma Donlon, "Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina," in *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, ed. Dina Francesca Haynes (London: Routledge, 2008), 267; Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford: Oxford University Press, 2019), 328.

[59] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 349.

[60] Ibid. While some criminal proceedings were initiated in Bosnian courts during and shortly after the armed conflict, many of them were later ruled to have constituted unfair trials by the Bosnian Human Rights Chamber. See Donlon, *Rule of Law,* 267.

[61] Orentlicher, *Some Kind of Justice*, 337.

[62] Ibid.

[63] Hikmet Karčić, "'The Court is Accommodating our Murderers': Prosecuting Aged Defendants in Domestic Courts in Bosnia and Herzegovina," *International Criminal Law Review* 22, no. 1–2 (2022), 211, accessed October 19, 2024, https://doi.org/10.1163/15718123-bja10092.

[64] The state Bosnia and Herzegovina is separated into two federal entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Brčko District is a separate administrative unit with its own judicial system. This division was agreed to in the Dayton Peace Agreement, see: General Framework Agreement For Peace in Bosnia and Herzegovina, Annex 4: Constitution, accessed September 27, 2024, https://www.ohr.int/dayton-peace-agreement/annex-4/.

Among the cases transferred from the ICTY to national courts, only one pertained to the Srebrenica genocide. Milorad Trbić, an assistant commander of a brigade of the VRS, was transferred to BiH in 2007, found guilty of genocide by the State Court of BiH, and ultimately received a final sentence of 20 years imprisonment.[65] However, the national courts of BiH have tried many more suspects related to the Bosnian war, (presumably) including the Srebrenica genocide.

As of June 2022, more than 600 war crimes cases have been adjudicated by courts in BiH, although nearly 500 war crimes cases—involving over 4,000 known suspects—remain before the country's prosecutors' offices.[66] In other words:

> with each passing day, the likelihood of achieving justice for the remaining victims of the atrocities committed during the war diminishes—a result of the death and illness of suspects, defendants, witnesses, and victims, coupled with a decreasing quality in the evidence to support prosecutions. Justice is now in a race against time.[67]

Moreover, the award of compensation within criminal proceedings to victims of atrocities—while possible—remains the exception rather than the rule.[68] This is true for Bosnian criminal proceedings in general, including the cases concerning Srebrenica.

Various criminal trials concerning the Srebrenica genocide have also taken place in Serbia. The Belgrade District Court War Crimes Chamber (WCC), which was established in 2003, has dealt with three such cases. First, in 2007 it ruled on a case involving five members of the Scorpions paramilitary group who were arrested and accused of war crimes by Serbian authorities after a video had been presented at the ICTY showing the execution of six Bosnian Muslims (including several teenage boys) in Trnovo near Srebrenica in July 1995. Four defendants were sentenced to prison sentences ranging between five and 20 years, while one was acquitted.[69] The outcome has been criticized as demonstrating the limits of the WCC:

> Although the WCC convicted four Serbian members of the Scorpions paramilitary unit, the WCC ruling was in line with the political interest of the state; it did not engage in connecting the defendants' acts with the broader context of genocide that was going on at the time, nor establish any link with the command in Belgrade. The Scorpions' crimes were portrayed as an isolated act, lacking any reference to the ongoing Srebrenica genocide.[70]

Second, the *Srebrenica* case commenced in 2016 against seven former police officers who are charged with having killed at least 1,313 Bosnian Muslim civilians on July 14, 1995, in the village of Kravica. In the context of this case, the Office of the War Crimes Prosecutor has been criticized for selective indictment practices, indicting lower-ranking individuals only—the

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[65] "Status of Transferred Cases," *ICTY*, accessed November 21, 2023, https://www.icty.org/en/cases/transfer-of-cases/status-of-transferred-cases.

[66] Organisation for Security and Co-operation in Europe (OSCE), *A Race Against Time: Successes and Challenges in the Implementation of the National War Crimes Processing Strategy of Bosnia and Herzegovina*, (Sarajevo: OSCE Mission to Bosnia and Herzegovina, June 2022), accessed October 22, 2024, https://www.osce.org/files/f/documents/9/0/521149.pdf, 5.

[67] Ibid.

[68] Ibid.

[69] "Jail for Serb Video Death Squad," *BBC News*, April 10, 2007, accessed November 21, 2023, http://news.bbc.co.uk/2/hi/europe/6540645.stm.

[70] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014), 66–67.

highest-ranking individual was a platoon commander—and for protracted proceedings.[71] This case is still ongoing. The third and final criminal case before Serbian criminal courts concerns the former commander of the Drina Corps, Milenko Živanović, who was indicted in December 2021 for ordering and participating in the forced relocation of the Bosnian Muslim civilian population from Srebrenica. He is the first senior VRS officer to be prosecuted in Serbia.[72]

Outside of Bosnia and Serbia, there have been few criminal law responses to the Srebrenica genocide. In the former Yugoslavia, Croatian courts have handed down two sentences against Scorpion members from the above-mentioned video that was presented as evidence at the ICTY.[73] In the Netherlands, the relatives of three men who were killed after leaving the Potočari compound not only sued the Dutch state through tort law (as discussed below), but were also involved in efforts to legally compel the Dutch public prosecutor to prosecute the Dutchbat leadership after it had refused to do so. However, these efforts were unsuccessful and ultimately no criminal proceedings were initiated.[74]

Concluding Observations on Criminal Law Responses

The two preceding sections provided an overview of the criminal proceedings against individual perpetrators that have been instituted both at the international level, through the ICTY and IRMCT, and at the domestic level, notably in Bosnia and Serbia. Although some domestic criminal proceedings remain ongoing, we can draw the following conclusions regarding the contribution of criminal proceedings to accountability for the Srebrenica genocide.

The ICTY has held many of the most high-ranking individuals accountable for the Srebrenica genocide and has established an authoritative historical record of the atrocities. However, it does not seem that domestic courts have been wholly successful in prosecuting the remaining lower-level perpetrators, as envisaged by the ICTY's completion strategy, notwithstanding the creation of war crimes chambers in Bosnia and Serbia. Yet preventing a procedural accountability gap calls for the procedures in various jurisdictions to complement each other so that perpetrators do not fall through the cracks and evade responsibility. Moreover, the analysis above also highlighted the shortcomings of these criminal procedures, including the risk that "justice delayed is justice denied": the more time passes, the less likely it is that defendants will be tried and convicted.

Finally, it is important to underline that criminal law has inherent limitations in achieving accountability. In international criminal law in particular, legal responses to atrocity remain limited to imprisonment, which need not necessarily be the best (or only) way to achieve accountability or meet the wants and needs of victims.[75] What is more, criminal proceedings can only be initiated against individuals, not against other collective entities such as states or international organizations, leaving various actors that play a key role in mass atrocities outside of its reach. Accordingly, the next section turns to efforts to hold collective entities accountable for the Srebrenica genocide under tort law.

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[71] "Report on War Crimes Trials in Serbia During 2021," *Humanitarian Law Center*, May 6, 2022, accessed October 22, 2024, http://www.hlc-rdc.org/?p=38451&lang=de, 122–123.

[72] Milica Stojanovic, "Serbia: Major War Crimes Cases Launched, But Trials Move Slowly," *Balkan Transitional Justice*, December 29, 2022, accessed November 21, 2023, https://balkaninsight.com/2022/12/29/serbia-major-war-crime-cases-launched-but-trials-move-slowly/.

[73] "Srebrenica Prison Sentences: 699 Years and Counting," *Humanitarian Law Center*, July 9, 2018, accessed November 21, 2023, http://www.hlc-rdc.org/?p=35398&lang=de; Sven Milekic, "Croatia Convicts Serbian 'Scorpions' Paramilitary," *Balkan Insight*, March 31, 2016, accessed November 21, 2023, https://balkaninsight.com/2016/03/31/croatian-convicts-serbian-scorpions-paramilitary-03-31-2016/.

[74] After the public prosecutor's refusal to prosecute, the relatives lodged a complaint with the Military Chamber of the Arnhem Court of Appeal, aiming to force the public prosecutor to prosecute Dutchbat leadership. Court of Appeal of Arnhem-Leeuwarden April 29, 2015, ECLI:NL:GHARL:2015:2968 (*Mustafić-Mujić et al v. Karremans et al.*).

[75] Mark A. Drumbl, "Impunities," in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford: Oxford University Press, 2020), 242.

Seeking Accountability Through Tort Law: Suing Collective Entities Before Domestic Courts

Tort law enables victims to hold those that have harmed them accountable through legal proceedings started at their own initiative. Unlike criminal prosecution, a finding of responsibility under tort law does not result in punitive legal consequences, such as imprisonment, but commonly revolves around the imposition of reparation obligations—often monetary compensation—aiming to "make right" the wrong that has been committed. At first sight, this aim might make tort law proceedings appear to be an ill-suited avenue for atrocity crimes such as genocide. After all, how can a wrong of such nature ever be made right? Yet within the overall legal response to such crimes, tort law can contribute to accountability in various ways. Proceedings based on tort law can result in the recognition that a particular person or entity is legally responsible for their contribution to the harm and thus help effectuate victims' right to remedies, for instance by recognizing wrongdoing or imposing an obligation of compensation for material and moral harm suffered.[76] This financial component that is often the focus of reparation in domestic tort law functions as a means to acknowledge responsibility and the truth of what has happened (rather than being an end in and of itself).[77] Overall, reparation can be seen as "the most tangible [legal] manifestation of the state addressing harms suffered by victims of conflict."[78]

Tort law also offers the opportunity of redress against entities that are not susceptible to criminal prosecution. Indeed, neither states nor international organizations can be brought before international criminal tribunals such as the ICTY as defendants, and we are unaware of any domestic legal system that makes it possible to criminally prosecute and punish a state or international organization before a national court. Yet the crime of genocide is often strongly intertwined with state actions or omissions, ranging from state officials actively devising and implementing a genocidal policy, to states failing to prevent acts of genocide.[79] Moreover, the inaction of international peacekeeping operations under the auspices of the UN in the face of genocidal violence in Srebrenica and Rwanda has brought to light the role that international organizations may play in failing to prevent such atrocities.[80]

In sum, tort law can offer a more textured understanding of the key roles played by actors neglected by criminal law responses to mass atrocities.[81] It can provide more diverse remedies, such as compensation, that better conform to the needs of victims. Unlike criminal law, tort law can also target collective actors and thus better capture the group-based nature of atrocity.[82] A large number of surviving relatives of victims of the Srebrenica genocide have pursued tort law claims against both the Netherlands and the UN as part of their quest for accountability. They appear to have done so exclusively through Dutch courts, which will therefore constitute the prime focus of our analysis, before we briefly comment on the lack of tort law claims in other jurisdictions.

Tort Law Responses to the Srebrenica Genocide Before Dutch Courts

Dutch civil courts have adjudicated various tort cases related to the Srebrenica genocide, all of which concerned the actions and omissions of Dutchbat in the enclave under its protection, and the legal responsibility of two collective actors for this conduct: the Netherlands and the UN.

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[76] See for instance UN Doc. A/RES/60/147. First mentioned in note 13.

[77] Simon Robins, "Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations," *Human Rights and International Legal Discourse* 11, no. 1 (2017), 49. See also Shelton, who in the context of human rights law argues that reparations must culminate in a revelation of truth: Dinah Shelton, "Reparations in Human Rights Law," in *Research Handbook on Implementation of Human Rights in Practice*, ed. Rachel Murray and Debra Long (Cheltenham: Edward Elgar Publishing, 2022), 36-58.

[78] Pablo de Greiff, "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006).

[79] On this, see generally Weatherall, *Duality of Responsibility in International Law*.

[80] John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations Among the P5* (Cheltenham: Edward Elgar Publishing, 2018), 1.

[81] Drumbl, *Atrocity, Punishment, and International Law*, 195.

[82] Ibid., 194.

The Mothers of Srebrenica foundation, representing some 6,000 women who lost family members during the Srebrenica genocide, sought accountability for the deaths of men who had sought refuge in the Srebrenica safe area, both inside and outside the Potočari compound, and the deaths of those who had been captured in the woods after fleeing the area under Dutchbat's protection.[83] To this end, the foundation brought cases against the UN and the Netherlands, arguing that *both* were legally responsible for the actions and omissions of Dutchbat. Their claim related to multiple wrongs in relation to the Srebrenica genocide. First, they submitted that Dutchbat had done too little to stop the advance of the VRS and protect the civilian population in the safe area around Srebrenica. In addition, they argued that during the evacuation of refugees from the mini safe area, Dutchbat had acted wrongfully by cooperating with the Bosnian Serbs in separating male refugees from other refugees, as well as by cooperating in the evacuation of male refugees who were staying inside the Potočari compound.[84]

The case against the UN was dismissed by the Dutch courts on account of the organization's entitlement to absolute immunity from the jurisdiction of national courts, following from international law. The Dutch Supreme Court ultimately confirmed this outcome in 2012.[85] The case against the Netherlands *did* result in a substantive ruling on responsibility, which was ultimately solidified by the Dutch Supreme Court. Dutch courts found that the Netherlands exercised effective control over, and was responsible for, Dutchbat's conduct[86] after the joint decision of the Netherlands and the UN to evacuate both Dutchbat and the refugees, which was taken on July 11, 1995, at 23:00.[87] Any conduct that had occurred before this evacuation decision—including Dutchbat's alleged failure to stop the advance of the VRS—was found not to be attributable to the Netherlands. From this, it can be deduced that any such conduct *would* be considered to fall within the UN's responsibility, although Dutch courts would never formally rule on the organization's responsibility in light of its immunity from jurisdiction.

In considering whether Dutchbat's conduct during the evacuation had breached any legal obligations, the Supreme Court distinguished between different groups of refugees based on their location at the time of the evacuation. Dutchbat's cooperation in the separation of male refugees in the mini safe area *outside* the compound was found not to be wrongful, on the basis that refusing to cooperate with the Bosnian Serbs would not have prevented the killing of these men.[88] However, the Netherlands *was* found to have acted wrongfully in relation to the evacuation of 350 male refugees that had sought refuge *inside* the compound, and was ordered to pay compensation to surviving relatives in proportion to the probability that these men would have been able to escape and survive had Dutchbat not cooperated in their evacuation, which the court estimated to be 10 percent.[89]

With a view to implementing the Supreme Court's compensation ruling, the Netherlands Compensation Commission Potočari was set up to evaluate and administer the compensation claims of surviving relatives, granting 15,000 euros to their widows and 10,000

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[83] In 2003, a different foundation carrying the name Udruženje Građana "Žene Srebrenice" Tuzla expressed its intention to institute a tort case against the Netherlands in relation to the fall of Srebrenica, but appears to never have proceeded after a provisional request for the hearing of witnesses was rejected by the Hague District Court. See District Court of the Hague, November 27, 2003, ECLI:NL:RBSGR:2003:AN8978.

[84] *Stichting Mothers of Srebrenica et al v. The Netherlands* (District Court of The Hague), para. 3.2.1.

[85] Supreme Court of the Netherlands, April 13, 2012, ECLI:NL:HR:2012:BW1999 (*Stichting Mothers of Srebrenica et al v. the Netherlands and the United Nations*).

[86] Supreme Court of the Netherlands, July 19, 2019, ECLI:NL:HR:2019:1223 (*Stichting Mothers of Srebrenica et al v. the Netherlands*), para. 5.1. For a more elaborate discussion of the legal reasoning underpinning this decision see Nedeski and Boutin, *The Continuing Saga*.

[87] *Stichting Mothers of Srebrenica et al v. The Netherlands* (District Court of The Hague), paras. 4.80–4.83.

[88] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (Supreme Court of the Netherlands), paras. 4.5.1–4.5.5.

[89] Ibid., para. 4.6.9. The Court did not specify how this would translate into monetary terms, see para. 4.7.9.

euros to close family members.[90] In accordance with the Supreme Court ruling, the Commission has afforded compensation exclusively to surviving relatives of the 350 male refugees who had been inside the compound, thereby rejecting a large number of requests for compensation.[91]

The second Dutch case, *Nuhanović and Mustafić v. the Netherlands*,[92] concerned the treatment of three specific victims of the Srebrenica genocide whose surviving relatives instituted tort law proceedings against the Dutch state. After the fall of Srebrenica, Muhamed and Ibro Nuhanović (respectively the father and brother of Hasan Nuhanović, interpreter for Dutchbat) and Dutchbat electrician, Rizo Mustafić, had been admitted into the Potočari compound. During the above-mentioned transitional period, Dutchbat ordered Muhamed Nuhanović and Rizo Mustafić to leave the compound, and Ibro Nuhanović chose to leave the compound with his son. All three were subsequently killed by the VRS.[93]

Because both the Netherlands and the UN had exercised control over Dutchbat after the joint decision to evacuate the mini safe area, the act of forcing these three individuals off the compound was ruled to be attributable to the Netherlands as well as legally wrongful.[94] Ultimately, the Dutch Supreme Court concluded that Muhamed Nuhanović and Rizo Mustafić would still be alive had they not been forced to leave,[95] and that the Netherlands was fully liable for the damage suffered by their surviving relatives.[96] This finding of responsibility stands in stark contrast to the outcome of the *Mothers of Srebrenica* case, which resulted in a much more limited finding of responsibility.[97] After a period of negotiations that followed the rulings in *Nuhanović and Mustafić v. the Netherlands*, the Netherlands issued an apology and acknowledgement of wrongdoing to the surviving relatives and agreed to pay them an undisclosed amount in monetary compensation.[98]

Absence of Tort Law Claims in Other Jurisdictions and Concluding Observations on Tort Law

To the best of our knowledge, tort law claims have been brought solely against the Dutch state and the UN; not against individuals or other states and entities. Moreover, no tort law claims specifically pertaining to the Srebrenica genocide have been brought in other jurisdictions. Should such claims be instituted, however, they would face significant obstacles. In relation to Serbian courts, it has, for instance, been observed that the statute of limitations on compensation claims for human rights violations is in most cases interpreted unfavorably for

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[90] Marjolein Koster, "Nabestaanden Srebrenica Dienen Massaal Claims in Tegen Nederland: al 12 Miljoen Betaald," *RTL Nieuws*, June 20, 2023, accessed November 21, 2023, https://www.rtlnieuws.nl/nieuws/politiek/artikel/5391400/12-miljoen-schadevergoedingen-nabestaanden-genocide-srebrenica. For more information on the Commission and the claim procedures see the website of the Netherlands Compensation Commission Potočari: https://www.nccpotocari.nl/en/.

[91] Ibid.

[92] See Supreme Court of the Netherlands, September 6, 2013, ECLI:NL:HR:2013:BZ9225 (*The Netherlands v. Nuhanović*) and the identical case Supreme Court of the Netherlands, September 6, 2013, ECLI:NL:HR:2013: BZ9228 (*The Netherlands v. Mustafić*).

[93] *The Netherlands v. Nuhanović* (Supreme Court of the Netherlands), para. 3.1.

[94] Ibid., paras. 3.13 and 3.15.

[95] Ibid., para. 6.14. The death of Ibro Nuhanovic was considered the result of the wrongful acts with respect to Muhamed and was therefore considered attributable to the Netherlands as well, resulting in its liability for the damage resulting from his death, see *Nuhanović v. The Netherlands* (Court of Appeal of the Hague), para. 6.14.

[96] Ibid., para. 6.20.

[97] This can be ascribed to some specific circumstances that surrounded the removal of Muhamed and Ibro Nuhanović and Rizo Mustafić, including the fact that they could have been placed on a list of local personnel and evacuated with the Dutch battalion, and that they had been the very last to leave the premises, by which time Dutchbat had to have been aware of the real risk of them being killed or subjected to inhuman treatment. See *Nuhanović v. The Netherlands* (Court of Appeal of the Hague), paras. 6.1–6.20.

[98] "Vergoeding en Excuses Voor Nabestaanden Weggestuurde Srebrenica-slachtoffers," *NOS*, June 25, 2015, accessed November 21, 2023, https://nos.nl/artikel/2043421-vergoeding-en-excuses-voor-nabestaanden-weggestuurde-srebrenica-slachtoffers.

victims, resulting in a denial of their claims.[99] What is more, the legal framework in Bosnia has been qualified as wholly inadequate to ensure comprehensive access to full reparation for all categories of civilian wartime victims.[100] Victims who initiate compensation claims in civil proceedings have often seen their claims dismissed due to a statute of limitations applied to wartime compensation claims, in particular by courts in the Republika Srpska,[101] and are subsequently forced to pay high court fees as a result of the "loser pays" principle.[102]

In sum, the foregoing overview shows that tort law claims, like criminal proceedings, have left various accountability gaps both from a procedural and substantive accountability perspective. While the Netherlands has been held fully responsible for the deaths of three specific victims of the Srebrenica genocide and is fully liable for the harm suffered by their surviving relatives from a tort law perspective, this finding of responsibility does not extend to the remaining thousands of Bosnian men who were killed. Among the remaining victims, Dutch courts have established that the Netherlands can only be held responsible for 350 male refugees inside the compound, and the surviving relatives of that very limited group can only claim 10 percent of their damage from the Netherlands. No responsibility has been established (nor accountability obtained) in relation to the remaining refugees who had fled into the woods, nor those who had sought refuge inside the Srebrenica safe area but were located outside the compound.

Moreover, besides the Dutch state, no other actor(s) have been held accountable under tort law. Crucially, no tort law claims appear to have been instituted against individuals or other states that may have played a role. When it comes to the UN, courts are simply not able to rule on its role in the Srebrenica genocide due to its immunity from jurisdiction—even though Dutch courts have not excluded the possibility that the UN is legally (co-)responsible. In other words, while tort law proceedings have been able to offer victims a (small) piece of accountability that cannot be obtained through criminal law, they have done so only to a limited extent and in relation to a very specific group of victims. Accordingly, the next section discusses to what extent judicial bodies that address the responsibility of states under international law have been able to fill any of the remaining gaps.

Holding States Accountable for the Srebrenica Genocide: Responsibility Under International Law

In addition to international and domestic criminal law responses and suing collective entities through tort law, efforts have also been undertaken to hold various states that played a role in the Srebrenica genocide accountable for breaching their obligations under international law. It is important to emphasize that these cases are distinctly *not* about criminal responsibility. As noted earlier, states cannot be the subject of criminal proceedings and cannot as such be "punished" for their wrongs. What is more, efforts to solidify the notion of crimes of states as a distinct category leading to criminal state responsibility under international law have been unsuccessful,[103] and the current international law of state responsibility is consciously devoid of

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[99] See Humanitarian Law Center, *Circumventing Justice: The Statute of Limitations as a Mechanism for Denying War Victims the Right to Compensation*, Belgrade, June 28, 2018, 7; Humanitarian Law Center, *The Right to Reparation in Compensation Lawsuits—The Practice of Serbian Courts 2017–2020*, Belgrade, March 12, 2021, 60–63.

[100] United Nations Human Rights Council, *Visit to Bosnia and Herzegovina: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Occurrence*, July 8, 2022 (UN Doc. A/HRC/51/34/Add.2), paras. 58–59.

[101] The Special Rapporteur has underlined that this "is contrary to international standards, according to which atrocity crimes are not subject to statutes of limitations." See ibid., para. 55.

[102] Ibid., para. 56.

[103] Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility," *European Journal of International Law* 13, no. 5 (2002), 1128–1131, accessed October 19, 2024, https://doi.org/10.1093/ejil/13.5.1127. For a defense of the lack of state criminal responsibility and punishment under international law see Sean Fleming, "Leviathan on Trial: Should States be Held Criminally Responsible?" *International Theory* 13, no. 3 (2021), 427–450, accessed October 19, 2024, https://doi.org/10.1017/S1752971920000354.

punitive elements.[104] In addition to the public law-like function of safeguarding and restoring the international rule of law, the main function of the law of international responsibility is that of remedial justice. Many, though not all, of the legal consequences that the law of state responsibility attaches to the wrongdoing of states—in particular the obligation of reparation, which is fulfilled through a combination of restitution, compensation and satisfaction[105]—can be said to roughly resemble a domestic tort law-like approach to responsibility.[106] Accordingly, cases related to the Srebrenica genocide adjudicated by international courts that focus on the responsibility of states, share many of the characteristics of the tort law responses discussed above, including that they offer the opportunity of redress against collective entities that cannot be criminally prosecuted and the ability to provide more diverse remedies that may complement criminal law responses.

Multiple international judicial bodies that address the responsibility of states under international law have ruled on state responsibility in relation to various aspects of the Srebrenica genocide: the ECtHR, the ICJ and the Human Rights Chamber for Bosnia and Herzegovina. This section discusses them in turn. Yet a few differences amongst these procedures are worth briefly mentioning, particularly when it comes to who can bring a case against whom. Before the ECtHR, it is generally an individual victim who brings a complaint against a state,[107] and the ECtHR examines whether the state breached its obligations under the European Convention on Human Rights (ECHR). Before the ICJ, in turn, a state can argue that another state incurs international responsibility because it breached an international obligation, for instance the prohibition of genocide. It can do so on its own behalf if it has been affected by that violation of international law, on behalf of its citizens, or in the interest of the international community. Finally, the Human Rights Chamber for Bosnia and Herzegovina examined compliance with the ECHR, but individuals can bring complaints not only against the state of BiH, but also the two entities of BiH: the Federation of BiH and Republika Srpska.[108]

The European Court of Human Rights: Tort Law Proceedings in the Netherlands Did Not Violate Surviving Relatives' Human Rights

Since the litigation under criminal and tort law in the Netherlands did not lead to a satisfactory outcome for surviving relatives of the Srebrenica genocide, a number of distinct complaints about these proceedings were brought to the ECtHR. None of these complaints directly focus on responsibility for the atrocities in July 1995. Rather, they concern the question whether the legal proceedings in the Netherlands pertaining to the Srebrenica genocide—particularly in view of their outcome—complied with the Dutch state's human rights obligations under the ECHR.

The first ECtHR case followed from the legal proceedings that were initiated against the UN. Before the ECtHR, the applicants contended that the Dutch courts' conclusion that the UN's immunity from jurisdiction prevented them from ruling on its responsibility violated their right to a fair trial. However, the ECtHR ruled that the granting of immunity to the UN served a legitimate purpose and was not disproportionate—and thus not in breach of the ECHR—thereby cementing the accountability gap regarding the UN's role in the Srebrenica genocide.[109]

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[104] As discussed in Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," *American Journal of International Law* 96, no. 4 (2002), 833–856, accessed October 19, 2024, https://doi.org/10.2307/3070681.

[105] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the Work of its 53rd Session, 2001 (UN Doc. A/56/10).

[106] Ibid.

[107] Though the ECHR also allows for inter-state complaints, which are on the rise, see https://www.echr.coe.int/inter-state-applications.

[108] See General Framework Agreement For Peace in Bosnia and Herzegovina, Annex 6: Agreement on Human Rights, accessed September 27, 2024, https://www.ohr.int/dayton-peace-agreement/annex-6/.

[109] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 169.

The second case brought before the ECtHR followed from the decision not to initiate criminal proceedings against the Dutchbat leadership in the Netherlands.[110] The applicants complained that the refusal to order the prosecution of the Dutchbat leadership or a criminal investigation into its involvement in the deaths of their relatives, amounted to a breach of the state's procedural obligations under article 2 ECHR (which protects the right to life).[111] The ECtHR disagreed, finding that the Dutch authorities had complied with their obligation to conduct an effective investigation which was capable of leading to the establishment of the facts, and of identifying and—if appropriate—punishing those responsible.[112]

The final two applications against the Netherlands concerning the Srebrenica genocide were submitted to the ECtHR in 2020, in the aftermath of the Dutch Supreme Court's decision in *Mothers of Srebrenica v. The Netherlands*. The applicants argued that the limited findings of responsibility by the Dutch courts constituted a violation of their rights under the ECHR. However, these applications were declared inadmissible and thus were not examined substantively.[113] In sum, the ECtHR did not close the accountability gaps for the Srebrenica genocide left by Dutch domestic procedures, and has confirmed the limitations of the existing legal infrastructure, notably as regards the immunity of the UN.

The International Court of Justice: Serbia Failed to Prevent the Srebrenica Genocide

To this date the ICJ has adjudicated only one inter-state case concerning the Srebrenica genocide: the case of *Bosnia and Herzegovina v. Serbia and Montenegro*.[114] Bosnia brought this case on its own behalf, as well as on behalf of its citizens who had been victims of the genocide.[115] There is evidence indicating that multiple states were aware or should have been aware of the existence of a serious risk of genocide in Srebrenica, such as the United States (US), the United Kingdom (UK) and France,[116] and in 1993 "Bosnia seriously considered the option to bring before the Court other states, such as the United Kingdom, for their breach of the duty to prevent the commission of a genocide."[117] However, in the end a case was initiated solely against Serbia. The application lodged by Bosnia sought to hold Serbia responsible for its role in the Srebrenica genocide, arguing that it had breached the Genocide Convention.[118] BiH asked the ICJ to rule that Serbia was responsible for, primarily, the commission of genocide, or alternatively, for its complicity in genocide and its failure to prevent and punish genocide.[119]

Since the Srebrenica genocide had been committed by the army of Republika Srpska and the Scorpions paramilitary group (and not by the Serbian army itself), an important question for the purpose of establishing Serbia's responsibility concerned the link between these non-state actors and Serbia. The latter could only be responsible under international law for the actual commission of genocide if the link between these non-state actors and Serbia was strong

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[110] *Mustafić-Mujić et al. v. The Netherlands*, ECtHR, no. 49037/15, August 30, 2016, para. 97.

[111] Ibid., para. 131.

[112] Ibid.

[113] On file with the authors.

[114] When BiH lodged its application with the ICJ, the respondent state was called the Federal Republic of Yugoslavia. In 2003, it changed its name to Serbia and Montenegro, and it became Serbia after Montenegro declared its independence in 2006. For the sake of simplicity, we refer to the respondent state as Serbia.

[115] See also the discussion of this case in Jeffrey Bachman's article in this special issue.

[116] Florence Hartmann and Ed Vulliamy, "How Britain and the US Decided to Abandon Srebrenica to Its Fate," *Guardian*, July 4, 2015, accessed November 21, 2023, https://www.theguardian.com/world/2015/jul/04/how-britain-and-us-abandoned-srebrenica-massacre-1995.

[117] Andrea Gattini, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment," *European Journal of International Law* 18, no. 4 (2007), 697, accessed October 19, 2024, https://doi.org/10.1093/ejil/chm038.

[118] Relying on ICTY case law, the ICJ recognised that the atrocities at Srebrenica qualified as genocide. See *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 278–297.

[119] Ibid., para. 379.

enough to merit attribution of their conduct to Serbia under the law of state responsibility. The Court considered two potential grounds for the attribution of conduct before concluding that Serbia could not be held responsible for the commission of the Srebrenica genocide as such.[120]

The ICJ then proceeded to examine secondary forms of responsibility, including whether Serbia had been complicit in the commission of genocide, concluding that this was not the case.[121] While the atrocities in Srebrenica were committed, at least in part, with resources resulting from "the quite substantial aid of a political, military and financial nature provided by [Serbia] to the Republika Srpska and VRS,"[122] Bosnia had not conclusively proven that Serbia had known of the genocidal intent of the VRS, and the ICJ found such knowledge to be one of the requirements to establish responsibility for complicity in genocide under international law.[123]

Finally, the ICJ considered whether Serbia failed to prevent and punish genocide. It noted that due to its connections with the VRS, Serbia had been in a unique position to influence its behavior and, moreover, "could hardly have been unaware of the serious risk" that genocide would be committed once the VRS forces occupied the Srebrenica enclave.[124] In spite of this, Serbia "did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS."[125] Not only did this amount to a breach of Serbia's obligation to prevent genocide, but by failing to cooperate with the ICTY, it had also breached its obligation to punish genocide.[126] The legal consequences of this violation of international law remained rather limited since the ICJ held that its declaration on the responsibility of Serbia constituted appropriate satisfaction.[127]

Thus, as regards the ICJ, we can identify the following accountability gaps. First, from a procedural perspective, Serbia is the only state that has been brought before the ICJ for its involvement in the Srebrenica genocide—ultimately being held responsible for its failure to prevent genocide—whereas *multiple* States had the knowledge of the risk and capacity to act and arguably breached their prevention obligation in relation to the atrocities at Srebrenica. Moreover, no state nor entity has been held legally accountable for committing or actively contributing to the genocide itself.

Second, as regards the substantive dimension of accountability, it has been argued that the ICJ's finding that the Scorpions' conduct could not be attributed to Serbia was a result of insufficient evidence being presented to the Court as well as a contested interpretation of the law on state responsibility by the Court.[128] In other words, while Serbia has "only" been held accountable for failing to prevent the genocide, it was arguably involved more actively, notably by supporting the army of Republika Srpska and through the involvement of the Scorpions paramilitary unit. Serbia's active involvement in the armed conflict in Bosnia and Herzegovina was confirmed in 2023 by the Appeals Chamber of the IRMCT, when it convicted two Serbian state officials working for the Ministry of the Interior's State Security Service as members of a joint criminal enterprise, together with other senior leadership from Serbia and the Republika Srpska, for crimes committed by various Serb forces, including the Scorpions.[129]

The limited responsibility that the ICJ imposed on Serbia does not adequately reflect its active involvement. This applies both to the nature of the legal responsibility incurred by Serbia, which is solely for a failure to take preventative action, and to the legal consequences that were

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[120] Ibid., para. 413.

[121] Ibid., paras. 416–424.

[122] Ibid., para. 422.

[123] Ibid., para. 421.

[124] Ibid., para. 436.

[125] Ibid., para. 438.

[126] Ibid., para. 449.

[127] Ibid., paras. 459–470.

[128] Milanović, *State Responsibility for Genocide*, 673–677.

[129] *Prosecutor v. Stanišić and Simatović*, Appeals Chamber judgment, May 31, 2023, MICT-15-96-A.

(not) tied to Serbia's breach of international law. As noted above, according to the ICJ, its finding that Serbia was responsible for failing to prevent and punish the genocide constituted appropriate satisfaction. It declined to order any other reparations: it refused to order Serbia to provide compensation as well as assurances and guarantees of non-repetition.[130] Neither did the ICJ consider other modalities of satisfaction such as ordering a public apology,[131] the financing of programs benefiting victims and relatives, or measures with the aim of keeping alive the memory of the victims.[132] From a substantive accountability perspective, it can therefore be argued that the ICJ's ruling fails to do justice to the right to reparation of the victims of the Srebrenica genocide and relatives.

The Human Rights Chamber for Bosnia and Herzegovina: Republika Srpska Violated the Rights of Family Members in the Aftermath of the Srebrenica Genocide

The Human Rights Chamber for Bosnia and Herzegovina was established by the 1995 Dayton Peace Agreement in order to assist the Republic of BiH, the Federation of BiH, and the Republika Srpska in honoring their obligations under the Peace Agreement.[133] Its jurisdiction pertained to alleged or apparent violations of human rights as provided in the ECHR, and alleged or apparent acts of discrimination, but only insofar as these acts occurred after the entry into force of the peace agreement on November 30, 1995.

In view of this temporal limitation to its jurisdiction, the Human Rights Chamber was destined to be unable to sufficiently address questions of legal responsibility for the Srebrenica genocide. It did, however, rule on an important aspect of the aftermath of these atrocities. The case of *Selimović et al. v. Republika Srpska* brought together 1,800 appeals regarding the disappearance of persons in and around Srebrenica in July 1995.[134] The applicants alleged that, "as close family members, they are themselves victims of alleged or apparent human rights violations resulting from the lack of specific information on the fate and whereabouts of their loved ones last seen in Srebrenica in July 1995."[135] Republika Srpska was ultimately found to be responsible for violating the human rights of family members of the men and boys who had disappeared, through its failure to make accessible and disclose information, as well as its failure to inform applicants about the truth of the fate and whereabouts of their missing relatives. It was ordered to conduct an effective investigation and pay approximately 2,000,000 euros for the construction of a genocide memorial in Potočari.[136]

While this is the only case that addresses the responsibility of the entity of Republika Srpska—an entity that played a crucial and devastating role in the Srebrenica genocide—and is thus a welcome component of the legal response to these atrocities, the Human Rights Chamber's decision still leaves an essential accountability gap, since it does not pertain to the legal responsibility of Republika Srpska for the events at Srebrenica in July 1995. Nonetheless, this decision, combined with international pressure, did ultimately prompt the Republika Srpska government to form a special commission of inquiry on Srebrenica, and to recognize its

[130] *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 459–470. For a critique of the Court's decision on compensation see Gattini, *Breach of the Obligation to Prevent*; Milanović, *State Responsibility for Genocide*.

[131] Commentaries to the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 107.

[132] Gattini, *Breach of the Obligation to Prevent*, 711.

[133] Annex 6, Article II Dayton Peace Agreement.

[134] Hikmet Karčić, "From the *Selimović* Case to the Srebrenica Commission: The Fight to Recognize the Srebrenica Genocide," *Journal of Muslim Minority Affairs* 35, no. 3 (2015), 370–379, accessed October 19, 2024, https://doi.org/10.1080/13602004.2015.1080951.

[135] *Selimović et al. v. Republika Srpska (Srebrenica Case)*, Human Rights Chamber for Bosnia and Herzegovina, March 7, 2003, para. 135.

[136] Ibid., para. 202. See also Milanović, *State Responsibility for Genocide*, 691.

responsibility for the massacre—though without acknowledging that the events in Srebrenica amounted to genocide.[137]

Overview: What Accountability Gaps Have Been Left Unfilled by Legal Responses to the Srebrenica Genocide?

The previous sections provided an overview of the legal actions that have been initiated so far to hold the various actors involved in the Srebrenica genocide accountable. They highlighted the extent to which legal responsibility has been established, as well as the remaining accountability gaps left by the various legal responses under domestic and international criminal law, tort law, and international state responsibility law. This section synthesizes and builds on that analysis by examining to what extent multiple adjudicatory mechanisms across legal regimes have managed to deliver accountability for the Srebrenica genocide, and what are the remaining accountability gaps proceeding from the two dimensions of procedural and substantive accountability. The following actors are discussed in turn: individuals, the UN, states, and non-state actors (Republika Srpska and the Scorpions paramilitary group).

Criminal Prosecution of Individuals for Their Role in the Srebrenica Genocide

The predominant legal response to individuals' roles in the Srebrenica genocide has been through criminal prosecution. Individuals have been tried both before the ICTY and in various domestic jurisdictions. The preceding analysis identified a number of accountability gaps left by these criminal law responses. First, the lack of complementarity between national and international jurisdictions in prosecuting higher and lower-level perpetrators, as well as the internal shortcomings of each procedure, have contributed to accountability gaps alongside the two dimensions of accountability that this article addresses. Notably, although domestic criminal prosecutions of some individual perpetrators remain ongoing, the prosecution of all perpetrators is not a realistic prospect. The more time passes, the less likely it is that suspects will be tried and convicted, embodying the risk that "justice delayed is justice denied."

The criminal prosecution of alleged perpetrators of the Srebrenica genocide in other states would—at least theoretically—be possible on the basis of the principle of universal jurisdiction. However, "the judicial response to Srebrenica from other states has mainly focused on violations of immigration laws by alleged perpetrators, rather than on their criminal responsibility for involvement in the massacre."[138] Some cases were brought before German and Austrian courts against individuals allegedly involved in the conflict in the former Yugoslavia, but none of them related to the Srebrenica genocide.[139] Thus, to the best of our knowledge, no national court has tried any Srebrenica genocide perpetrator relying on the doctrine of universal jurisdiction.[140]

Besides the alleged perpetrators of the Srebrenica genocide, no individual members of UNPROFOR have been brought before a court, either under criminal or tort law. We discussed the failed attempts to compel the Dutch public prosecutor to prosecute the Dutchbat leadership. None of the other UNPROFOR staff, such as General Bernard Janvier (Theatre Force Commander of the UN Peace Forces in the former Yugoslavia), Major General Cees Nicolai (UNPROFOR Chief of Staff) and General Sir Rupert Smith (UNPROFOR Commander) have been the subject of criminal prosecution. The same holds true for the UN Secretary General and other UN officials.

Other accountability gaps left by the criminal prosecution of individuals relate more generally to the inherent limitations of criminal law in achieving accountability. From the perspective of substantive accountability, the punishment of individuals through incarceration

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[137] Milanović, *State Responsibility for Genocide*, 692.

[138] Valentina Spiga, "The Response to Srebrenica from States Not Directly Involved in the Atrocities," *Journal of International Criminal Justice* 14, no. 4 (2016), 846, accessed October 19, 2024, https://doi.org/10.1093/jicj/mqw034.

[139] See Ruth Rissing Van-Saan, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia," *Journal of International Criminal Justice* 3, no. 2 (2005), accessed October 19, 2024, https://doi.org/10.1093/jicj/mqi038.

[140] Spiga, *The Response to Srebrenica*, 846.

need not necessarily be the best (or only) way to achieve accountability or meet the wants and needs of victims, whereas from the perspective of procedural accountability criminal proceedings can only be initiated against individuals, leaving various other actors that played a key role in the Srebrenica genocide outside of criminal law's reach.

Accountability of the UN for Its Role in the Srebrenica Genocide

Although the Srebrenica genocide was committed by Bosnian Serb forces, the UN played an important role in the atrocities—notably through its inaction. At a general level, UNPROFOR's mandate as a peacekeeping mission was inadequate in the Bosnian context where there was no peace to keep. More specifically, while it had declared Srebrenica to be a "safe area," it failed to protect the Bosnian Muslims who had sought refuge in the enclave, and there seems to be sufficient legal ground to claim that Dutchbat's conduct in and around the Srebrenica enclave—for which the Dutch state has been held (partially) accountable by its domestic courts—also fell within the UN's legal responsibility. In addition, the UN failed to provide air support when requested by Dutchbat on the eve of the massacre.[141]

Yet we showed that attempts to hold the UN to account under domestic tort law for its role in the Srebrenica genocide have failed. Dutch courts ruled that the UN enjoyed immunity from jurisdiction, and the ECtHR upheld this finding. Moreover, it is unlikely that other attempts at holding the UN accountable would be successful. Article 105(1) of the UN Charter[142] establishes that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes," and according to Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations[143]: "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity." Yet Section 29 also requires the UN to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the UN is a party, and disputes involving UN officials who enjoy immunity. In addition, Article 48 of the UNPROFOR status of forces agreement requires that a claims commission be set up, yet this was not done.[144]

In sum, the UN has not been held accountable in light of its immunity from domestic courts' jurisdiction, and there is no international court that has the jurisdiction to rule on its legal responsibility. At the same time, the UN has failed to set up alternative accountability mechanisms, which only strengthens a lamentable accountability gap. This gap reflects both dimensions of accountability: the UN's immunity from domestic jurisdiction prevents substantive accountability from being achieved, while the absence of alternative procedures highlights the lack of procedural accountability. The impossibility to hold the UN accountable for its role in the Srebrenica genocide has been widely criticized.[145]

Accountability of States for Their Role in the Srebrenica Genocide

The foregoing analysis demonstrated that tort law responses before Dutch courts have succeeded in holding the Netherlands partially to account for the conduct of Dutchbat, but only in relation to a limited number of victims. As a result, a few surviving relatives have benefited from some measures of satisfaction and monetary compensation. What is more, at the international level

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[141] On the role of the UN, see United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, from para. 467.

[142] United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI.

[143] United Nations, *Convention on the Privileges and Immunities of the United Nations*, February 13, 1946, 1 UNTS 15.

[144] *Stichting Mothers of Srebrenica et al. v. The Netherlands* (ECtHR), para. 162.

[145] See for instance Kirsten Schmalenbach, "Preserving the Gordian Knot: UN Legal Accountability in the Aftermath of Srebrenica," *Netherlands International Law Review* 62, no. 2 (2015), 313–328, accessed November 29, 2024, https://doi.org/10.1007/s40802-015-0028-8; Maria Irene Papa, "The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity versus Right of Access to a Court," *Journal of International Criminal Justice* 14, no. 4 (2016), accessed October 19, 2024, https://doi.org/10.1093/jicj/mqw040.

Serbia was found to be responsible by the ICJ, but only for failing to prevent the Srebrenica genocide, which failed to reflect its more active role, and without imposing other legal consequences such as compensation. In addition to the shortcomings discussed above regarding the extent to which these two states have been held accountable and compelled to provide reparations (substantive accountability gap), other states have evaded accountability altogether, leaving accountability gaps alongside both the substantive and procedural dimension.

States that have escaped judicial scrutiny include members of the Contact Group, permanent members of the Security Council, and/or participants in UNPROFOR.[146] For instance, the French National Assembly concluded that France, alongside the UK, the US and the Netherlands, was responsible for the Srebrenica genocide.[147] Likewise, the UN Secretary-General recognized that the members of the Security Council were unable to provide UNPROFOR with an adequate mandate[148] and that "[t]he international community as a whole must accept its share of responsibility for [the genocide] by its prolonged refusal to use force."[149] Considering the ICJ's ruling in *Bosnia and Herzegovina v. Serbia and Montenegro* on the obligation to prevent genocide, the question arises to what extent other states should have done more in order to comply with their obligations, for instance by sharing military intelligence or exerting diplomatic pressure on the Bosnian Serb and/or Serb authorities. This question arises in particular in relation to those states that were in a strong position to take action, such as the five permanent members of the Security Council.[150] In light of evidence indicating that multiple states were aware or should have been aware of the existence of a serious risk of genocide in Srebrenica,[151] "it can certainly be argued that a plurality of states was obligated to take measures to prevent the commission of the Srebrenica genocide,"[152] and can also be held responsible for failing to do so. However, legal proceedings against those other states were ultimately not pursued.

What is more, it has been reported that the Bosnian authorities were opposed to evacuating civilians from Srebrenica,[153] while the French parliamentary assembly inquiry suggests that the Bosnian authorities might have been willing to give up Srebrenica for strategic military reasons.[154] If this allegation were true, it would mean that the responsibility of the Bosnian state should also be examined. Finally, countries that directly supported the VRS have not been held accountable. Notably, Greece shipped light arms and ammunition to the VRS between 1994 and 1995, and "around 100 Greek soldiers are believed to have joined the Greek Volunteer Guard, formed at Mladić's request, some of whom fought alongside the VRS Army in Srebrenica."[155] In sum, then, except for Serbia and the Netherlands who have been held partially accountable, no state has been held accountable for its role in the Srebrenica genocide, although other states' involvement ranges from support for the VRS Army in Srebrenica to failing to prevent the genocide.

Accountability of Non-state Actors for Their Role in the Srebrenica Genocide

Two non-state actors played key a role in the Srebrenica genocide: Republika Srpska and the Scorpions paramilitary group, which we discuss in turn. First, Republika Srpska has not been

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[146] In April 1994, a Contact group was established, consisting of representatives of France, Germany, Russia, the UK, and the US, which largely assumed the peace-making role in BiH: United Nations, *The Fall of Srebrenica*, para. 153.

[147] French National Assembly, *Report of the Joint Information Mission on the Events in Srebrenica*, November 22, 2001, no. 3413, 190, accessed December 22, 2024, https://www.assemblee-nationale.fr/11/rap-info/i3413-01.asp.

[148] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, paras. 488-493

[149] Ibid., para. 501.

[150] Heieck, *A Duty to Prevent Genocide*.

[151] Hartmann and Vulliamy, *How Britain and the US Decided to Abandon Srebrenica*.

[152] Nataša Nedeski, *Shared Obligations in International Law* (Cambridge: Cambridge University Press, 2022), 176.

[153] United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, para. 318.

[154] French National Assembly, *Report of the Joint Information Mission on the Events in Srebrenica*. First mentioned in note 147. However, see also United Nations, *The Fall of Srebrenica*, UN Doc. A/54/549, para. 485.

[155] Spiga, *The Response to Srebrenica*, 851.

held accountable for the Srebrenica genocide under domestic or international law, although it did recognize its responsibility for the massacre following a ruling of the Human Rights Chamber for Bosnia and Herzegovina on its conduct in the aftermath of these atrocities. As noted above, due to jurisdictional limitations, the Human Rights Chamber was unable to address Republika Srpska's responsibility for the genocide itself. What is more, considering that Republika Srpska is not a state, it cannot be held accountable under international law (for instance before the ICJ). Moreover, because Republika Srpska is an entity that is part of BiH, holding the state to which it belongs accountable under international law would imply holding the Bosnian state accountable. Hence, while the Srebrenica genocide was committed in the context of the armed conflict between the VRS and the Bosnian army, from the perspective of international law it is not possible to hold Republika Srpska separately to account. Overall, this points to an accountability gap alongside both the procedural and substantive dimension.

Second, a Serbian paramilitary unit, the Scorpions, was involved in the execution of six Bosnian Muslim men and boys in Trnovo after the fall of Srebrenica in July 1995, which has resulted in some criminal law responses. As noted earlier, four individual Scorpions members have been convicted by Serbian courts and two by Croatian courts. Moreover, the IRMCT has sentenced two Serbian state officials working for the State Security Service as members of a joint criminal enterprise for various crimes committed by Serb forces, including the murder and persecution committed by the Scorpions in Trnovo.[156]

It is not unlikely that other Scorpions members also contributed to the genocide. For instance, in 2021 a grave containing the mortal remains of at least 10 Srebrenica victims was uncovered in the zone where 100 to 150 Scorpions members were located in July 1995.[157] Yet, to the best of our knowledge, no other Scorpions members, nor the paramilitary group itself or any other entity or organization, have been held accountable for the paramilitary group's contribution to the Srebrenica genocide, which likewise reflects both a procedural and substantive accountability gap.

Conclusion

This article examined to what extent multiple adjudicatory mechanisms across legal regimes managed to deliver accountability for the Srebrenica genocide as well as what accountability gaps remain. The foregoing analysis demonstrated that, although domestic courts in multiple jurisdictions as well as a number of international courts have adjudicated cases pertaining to the genocide against different actors, accountability gaps remain. We have focused on identifying these gaps alongside two dimensions. From a procedural perspective, it is clear that many actors that played a direct or indirect role in the Srebrenica genocide, including individuals, the UN, states and non-state actors, have managed to avoid legal scrutiny. As a result, no court has ruled on their legal responsibility and evaluated whether or not they have acted in breach of the law. In some instances, this has been due to jurisdictional limitations, but the lack of legal proceedings against a particular actor can also be the result of other—for instance political—factors. Moreover, from a substantive accountability perspective, the legal responses discussed have shortcomings in terms of realizing the right to reparation of victims and their relatives. Indeed, even those legal responses that did result in a finding of responsibility in relation to the Srebrenica genocide arguably left substantive accountability gaps; for instance, because a finding of responsibility assigned a passive role to an actor that arguably played a more active role, because responsibility was imposed only in relation to a limited number of victims, or because a ruling has limited legal consequences.

To conclude, we can draw some general conclusions from the preceding overview. As many accountability gaps remain, both within and across regimes, it is important to better

[156] *Prosecutor v. Stanišić and Simatović*, Appeals Chamber judgment, May 31, 2023, MICT-15-96-A, para. 567.

[157] Nejra Dzaferagic, "Kalinovik Mass Grave Contains Srebrenica Victims, Experts Confirm," *Balkan Insight*, December 8, 2021, accessed November 3, 2023, https://balkaninsight.com/2021/12/08/kalinovik-mass-grave-contains-srebrenica-victims-experts-confirm/.

understand the extent to which various legal regimes can complement each other in delivering accountability. As noted above, on the one hand, criminal law focuses on punishing individual perpetrators, whereas tort law and international state responsibility law can target collective entities that cannot be criminally prosecuted, like states, and courts can order reparations to "make right" the wrong that has been committed, such as compensation. In the context of the Srebrenica genocide, a mixed picture emerges as regards the complementarity of multiple legal regimes, both in terms of holding specific actors responsible and attaching legal consequences to such responsibility.

First, the plurality of applicable legal regimes has enabled the targeting of a variety of different actors, many of whom are connected, and a finding that a particular actor is responsible for its role in the Srebrenica genocide may have implications for the responsibility of another—even in the absence of an explicit judicial finding of responsibility. For instance, it can be argued that, although Republika Srpska has not been held accountable for the Srebrenica genocide before a judicial body, it is legally responsible in light of its former president Karadžić having been sentenced to life imprisonment for crimes that include the Srebrenica genocide. One could say that in this regard, individual and collective responsibility complement each other. Another example would be the tort law litigation in the Netherlands, which has held the Dutch state partially accountable for Dutchbat's conduct. Even though no actor has been held accountable for the fall of the Srebrenica "safe area," the analysis of Dutch courts strongly suggests that Dutchbat's conduct could also fall within the UN's responsibility. It is unlikely that future litigation will be able to comprehensively address these gaps in light of structural impediments such as the immunity of the UN. This shows that the law in its current state is only able to capture the collective aspect of atrocities such as genocide to a limited extent.[158]

Second, to what extent the outcome of a particular procedure can provide reparation to the victims and their relatives varies per case. On the one hand, the conviction of Radovan Karadžić and Ratko Mladić is relevant for all victims of the Srebrenica genocide. On the other hand, the conviction of Dražen Erdemović, who pleaded guilty to the killing of approximately 70 people, does not directly contribute to achieving accountability for victims killed by others. Likewise, the Dutch tort case of *Nuhanović and Mustafić v. the Netherlands* is only directly relevant for the relatives of three specific victims (Muhamed and Ibro Nuhanović and Rizo Mustafić), and the Dutch tort litigation initiated by the Mothers of Srebrenica has granted some compensation to surviving relatives of 350 victims. Nonetheless, these and other cases discussed throughout this article generally contribute to establishing the truth of what happened and establish the responsibility of specific actors. They thereby provide—at least to some extent—satisfaction to the victims.

Finally, the multiplicity of legal procedures across jurisdictions and legal regimes presents a challenge for victims to obtain accountability. Such obstacles include barriers to accessing courts in multiple countries, such as language, costs, and expertise, as well as increased risks of being re-victimised. International and domestic courts cannot expect victims to know about, let alone initiate, litigation across multiple jurisdictions.

More generally, our analysis shows that the operationalization of accountability through multiple judicial mechanisms remains diffuse and uncoordinated, leading to a piecemeal realization of accountability.[159] While one could argue that judicial mechanisms could have delivered more accountability than they have, in both procedural and substantive terms, it is important to underline that legal responses to mass atrocities will always be able to contribute only a few pieces to the complex puzzle of accountability, and need to be complemented by non-judicial mechanisms. Therefore, further research is needed to examine how accountability gaps can be closed, or at least narrowed, in the context of the Srebrenica genocide as well as other mass atrocities.

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[158] See Drumbl, *Atrocity, Punishment, and International Law*.

[159] See Weatherall, *Duality of Responsibility in International Law*, xvi.

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